

Control Number: 46120



Item Number: 1

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46120

DOCKET NO. \_\_\_\_\_

CITY OF MIDLOTHIAN NOTICE OF  
INTENT TO PROVIDE WATER  
SERVICE TO LAND DECERTIFIED  
FROM MOUNTAIN PEAK SPECIAL  
UTILITY DISTRICT §  
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BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

2016 JUL -1 AM 10:49  
PUBLIC UTILITY COMMISSION  
FILED CLERK

**CITY OF MIDLOTHIAN'S NOTICE OF INTENT  
TO PROVIDE WATER SERVICE TO LAND DECERTIFIED FROM  
MOUNTAIN PEAK SPECIAL UTILITY DISTRICT**

TO THE PUBLIC UTILITY COMMISSION OF TEXAS:

NOW COMES, the City of Midlothian, Texas (Midlothian) and notifies the Commission pursuant to Texas Water Code (TWC) § 13.254(d) & (e) and PUC Subst. Rule 24.113(h) & (i) of Midlothian's intent to provide retail water service to an approximately 97.7-acre tract of land (Decertified Property) which was decertified from Mountain Peak Special Utility District (Mountain Peak) water Certificate of Convenience and Necessity (CCN) No. 10908 in PUC Docket No. 44394. Attached hereto as Exhibit "A" is a letter from Midlothian providing notice of intent to serve. In support thereof, Midlothian respectfully shows as follows:

1. In 2010, the City of Midlothian acquired the property for development of a regional park on over 97.7-acres of land. On January 30, 2015, in Docket No. 44394<sup>1</sup> Midlothian requested decertification of its parkland under the authority of TWC § 13.254(a-5), which allows a landowner of at least 25 acres that is not receiving water or sewer service and is located in certain Texas counties (including Ellis County) to request expedited release from the CCN of the incumbent utility. On March 17, 2015, the Commission found the petition administratively complete as to the 97.7 acre tract of land sought to be decertified. On May 5, 2015, the Commission approved Midlothian's petition to remove the Decertified Property from Mountain Peak's CCN. A copy of the final order in PUC Docket No. 44394 is attached as Exhibit "B." A copy of the amended CCN and map attachment referenced in ordering paragraph 3 of the final order is attached as Exhibit "C."

2. In addition to owning the parkland, Midlothian is a retail public utility currently providing water service to other areas within its incorporated limits under CCN No. 11706.

<sup>1</sup> Tex. Pub. Util. Comm'n, *Petition of City of Midlothian to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity by Expedited Release in Ellis County*, Docket No. 44394 (May 5, 2016). The final order recites, among other things, the procedural history summarized here.

Midlothian now intends to provide water service to itself at the Decertified Property, a planned city park.

3. Section 13.254(a-6) recognizes that the Commission “*may* require an award of compensation by the petitioner to a decertified retail public utility that is the subject of a petition filed under Subsection (a-5) as otherwise provided by this section.” Midlothian requests an order from the Commission finding that minimal compensation, if any, is appropriate, since the Decertified Property was shown to be “not receiving water ... service” from Mountain Peak under TWC § 13.254(a-5), and no property has been “rendered *useless* or *valueless* to the decertified retail public utility as a result of the decertification” under TWC § 13.254(d) (emphasis added).

4. Under TWC § 13.254(e) the determination of the monetary amount of compensation, if any, to the decertified utility is determined at the time another retail public utility, here Midlothian, seeks to provide service in the previously decertified area but before service is actually provided. The monetary amount of compensation must be determined no later than the 90th calendar day after the date of the filing of this notification of intent to serve. TWC § 13.254(e). In light of the public purpose served by Midlothian’s establishment of a city park and the absence of any property rendered useless or valueless to Mountain Peak as a result of the decertification, Midlothian requests an order from the Commission such that any restriction or limitation on retail water service by Midlothian to the Decertified Property under TWC § 13.254(d) or (e) (and under PUC Subst. R. 24.113(h) or (i), respectively), would be removed or otherwise made inapplicable.

5. Midlothian requests that this notice of intent be docketed as a new case with appropriate notice published as in other Section 13.254 cases and further requests a procedural schedule established to ensure compliance with statutory deadlines. Particularly in light of an expected park opening in 2016, expedited consideration by Commission is requested.


6. A copy of this pleading is being sent by certified mail to Mountain Peak and legal representatives in PUC Docket No. 44394.

WHEREFORE, PREMISES CONSIDERED, the City of Midlothian respectfully requests that the Commission take notice of Midlothian’s intent to serve; that the appropriate notice of this pleading be issued as required by PUC rules; that a procedural schedule be established consistent with requirements of TWC § 13.254; that the Commission determine that no property

is rendered useless or valueless to Mountain Peak Special Utility District as a result of the decertification in PUC Docket No. 44394; and that the amount of compensation to be provided to Mountain Peak Special Utility District, if any, be determined; and that Midlothian have all other relief to which it is entitled.

