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DOCKET NO. 50404

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PUBLIC UTILITY COMMISSION  
OF TEXAS  
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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 2014-B GRANTOR §  
RETAINED ANNUITY TRUST TO §  
AMEND MARILEE SPECIAL UTILITY §  
DISTRICT'S CERTIFICATE OF §  
CONVENIENCE AND NECESSITY IN §  
COLLIN COUNTY BY EXPEDITED §  
RELEASE §

PUBLIC UTILITY COMMISSION  
OF TEXAS

**COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION**

**COMES NOW** the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this recommendation. Staff recommends that the petition be approved. In support thereof, Staff would show the following:

**I. BACKGROUND**

On January 2, 2020, 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 (Petitioner), filed a petition for streamlined expedited release to amend Marilee Special Utility District's (Marilee SUD) water certificate of convenience and necessity (CCN) No. 10150 in Collin County, under Texas Water Code (TWC) § 13.2541(b) and 16 Texas Administrative Code (TAC) § 24.245(l). The Petitioner supplemented the application on February 7, 2020, February 12, 2020, and April 1, 2020.

On June 12, 2020, Order No. 5 was issued, establishing a deadline of June 26, 2020, for Staff to file a recommendation on final disposition. This pleading, therefore, is timely filed.

**II. RECOMMENDATION**

As detailed in the attached memorandum from Patricia Garcia in the Commission's Infrastructure Division, Staff has reviewed petition for streamlined expedited release and supplemental information filed by the Petitioner and recommends that it be approved. The map and digital data submitted by the Petitioner provide adequate information to demonstrate that the

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petition satisfies the requirements of TWC § 13.2541(b) and 16 TAC § 24.245(l). Specifically, the petition shows that the property for which the Petitioner seeks expedited release is located in Collin County, which is a qualifying county, is not receiving water utility service, and that the aggregated, contiguous tracts of land make up a single property that is at least 25 acres. Therefore, Staff recommends that the petition be approved

In its pleadings, Marilee SUD contends that the application should be denied. Staff will address those arguments here.

#### **A. Res Judicata and Collateral Estoppel**

Under 16 TAC § 22.181(d)(3-4), a proceeding may be dismissed for res judicata or collateral estoppel. To successfully raise the affirmative defense of res judicata a party has the burden to prove three elements: 1) a final prior judgment on the merits by a court of competent jurisdiction; 2) the identity of the parties, or those in privity with them; and 3) a second action based on the same claims which were raised, or could have been raised, in the first action.<sup>1</sup>

Upon review, Staff recommends that Marilee SUD has failed to meet the burden of proof required to dismiss this proceeding on res judicata grounds. Primarily, Marilee SUD has failed to demonstrate that the parties are the same or in privity with the parties in Docket No. 46866.<sup>2</sup> Marilee SUD asserts that the parties “appear” to be in privity and that the Petitioner has failed to demonstrate that the parties are not in privity.<sup>3</sup> In its subsequent brief, the Petitioner asserts that Marilee SUD’s claims of privity are mistaken and that the trust in the present matter, the Sterling Deason O’Donnell DD 2012 Trust, and Patricia Miller Deason, the applicant in Docket No. 46866, are not in privity.<sup>4</sup> As such, Staff recommends that Marilee SUD has failed to satisfy all three elements required for res judicata as it has not demonstrated privity between Patricia Miller Deason and the Sterling Deason O’Donnell DD 2012 Trust.

To raise the affirmative defense of collateral estoppel a party has the burden to prove three elements: 1) the facts sought to be litigated in the second action were fully and fairly litigated in

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<sup>1</sup> *Puentes v. Fannie Mae*, 350 S.W.3d 732, 739 (Tex. App.—El Paso 2011, pet. dism’d).

<sup>2</sup> *Petition of Patricia Miller Deason to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 46866, Order (May 19, 2017).

<sup>3</sup> Marilee Special Utility District’s Surreply to Petitioner’s Reply at 5-6 (Apr. 16, 2020).

