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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	§	OF TEXAS
UNDER AGREEMENT OF THE DD	§	
2014-B GRANTOR RETAINED	§	
ANNUITY TRUST TO AMEND	§	
MARILEE SPECIAL UTILITY	§	
DISTRICT'S CERTIFICATE OF	§	
CONVENIENCE AND NECESSITY IN	§	
COLLING COUNTY BY EXPEDITED	§	
RELEASE	§	

**MARILEE SPECIAL UTILITY DISTRICT'S
MOTION FOR REHEARING**

TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, Marilee Special Utility District (the "District"), and files its Motion for Rehearing ("Motion") of the Public Utility Commission of Texas's (the "Commission") amending the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release property 260.372 acres of property ("Tract of Land") in Collin County, Texas.¹ Subsequently, the Commission's Chief Administrative Law Judge issued a Notice of Approval Making a Determination in Compensation on November 10, 2022 ("Notice of Approval").² A party must file a motion for rehearing "not later than the 25th day after the date the decision or order that is the subject of motion is signed."³ The 25th day after November 10, 2022, is December 5, 2022, and this Motion is timely filed.⁴ In support thereof, the District respectfully shows as follows:

I. INTRODUCTION

This proceeding for streamlined expedited release was initiated in January 2020 with the filing of a petition (the "Petition" or "Original Petition") by Petitioners Sterling Deason O'Donnell

¹ Order (October 12, 2021).

² Notice of Approval Making a Determination on Compensation (November 10, 2022).

³ Tex. Gov't Code § 2001.146.

⁴ The District files this Motion, in relevant part, to preserve its rights and remedies on appeal. *See, e.g., Suburban Util. Corp. v. Pub. Util. Com.*, 652 S.W.2d 358, 364 (Tex. 1983) ("[A] motion for rehearing is prerequisite to an appeal.") (internal quotation marks omitted).

and Darwin Deason (“Petitioners”) as co-trustees of the Sterling Deason O’Donnell DD 2012 Trust, pursuant to Section 13.2541 of the Texas Water Code (“TWC”) and 16 Texas Administrative Code (“TAC”) § 24.245(h).⁵ On April 7, 2021, after months of briefing, the Commission issued an Order Remanding to Docket Management because the Petitioners “failed to provide documentation to demonstrate that water meter 1528 itself is not located on the tract of land to be released.”⁶ The entire process began again, when Petitioners filed their First Amended Petition (“Amended Petition”), which alleges that the Tract of Land is greater than 25 acres, not receiving water or sewer service, and is entirely within Collin County.⁷

On June 10, 2021, the Commission’s Administrative Law Judge (“ALJ”) held that the Amended Petition was administratively complete.⁸ The ALJ entered a proposed order decertifying the Tract of Land on August 10, 2021.⁹ The District filed Exceptions and Corrections to the proposed order, which were rejected.¹⁰ The Commission adopted the proposed order without comment in an open meeting on October 7, 2021, after denying the District’s request for oral argument.¹¹ The Commission entered its Order decertifying the Tract of Land from the District’s CCN (the “Order”) on October 12, 2021.

The District filed a Motion for Rehearing on November 5, 2021, raising five points of error regarding the Order. No other party filed a Motion for Rehearing, and no other party responded to the District’s Motion for Rehearing. The Commission considered the District’s Motion for Rehearing in an open meeting on December 2, 2021, after denying the District’s request for oral argument.¹² At the open meeting, the Commissioners unanimously voted to extend the time to act

⁵ Petition of Sterling Deason O’Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O’Donnell DD 2012, at 1-2 (Jan. 2, 2020) (seeking to decertify 260.372 acres of property).

⁶ CITE TO ORDER REMANDING TO DOCKET MANAGEMENT ISSUED APRIL 7, 2021.

⁷ 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-B Grantor Retained Annuity Trust Dated September 5, 2012 for Expedited Release Pursuant to Texas Water Code Section 13.2541Held by Marilee Special Utility District in Collin County at 2 (Apr. 27, 2021).

⁸ Order No. 12 – Finding Amended Petition, as Supplemented, Administratively Complete, Granting Extension, and Establishing Procedural Schedule (June 10, 2021).

⁹ Proposed Order and Memorandum (Aug. 10, 2021).