Respectfully submitted,

DAVIDSON, TROILO, REAM & GARZA, P.C.  
601 NW Loop 410, Suite 100  
San Antonio, Texas 78216  
Telephone: (210) 349-6484  
Facsimile: (210) 349-0041

By:   
Patrick W. Lindner  
State Bar No. 12367850  
Paul M. González  
State Bar No. 00796652

ATTORNEYS FOR CITY OF MIDLOTHIAN

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document will be served on the following parties on ~~June~~ July 1, 2016, via methods indicated:

*Via certified mail-return receipt requested:*  
Mr. Randel Kirk, General Manager  
Mountain Peak Special Utility District  
5671 Waterworks Road  
Midlothian, TX 76065

*Via certified mail-return receipt requested & email:*  
Leonard Dougal  
JACKSON WALKER, LLP  
100 Congress, Suite 1100  
Austin, Texas 78701  
Email: [ldougal@jw.com](mailto:ldougal@jw.com)  
Telephone: (512) 236-2233  
Facsimile: (512) 391-2112

  
Paul M. González



Chris Dick  
City Manager

E-mail: [chris.dick@midlothian.tx.us](mailto:chris.dick@midlothian.tx.us)

June 28, 2016

Public Utility Commission of Texas  
1701 North Congress Avenue  
P. O: Box 13326  
Austin, Texas 78711-3326

RE: City of Midlothian's Notice Intent to Provide Water Service to the Area Decertified from Mountain Peak Special Utility District's Water CCN in PUC Docket No. 44394.

To Whom It May Concern:

Please accept this letter as notice pursuant to Texas Water Code (TWC) § 13.254 and 16 Texas Administrative Code (TAC) § 24.113 of the City of Midlothian's intent to provide service to the area which was decertified from Mountain Peak Special Utility District's (Mountain Peak's) water Certificate of Convenience and Necessity ("CCN") No. 10908 in Ellis County, Texas, in PUC Docket No. 44394, provided any and all compensation costs are paid.

Pursuant to TWC § 13.234(e) and 16 TAC § 24.113(i), compensation, if any, for any property that the Public Utility Commission (Commission) determines is rendered useless or valueless to Mountain Peak as a result of the decertification shall be determined no later than the 90th calendar day after the date of this notice.

If you have, any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Dick", written over a horizontal line.

Chris Dick  
City Manager

DOCKET NO. 44394

2015 MAY -1 PM 4:39  
PUBLIC UTILITY COMMISSION  
FILING CLERK

PETITION OF CITY OF MIDLOTHIAN §  
TO AMEND MOUNTAIN PEAK §  
SPECIAL UTILITY DISTRICT'S §  
CERTIFICATE OF CONVENIENCE §  
AND NECESSITY BY EXPEDITED §  
RELEASE IN ELLIS COUNTY §

PUBLIC UTILITY COMMISSION  
OF TEXAS

**ORDER**

This Order addresses the petition by the city of Midlothian for an expedited release of a tract of land from the certificate of convenience and necessity of Mountain Peak Special Utility District. For the reasons discussed in this Order, Midlothian's petition, as amended, is granted and Mountain Peak's certificate number 10908 is amended to remove the city's property.

**I. Background**

On January 30, 2015, Midlothian filed a petition, under Texas Water Code (TWC) § 13.254(a-5) and 16 Tex. Admin. Code (TAC) § 24.113(r), for the expedited release of 104.356 acres of land, owned by the city and located within Mountain Peak's water service area in Ellis County.<sup>1</sup> On February 25, 2015, Mountain Peak filed a motion to intervene, brief, and affidavit asserting that Mountain Peak is providing water service to a sewer lift station on the northern portion of the property.<sup>2</sup> On March 11, 2015, Midlothian amended its petition to exclude the northern approximately 6.7 acres from the 104.356 acres that were originally designated.<sup>3</sup> The sewer lift station referenced by Mountain Peak is located on that 6.7-acre tract.<sup>4</sup> The amended

<sup>1</sup> Petition of City of Midlothian to Amend Mountain Peak Special Utility District's Certificate of Convenience and Necessity by Expedited Release in Ellis County (Jan. 1, 2015) (Petition).

<sup>2</sup> Mountain Peak Special Utility District's Motion to Intervene, Affidavit and Brief Regarding Lack of Administrative Completeness and Deficiencies in the Petition at 4-5 (Feb. 25, 2015) (Motion to Intervene).

<sup>3</sup> City of Midlothian's Response to Order No. 2 at 5-6 (Mar. 11, 2015) (Response to Order No. 2).

