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Received - 2022-06-16 01:10:40 PM
Control Number - 50404
ItemNumber - 106

PUC DOCKET NO. 50404

PETITION OF STERLING DEASON	§	
O'DONNELL AND DARWIN DEASON,	§	PUBLIC UTILITY COMMISSION
CO-TRUSTEES OF THE STERLING	§	
DEASON O'DONNELL DD 2012 TRUST	§	
UDER AGREEMENT OF THE DD 2014-B	§	
GRANTOR RETAINED ANNUITY TRUS	§	OF TEXAS
TO AMEND MARILEE SPECIAL	§	
UTILITY DISTRICT'S CERTOIFICATE	§	
OF CONVENIENCE AND NECESSITY	§	
IN COLLIN COUNTY BY EXPEDITED	§	
RELEASE	§	

**MARILEE SPECIAL UTILITY DISTRICT'S
RESPONSE TO ORDER NO. 18**

TO THE HONORABLE CHIEF ADMINISTRATIVE LAW JUDGE BURKHALTER:

COMES NOW Marilee Special Utility District (the "District"), by and through undersigned counsel, and files this Motion to Dismiss this proceeding for failure to state a claim upon which relief may be granted, as the Petitioners sold the Tract of Land at issue and are thus no longer eligible for streamlined expedited release under Texas Water Code ("TWC") § 13.2541 and 16 Texas Administrative Code ("TAC") 24.245(h). In support thereof, the District respectfully shows the Honorable Administrative Law Judge ("ALJ") as follows:

I. BACKGROUND

1. On January 2, 2020, Petitioners Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014-B Grantor Retained Annuity Trust ("Petitioners") filed a Petition for Expedited Release Pursuant to Texas Water Code Section 13.2541 seeking to use the Public Utility Commission's ("Commission") streamlined expedited release process, TWC § 13.2541 and 16 TAC § 24.245(h),

to extract approximately 260.372 acres from the water utility service area the District serves under Certificate of Convenience and Necessity (“CCN”) No. 10150 in Collin County, Texas.¹

2. On April 27, 2021, Petitioners filed a First Amended Petition (the “Petition”), seeking to extract approximately 259.504 acres (the “Tract of Land”) out of the 260.372 acres that was the subject of their original petition.²

3. On June 10, 2021, the ALJ ordered that the Petition was administratively complete, and entered the procedural schedule that governs this proceeding.³ Included in the procedural schedule in Order No. 12 are the following procedural deadlines:⁴

<i>In the event expedited release is granted and petitioner and CCN holder are unable to select an agreed-upon appraiser</i>	
Deadline for petitioner and CCN holder to make a filing stating that they have been unable to select an agreed-upon appraiser and affirming that they will pay half of the cost of Commission Staff's appraiser	Within 10 days after the Commission approves streamlined expedited release
Deadline for reports from petitioner's appraiser and from CCN holder's appraiser	Within 70 days after the Commission approves expedited release
Deadline for Commission Staff's appraiser's report	Within 100 days after the Commission approves expedited release
Deadline for Commission's final order determining the amount of monetary compensation, if any, owed by petitioner to CCN holder	Within 60 days after Commission receives the final appraisal
Deadline for petitioner to pay any compensation due to CCN holder	Within 90 days of Commission's final order on compensation

¹ Petition by Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014 Grantor Retained Annuity Trust Dated September 5, 2012 for Expedited Release from CCN (Jan. 20, 2020).

² First Amended Petition by Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014 Grantor Retained Annuity Trust Dated September 5, 2012 for Expedited Release from CCN (Apr. 27, 2021).

³ Order No. 12 – Finding Amended Petition, as Supplemented, Administratively Complete, Granting Extension, and Establishing Procedural Schedule (June 10, 2021).

⁴ *Id.* at 3.

4. On March 1, 2022, the Commission entered its Second Motion on Rehearing granting the Petition (the “Order”).⁵ In the Order, the Commission provided as follows:

The proceeding to determine the amount of compensation to be awarded to the CCN holder, if any, commences with the filing of this Order in accordance with the schedule adopted in Order No. 12. Any decision on compensation will be made by a separate order.⁶

The Order specifically states that Order No. 12 controls the compensation phase of this proceeding. Order No. 12 specifically provides a deadline of “petitioner,” not any other party, person, or entity, to compensate CCN holder, which is the District.

5. On May 10, 2022, Petitioners and the District timely submitted appraisal reports for the Tract of Land.

6. On June 9, 2022, Commission Staff filed a request for clarification and abatement.⁷ Commission Staff explained that Petitioners refused to guarantee payment of their one-half of Commission Staff’s appraisal costs,⁸ refused to provide necessary information to Commission Staff’s appraiser,⁹ and, most importantly, that Petitioners have sold the Tract of Land to a buyer who is not and has never been a party to this proceeding.¹⁰ Based on these developments, Commission Staff requested clarification from the ALJ as to whether, among other things, Petitioners still have standing to bring this proceeding, since they have sold the Tract of Land.