¹⁰ Proposed Order Memorandum (Sept. 22, 2021).

¹¹ Marilee Special Utility District’s Request for Oral Argument (Sept. 30, 2021); Commissioners Will Not Hear Oral Argument at the October 7, 2021 Meeting of the PUC (Oct. 5, 2021).

¹² Marilee Special Utility District’s Request for Oral Argument (Nov. 22, 2021); Commissioners Will Not

on the District's Motion for Rehearing.¹³ The District's Motion for Rehearing was considered by the Commissioners at the January 13, 2022 open meeting of the Commission, and adopted a memorandum authored by Commissioner Glotfelty.¹⁴ On January 14, 2022, the Commission entered the Order on Rehearing, which included the revisions proposed by Commissioner Glotfelty's memorandum—namely, defining “tract of land,” and adding three conclusions of law.¹⁵

The Order on Rehearing did not address the arguments or points of error the District raised in its Motion for Rehearing. Nevertheless, the Order on Rehearing “modifie[d], correct[ed], or reform[ed]” the Order beyond a “typographical, grammatical, or other clerical change.”¹⁶ Accordingly, to exhaust its administrative remedies, the District timely filed a Second Motion for Rehearing on February 8, 2022.¹⁷ No other party filed a response to the District's Second Motion for Rehearing.

On February 17, 2022, the Commission notified the parties that it would hear the District's Second Motion for Rehearing at the Commission's open meeting on February 25, 2022. The Commissioners stated at the meeting that they granted the Second Motion for Rehearing to correct Findings of Fact (“FOF”) 44 and 45 to make them consistent with the TWC and Commission rules, as those findings were not written consistently with the Commission's recommendations on the proper use of the terms “Tract of Land” and “Property.”¹⁸ The Commission issued its Second Order on Rehearing, in which FOF 44 and FOF 45 were revised as follows:

Hear Oral Argument at the December 2, 2021 Meeting of the PUC (Nov. 30, 2021).

¹³ Order Extending Time (Dec. 2, 2021).

¹⁴ Commissioner Glotfelty's Memo (Jan. 12, 2022).

¹⁵ Order on Rehearing (Jan. 14, 2022).

¹⁶ See Tex. Gov't Code § 2001.146(h) (defining when a subsequent motion for rehearing is necessary).

¹⁷ Marilee Special Utility District's Second Motion for Rehearing (Feb. 8, 2022).

¹⁸ See Public Utility Commission of Texas, Open Meeting Broadcast, at 9:53-11:33 (Feb. 25, 2022) (recording the Commission's consideration of the Second Motion for Rehearing, which was Item One on the agenda), available at https://www.adminmonitor.com/tx/puct/open_meeting/20220225/ (last visited Mar. 24, 2022).

FOF 44

- Order on Rehearing: “The CCN holder owns and operates three water meters on the petitioners’ tract of land, but none of those meters are located within the tract of land, and none provide water service to the tract of land.”¹⁹
- Second Order on Rehearing: “The CCN holder owns and operates three water meters on the petitioners’ property, but none of those meters are located on the tract of land, and none provide water service to the tract of land.”²⁰

FOF 45

- Order on Rehearing: “The CCN holder provides, or has provided, water service to three separate parcels within the petitioners’ tract of land, but none of those parcels lies within the tract of land.”²¹
- Second Order on Rehearing: “The CCN holder provides, or has provided, water service to the petitioners’ property, but not within the tract of land.”²²

The Second Order on Rehearing did not address the arguments or points of error the District raised in its Second Motion for Rehearing. Nevertheless, the Second Order on Rehearing “modifie[d], correct[ed], or reform[ed]” the Order beyond a “typographical, grammatical, or other clerical change.”²³ Accordingly, the District timely filed a Third Motion for Rehearing to exhaust its administrative remedies in this proceeding on March 25, 2022.²⁴ No other party filed a response to the District’s Third Motion for Rehearing, and the Commission provided notice that the Third Motion for Rehearing would not be added to an open meeting agenda.²⁵

On May 10, 2022, the District and Petitioner submitted appraisals addressing the compensation due to the District under TWC § 13.2541(f) and (i).²⁶ On November 3, 2022, the

¹⁹ Order on Rehearing, at FOF 44.

