



Control Number: 50404



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DOCKET NO. 50404

PETITION OF STERLING DEASON §  
O'DONNELL AND DARWIN DEASON, §  
CO-TRUSTEES OF THE STERLING §  
DEASON O'DONNELL DD 2012 TRUST §  
UNDER AGREEMENT OF THE DD §  
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MARILEE SPECIAL UTILITY §  
DISTRICT'S CERTIFICATE OF §  
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COLLIN COUNTY BY EXPEDITED §  
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PUBLIC UTILITY COMMISSION

OF TEXAS

**MARILEE SPECIAL UTILITY DISTRICT'S  
SURREPLY TO PETITIONER'S REPLY**

COMES NOW, Marilee Special Utility District ("Marilee"), in accordance with 16 Texas Administrative Code (TAC) § 22.78, and timely files this Surreply to the Reply of Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under the DD 2014-B Grantor Retained Annuity Trust ("Petitioner") filed on April 8, 2020, Item 13 of this Docket ("Petitioner's Reply"). In support thereof, Marilee respectfully shows the following:

**I. Previous Denial of Decertification of the Property is Relevant in the Dismissal of a Proceeding with the Commission.**

Petitioner claims that the Commission's denial of the 2017 decertification petition filed in Docket No. 46866 (the "2017 Petition") by Patricia Miller Deason, who was the previous landowner of the subject property in this Docket, is irrelevant based on the Commission's previous finding in the *Petition of HMP Ranch, Ltd. To Amend Johnson*

*County Special Utility District's Certificate of Convenience and Necessity in Johnson and Tarrant Counties by Expedited Release*, Docket No. 45037 (the "HMP Ranch Petition").<sup>1</sup>

However, Petitioner fails to distinguish the circumstances in the dockets, including that no previous landowner of the subject property in the HMP Ranch Petition filed for decertification from the Certificate of Convenience and Necessity ("CCN"). Here (1) the "successor" property owner (Petitioner) is the owner of substantially the same property addressed in the previous petition filed by Ms. Deason, (2) the previous landowner (Ms. Deason) was denied decertification under virtually identical facts and circumstances, and (3) the current "successor" landowner filing for decertification and Ms. Deason are in privity to each other.

**A. The Commission May Deny A Petition Based on Res Judicata and Collateral Estoppel.**

The Commission is an administrative agency of the State of Texas. "Res judicata applies to administrative agency adjudications. See *New Talk, Inc. v. Sw. Bell Tel. Co.*, 520 S.W.3d 637, 648-49 (Tex. App.—Fort Worth 2017, no pet.)." *El Duranguense Fort Worth Inc. v. Texas Alcoholic Beverage Comm'n*, No. 02-19-00219-CV, 2020 WL 1465991, at \*13 (Tex. App. Mar. 26, 2020). Moreover, 16 TAC § 22.181(d)(3)-(4) allows the Commission to dismiss a proceeding based on res judicata and collateral estoppel.

"Res judicata (claim preclusion) and collateral estoppel (issue preclusion) bar re-litigation of issues or cases between parties which have already been decided. See *Puentes v. Fannie Mae*, 350 S.W.3d 732, 739 (Tex.App.—El Paso 2011, pet. dismissed); *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 137 (Tex.App.—El Paso 1997, pet. denied). A party that successfully raises a res judicata defense by providing the following elements: (1) a final prior judgment on the merits by a court of competent jurisdiction; (2) the identity

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of the parties, or those in privity with them; and (3) a second action based on the same claims which were raise, or could have been raised, in the first action. Puentes, 350 S.W.3d at 739. Likewise, a party successfully raises a collateral estoppel defense by providing (1) the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; (3) the parties were cast as adversaries in the first action. Mendoza v. Bazan, 574 S.W.3d 594, 605 (Tex.App.—El Paso 2019, pet. denied).

