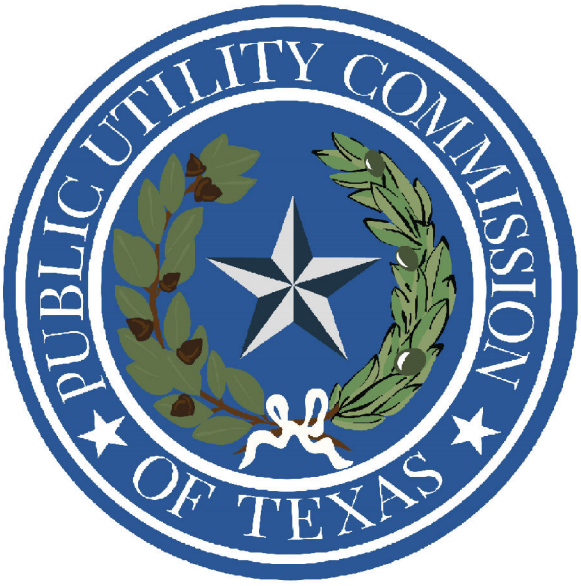

Filing Receipt

Received - 2022-02-08 12:18:58 PM
Control Number - 50404
ItemNumber - 86

PUC 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 COLLING COUNTY BY EXPEDITED RELEASE	§	**PUBLIC UTILITY COMMISSION OF TEXAS**

MARILEE SPECIAL UTILITY DISTRICT'S
SECOND MOTION FOR REHEARING

TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, Marilee Special Utility District (the "District"), and files its Second Motion for Rehearing ("Motion") of the Public Utility Commission of Texas's (the "Commission") Order on Rehearing ("Order on Rehearing") amending the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release property ("Property") in Collin County, Texas.[1] 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."[2] The 25th day after January 14, 2022, is February 8, 2022, and this Motion is timely filed.[3] 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 and Darwin Deason ("Petitioners") as co-trustees of the Sterling Deason O'Donnell DD 2012

[1] Order on Rehearing (Jan. 14, 2022).

[2] Tex. Gov't Code § 2001.146.

[3] 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).

Trust, pursuant to Section 13.2541 of the Texas Water Code ("TWC") and 16 Texas Administrative Code ("TAC") § 24.245(h).[4] The First Amended Petition ("Amended Petition"), which is the subject of the Order, was filed after the Commission remanded the Petition back to the Honorable Administrative Law Judge ("ALJ") at the State Office of Administrative Hearings ("SOAH") in April 2021, and alleges that the Property is greater than 25 acres, not receiving water or sewer service, and is entirely within Collin County.[5]

On June 10, 2021, the ALJ held that the Amended Petition was administratively complete.[6] The ALJ entered a proposed order decertifying the Property on August 10, 2021.[7] The District filed Exceptions and Corrections to the proposed order, which were rejected.[8] 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.[9] The Commission entered its Order decertifying the Property 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 Commission's 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.[10] At the open meeting, the Commissioners unanimously voted to extend the time to act on the District's Motion for Rehearing.[11] The District's Motion for Rehearing was considered by the Commissioners at the January 13, 2022 open meeting of the Commission, and

---

[4] 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).

[5] 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).

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

[7] Proposed Order and Memorandum (Aug. 10, 2021).

[8] Proposed Order Memorandum (Sept. 22, 2021).

[9] 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).

[10] Marilee Special Utility District's Request for Oral Argument (Nov. 22, 2021); Commissioners Will Not Hear Oral Argument at the December 2, 2021 Meeting of the PUC (Nov. 30, 2021).

[11] Order Extending Time (Dec. 2, 2021).

adopted a memorandum authored by Commissioner Glotfelty.[12] 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.

Neither Commissioner Glotfelty's Memorandum nor the Order on Rehearing engaged with 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."[13] Accordingly, the District must file a Second Motion for Rehearing to exhaust its administrative remedies in this proceeding.[14]

II. POINTS OF ERROR

Like the Order, the Commission's Order on Rehearing is based on factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of Property 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, reverse the 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 Property 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 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 Petitioner set forth only an affidavit that provided no facts regarding water service, but merely unsupported claims. Further, the Commission's Order on Rehearing fails to explain why it determined that the Property is not receiving service as interpreted in *Texas General Land Office v. Crystal Clear Water Supply*

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

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

[14] *Id.*

Corp.,[15] when, as the Order on Rehearing states, "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."[16]

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.[17] 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 45 states. The Property is thus receiving "service" as interpreted by *Crystal Clear*, as described in more detail in Section II.B, below.