²⁰ Second Order on Rehearing, at FOF 44.

²¹ Order on Rehearing, at FOF 45.

²² Second Order on Rehearing, at FOF 45.

²³ See Tex. Gov’t Code § 2001.146(h) (defining when a subsequent motion for rehearing is necessary).

²⁴ *Id.*

²⁵ Notice of Motion for Rehearing [April 4, 2022]

²⁶ Marilee SUD’s Submission of Appraisal Report [May 10, 2022]; and Petitioner’s Submission of Appraisal

Commission Staff submitted its third appraiser report regarding compensation as required by 13.2541(i).²⁷ On November 10, 2022, the Chief ALJ issued the Notice of Approval.²⁸

The Commission's decisions to grant the Petition in the Order and subsequently issue the Notice of Approval were in error. Both the Commission's Order and Notice of Approval contain factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Subject Property from the District and to prevent the District from being materially prejudiced, as described herein. Accordingly, the District respectfully requests that the Commission grant the District's Motion for Rehearing, rescind the Notice of Approval, reverse the Order, and enter a final order denying the Petition because the Subject Property is receiving service from the District and is thus ineligible for expedited release under TWC § 13.2541 and 16 TAC § 24.245(h), and because the District's federal indebtedness entitles the District to protection from curtailment or limitation of its service area, under 7 U.S.C. § 19267(b).

II. POINTS OF ERROR

The Commission's Second Order on Rehearing and the Notice of Approval are based on factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Tract of Land from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that the Commission grant the District's Motion, rescind the Notice of Approval, reverse the Second Order on Rehearing, and enter a final order denying the Amended Petition.

A. Point of Error No. 1—The Commission Erred by Failing to Hold Petitioners to Their Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 6, 7, 8, 9, 10, 38, 39, 40, and COL Nos. 7, 12, 13, and Ordering Paragraph 1).

In order to carry their burden of establishing that the Tract of Land is not receiving water service, the petitioner in a proceeding brought under TWC § 13.2541 and 16 TAC § 24.245(h) has the burden to prove that the area requested to be decertified is not receiving service. It is arbitrary

Report [May 10, 2022].

²⁷ Commission Staff's Submission of Third-Party Appraisal Report [November 3, 2022].

²⁸ Notice of Approval (November 10, 2022).

and capricious for the Commission to decertify property from a CCN when a petitioner fails to set forth facts to establish that the property is not receiving service, as here, where Petitioners set forth only an affidavit that provided no facts regarding water service, but merely unsupported claims. Further, the Commission's Second Order on Rehearing fails to explain why it determined that the Tract of Land is not receiving service as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corp.*,²⁹ when, as the Second Order on Rehearing makes the following findings of fact:

- “The CCN holder owns and operates an eight-inch waterline running through the southern end of the tract of land, and a four-inch waterline running through the northwestern corner of the tract of land[.]”³⁰
- “The CCN holder owns and operates a six-inch waterline running parallel to, but outside of, the northeastern boundary of the tract of land, and a two-inch waterline running parallel to, but outside of, the southeastern boundary of the tract of land.”³¹
- “The CCN holder owns and operates additional water system infrastructure located outside of, but in proximity to, the tract of land.”³²
- “The CCN holder owns and operates three water meters on the petitioners’ property[.]”³³
- “The CCN holder provides, or has provided, water service to the petitioners’ property, but not within the tract of land.”³⁴

Notably, in each of these findings of fact, the Second Order on Rehearing includes a legal conclusion—that the District is—despite the facts regarding the District’s facilities, waterlines on or near the Tract of Land--“not providing water service to the tract of land.” Those legal conclusions, which are incorrect, have been omitted from the quoted phrases above and should be

²⁹ 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied) (interpreting TWC § 13.2541’s predecessor statute, § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the Water Code. See Tex. S.B. 2272, 86th Leg., R.S. (2019)).

³⁰ Second Order on Rehearing, at FOF 41.

³¹ *Id.* at FOF 42.

³² *Id.* at FOF 43.

³³ *Id.* at FOF 44.

³⁴ *Id.* at FOF 45.

removed from the findings of fact and placed in the Conclusions of Law with an analysis of why those facts do not demonstrate “service” under the TWC., TAC, and *Crystal Clear*.