7. On the same day, June 9, 2022, the District filed a notice of its agreement with Commission Staff’s Request.¹¹

⁵ Second Order on Rehearing (Mar. 1, 2022).

⁶ *Id.* at Ordering Paragraph 7 (Mar. 1, 2022).

⁷ Commission Staff’s Informational Filing and Request for Clarification and Abatement (June 9, 2022).

⁸ *See id.* at 2-3 (stating that Commission Staff’s appraiser has not received “an agreement for payment upon delivery of his appraisal report” from Petitioners.).

⁹ *See id.* at 2-3 (explaining that Commission Staff’s appraiser has not received required preliminary information for Commission Staff’s appraisal report from Petitioners).

¹⁰ *See id.* at 4 & Staff’s Exhibit B (stating that Petitioners have sold the Tract of Land at issue in this proceeding and providing email from Petitioners’ counsel, dated June 2, 2022, admitting that Petitioners “closed on the sale of the property” on Thursday, May 26, 2022, and that Petitioners’ counsel “ha[s] not been engaged by the buyer.”).

¹¹ Marilee Special Utility District’s Notice of Agreement with Commission Staff’s Request for Clarification and Abatement (June 9, 2022).

8. The same day, on June 9, 2022, the ALJ entered Order No. 18, which requires Petitioners to respond fully to Commission Staff's Request by June 16, 2022.¹² The ALJ also provided the District with the opportunity to file a response to Commission Staff's Request by that date, and this pleading is timely filed.

II. REQUESTS FOR RELIEF

9. The District respectfully proposes four possible means of reaching a resolution of the issues raised in Commission Staff's request, as described below:

A. The District Requests that the ALJ Recommend that the Commission Withdraw the Order and Dismiss this Proceeding.

10. To obtain release of property from a CCN holder under TWC § 13.2541, a landowner must demonstrate with affirmative evidence that the landowner *owns a tract of land* that is at least 25 acres, that the tract of land is located in a qualifying county, and that the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.¹³

11. The Petitioners in this proceeding, Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014-B Grantor Retained Annuity Trust, do not own the Tract of Land,¹⁴ and, as a result, no longer have standing to bring this proceeding. Petitioners cannot "cure" this deficiency: The Commission rules do not provide for Petitioners to abandon their case and the Commission has ruled in a different TWC § 13.2541 proceeding that Petitioners are prohibited from substituting in a different petitioner—one who actually owns the Tract of Land and has standing to bring this proceeding—at this stage of the proceeding.¹⁵ As the ALJ stated in that order, Petitioners should have withdrawn

¹² Order No. 18 – Requiring Response to Commission Staff's Filing as of June 9, 2022 (June 9, 2022).

¹³ TWC § 13.2541 (emphasis added); *see also* 16 TAC § 24.245(h). *See also* Marilee Special Utility District's Response and Objection to the Administratively Complete Amended Petition, at 9, 12-13 (detailing Petitioners' failure to meet their burden of proof under TWC § 13.2541 and 16 TAC § 24.245(h)).

¹⁴ Commission Staff's Informational Filing and Request for Clarification and Abatement, at 4 & Staff's Exhibit B (June 9, 2022) (stating that Petitioners have sold the Tract of Land at issue in this proceeding and providing email from Petitioners' counsel, dated June 2, 2022, admitting that Petitioners "closed on the sale of the property" on Thursday, May 26, 2022, and that Petitioners' counsel "ha[s] not been engaged by the buyer.").

¹⁵ *See Petition of Charles D. Carter to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 52917, Order No. 6 – Rejecting First Amended Petition

their Petition when they sold the Tract of Land.¹⁶ As Petitioners have not done so, it is appropriate for the Commission to withdraw the Order and dismiss the Petition.

12. The Commission's procedural rules include the following reasons for dismissal: lack of jurisdiction, moot question or obsolete petition, res judicata, collateral estoppel, unnecessary duplication of proceedings, failure to prosecute, failure to amend an application such that it is sufficient after repeated determinations that the application is insufficient, failure to state a claim for which relief can be granted, gross abuse of discovery, withdrawal of an application, or other good cause shown.¹⁷ Here, Petitioners do not own the Tract of Land, and therefore cannot state a claim for streamlined expedited release of the Tract of Land upon which relief may be granted. Accordingly, the District moves the ALJ to enter a notification to the Commission stating that Petitioners have lost their standing to pursue this action, failed to state a claim upon which relief may be granted, and recommending that the Commission's Order be withdrawn, and the Petition be dismissed pursuant to TWC § 13.2541 and 16 TAC § 22.181(d).

B. The District Moves for the ALJ to Certify the Issues in Commission Staff's Request to the Commission and Abate this Proceeding.

