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COMMISSIONER MEMORANDUM

MEETING DATE: February 12, 2021

DATE DELIVERED: February 11, 2021

AGENDA ITEM NO.: 15

CAPTION: Docket No. 51455 – Petition of Clay Road
628 Development, LP to Amend T & W
Water Service Company's Certificate of
Convenience and Necessity in Montgomery
County by Expedited Release

DESCRIPTION: Commissioner D'Andrea Memorandum

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Hicks, Ruby

Public Utility Commission of Texas

Commissioner Memorandum

TO: Chairman DeAnn T. Walker
Commissioner Shelly Botkin

FROM: Commissioner Arthur C. D'Andrea

DATE: February 11, 2021

RE: February 12, 2021 Open Meeting – Item No. 15
Docket No. 51455 – *Petition of Clay Road 628 Development, LP to Amend T&W Water Service Company's Certificate of Convenience and Necessity in Montgomery County by Expedited Release*

The judge in this matter has certified an issue to the Commission asking whether Clay Road may again petition the Commission for a streamlined expedited release of the same tract of land for which the Commission previously denied such a petition.

I believe that the issue certified misses the point slightly by focusing on whether Clay Road may file a second petition instead of whether the Commission may hear and act on the second petition. The parties in this case filed petitions addressing the legal doctrines of res judicata and collateral estoppel and concluded that neither of these doctrines would preclude Clay Road from filing this second petition or the Commission from considering and acting on the petition.

I disagree with the parties' conclusions and believe that the Commission cannot consider and act on this second petition. I believe that the doctrine of res judicata can act as a bar to the Commission's consideration of this second petition even if no party in this case has raised this doctrine as an affirmative defense. Res judicata is concerned with conserving judicial resources, so it can be raised sua sponte by a tribunal. And I further disagree that res judicata would not apply in this type of proceeding simply because it does not meet the definition of contested case in the Administrative Procedure Act. And finally, I disagree that there are changes in the material facts underlying the Commission's previous decision that would allow an avoidance of this legal doctrine.

But further, I do not believe that this Commission has the authority to revisit its prior decision. More than one court has so ruled; and other courts have ruled similarly for other agencies. It is a question of whether the Legislature has delegated authority to this Commission to revisit its prior decision; and I believe there is no such delegation. Nor can there be an implied power as it would be unnecessary to carry out any expressly delegated power.

However, and more important, I believe that the Commission should not focus here on plying these legal seas but should take a more pragmatic and practical approach. To meet the needs of the parties in this case while complying with the Water Code and our prior order and staying within our delegated authority.

The issue is that Clay Road has asked for release of a tract of land that the Commission has ruled is receiving water service. And it appears clear that because T&W has an easement under which it has the right to use a small corner of this tract to build and operate its water treatment plant that this small corner is not available for development. Accordingly, this small corner does not need to be released from T&W's certificated service area. The Commission has seen this scenario before and there is a simple solution: amend the application to remove the small tract of land—which is subject to the easement—from the tract of land requested to be released.

If T&W were to amend its application in this manner, then I believe that the Commission would have authority to consider the petition and would not be constrained by any legal doctrines in granting the release on the remainder of this tract of land.

I would ask Clay Road to agree to make such an amendment and, if it does so, to direct Docket Management to process this amended petition expeditiously so that Clay Road could move forward with its plan.

I look forward to discussing this matter with you at the open meeting.