Under *Crystal Clear*, the Commission must review the present facts and circumstances, including the service application and agreements (including transfer agreements) that cover all the acres of the tract at issue. In *Crystal Clear*, the Austin Court of Appeals held that facilities or lines “used” or “committed” to providing such service might cause a property to “receive service” under the statutory and regulatory definition.³⁵ But where water lines are actually present within a tract and “committed” to the property in that manner, the tract is unquestionably “receiving service.”

Here, the District has served and is capable of serving the Tract of Land, as Finding of Fact 42-45 states. The Tract of Land is thus receiving “service” as interpreted by *Crystal Clear*, as described in more detail in Section II.B, below. There are District facilities currently serving the property on which the Tract of Land is located that are in use to irrigate the Tract of Land. The Commission seems to deliberately overlook the fact that the District provides water service to Petitioner's land, including the Tract of Land. The Commission's indifference to these facts has now led to the District being damaged by the Commission taking acreage that the District is serving and which the District relies upon for paying its debts. Such an outcome was not intended by the legislature when the streamlined expedited release process was created.²⁵

The proper analysis of Petitioners' burden is reflected in *Johnson County Special Utility District v. Public Utility Comm'n of Texas*.³⁶ The petitioner in that case provided a detailed affidavit by a land broker on the grounds of the property to be decertified, in which the broker stated that he searched the property, which was inhabited, for several hours and found no district water meters or facilities, only “two shuttered ground well heads” and a “small, elevated water storage tank . . . implying that any dwelling on the [p]roperty required that water pressure be

³⁵ *Crystal Clear*, 449 S.W.3d at 140.

³⁶ No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin May 11, 2018, pet. denied) (mem. op.).

generated locally and not from a retail water utility service provider.”³⁷ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.³⁸

Here, Petitioners have not met their burden of proof to decertify the Tract of Land under TWC § 13.2541. The Second Order on Rehearing improperly permits Petitioners to decertify Tract of Land that the District is capable of immediately providing service to, as evidenced by the District’s existing meters, waterlines, and facilities. The Commission’s approval of Petitioners’ “carving out” of the Tract of Land from the existing meters, waterlines, and facilities, and acceptance of Petitioners’ insufficient affidavit eviscerates Petitioners’ burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land is receiving, has received, and is capable of receiving water service under TWC § 13.2541 and *Crystal Clear*.

B. Point of Error No. 2—The Commission Erred in Holding that the Tract of Land Is Not Receiving Water Service from the District (FOF Nos. 38, 39, 40, 42, 43, 44, 46, 47, 48 and COL Nos. 12 and 13 and Ordering Paragraph 1).

The TWC authorizes decertification or expedited release only for property “that is not receiving water or sewer service.”³⁹ The TWC broadly defines “service” as:

any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties...to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.⁴⁰

Whether or not a retail public utility has performed “any act,” “supplied or furnished” anything, or “committed or used” “any facilities or lines” in in the “performance of its duties” is a fact question. According to the plain text of that definition and how both the Commission and Texas courts have interpreted it, the question of whether or not a tract is receiving “service” is not dependent upon whether water or sewer is being used or has been requested on the tract sought to

³⁷ *Id.* at **6-7.

³⁸ *Id.* at **9-10 (citing Commission’s Finding of Fact No. 24).

³⁹ TWC § 13.2541(b).

⁴⁰ TWC § 13.002(21); see also 16 TAC § 24.3(33) (same definition).

be decertified—this is where the Commission has repeatedly erred in this case. Instead, a tract is “receiving” water or sewer service if either of the following conditions are met:

- Any facilities or lines are committed or used in the performance of the CCN holder’s duties as a retail public utility providing service to the property; or
- Any lines are committed or used in the performance of the CCN holder’s duties as a retail public utility.⁴¹

As defined by TWC § 13.002(9), “facilities” includes “all the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.” *Crystal Clear* held that facilities or lines “used” or “committed” to providing such service can cause a property to “receive service.”⁴²

The Commission’s Second Order on Rehearing errs in its analysis of whether the Tract of Land receives water service. The District objects to Finding of Fact No. 38, which states that the Tract of Land “is not receiving actual water service” from the District. FOF 38 should be deleted because it is irrelevant to the correct analysis under TWC §§ 13.002, 13.2541, 16 TAC § 24.254(h), and *Crystal Clear*. The question of whether a tract is receiving “service” is not dependent on whether water or sewer is being used or has been requested on the tract sought to be decertified.