<sup>4</sup> *Id.*

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petition seeks expedited release of the remaining 97.7 acres from Mountain Peak's CCN No. 10908 in Ellis County.<sup>5</sup>

TWC § 13.254(a-5) contains the criteria that an applicant for expedited release from a CCN must demonstrate: (1) the applicant owns a tract of land (2) that is at least 25 acres in area, (3) that is not receiving water or sewer service, and (4) that is located in a qualifying county. Neither party disputes that Midlothian owns the 97.7-acre tract, that expedited release of at least 25 acres is requested, or that the 97.7-acre tract is located in a qualifying county. The only criterion that is contested in this proceeding is whether the 97.7-acre tract is receiving water or sewer service from Mountain Peak.

## II. Receiving Water Service

Both parties rely on the decision by the Texas Third Court of Appeals in *Crystal Clear*<sup>6</sup> to support their respective interpretation of whether the 97.7-acre tract is receiving water service. In that case, the Texas Commission on Environmental Quality granted the Texas General Land Office's petition for expedited release of a portion of property from the certificated area of Crystal Clear Water Supply Corporation under TWC § 13.254(a-5).<sup>7</sup> Crystal Clear appealed the decision, claiming that the property was in fact "receiving water service" under § 13.254(a-5).<sup>8</sup> The Third Court of Appeals reviewed the decision under the substantial evidence standard and held, in relevant part, as follows:

1. The fact that a tract is not receiving actual water on the property does not suffice as proof that the tract is not "receiving water service" under TWC § 13.254(a-5).<sup>9</sup>
2. "The mere existence of water lines or facilities on or near a tract [does] not necessarily mean that tract [is] 'receiving water service.'"<sup>10</sup>

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<sup>5</sup> *Id.* at 5-6, 9-10 (Supplemental Affidavit of Michael G. Adams, P.E.).

<sup>6</sup> *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. filed).

<sup>7</sup> *Id.* at 132.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 140.

<sup>10</sup> *Id.*

3. Rather, determining whether a tract is “receiving water service” is a “fact-based inquiry requiring the commission to consider whether the retail public utility has facilities or lines committed to providing water *to the particular tract* or has performed acts or supplied anything *to the particular tract* . . . . All of these considerations are matters committed to the Commission’s sound discretion and authority to decide issues of fact.”<sup>11</sup>
4. Whether it is permissible under TWC § 13.254(a-5) to decertify a tract of land consisting of only part of the contiguous area of land owned by a given owner within a particular CCN was a moot question in *Crystal Clear* because of the passage of Tex. Spec. Dist. Code § 7206.001-.005.<sup>12</sup> However, the Court also concluded that “section 13.254(a-5) does not contain an ‘all or nothing’ requirement.”<sup>13</sup>

In this proceeding, each party submitted affidavits attesting (respectively) that the 97.7-acre tract is or is not receiving water or sewer service.<sup>14</sup> The affiant for Mountain Peak attested that (a) Mountain Peak has a water line connected to a sewer lift station on the 6.7-acre tract;<sup>15</sup> (b) Mountain Peak maintains facilities and lines on or near the 97.7-acre tract;<sup>16</sup> (c) Mountain Peak has capacity to serve the 97.7-acre tract;<sup>17</sup> and (d) Mountain Peak expanded some facilities in order to accommodate potential development on the 97.7-acre tract.<sup>18</sup> Nevertheless, the affiant for Midlothian attested that (a) Mountain Peak does not provide service to the unplatted and undeveloped 97.7-acre tract;<sup>19</sup> (b) at no time did Midlothian submit an application to Mountain Peak for extension of the water line to the lift station on the platted 6.7-acre tract adjoining the 97.7-acre tract;<sup>20</sup> and (c) Midlothian did not pay Mountain Peak any tap fees or

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<sup>11</sup> *Id.* at 140-41 (emphasis original).

<sup>12</sup> *Id.* at 136.

<sup>13</sup> *Id.*

<sup>14</sup> Petition at 5-6 (Affidavit of Michael G. Adams, P.E.); Motion to Intervene, Exhibit A (Affidavit of Randel Kirk); Response to Order No. 2, Attachment A, at 9-11 (Supplemental Affidavit of Michael G. Adams, P.E.); Mountain Peak Special Utility District’s Supplemental Brief Regarding Deficiencies in the Amended Petition, Exhibit A, at 13-14 (First Supplemental Affidavit of Randel Kirk) (March 12, 2015); City of Midlothian’s Supplemental Response to Order No. 2, Attachment 2, at 12-13 (Second Supplemental Affidavit of Michael G. Adams, P.E.) (March 13, 2015); Mountain Peak’s Second Supplemental Brief Addressing Water Service to the Amended Park Property, Exhibit A, at 12-13 (Second Supplemental Affidavit of Randel Kirk) (March 16, 2015).