13. In the alternative, the Commission's procedural rules authorize a presiding officer to certify to the Commission an issue that involved an ultimate finding of compliance with or satisfaction of a statutory standard the determination of which is committed to the discretion or judgment of the Commission by law.¹⁸

14. The District respectfully submits that the issue raised by Commission Staff's request for clarification and abatement—namely, whether Petitioners still have standing and how this case is to proceed now that Petitioners have sold the Tract of Land—is appropriate for

and Request to Restyle Docket (Apr. 6, 2022) ("The request to restyle the petition is denied and the attempt to substitute Sater as the petitioner is denied. The proper course of action would be for Mr. Carter to move to withdraw his petition in this docket so that it can be closed. If Sater wishes to pursue streamlined expedited release it must file a new petition in a new docket.").

¹⁶ See 16 TAC § 22.181(g)(1) ("A party that initiated a proceeding may withdraw its application without prejudice to refiling of same, at any time before that party has presented its direct case.").

¹⁷ 16 TAC § 22.181(d).

¹⁸ 16 TAC § 22.127(a).

certification to the Commission, as it involves an ultimate satisfaction of TWC § 13.2541, which is a statutory standard.

15. In the event that the ALJ does not grant the District's request that the ALJ recommend to the Commission that the Order should be withdrawn and the proceeding dismissed, the District respectfully requests that the ALJ certify the issues raised in Commission Staff's request to the Commission, and abate this proceeding pending the Commission's resolution of the certified question.¹⁹

C. The District Moves for the ALJ to Abate this Proceeding While the District Moves the Commission to Reconsider the Order.

16. In the alternative, the District may file a motion for reconsideration of the Order based on the newly discovered fact that Petitioners no longer own the Tract of Land. The ALJ has "broad discretion" to abate a proceeding under the Commission's procedural rules.²⁰ Accordingly, in the event that the ALJ does not act to recommend the Commission withdraw the Order or certify an issue to the Commission, the District respectfully requests that the ALJ abate this proceeding while the District files a motion for reconsideration of the Order.

D. The District Moves for the ALJ to Abate this Proceeding Pending the Outcome of the District's State-Court Appeal of the Order.

17. In the alternative, the District respectfully submits that this proceeding be abated during the pendency of the District's state-court appeal of the Order, as described herein.

18. On May 25, 2022, the District initiated judicial review of the Order in Travis County District Court (the "Appeal").²¹ The District is in the process of supplementing its Original Petition for Judicial Review to include the newly discovered fact that Petitioners no longer own the Tract of Land, as they sold the Tract of Land before this proceeding was final.

¹⁹ See 16 TAC § 22.127(c) ("The presiding officer may abate the proceeding while a certified Commission action issue is pending.").

²⁰ 16 TAC § 22.202(c).

²¹ *Marilee Special Utility Dist. v. Pub. Util. Comm'n of Texas*, No. D-1-GN-22-002411 (455th Dist. Ct., Travis County, Tex., May 25, 2022) (Marilee Special Utility District's Original Petition for Judicial Review).

19. The Commission's order decertifying the Tract of Land in this proceeding will potentially be reversed or remanded to the Commission for reconsideration, at which time the District would move the Commission to withdraw the Order and dismiss this proceeding, since Petitioners no longer own the Tract of Land at issue, and thus lack standing to pursue their claim.

20. In the event that the ALJ does not take any of the other actions requested herein, the District alternatively respectfully requests that the ALJ enter an order abating this proceeding during the pendency of the Appeal.

III. PRAYER

The Petitioners in this proceeding, Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under Agreement of the DD 2014-B Grantor Retained Annuity Trust, do not own the Property that is the subject of the Petition,²² and accordingly cannot satisfy TWC § 13.2541's requirement that the landowner *owns a tract of land* that is at least 25 acres, that the tract of land is located in a qualifying county, and that the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.²³

For the aforementioned reasons, the District prays that the ALJ take one off the following actions:

- Enter an order or other notification recommending to the Commission that the Order be withdrawn, and the Petition be dismissed pursuant to TWC § 13.2541 and 16 TAC § 22.181(d), for failure to state a claim upon which relief may be granted, as Petitioners no longer have standing to pursue their claim;
- Certify the issues raised in Commission Staff's request to the Commission, and abate this proceeding pending the Commission's resolution of the certified question;
- Abate this proceeding while the District files a motion for reconsideration of the Order with the Commission; or

²² Commission Staff's Informational Filing and Request for Clarification and Abatement, at 4 & Staff's Exhibit B (June 9, 2022) (stating that Petitioners have sold the Tract of Land at issue in this proceeding and providing email from Petitioners' counsel, dated June 2, 2022, admitting that Petitioners "closed on the sale of the property" on Thursday, May 26, 2022, and that Petitioners' counsel "ha[s] not been engaged by the buyer.").

²³ TWC § 13.2541 (emphasis added); *see also* 16 TAC § 24.245(h).

- Enter an order abating this proceeding during the pendency of the District's action for judicial review of the Commission's Order.

Finally, the District also respectfully requests any other relief in law or equity to which it may show itself to be entitled.

Respectfully submitted,



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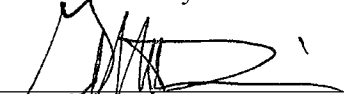
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ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this the 16th day of June 2022.



Grayson E. McDaniel