FOF Nos. 39 and 40 state that Petitioners never “requested” water service from the District and Petitioners never “paid any charges or fees” to the District to initiate or maintain water service for the Tract of Land. However, neither 16 TAC § 24.245(h), TWC § 13.2541, or *Crystal Clear*, require that Petitioners request water service from the District or pay charges and fees for the Commission to find that the Tract of Land is receiving “service.” Thus, FOF Nos. 39 and 40 should be removed as they are irrelevant to this proceeding.

⁴¹ See *id.*; see also *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.—Austin 2014, pet. denied).

⁴² *Crystal Clear*, 449 S.W.3d at 140.

The District has demonstrated in several pleadings how it has provided actual water service to the tract of land containing the Tract of Land.⁴³ Easements were conveyed to the District and it installed waterlines, received request for the meters, and provided—and continues to provide actual water—through various waterlines and meters to the tract of land that contains the Tract of Land. This is “service” under TWC §§ 13.002, 13.2541, 16 TAC § 24.254(h), and *Crystal Clear*. The District has not discontinued providing water service, and Petitioners have not proven that the District is no longer providing water through the 2”, 6”, 8” waterlines or and Meters #309 and #1528 on the property where the Tract of Land is located.

The District objects to FOF Nos. 42, 43, 44, 46, 47, and 48, as omitting that the District’s existing facilities, including the 8”, 2”, and 6” waterlines and Meters #309 and #1528, do not provide water service “to the tract of land.” The erroneous nature of these findings are reflected in FOF 45, which *correctly* states that the “CCN holder *provides, or has provided, water service to the petitioners’ property.*” Note that the “petitioners’ property” is approximately 265.679 acres.⁴⁴ The “Tract of Land” is approximately 259.5 acres.⁴⁵ It is obvious that Petitioners have intentionally “carved out” the District’s facilities, waterlines, and meters that serve the property and that the “Tract of Land” is what remains. Such selective pleading should not be permitted to succeed because such a Tract of Land is still receiving or capable of receiving “service” as defined by the TWC and *Crystal Clear*.

Through its existing facilities, water lines, and meters, the District has provided continuous service to Petitioners’ property that includes the Tract of Land and has the ability to immediately provide full service to the Tract of Land. If the Commission permits Petitioners to decertify property that the CCN holder can service and is servicing—as that term is interpreted by the TWC, TAC, and *Crystal Clear*, then the Commission is not taking into account the important public policy of preserving a CCN holder’s service area and is subjecting CCN holders to abusive tactics of landowners that were not intended by the legislators when they created the mechanism for

⁴³ See, e.g., Marilee Special Utility District’s Response to Petition for Expedited Release at 3-4 (describing facilities, water lines, and meters serving the tract of land where the Tract of Land is located) (Feb. 10, 2020); Marilee Special Utility District’s Response to the Administratively Complete Amended Petition at 11-13 (describing the District’s provision of service to the Tract of Land).

⁴⁴ Finding of Fact 32.

⁴⁵ Finding of Fact 33.

streamlined expedited release.⁴⁶ For this reason, the Commission must grant the District’s Motion and enter an order reversing the Second Order on Rehearing and denying the Amended Petition.

C. Point of Error 3—The Commission Erred When It Failed to Deny the Original Petition (FOF Nos. 5, 11, 20, 21, 22, 26, 49 and COL Nos. 3, 4, 5, 10, 13 and Ordering Paragraphs 1, 3).

The Commission erred in granting the Amended Petition because it did so in violation of TWC § 13.2541(c), which provides, “The utility commission shall grant the petition not later than the 60th day after the date the landowner files the petition.” Further, the Order, Order on Rehearing, and Second Order on Rehearing are in violation of the Commission’s substantive rules, which require the Commission to “issue a decision on a petition” for streamlined expedited release “no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.”⁴⁷

The original Petition in this proceeding was filed on January 2, 2020 and was not found administratively complete by the ALJ until June 12, 2020.⁴⁸ Sixty calendar days after June 12, 2020 is **August 11, 2020**, the date by which the Commission was statutorily required to issue a decision. In a clear violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission failed to enter any decision on the Petition until April 7, 2021.⁴⁹ Then the Commission again erred by refusing to deny the Petition and instead remanding the proceeding. As a result of the ALJ’s and Commission’s cumulative errors, the District has been forced to proceed through more than 19 months of additional litigation.