<sup>4</sup> Petitioner’s Brief in Support of Findings of Administrative Completeness at 3 (May 11, 2020).

the prior action; 2) those facts were essential to the judgment in the first action; and 3) the parties were cast as adversaries in the first action.<sup>5</sup>

Staff recommends that Marilee SUD has failed to meet the burden of proof for collateral estoppel. First, as discussed above, the parties to the present proceeding and Docket No. 46866 are not the same. Further, Staff recommends that the two requested areas are also different, thereby the facts of the two matters are not the same. In Docket No. 46866, the requested area was a 257.86-acre tract of land.<sup>6</sup> In the present matter, the requested area is a 260.32-acre tract of land.<sup>7</sup> Marilee SUD claims that because the two tracts share 97% of their area, that they are sufficiently similar as to be factually the same.<sup>8</sup> Although there is a great amount of overlap between the two tracts, Staff asserts that the two tracts are distinct. They are of different acreages and, importantly, the present application removes three areas that receive water service from Marilee SUD that were fatal to the previous application.<sup>9</sup> As such, Staff recommends that Marilee SUD has failed to satisfy all elements necessary to assert collateral estoppel in this matter as neither the parties nor the facts have remained the same.

#### **B. Receiving Water Service**

Marilee SUD asserts that the requested area is receiving water service through three active water meters, three water lines running through the property, and a 6” water line running adjacent to the property.<sup>10</sup> Staff recommends that these three elements are not sufficient to meet the standard of “receiving” water service. To receive water service, a retail water utility must have “facilities or lines committed to providing water to the particular tract or has performed acts or supplied anything to the particular tract . . .”<sup>11</sup>

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<sup>5</sup> *Mendoza v. Bazan*, 574 S.W.3d 594, 605 (Tex.App.—El Paso 2019, pet. denied).

<sup>6</sup> Docket No. 46866, Order at Finding of Fact No. 1.

<sup>7</sup> Application at 2.

<sup>8</sup> Marilee Special Utility District’s Surreply to Petitioner’s Reply at 5 (Apr. 16, 2020).

<sup>9</sup> *Id.*; see also, Docket No. 46866, Order at Finding of Fact No. 5.

<sup>10</sup> Marilee Special Utility District’s Response to Administratively Complete Petition and Petitioner’s Brief in Support of Finding Thereof at 3 (Jun. 19, 2020).

<sup>11</sup> *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex.App.—Austin 2014, pet. denied); *Petition of LGI Homes-Texas, LLC to Amend Bolivar Water Supply Corporation’s Water Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 49433, Finding of Fact Nos. 17-18 (Mar. 2, 2020); *Petition of Frost Bank National Bank as Trustee of the Freeman Educational Foundation to Amend the City of San Marcos’ Water Certificate of Convenience and Necessity in Hays County by Expedited Release*, Docket No. 49366, Findings of Fact Nos.17-18 (Dec. 13, 2019).

First, the three active meters are not within the requested area. As the Petitioner indicates, the three active meters are within the metes and bounds of the greater property, but the requested area does not include the tracts or addresses where those meters are located and provide service.<sup>12</sup> As such, the active meters do not meet the standard for the requested area to be considered to be receiving service.

Second, the three water lines running through the property and the 6” water line running adjacent to the property have not been shown to be committed to providing water to the particular tract. Through its various pleadings, Marilee SUD has not demonstrated that the three water lines and the adjacent 6” water line are committed to the particular tract that comprises the requested area. In *Crystal Clear*, the CCN holder raised the issue of existing water lines and facilities.<sup>13</sup> The court looked to whether those lines or facilities were constructed for the purpose of providing water to the property in question. Finding that the facilities were constructed to serve the greater area, and not the particular property, the court determined that the facilities were not committed to the particular tract of land and therefore, the property in question was not receiving service.<sup>14</sup> Similarly, Marilee SUD does not demonstrate that the water lines were installed for the purpose of providing water to the requested area. As such, they cannot be considered to be committed to the particular property and the requested area is not, therefore, receiving water service from Marilee SUD.

Accordingly, Staff recommends that the requested area is not receiving water service.

### **C. Policy**

Marilee SUD asserts that allowing a petitioner to carve out areas receiving water service from a greater property and then granting release to the remaining area would have “grave” effects on utilities.<sup>15</sup> However, there is consistent precedent for allowing landowners to carve out both large and small sections of their properties for the purposes of expedited release. Most relevant is Docket No. 44394 where the petitioner amended a request for streamlined expedited release,

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<sup>12</sup> Reply to Marilee Special Utility District’s Response to Petition for Expedited Release at 4-5 (Apr. 8, 2020).