<sup>15</sup> Affidavit of Randel Kirk at ¶¶ 4-5; Second Supplemental Affidavit of Randel Kirk at ¶ 5.

<sup>16</sup> Second Supplemental Affidavit of Randel Kirk at ¶ 7.

<sup>17</sup> *Id.* at ¶¶ 6, 7, 8.

<sup>18</sup> *Id.* at ¶ 7.

<sup>19</sup> Supplemental Affidavit of Michael G. Adams, P.E. at ¶ 11.

<sup>20</sup> *Id.* at ¶¶ 6, 11.



fees for extension of the water line to the lift station on the 6.7-acre tract.<sup>21</sup> The dueling affidavits demonstrate that while facilities and lines are near and even on the 97.7-acre tract and capacity to serve that tract may exist, Mountain Peak has not committed facilities or lines to provide water to the 97.7-acre tract. Mountain Peak has also not performed acts or supplied anything to that tract.

In addition to presenting the above facts, Mountain Peak also pointed to a state case, and indirectly to a federal one, that interpret the federal term “made services available” as it is used in 7 U.S.C. § 1926(b) in support of the argument that the 97.7-acre tract is receiving water service under TWC § 13.254(a-5).<sup>22</sup>

The Commission finds that Midlothian adequately proved that the 97.7-acre tract was not receiving water service under TWC § 13.254(a-5). Moreover, the Commission finds that in this proceeding, it may not consider the potential application of federal law, particularly 7 U.S.C. § 1926(b), especially in light of TWC § 13.254(a-6).<sup>23</sup> Midlothian’s petition should therefore be granted.

The Commission adopts the following findings of fact and conclusions of law:

### III. Findings of Fact

#### Procedural History

1. The city of Midlothian is a municipality in Texas.
2. Mountain Peak is a special utility district that possesses certificate of convenience and necessity number 10908.
3. On January 30, 2015, Midlothian filed a petition to amend Mountain Peak’s water CCN No. 10908, by expedited release of 104.356 acres of land pursuant to TWC § 13.254(a-5) and 16 TAC § 24.113(r).

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<sup>21</sup> *Id.*

<sup>22</sup> See *Creedmoor-Maha Water Supply Corp. v Tex. Comm’n on Env’tl. Quality*, 307 S.W.3d 505 at 522 (Tex. App.—Austin 2010); *Glenpool Utility Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988).

<sup>23</sup> See TWC § 13.254(a-6) (“The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program.”).

4. On February 3, 2015, Order No. 1 was issued, setting a deadline for comments on administrative completeness of the application and notice.
5. On February 25, 2015, Mountain Peak filed a motion to intervene and brief regarding lack of administrative completeness and deficiencies in the petition.
6. On March 2, 2015, Commission Staff filed a response to Order No. 1 recommending that the petition be deemed deficient and that Midlothian respond to Mountain Peak's filing.
7. On March 2, 2015, Order No. 2 was issued, finding Midlothian's application incomplete and deficient and establishing a deadline and an opportunity to cure.
8. On March 11, 2015, Midlothian responded to Order No. 2 and amended its petition to exclude the 6.7-acre tract of land that Mountain Peak asserted was receiving water utility service. On March 13, 2015, the city supplemented its response to Order No. 2.
9. On March 12 and 16, 2015, Mountain Peak filed briefs regarding deficiencies in the amended petition and addressing water service to the remaining 97.7-acre tract of land.
10. On March 16, 2015, Mountain Peak requested referral to the State Office of Administrative Hearings for a hearing on the merits.
11. On March 16, 2015, Commission Staff filed a supplement recommendation that the amended petition is administratively complete and notice is sufficient.
12. On March 17, 2015, Order No. 3 was issued, finding the petition administratively complete and sufficient for further review.
13. On March 17, 2015, Commission Staff filed its recommendation on final disposition, recommending that the Commission approve Midlothian's petition, as amended, for expedited release and requested that the Commission Staff's memorandum, attached maps of the decertification area, and proposed CCN certificate be admitted as evidence.
14. On March 20, 2015, the administrative law judge (ALJ) in this proceeding issued a proposed order with findings of fact and conclusions of law to the effect that Midlothian's petition should be denied.