⁴⁶ See, e.g., House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) at 4-5 (stating that TWC § 13.254 was designed to prevent “abuses of CCN authority” where “a landowner looking to develop his or her land might find that although the land was in a CCN, that utility was unable or unwilling to extend service to his or her property.” Section 13.254 was not meant to arbitrarily deprive CCN holders of property they are actively servicing.). Streamlined expedited release was created in 2019 to be a simplified offshoot of expedited release that better codified the way CCN holders should be compensated for property decertified from their CCN service area. See, e.g., Acts 2019, 86th Leg., R.S., Ch. 688, General and Special Laws of Texas (enrolled bill to be codified at TWC § 13.2541). The policies considered by the legislature regarding the substance of both TWC §§ 13.254 and 13.2541 are best reflected by the legislative history for TWC § 13.254, which was enacted in 2005 in House Bill 2876.

⁴⁷ 16 TAC § 24.245(h)(7).

⁴⁸ See Order No. 5 – Finding Petition Administratively Complete and Notice Sufficient, Establishing Procedural Schedule (June 12, 2020) (the Petition was ordered to be administratively incomplete on February 6, 2020, and Commission Staff again found it administratively incomplete on March 19, 2020).

⁴⁹ Order Remanding to Docket Management (Apr. 7, 2021).

The Commission's procedural errors are arbitrary and capricious, have no basis in the TWC or the TAC, and have materially prejudiced the District. For example, another Commission rule states that the District should not apply for any federal loan "after the date the petition is filed until the utility commission issues a decision on the petition."⁵⁰ It is not only prejudicial, but unconscionable, for the District to be prevented from seeking financing for needed improvements solely because the Commission failed to follow its own mandatory statutory and rule requirements.

The District was also materially prejudiced by the Commission's decision on April 7, 2021, to remand the Petition rather than deny it, a decision that deliberately prolonged this proceeding in further violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7). That decision also further materially prejudiced the District by putting it in possible violation of the statute and Commission rules if it sought a loan after the Petition was remanded and before the Amended Petition was filed.⁵¹ No reason has been given for the Commission's failure to issue a timely decision, and no reason was given for why the Commission would remand the Petition instead of denying it.⁵² As it was, Petitioners have had multiple opportunities but have repeatedly and consistently failed to meet their required burden of proof.

Because of the Commission's legal errors in its treatment of the Petition, the District has been materially prejudiced by, among other things, legal costs, delays to needed financing, and improper limitation and curtailment of its service area. To correct the errors and remedy the harm done to the District, the Commission respectfully urge the Commission to grant the District's Motion and enter an order denying the Amended Petition.

⁵⁰ TWC § 13.2541(e); *see also* 16 TAC § 24.245(h)(8) ("The CCN holder must not initiate an application to borrow money under a federal loan program after the date the petition is filed until the commission issues a final decision on the petition.").

⁵¹ The original Petition was remanded on April 7, 2021, and the First Amended Petition was filed on April 27, 2021.

⁵² Similarly, no reason has been given for the Commission's violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), under which the Commission must issue a decision on a petition for streamlined expedited release no later than 60 calendar days after the presiding officer determines that the petition is administratively complete. Rather than attempt to adhere to the statutory deadlines, the Commissioners instead extended their time to act on the District's Motion for Rehearing, filed on November 5, 2021, for 100 additional days. The Commission did not consider the District's Motion for Rehearing until January 14, 2022. Then, the Commission caused further delay by issuing the Second Order on Rehearing, which, like the first Order on Rehearing, did not engage with any of the District's arguments.

D. Point of Error 4 -The Commission Erred by issuing a Notice of Approval Making Determination on Compensation that is based on facts not supported by the record.