<sup>13</sup> *Crystal Clear*, 449 S.W.3d at 140.

<sup>14</sup> *Id.*

<sup>15</sup> Marilee Special Utility District’s Response to Administratively Complete Petition and Petitioner’s Brief in Support of Finding Thereof at 5-6 (Jun. 19, 2020).

carving out 6.7 acres from the 104-acre tract that originally comprised the requested area.<sup>16</sup> The 6.7-acre section had a sewer lift station and a 1” water line on it, and the remainder of the requested area was not receiving water service. The Commission approved the amended application and the Third Court of Appeals of Texas agreed with the Commission’s decision.<sup>17</sup> The appeals court noted that TWC § 13.254(a-5) (now 13.2541(b)) “does not have an ‘all or nothing’ requirement that prevents a landowner from choosing to seek expedited release of some, but not all, of its property located in a certificated service area.”<sup>18</sup> As such, Staff recommends that carving out a portion of a greater property for expedited release is consistent with Commission precedent and has not led to the “grave” results of which Marilee SUD portends.

### III. CONCLUSION

Staff respectfully requests the issuance of an order consistent with the foregoing recommendation.

Dated: June 26, 2020

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<sup>16</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*, Docket No. 44394, Order (May 1, 2015).

<sup>17</sup> *Mountain Peak Special Util. Dist. v. Pub. Util. Comm’n of Tex.*, No. 3-16-00796-CV, 2017 WL 5078034 at \*3 (Tex. App.—Austin Nov. 2, 2017).

<sup>18</sup> *Id.*

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
LEGAL DIVISION**

Rachelle Nicolette Robles  
Division Director

Eleanor D'Ambrosio  
Managing Attorney

*/s/ Creighton R. McMurray*

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**DOCKET NO. 50404**

**CERTIFICATE OF SERVICE**

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on June 26, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

*/s/ Creighton R. McMurray*

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Creighton R. McMurray

## PUC Interoffice Memorandum

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**To:** Creighton McMurray, Attorney  
Legal Division

**From:** Patricia Garcia, Engineering Specialist  
Infrastructure Division

**Date:** June 26, 2020

**Subject:** **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 2014-B Grantor Retained Annuity Trust to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*

On January 2, 2020, Sterling Deason O'Donnell and Darwin Deason, Co-Trustee of the Sterling Deason O'Donnell DD 2012 Trust under agreement of the DD 2014-B Grantor Retained Annuity Trust (Petitioner) filed an application for streamlined expedited release from and to amend Marilee Special Utility District's (Marilee SUD) water certificate of convenience and necessity (CCN) No. 10150 in Collin County, under Texas Water Code (TWC) § 13.2541(b) and 16 Texas Administrative Code (TAC) § 24.245(I). The Petitioner asserts that the land is at least 25 contiguous acres, is not receiving water service, and is located in Collin County, which is a qualifying county.

The Petitioner submitted a sworn affidavit attesting that the property was not receiving water from Marilee SUD and a warranty deed confirming the Petitioner's ownership of the tract of land. In addition, the Petitioner submitted sufficient maps and digital data for determining the location of the requested release area within Marilee SUD's certificated service area. Mapping Staff was able to confirm the tract of land is approximately 260 acres.

On January 16, 2020, Marilee SUD filed a motion to intervene, which was granted by the Administrative Law Judge (ALJ) on January 30, 2020. On February 11, 2020, Marilee SUD filed a response to the petition, which included customer bills and a map showing where service is provided to the requested property. On April 8, 2020, the Petitioner filed a response to Marilee SUD indicating the areas being served are not within the requested area of this petition. Staff recommends that the requested area does not include the areas where Marilee SUD's meters are located.

In accordance with TWC § 13.2541 and 16 TAC § 24.245(I), the Petitioner has met the Commission's requirements to allow for the release of the requested area from Marilee SUD's CCN No. 10150. Therefore, Staff recommends approval of the petition. Enclosed is a final map and certificate for Commission approval.

Additionally, Staff recommends that a final map and certificate be provided to the CCN holder.