15. On March 24, 2015, Mountain Peak, Commission Staff, and Midlothian filed their respective exceptions to the proposed order.
16. On March 24, 2015, Midlothian requested oral argument before the Commission regarding the application of TWC §§ 13.254(a-5) and (a-6), and the Commission granted such on March 25, 2015.
17. On March 25, 2015, Mountain Peak filed objections to Midlothian's exceptions, and Midlothian replied to such on the same day. Midlothian filed a supplement to its own exceptions on April 10, 2015.
18. On March 25, 2015, the ALJ issued corrections to the proposed order, including one typographical correction and one substantive clarification.
19. On March 25, 2015, Commission Advising filed correspondence received from Senators Robert Nichols and Brandon Creighton, clarifying their intent in authoring and sponsoring the bills that were eventually passed and then codified under TWC § 13.254(a-5).
20. On March 26, 2015, the Commission heard oral arguments for this matter at its Open Meeting.
21. On March 31, 2015, Midlothian replied to Mountain Peak's objections to Midlothian's exceptions to the proposed order. The filing included an expedited request for a new scheduling order.
22. On April 3, 2015, Mountain Peak replied to Midlothian's expedited request for a new scheduling order.
23. On April 9, 2015, Mountain Peak moved for leave to file its third supplemental brief regarding deficiencies in the amended petition, and Midlothian responded to same on April 15, 2015.
24. On April 17, 2015, the Commission again discussed this matter at an Open Meeting and granted Midlothian's petition.

Notice

25. Midlothian provided notice of the petition to Mountain Peak on January 27, 2015, by certified mail.

26. Notice of the petition was published in the *Texas Register* on February 13, 2015.

Project Description

27. The 97.7-acre tract is situated in Ellis County, a qualifying county under TWC § 13.254(a-5) and 16 TAC § 24.113(r).

28. The 97.7-acre tract is at least 25 acres.

Water Service

29. Both parties submitted affidavits in support of their relative positions regarding whether the 97.7-acre tract is receiving water utility service from Mountain Peak.

30. Midlothian submitted three affidavits from Michael G. Adams, P.E.<sup>24</sup>

31. According to Mr. Adams, the 97.7-acre tract is an unplatted and undeveloped tract of land.<sup>25</sup>

32. According to Mr. Adams, Mountain Peak does not provide service to the 97.7-acre tract.<sup>26</sup>

33. According to Mr. Adams, the 6.7-acre tract was platted for the Lawson Farms subdivision before sale to Midlothian and has a sewer lift station on it.<sup>27</sup>

34. According to Mr. Adams, a 1-inch water line connects the Lawson Farms subdivision and the lift station.<sup>28</sup>

35. According to Mr. Adams, Midlothian has never paid, or been billed, for the construction of Mountain Peak's water line connected to the lift station or delivery of water to the station.<sup>29</sup>

36. According to Mr. Adams, at no time did Midlothian submit an application to Mountain Peak for extension of the water line to the lift station, nor did Midlothian pay Mountain Peak any tap fees or fees for extension of the water line to the lift station.<sup>30</sup>

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<sup>24</sup> Affidavit of Michael G. Adams, P.E.; Supplemental Affidavit of Michael G. Adams, P.E.; Second Supplemental Affidavit of Michael G. Adams, P.E.

<sup>25</sup> Supplemental Affidavit of Michael G. Adams, P.E. at ¶ 11.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at ¶¶ 3, 6.

<sup>28</sup> *Id.* at ¶ 4.

<sup>29</sup> *Id.*

37. According to Mr. Adams, there is no meter or city account for the 1-inch water line.<sup>31</sup>
38. Mountain Peak submitted three affidavits from Randel Kirk.<sup>32</sup>
39. According to Mr. Kirk, Mountain Peak has a 2-inch water line connected to the sewer lift station, ending with an angle-stop valve in a meter box.<sup>33</sup>
40. According to Mr. Kirk, "Mountain Peak has constructed and furnished distribution lines and other facilities near [the 97.7-acre tract] with the capacity to provide water service to the property."<sup>34</sup>
41. According to Mr. Kirk, "[a] nearby subdivision has multiple distribution lines, including the twelve-inch line from which the two-inch line connecting to the lift station extends."<sup>35</sup>
42. According to Mr. Kirk, Mountain Peak has a six-inch water line which traverses the southern boundary of, and is located on, the 97.7-acre tract.<sup>36</sup>
43. According to Mr. Kirk, Mountain Peak's above-referenced six-inch water line "has the capacity available to serve the [97.7-acre tract]."<sup>37</sup>
44. According to Mr. Kirk, Mountain Peak increased the capacity of a particular ground storage tank "in response to potential development on or near" the 104.356 acres, including the 97.7-acre tract.<sup>38</sup>
45. According to Mr. Kirk, Mountain Peak "has invested in water supplies sufficient to serve its customers" within its current CCN, including the [97.7-acre tract].<sup>39</sup>

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<sup>30</sup> *Id.* at ¶ 5.

<sup>31</sup> *Id.* at ¶ 10.