The Commission-appointed appraiser, Utility Valuation Experts , issued an appraisal on November 3, 2022 (“Commission Appraisal”), concluding that the Petitioner is not required to compensate the District.⁵³ The Notice of Approval adopted the Commission Appraisal.⁵⁴ The Commission Appraisal improperly evaluates “Factor 2” because it is premised on the assumption that debt is only allocable to the decertified area relative to the construction of physical facilities within the decertified area in question. This is an assumption that is not based on the actual language regarding determining compensation under factor 2. As noted in numerous other Dockets (PUC Dockets 52435, 52490, 52518, 52530, 52533, 52542, 52653), Marilee is obligated to provide continuous and adequate service to current and future customers within the area of its CCN. This requires advance planning and investment in critical infrastructure and source of supply in order to meet these obligations, and these investments are typically made in anticipation of new demand that will need to be served. Additionally, the Commission Appraisal report implies it is inappropriate to allocate debt service uniformly across all connections within Marilee’s service territory. Since Marilee has one rate structure to recover their revenue requirement across the service area, the allocation of existing debt service must be spread uniformly across all existing connections, or rate payers.

Marilee has issued debt to fund the planning, design, and construction of facilities to provide water service to existing and future customers within its CCN. An outcome of Marilee’s use of debt financing for long-term capital investments in its water system is the general alignment of the payment for these assets with their expected service lives. This financing structure provides what could be considered a more equitable balance for the recovery of fixed costs from investments in the system amongst existing and future ratepayers. Because Marilee has one tariff that applies to the entire system, fixed costs related to debt service must be allocated and considered across all ratepayers within the system on the same

⁵³ Commission Staff’s Submission of Third-Party Appraisal Report (November 3, 2022).

⁵⁴ Commission Staff’s Notice of Approval (November 10, 2022) at FOFs 10.

basis. The Commission Appraisal simply did not perform sufficient analysis to justify the result arrived at given the limited level of detail provided in their analysis under Factor 2.

For this reason, Finding of Fact No. 10 in the Notice of Approval should be amended to provide for compensation to the District under Factor 2 in the amount of \$ 130,747, resulting in a total due to the District of \$211,485, and the Conclusion of Law No. 1 should also be amended to provide for compensation to the District of \$211,485.⁵⁵

E. Point of Error 5 -The Commission Erred by issuing a Notice of Approval Making Determination on Compensation that is denies recovery of any fees incurred by Marilee.

The Commission Appraisal appears to simply conclude that because the fees incurred by Marilee in this docket are high, they should not be recovered at all. The argument that legal and engineering fees are not necessary and reasonable does not appear to have any basis other than the appraiser's opinion. The language for compensation under this factor indicates that any of the legal and engineering professional fees that can be substantiated by an invoice should be eligible for compensation. The same third-party appraiser for this docket, has previously found that the legal and professional fees included for compensation in the report for Docket No. 52497 were just and reasonable.

The Commission Appraisal also ignore the duration and complexity of this particular docket. The proceeding was initiated in January of 2020. Nearly three years later it is finally coming to an end. Because of deficiencies in the original Petition, Marilee was forced to file numerous pleadings, which resulted in the Commission remanding the case for further proceedings on April 4, 2021.⁵⁶ Petitioners subsequently filed their Amended Petition on April 27, 2021, essentially restarting the entire process.⁵⁷ And finally, in October 2021 (nearly 22 months after the original Petitioner was filed), the Commission issued the Order.⁵⁸ Once the Order was issued, the Commission considered two motions for rehearing and issued revised orders on rehearing each time as described in detail above. The Commission finally issued its Second Order on Rehearing

⁵⁵ Marilee Special Utility District's Submission of Appraisal (May 10, 2022) at 13.

⁵⁶ Order Remanding to Docket Management [April 4, 2021].

⁵⁷ Petitioner's First Amended Petition [April 27, 2021].

