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Item Number: 31

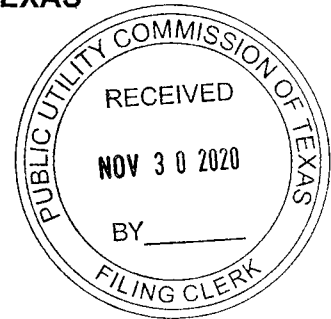
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DOCKET NO. 50404

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

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PUBLIC UTILITY COMMISSION
OF TEXAS



**MARILEE SPECIAL UTILITY DISTRICT'S RESPONSE TO ORDER NO. 6
AND SUPPLEMENTAL MOTION TO DISMISS**

COMES NOW, Marilee Special Utility District ("Marilee") and files this Response to Order No. 6 and Supplemental Motion to Dismiss. In support thereof, Marilee respectfully shows 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 to decertify 260.372 acres of real property (the "Property") from Marilee's certificated water service territory, Certificate of Convenience and Necessity (CCN) No. 10150 pursuant to Texas Water Code (TWC) § 13.2541(b)¹ and 16 Texas Administrative Code (TAC) § 24.245(l)² (the "Petition").

On February 11, 2020, Marilee filed its required Response that the Petition should be denied (i.e., a motion to dismiss), providing details that the Property is currently receiving water service from Marilee through three (3) active meters and various existing waterlines and that the previous landowner of the Property was denied a petition for

¹ TWC § 13.254(a-5), amended by Acts 2019, 86th Leg., ch. 688 (S.B. 2272), § 4.

² The Petition was filed pursuant to 16 TAC § 24.245(l) on January 2, 2020, where the current § 24.245 was adopted to be effective July 2, 2020, 45 TexReg 4321, and current through 45 Tex.Reg. No. 8066, dated November 6, 2020, as effective on or before November 13, 2020.

expedited release by the Commission in 2017, finding the Property was receiving water service through the same 3 active meters.³

On April 16, 2020, Marilee filed its Surreply to Petitioner's Reply, requesting the Petitioner be dismissed under the doctrines of res judicata and collateral estoppel and, among other things, pointing out that the billing statements and service addresses provided are for the *same* three active meters in 2017 and Marilee continued to provide service to the Property subject to the Petition.⁴

On June 12, 2020, the Petition was deemed administratively complete and a procedural schedule was set by issued Order No. 5, including a sixty-day deadline to approve or deny the expedited release of the Property by August 11, 2020.⁵

On July 2, 2020, Marilee filed its Objection to Commission Staff's (Staff) Recommendation on Final Disposition, showing that the 2017 petition also excluded areas around the three active meters and that the Marilee had committed prior to 2017 and continues to currently commit and provide water service to the Property and adjacent areas through the various service agreements executed prior to and after 2017.⁶ Further, Petitioner failed to show any action by Marilee that it had ceased to provide or commit to providing water service to the Property.⁷

On November 19, 2020, issued Order No. 6 denied Marilee's motion to dismiss provided in its first Response.⁸ Thus, in accordance with 16 TAC § 22.78, this Response is timely filed.

II. Response to Background in Order No. 6

Order No. 6 states that tenants of the Petitioner *are receiving water service from three active meters on the lots, which are not within the Property* seeking expedited

³ Marilee's Response to the Petition, at 2-6 (Feb. 11, 2020).

⁴ Marilee's Surreply to Petitioner's Reply, at 6-7 (Apr. 16, 2020).

⁵ Order No. 5, at 2 (Jun. 12, 2020).

⁶ Marilee's Objection to Commission Staff's Recommendation on Final Disposition, at 3-8 (Jul. 2, 2020).

⁷ *Id.*, at 9.

⁸ Order No. 6, at 3 (Nov. 19, 2020).

release.⁹ Because that was true in 2017 (and is still true today), the Commission denied the 2017 petition when the property at issue *also excluded* the lots where the same three active meters are located¹⁰ and utilized for receiving water service from Marilee. The Commission denied the expedited release finding the *entire* property was receiving water service under various service agreements—which altogether included the entire 2017 property and the Property here.¹¹ There is no reason to hold differently in this case.

Further, Marilee has not discontinued “service” as defined by TWC § 13.002(21), including facilities committed and used by Marilee to provide water service to the 2017 subject property or the Property in this Petition, as it is evident not only by the current service to tenants¹² receiving water service through the three active meters and Marilee’s existing waterlines and facilities, but also confirmed in the finding by the Commission in 2017.

Petitioner has not shown any “act performed” by Marilee or how Marilee no longer commits to or uses its waterlines and facilities to provide service to the Property. The fact that a tenant continues to pay for the water usage reconfirms Marilee’s current service, commitment and use of its waterlines and facilities, and obligation to continue to provide water service to the Property, which Marilee committed to long ago and especially evidenced through the service agreements mentioned herein. Thus, the Petition should be denied as the Property does not qualify for streamlined expedited release under TWC § 13.2541(b) and 16 TAC § 24.245(l)(2)(B), now 16 TAC § 24.245(h)(1)(B).