<sup>32</sup> Affidavit of Randel Kirk; First Supplemental Affidavit of Randel Kirk; Second Supplemental Affidavit of Randel Kirk.

<sup>33</sup> Affidavit of Randel Kirk at ¶¶ 4-5; Second Supplemental Affidavit of Randel Kirk at ¶ 5.

<sup>34</sup> Second Supplemental Affidavit of Randel Kirk at ¶ 7.

<sup>35</sup> *Id.* at ¶ 7.

<sup>36</sup> *Id.* at ¶ 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at ¶ 7.

<sup>39</sup> *Id.* at ¶ 8.

46. The 97.7-acre tract is not receiving actual water from Mountain Peak.
47. Mountain Peak has not committed facilities or lines providing water to the 97.7-acre tract, nor has it performed acts or supplied anything to that particular tract.
48. The 97.7-acre tract is not "receiving water service" from Mountain Peak under TWC § 13.254(a-5).

Service Area Agreement

49. On November 4, 1996, Midlothian and Mountain Peak entered into a contract<sup>40</sup> in which they agreed, *inter alia*, that (1) "[i]n the Dual Certificated area, Midlothian will provide water distribution service only to industrial customers, and Mountain Peak will provide water distribution service only to other-than-industrial customers . . ." and (2) "[n]either Midlothian nor Mountain Peak will apply to any regulatory, judicial, or governing body to change, alter, or amend the boundaries between their CCNs . . . and will jointly utilize all reasonable actions to resist any change thereto."
50. On October 21, 1997, in TNRCC Docket No. 97-0457-UCR, the Texas Natural Resource Conservation Commission ("TNRCC"), the predecessor to the Texas Commission on Environmental Quality and ultimately to the PUC, approved the "portions of the [contract] designating the areas to be served by [the parties] pursuant to their Certificates of Convenience and Necessity..." under TWC § 13.248.<sup>41</sup>
51. The TNRCC did not approve the portions of the contract restricting the parties from applying to "change, alter or amend the boundaries between their CCNs or the arrangements" for the Dual Certificated Area.<sup>42</sup>

Definition of "Filed"

52. Under 16 TAC § 24.8(a), petitions are not considered filed until (1) they are received by the Commission and accompanied by a filing fee, if any, as required by statute or commission rules, and (2) a determination of administrative completeness is made.

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<sup>40</sup> See Mountain Peak Special Utility District's Supplemental Brief Regarding Deficiencies in the Amended Petition, Attachment 1, at 16-17 (March 12, 2015).

<sup>41</sup> See *id.*, Attachment 2, at 19-23.

<sup>42</sup> See *id.*, Attachments 1 & 2, at 16-17, 19-23.

53. The administrative completeness requirement was in 30 TAC § 291.8, the Texas Commission on Environmental Quality's version of 16 TAC § 24.8(a), and was in effect when the legislature amended TWC § 13.254 to add subsection (a-5).<sup>43</sup>

**Federal Loan Program**

54. According to Mr. Kirk, Mountain Peak is currently a borrower of funds from, and indebted to, the U.S. federal government on two debt instruments through the U.S. Department of Agriculture, Agriculture Rural Utilities Services.<sup>44</sup>
55. TWC § 13.254(a-6) forbids the Commission from denying "a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program."

**IV. Conclusions of Law**

1. The city of Midlothian is a municipality in Texas.
2. Mountain Peak is a special utility district that possesses certificate of convenience and necessity number 10908.
3. The Commission has jurisdiction over this matter pursuant to TWC §§ 13.041 and 13.254(a-5).
4. Midlothian's amendment of its original petition was allowable under 16 TAC § 22.76.
5. An entity (such as a municipality) is not required by statute or Commission rules to demonstrate that it has authority to file a petition under TWC § 13.254(a-5).

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<sup>43</sup> See *Cent. Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App.—Austin Apr. 3, 1996), writ denied, 960 S.W.2d 617 (Tex. 1997) ("When an agency determination is in effect at the time the legislature amends the law without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation."); see also Act of May 13, 2013, 83<sup>rd</sup> Leg., R.S., ch. 171, § 96(j), 2013 Tex. Sess. Law Serv. (S.B. 567) (Vernon's) ("A rule, form, policy, procedure, or decision of the Texas Commission on Environmental Quality related to a power, duty, function, program, or activity transferred under this Act continues in effect as a rule, form, policy, procedure, or decision of the Public Utility Commission of Texas and remains in effect until amended or replaced by that agency." The referenced transfer took effect on September 1, 2013.); Act of May 25, 2011, ch. 1325, § 4, 2011 Tex. Sess. Law Serv. Ch. 1325 (S.B. 573) (Vernon's) (adding Subsection (a-5)).

<sup>44</sup> *Id.* at ¶ 4.