⁵⁸ Order on Petitioner's First Amended Petition [October 12, 2021].

in March of 2022.⁵⁹ Although all of these details regarding the complexity and length of the hearing process were available to the third-party appraiser before the Commission Appraisal was issued, the Commission Appraisal ignores all of them. Instead, the Commission Appraisal states:

The subject legal fees reported by NewGen (\$68,567) appear to be excessive relative to similar matters. However, UVE is has not been provided copies of the invoices purported to amount to \$68,567. Further, UVE is not able to determine, based upon a review of the docket files, if the legal fees, as purported by NewGen, are substantiated by the services provided by the CCN holder's counsel. UVE discussed this issue with the client (Attorney Lehmann) and advised the client that UVE will not address the compensation due for legal fees and, instead, recommends the client address the issue with the parties directly.⁶⁰

The third-party appraiser similarly dismisses the District's request for engineering fees and appraisal fees. Given the complexity and duration of this proceeding and the requirement of the language for compensation under this factor, which states that any of the legal and engineering professional fees that can be substantiated by an invoice should be eligible for compensation, the Commission should

For this reason, Finding of Fact No. 8 in the Notice of Approval should be amended to provide for compensation to the District under Factor 8 in the amount of \$ 80,738, resulting in a total due to the District of \$211,485.⁶¹

F. Point of Error 5—The Commission Erred by Omitting Relevant Facts and Law from the Second Order on Rehearing, Thereby Creating an Unclear Record.

The Second Order on Rehearing omits significant procedural events that occurred during this proceeding. In order to have a clear record on appeal, the District respectfully requests that the Second Order on Rehearing be revised to include new FOF and Conclusions of Law ("COL") substantially similar to the following:

- **Proposed FOF 6A.** In Order No. 3, filed on February 6, 2020, the petition was ordered administratively incomplete based on Commission Staff's recommendation, and petitioner was given a deadline of February 19, 2021, to cure deficiencies.

⁵⁹ Second Order on Rehearing on First Amended Petition [March 1, 2022].

⁶⁰ Commission Staff's Submission of Third-Party Appraisal Report, at 8 [November 3, 2022].

⁶¹ Marilee Special Utility District's Submission of Appraisal (May 10, 2022) at 13.

- **Proposed FOF 8A.** In a supplemental recommendation filed on March 19, 2020, Commission Staff recommended that the petition again be found administratively incomplete.
- **Proposed FOF 10A.** In Order No. 4, filed on April 27, 2020, the ALJ ordered Commission Staff to file a supplemental recommendation on the petition's administrative completeness.
- **Proposed FOF 11A.** On January 16, 2020, CCN holder moved to intervene.
- **Proposed FOF 29A.** On August 10, 2021, the ALJ entered a proposed order and memorandum.
- **Proposed FOF 29B.** On August 24, 2021, the CCN holder filed corrections and exceptions to the proposed order.
- **Proposed FOF 29C.** On October 12, 2021, the Commission entered an order granting petitioner streamlined expedited release.
- **Proposed FOF 29D.** On November 5, 2021, the CCN holder filed a motion for rehearing.
- **Proposed FOF 29E.** On December 2, 2021, the Commission entered an order extending the time to act on the CCN holder's motion for rehearing.
- **Proposed FOF 29F.** On January 14, 2022, the Commission entered the order on rehearing.
- **Proposed FOF 29G.** On February 8, 2022, the CCN holder filed a second motion for rehearing.
- **Proposed FOF 29H.** On March 1, 2022, the Commission entered the second order on rehearing.
- **Proposed FOF 29I.** On March 25, 2022, the CCN holder filed a third motion for rehearing.

- **Proposed COL 2A.** Under TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission must issue a decision on a petition for streamlined expedited release no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.
- **Proposed COL 7A.** A petitioner seeking streamlined expedited release must file with the Commission a petition and supporting documentation verified by a notarized affidavit and containing (A) a statement that the petition is being submitted under TWC §13.2541 and 16 TAC § 24.245(h); (B) proof that the tract of land is at least 25 acres in size; (C) proof that at least part of the tract of land is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county; (D) a statement of facts that demonstrates that the tract of land is not currently receiving service; (E) copies of deeds demonstrating ownership of the tract of land by the landowner; (F) proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission; and (G) the mapping information described in 16 TAC § 24.245(k).

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that the Commission grant its Motion for Rehearing, rescind the Notice of Approval, enter an order denying the Amended Petition, all as set forth above, in all respects, and grant the District such additional and further relief to which it may be entitled.

Respectfully submitted,

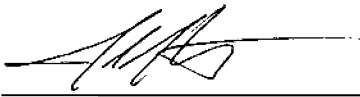
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ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

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 5th day of December 2022.

_____

John J. Carlton