In applying claim or issue preclusion, we employ a transaction approach that pragmatically gives weight to whether the facts of the two claims are ‘related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties’ expectations or business understanding or usage.’ Barr v. Resolution Tr. Corp. ex rel. Sunbelt Fed. Sav., 837 S.W.2d 627, 631 (Tex. 1992), quoting Restatement of Judgements § 24(2).”

*Fenenbock v. W. Silver Recycling, Inc.*, No. 08-19-00093-CV, 2020 WL 858635 at \*4 (Tex. App. Feb. 21, 2020).

**B. The Commission’s Denial Of The 2017 Petition Is A Final Judgment Based On Facts Essential To The Judgment.**

As shown in Marilee’s Response to the Petition, the Commission previously denied the 2017 decertification petition filed by Patricia Miller Deason (the “2017 Petition”), the previous landowner of the subject property in this Docket (the “Property”).<sup>2</sup> The Commission found that Deason failed to sufficiently demonstrate that Marilee has not committed facilities or lines providing water service to the subject property, nor performed acts and/or supplied things to the subject property, nor that the subject property was not

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receiving water service from Marilee, as the term has been defined by the courts or otherwise, among other findings.<sup>3</sup> In other words, Deason failed to show that Marilee is not providing water service under Texas Water Code § 13.254(a-5), which was the basis of the 2017 Petition.

Thus, the Commission's Order is a final judgment on the merits, based on facts essential to the denial of the 2017 Petition, fulfilling elements (1) of res judicata and (2) of collateral estoppel cited by the *Fenenbock* Court.<sup>4</sup>

**C. The Facts And Claims Of The Petition In This Docket And The 2017 Petition Are Related In Time, Space, Origin, Or Motivation.**

Petitioner does not sufficiently show that the facts in its Petition and the 2017 Petition are substantially different in Petitioner's Reply. The Commission must deny the Petition, as the Commission denied the 2017 Petition, under the *Fenenbock* Court's standards.

The Petition and the 2017 Petition are "related in time, space, origin, or motivation." Both the Petition and 2017 Petition claim that Marilee does not provide water to essentially the same subject property. Moreover, Marilee has the same 2", 4", 6" and 8" waterlines and meters as indicated in Marilee's pleadings in both dockets and provides water service through the same waterlines and meters, where Petitioner owns the property that the meters serve.

Less than two (2) years after the Commission denied the 2017 Petition, Patricia Miller Deason conveyed the property to Petitioner.<sup>5</sup> Less than one (1) year after the

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conveyance of the property, Petitioner filed the Petition in this Docket to decertify substantially the same property in the 2017 Petition. Petitioner files the Petition and conveniently (if not tactically) excludes three tracts (less than 3 acres each) of the conveyed property, in order to assert that the subject properties of both dockets are not the same.<sup>6</sup> In other words, more than 97% of the Property is the same subject property in the 2017 Petition denied decertification by the Commission.

The details of these actions show that the conveyance was a related motivation to decertify, as it took place within a short period of time, for essentially the same property where Marilee still provides water through the same waterlines and meters.

Petitioner (and Patricia Miller Deason by her conveyance of the Property thereof) attempts to circumvent the Commission's denial of the 2017 Petition. Res judicata and collateral estoppel prevents Petitioner's attempt, as the same substantial claims were already litigated fully and fairly.

**D. Privity Of The Parties Petitioner and Patricia Miller Deason**

Although Petitioner and Patricia Miller Deason are the exact same party in the Petition and the 2017 Petition, respectively, Petitioner appears to have a familial trust associated with Patricia Miller Deason, as indicated by the name of the Petitioner being "Sterling Deason O'Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O'Donnell DD 2012 Trust Under the DD 2014-B Grantor Retained Annuity Trust" and stated in Marilee's Response.<sup>7</sup> Petitioner does not deny, nor has it shown, that Patricia Miller Deason does not hold a reversionary interest, is not a beneficiary, or is not a settlor

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"There is no definition of privity which can be applied to all cases involving the doctrine of res judicata. Benson v. Wanda Petroleum Co. 468 S.W.2d 361, 363 (Tex. 1971). '[T]he determination of who are privies requires careful examination into the circumstances of each case ....' Id. Those in privity with a party may include persons who exert control over the action, persons whose interests are represented by a party, or successors in interest to a party. Getty Oil, 845 S.W.2d at 800-01. It may also include persons who are vicariously responsible for the conduct of the party to the first suit. Id at 801 n.8."