The proper analysis of a Petitioner's burden is reflected in *Johnson County Special Utility District v. Public Utility Comm'n of Texas*.[18] 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 generated locally and not from a retail water utility service provider."[19] The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.[20]

Here, Petitioner has not met its burden of proof to decertify the Property under TWC § 13.2541. The Order on Rehearing improperly permits Petitioner to decertify Property that the

---

[15] 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)).

[16] Order on Rehearing at Finding of Fact 45.

[17] *Crystal Clear*, 449 S.W.3d at 140.

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

[19] *Id.* at **6-7.

[20] *Id.* at **9-10 (citing Commission's Finding of Fact No. 24).

District is capable of immediately providing service to, as evidenced by the District's existing meters, waterlines, and facilities. The Commission's approval of Petitioner's "carving out" of the Property 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 Property 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 Property 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."[21] 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.[22]

Whether or not a tract is "receiving water or sewer service" under TWC § 13.2541 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 be decertified. 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.[23]

---

[21] TWC § 13.2541(b).

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

[23] *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).

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."[24]

The Commission's Order on Rehearing errs in its analysis of whether the Property receives water service. The District objects to Finding of Fact No. 38, which states that the Property "is not receiving actual water service" from the District. Finding of Fact 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.

Finding of Fact Nos. 39 and 40 state that Petitioner has never "requested" water service from the District and Petitioner has never "paid any charges or fees" to the District to initiate or maintain water service for the release property. However, neither 16 TAC § 24.245(h), TWC § 13.2541, or *Crystal Clear*, require that Petitioner request water service from the District or pay charges and fees for the Commission to find that the Property is receiving "service." Thus, Findings of Fact Nos. 39 and 40 should be removed as they are irrelevant to this proceeding.

The District has demonstrated in several pleadings how it has provided actual water service to the tract of land containing the Property.[25] 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 Property. 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 Petitioner has not proven that the District

[24] *Crystal Clear*, 449 S.W.3d at 140.

[25] *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 Property 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 Property).

is no longer providing water through the 2", 6", 8" waterlines or and Meters #309 and #1528 on the tract of land where the Property is located.

The District objects to Findings of Fact 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 Finding of Fact 45, which *correctly* states that the "CCN holder provides, or has provided, water service to *three separate parcels within the petitioners' tract of land*." Note that the "petitioner's tract of land" is approximately 265.679 acres.[26] The "release property" is approximately 259.5 acres.[27] It is obvious that Petitioners have intentionally "carved out" the District's facilities, waterlines, and meters that serve the "tract of land" and that the "release property" is what remains. Such selective pleading should not be permitted to succeed because such a property 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' land that includes the Property and has the ability to immediately provide full service to the Property. If the Commission permits Petitioners to decertify property that the CCN holder can service and is servicing, 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 streamlined expedited release.[28] For this reason, the Commission must grant the District's Motion and enter an order denying the Amended Petition.

---

[26] Finding of Fact 32.

[27] Finding of Fact 33.

[28] *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.

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 on Rehearing is in clear 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."[29]

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.[30] Sixty calendar days after June 12, 2020 is **August 11, 2020**, the date by which the Commission was 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.[31] 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 18 months of additional litigation.

The Commission's multiple 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."[32] It is not only prejudicial, but unconscionable, for the District to be prevented from seeking financing for needed

---

[29] 16 TAC § 24.245(h)(7).

[30] *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).

[31] Order Remanding to Docket Management (Apr. 7, 2021).

[32] 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.").

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.[33] 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.[34] 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 must grant the District's Motion and enter an order denying the Amended Petition.

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

The Order on Rehearing omits significant procedural events that occurred during this proceeding from its Findings of Fact. In order to have a clear record on appeal, the District respectfully requests that the Order on Rehearing be revised to include new Findings of Fact and Conclusions of Law substantially similar to the following:

---

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

[34] 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.

- **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.

- **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 13A.** On June 19, 2020, CCN Holder filed a response to the administratively complete petition.

- **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 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 Second Motion for Rehearing, 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,

By: _____

John J. Carlton
State Bar No. 03817600
Grayson E. McDaniel
State Bar No. 24078966
The Carlton Law Firm P.L.L.C.
4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
Fax (512) 900-2855
john@carltonlawaustin.com
grayson@carltonlawaustin.com

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 8th day of February 2022.

_____

Grayson E. McDaniel