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2020 DEC 14 AM 10:51

DOCKET NO. 50404

PUBLIC UTILITY COMMISSION

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 §
COLLING COUNT BY EXPEDITED §
RELEASE §

PUBLIC UTILITY COMMISSION

OF

TEXAS

**PETITIONER'S RESPONSE TO MARILEE SPECIAL UTILITY DISTRICT'S
MOTION TO DISMISS FOR LACK OF DUE PROCESS**

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 (the "Petitioner") files this Response to Marilee Special Utility District's Motion to Dismiss for Lack of Due Process and in support thereof, respectfully shows as follows:

I. Background and Procedural Status

On January 2, 2020, Petitioner filed its petition (the "Petition") for expedited release of approximately 260.372 acres of property (the "Property" or "Requested Area") from Marilee SUD's water Certificate of Convenience and Necessity ("CCN") No. 10150 in Collin County, under Texas Water Code §13.2541(b) and 16 Texas Administrative Code §24.245(l).

Marilee previously filed a Motion to Dismiss on the basis of res judicata and collateral estoppel, which was denied on November 19, 2020. Marilee now makes another attempt at dismissal based on lack of due process. Marilee's argument is without basis in law or fact.

II. Argument and Authority

Marilee seeks dismissal of this matter for good cause under 16 TAC § 22.181(d)(11). Marilee argues that it has been deprived of due process because: (1) the Commission has

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exceeded the statutorily prescribed 60 day streamlined expedited release timeline; and (2) it has been prohibited from filing an application for a federal loan. Neither of these are constitutionally protected rights that serve as grounds for dismissal.

In determining whether a statute or regulation constitutes a protected property interest, courts must determine whether the statute or implementing regulation places “substantive limitations on official discretion.” *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *see also Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 735 (5th Cir. 2008); *Lee v. Tex. Worker’s Comp. Comm’n*, 272 S.W.3d 806, 817 (Tex. App.—Austin 2008, no pet.). Statutes or regulations limit official discretion if they contain “explicitly mandatory language, i.e., specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.” *Lee*, 272 S.W.3d at 817. Here, there are no substantive limits that implicate Marilee’s protected rights or property interest.

A. Streamlined Expedited Release Creates a Landowner Right

The Texas Water Code provides:

[The owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area from a certificate of public convenience and necessity in the manner provided by this section and is entitled to that release if the landowner’s property is located in a county with a population of at least one million, a county adjacent to a county with a population of at least one million.

TEX. WATER CODE § 13.2541(b).

Nothing in this provision grants a due process interest for Marilee. Instead, this provision creates the right for Petitioner to decertify its land from Marilee’s CCN in a streamlined expedited fashion because it has met the above-prerequisites. Marilee complains that section 13.2541(c), requirement that the Commission to grant the Petition within 60 days after filing, has not been met. TEX. WATER CODE § 13.2541(c). While this cause has remained on the docket longer than

the prescribed 60 days, this has not caused harm or prejudice to Marilee. Marilee's CCN remains intact, for the time, despite its lack of investment of or capacity to serve the Property. It was the clear intent of the Texas Legislature that the purpose of this act was to give incentive to developers to buy and develop land within an existing CCN without fear of the costs associated with being released from a non-serving CCN. *See* Senate Journal, 82d Legislature R.S.; pp. 1318-19 (April 26, 2011). Marilee itself has caused delay to the intended process by filing baseless motions such as this.

B. Prohibition of Federal Loans Protects Landowner Rights

Non-profit water utilities may obtain loans from the United States Department of Agriculture to construct water infrastructure. *See* 7 U.S.C. § 1926(b). Under section 1926(b), a federally indebted water service area may be protected from decertification to protect its financial viability. *See North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996). Texas Water Code sections 13.2541(e) specifically prohibits a CCN holder from applying for a loan under a 1926(b) program while a decertification petition is pending. TEX. WATER CODE § 13.2541(e).

Here, Marilee does not argue that it has such a loan or that its decertification should be prevented on this basis. Rather, it argues that section 13.2541(e) precludes it from initiating applications to borrow money under 1926(b) during the pendency of this docket. TEX. WATER CODE § 13.2541(e). While this is true, Texas Water Code section 13.2541(e)'s purpose is to protect the landowner from a CCN holder applying for a federal loan for the sole purpose of thwarting a landowner's petition for streamlined expedited release. *Id.* Marilee does not claim it has an existing loan; nor does it specify if it has ever relied on a federal loan to finance infrastructure, whether it has planned new infrastructure, or whether it requires a federal loan to

finance such infrastructure. Thus, Marilee has not demonstrated any protected right or property interest under due process. Indeed, if Marilee desired to submit a federal loan application under 1926(b), it could simply withdraw its objection to the Petition.

III. Conclusion

For the above reasons, Petitioner respectfully requests that the Commission should deny Marilee's Supplemental Motion to Dismiss and grant Petitioner's Application for Streamlined Expedited Release.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following attorney of record on or before December 14th, 2020 in accordance with 16 Tex. Admin. Code § 22.74(c).

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