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Therefore, even if Patricia Miller Deason is not a direct beneficiary under the Trust or a settlor of the Trust, or holds no reversionary interest, the Trust would still be a successor in interest to Patricia Miller Deason if a beneficiary or settlor of the Trust is related to her. Certainly, the Trust is a successor in interest to Deason because Deason conveyed her property to the Trust after the Commission had denied the 2017 Petition—and with no material change in circumstances—between the date of that conveyance and the filing of the Petition.

## **II. Billing Statements And Service Addresses For The Active Meters Are Relevant To The Petition.**

In Petitioner's Reply, Petitioner claims that the billing statements provided in Marilee's Response are not associated with the Petitioner.<sup>8</sup> Conversely, Marilee's

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Response shows that the billing statements are for current water usage from the active Meters on property owned by Petitioner and more importantly, where Petitioner purposely excluded portions of the property in the Petition to circumvent the Commission's denial of the 2017 Petition.<sup>9</sup>

### **III. Facts Of This Case Are Distinguishable From The HMP Ranch Petition.**

Petitioner relies on the Commission's finding in the HMP Ranch Petition; however, the Commission did not previously deny the subject property (or 97% of the subject property) of the HMP Ranch Petition to decertify from the CCN holder. Moreover, the Commission made its finding in the HMP Ranch Petition in 2015<sup>10</sup> based on similar cases with similar facts and circumstances.

It is clear that the facts of this case are unique in the former landowner of the Property was denied decertification by the Commission, and the subsequent landowner, who is in privity with the former landowner, requests decertification less than 1 year after the conveyance of the property. The Commission must consider its findings of the 2017 Petition in accordance with the principles of res judicata and collateral estoppel.

For the reasons set forth herein and in its Response, Marilee Special Utility District respectfully requests the Petition be denied in its entirety.

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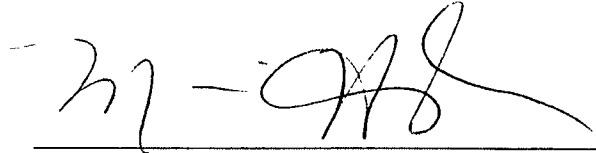
<sup>9</sup> See Marilee's Response, Item 9 of Docket No. 50404, at Ex. C (Feb. 11, 2020).

See also Petitioner's Supplemental Map, Item 12 (Apr. 1, 2020) (showing the excluded portions of the location of the Meters).

<sup>10</sup> See Commission's Order, Item 31 of Docket No. 45037 (Dec. 15, 2015).

Respectfully submitted,

JAMES W. WILSON & ASSOCIATES, PLLC



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ATTORNEYS FOR MARILEE SPECIAL  
UTILITY DISTRICT

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on the following parties of record on April 16, 2020, in accordance with 16 TAC § 22.74(c) and the Commission's Order Suspending Rules in Docket No. 50664.

via e-mail: creighton.mcmurray@puc.texas.gov

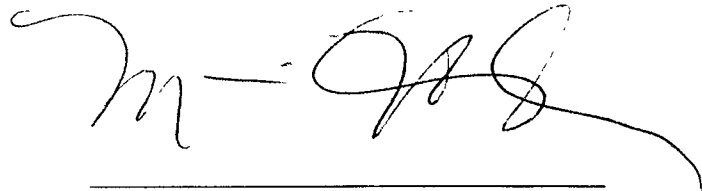
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