III. Supplemental Motion to Dismiss Based On Denial of Due Process

The Petition was filed on January 2, 2020 pursuant to TWC § 13.2541, where Subsection (c) requires the Commission to grant or deny the Petition not later than 60

⁹ *Id.*, at 2.

¹⁰ Marilee’s Objection to Staff’s Recommendation, at 3-4 (Jul. 2, 2020).

See also *Petition of Patricia Miller Deason to Amend Marilee’s CCN in Collin County by Expedited Release*, Docket No. 46866, Petition at Ex. B (Feb. 17, 2017) (showing the exclusion of the same lots where the three active meters provided service in 2017 and Marilee continues to provide water service).

¹¹ *Petition of Patricia Miller Deason to Amend Marilee’s CCN in Collin County by Expedited Release*, Docket No. 46866, Order at 6 (May 19, 2017).

¹² Order No. 6, at 2 (Nov. 19, 2020).

days after the Petition is filed, and Subsection (e) provides that Marilee may not initiate an application to borrow money under a federal loan program after the date the Petition is filed until the Commission issues a decision on the Petition. Not only has it been more than 60 days after the Petition was filed, but also past the 60-day approval deadline of August 11, 2020;¹³ however, the Commission has not ruled on the Petition.

The Commission's delay of issuing an order to grant or deny the Petition well past the required 60 days—while Marilee is prohibited from filing an application for a federal loan—denies Marilee of due process.¹⁴ TWC § 13.2541(c) and (e) are plainly written, and the Commission has unfairly deprived Marilee of its protected liberty and property interest to borrow money under a federal loan program,¹⁵ as the Commission has not issued a decision on the Petition within “a meaningful time and in a meaningful manner,”¹⁶ i.e., the statutory 60 days.

Thus, in accordance with 16 TAC § 22.181(d)(11), the Petition must be dismissed for good cause as the Commission's decision and its final order, when and if entered, will be null and void as a direct violation of TWC § 13.2541(c) and because the Commission has deprived Marilee of due process and its right to obtain a federal loan.

IV. Conclusion

In its responses and replies filed in this docket, Marilee has provided ample information that the Property is receiving water “service” from Marilee, including but not limited to the fact that Marilee is continuing to provide service to the Property here, before and after the Commission denied the related 2017 petition where the lots containing the

¹³ Order No. 5, at 2 (Jun. 12, 2020).

¹⁴ U.S. Const. amend. XIV, § 1; Tex. Const. art. I, § 19.

¹⁵ *McMaster v. Pub. Util. Comm'n of Texas*, No. 03-11-00571-CV, 2012 WL 3793257, at *6 (Tex. App. Aug. 31, 2012) (“Due process, of course, is implicated when the state or its agents deprive a person of a protected liberty or property interest.”) *See also Becker v. Bordelon*, No. 3:11-CV-0627-K, 2012 WL 6522742, at *5 (N.D. Tex. Dec. 10, 2012), *aff'd*, 536 F. App'x 453 (5th Cir. 2013). (“Due process is implicated when the state or its agents deprive a person of a protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Lee v. Texas Workers' Compensation Commission*, 272 S.W.3d 806, 817 (Tex.App.-Austin 2008, no pet.). Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Lee*, 272 S.W.3d at 817.”)

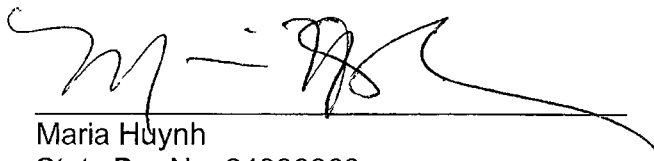
¹⁶ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Than*, 901 S.W.2d at 930).

three active meters were not part of the property at issue. Further, the Commission has deprived Marilee of due process and the right to obtain a federal loan under TWC § 13.2541(e) by failing to issue a ruling on the Petition according to the statutory deadline given to the Commission in TWC § 13.2541(c).

Thus, the Commission must dismiss the Petition, as the Property does not meet the required condition of streamlined expedited release under TWC § 13.2541(b) and 16 TAC § 24.245(l)(2)(B), now 16 TAC § 24.245(h)(1)(B). Further the Commission has deprived Marilee of due process by its prolonged delay in rendering a decision, where dismissal for denial of due process is the only appropriate remedy.

Respectfully submitted,

JAMES W. WILSON & ASSOCIATES, PLLC

A handwritten signature in black ink, appearing to read 'M-Huynh', is written over a horizontal line.

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ATTORNEYS FOR MARILEE SPECIAL
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following parties of record on November 25, 2020, by e-mail.¹⁷

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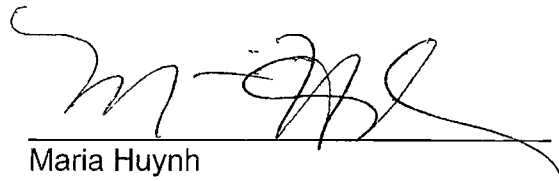
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¹⁷ See *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Suspending Rules (Mar. 16, 2020).