# **Public Utility Commission of Texas**

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

## **Marilee Special Utility District**

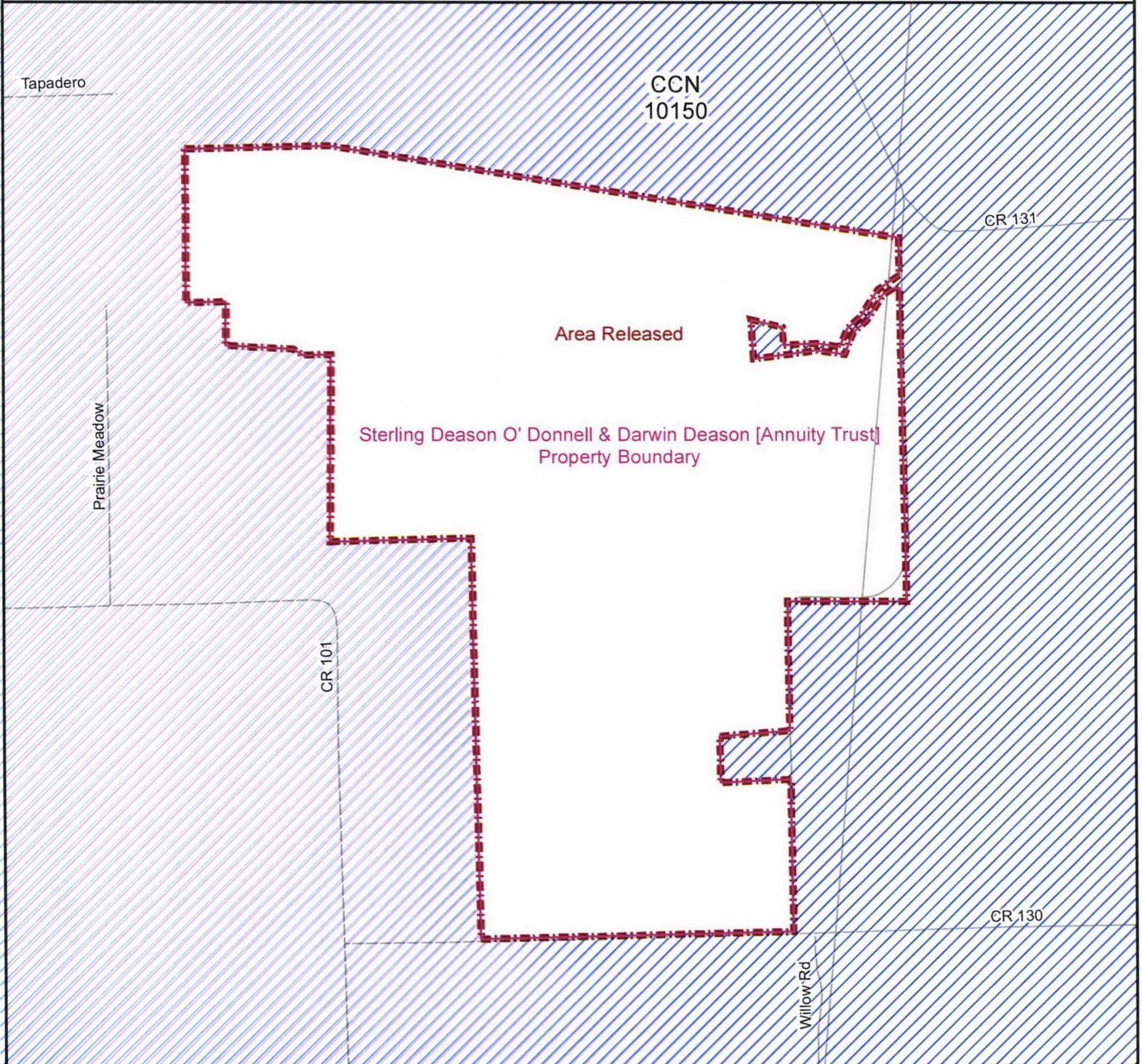
having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, Marilee Special Utility District is entitled to this

### **Certificate of Convenience and Necessity No. 10150**

to provide continuous and adequate water utility service to that service area or those service areas in Collin County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 50404 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the Marilee 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, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

Marilee Special Utility District  
Portion of Water CCN No. 10150  
PUC Docket No. 50404  
Petition by Sterling Deason O' Donnell & Darwin Deason [Annuity Trust] to Amend  
Marilee Special Utility District's CCN by Expedited Release in Collin County



**Water CCN**  
 10150 - Marilee SUD

 Area Released  
 Property Boundary

0 400 800  
Feet