6. Notice of the original and amended petition was provided in compliance with 16 TAC §§ 24.113(s), 22.54 - 22.55.
7. The 97.7-acre tract is a "tract of land" under TWC § 13.254(a-5).<sup>45</sup>
8. While Mountain Peak has constructed facilities and taken other action in order to give it the capacity to serve the property and possibly in anticipation of potential development, such does not suffice as proof that the 97.7-acre tract is "receiving water service" under TWC § 13.254(a-5).<sup>46</sup>
9. Federal law, and specifically 7 U.S.C. § 1926, regarding "providing service" is inapposite when determining whether a tract is "receiving water service" under the Texas Water Code.
10. Mountain Peak has not committed facilities or lines providing water to the 97.7-acre tract, nor has it performed acts or supplied anything to that particular tract.
11. The 97.7-acre tract is not "receiving water service" from Mountain Peak under TWC § 13.254(a-5).
12. The plain language of the portions of the Contract adopted in the October 21, 1997 TNRCC order in TNRCC Docket No. 97-0457-UCR do not prohibit the Commission from approving Midlothian's petition, as amended.
13. The 60-day deadline set forth in TWC § 13.254(a-6) begins on the date that there is an administrative determination that the petition is complete.
14. Because the amended petition in this proceeding was deemed complete on March 17, 2015, the 60-day deadline set forth in TWC § 13.254(a-6) began to run on that date.
15. Under TWC § 13.254(a-6), the Commission may not deny Midlothian's petition based on the fact that Mountain Peak is a borrower under a federal loan program.
16. This docket was processed in accordance with the requirements of PURA and Commission rules.

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<sup>45</sup> See *Tex. Gen. Land Office v. Crystal Clear Water Supp. Corp.*, 449 S.W.3d 130, 136 (2014) ("[S]ection 13.254(a-5) does not contain an 'all or nothing' requirement.").

<sup>46</sup> Facilities and lines must be "used for or committed to a particular tract before that tract is deemed to be 'receiving' services." *Tex. Gen. Land Office v. Crystal Clear Water Supp. Corp.*, 449 S.W.3d 130, 141 (2014).



17. Midlothian is entitled to approval of its petition because it has satisfied the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r) by adequately demonstrating ownership of a tract of land that is at least 25 acres, is located in a qualifying county, and is not receiving water or sewer service.

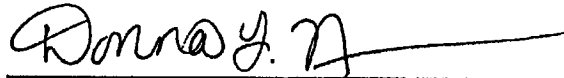
#### V. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following Order:

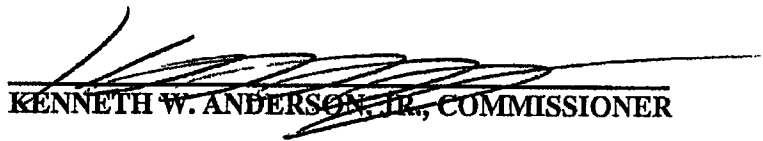
1. The city of Midlothian's petition for expedited release, as amended, is granted.
2. The city's 97.7-acre tract is removed from Mountain Peak's CCN No. 10908.
3. Mountain Peak's CCN No. 10908 is amended in accordance with this Order and the attached map and certificate.
4. The city's official service area maps for Mountain Peak shall reflect the change in service area made by this order.
5. All other motions, requests for entry of specific finds of fact and conclusions of law, and any other request for general or specific relief, if not expressly granted herein, are denied.

SIGNED AT AUSTIN, TEXAS the 1<sup>st</sup> day of May 2015

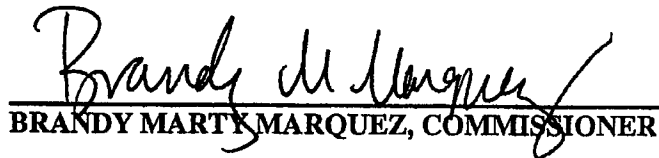
PUBLIC UTILITY COMMISSION OF TEXAS



DONNA L. NELSON, CHAIRMAN



KENNETH W. ANDERSON, JR., COMMISSIONER



BRANDY MARTK MARQUEZ, COMMISSIONER



# Public Utility Commission of Texas

**By These Presents Be It Known To All That**

## **Mountain Peak Special Utility District**

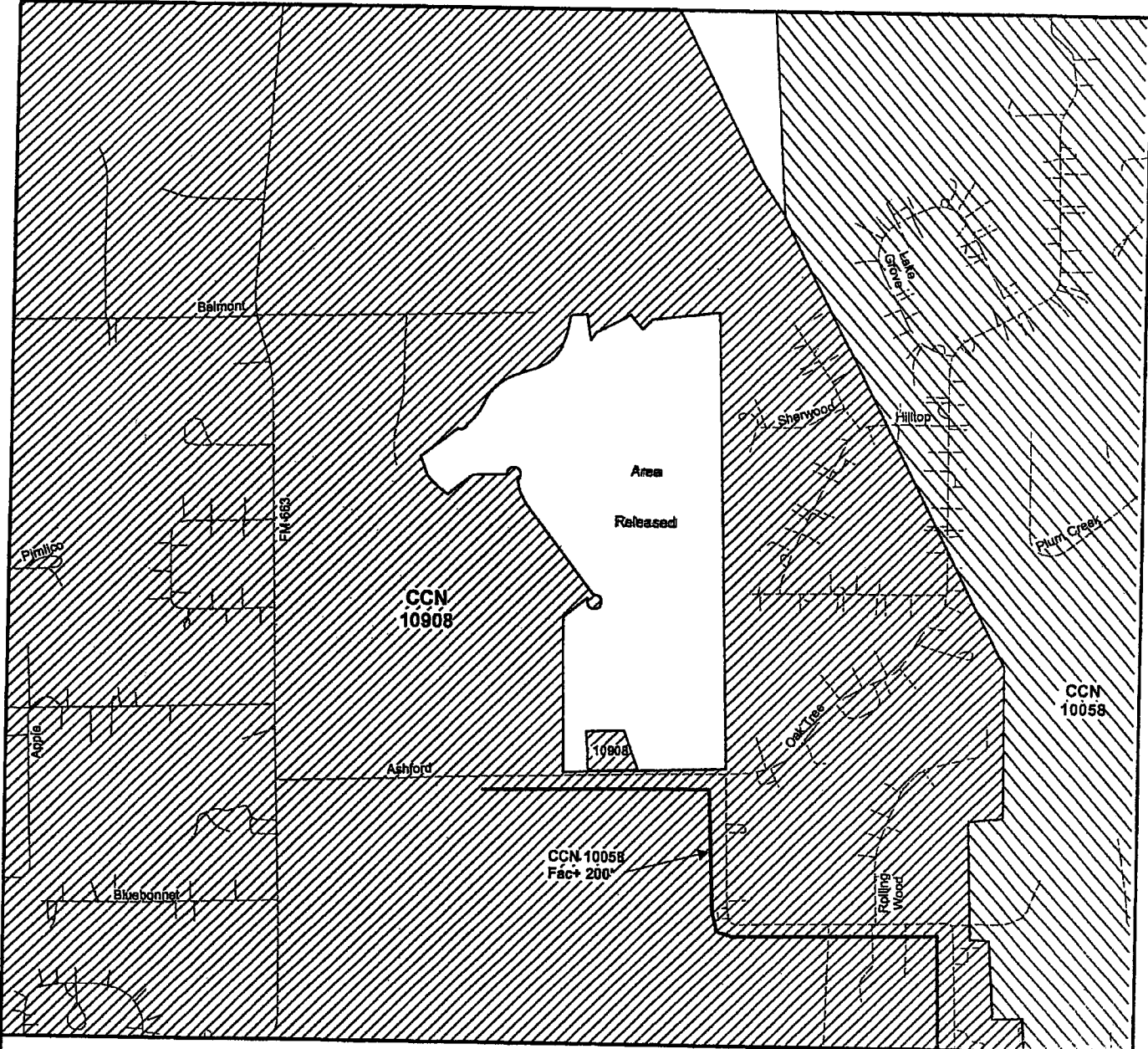
having duly applied for certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service by this Applicant, is entitled to and is hereby granted this

### **Certificate of Convenience and Necessity No. 10908**

to provide continuous and adequate water utility service to that service area or those service areas in Ellis County as by final Order or Orders duly entered by this Commission, which Order resulting from Docket No. 44394 is on file at the Commission offices in Austin, Texas; and is a matter of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty Mountain Peak Special Utility District, to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Issued at Austin, Texas, the 1<sup>ST</sup> day of MAY 2015.

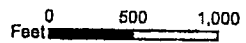
**Mountain Peak Special Utility District**  
**Portion of Water Service Area**  
**CCN No. 10908**  
**PUC Docket No. 44394**  
 Petition by City of Midlothian to Amend Mountain Peak SUD's CCN by Expedited Release  
 in Ellis County



Public Utility Commission of Texas  
 1701 N. Congress Ave  
 Austin, TX 78701

**Water CCN Service Areas**

- 10908 - Mountain Peak SUD
- 10058 - Sardis-Lone Elm WSC



**Facilities + 200' Water CCN**

- 10058 - Sardis-Lone Elm WSC

Map by: Suzanne Burt  
 Date created: March 17, 2015  
 Project path: n:\gis\projects\applications\44394.mxd

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