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PUC DOCKET NO. 51455

**PETITION BY CLAY ROAD 628
DEVELOPMENT, LP FOR
EXPEDITED RELEASE FROM
WATER CCN NO. 12892
HELD BY T & W WATER
SERVICE COMPANY**

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**BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS**

CLAY ROAD 628 DEVELOPMENT, LP'S BRIEF ON THE CERTIFIED QUESTION

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Clay Road 628 Development, LP's (Clay Road) and files this, its Brief on the Certified Question. In Order No. 2, the Administrative Law Judge (ALJ) certified the following question to the Commissioners of the Public Utility Commission of Texas (PUC):

If a landowner's petition for streamlined expedited release for a tract of land has been denied by the Commission, may the landowner re-petition for streamlined expedited release of the same tract based on the fact that the utility's position on the petition has changed.

The answer to that question is yes. Clay Road is not prohibited from submitting a second application for streamlined expedited release from the T&W Water Service Company's (T&W) Certificate of Convenience and Necessity (CCN) No. 12892 and the PUC's Order Denying Streamlined Expedited Release in Docket No. 50261 does not prevent the PUC from granting Clay Road's petition filed in this docket. While Clay Road's petition under Docket No. 51455 involves the same tract of the land and the same CCN holder as those in Docket No. 50261, the facts presented in the current petition are different. Specifically, based on the change in circumstances resulting in the settlement between T&W and Clay Road, T&W has agreed that Clay Road's property does not receive water service from T&W.

A. Background

On October 22, 2020, Clay Road filed its second petition for expedited streamlined decertification from T&W's CCN No. 12892. Clay Road seeks to decertify its property from T&W's CCN so that the Clay Road development may receive water service from Montgomery County Municipal Utility District No. 138 (District 138) and ultimately from the City of Conroe.¹

In Clay Road's second petition, Clay Road shows that it owns at least 25 acres in Montgomery County, and is not receiving water service from T&W. With the petition, Clay Road confidentially filed its Settlement Agreement with T&W and filed the affidavits of Perry Senn, Vice President of Clay Road, and Ron Payne, General Manager of T&W, both of which state that Clay Road is not receiving water service from T&W, and that T&W has received adequate compensation from Clay Road for the release of T&W's CCN over the Clay Road property.

B. Neither Res Judicata or Collateral Estoppel prevent the consideration and granting of Clay Road's petition pending under Docket No. 51455.

Res judicata, or claim preclusion, bars a subsequent suit if it arises out of the same subject matter of a previous suit and which could have been litigated in a prior suit. *See Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Sav.*, 837 S.W.2d 627, 631 (Tex. 1992). A party asserting res judicata as an affirmative defense must show the following: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action. *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 653 (Tex. 1996).

Collateral estoppel, or issue preclusion, is narrower than res judicata, and prevents the relitigation of particular facts or law already resolved in a prior suit. *Id.* at 628; *Bonniwell v. Beech*

¹ The Clay Road development is located within the city limits of the City of Conroe, and within the jurisdiction of District 138

Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984). To establish collateral estoppel, the party invoking the doctrine must establish that (1) the facts sought to be litigated in the second action were fully and fairly litigated in 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. *Bonniwell*, 663 S.W.2d at 818. Texas courts have made limited use of these doctrines in the administrative context. See *Coalition of Cities for Affordable Utility Rates v. Public Utility Comm'n of Tex.*, 798 S.W.2d 560, 563 (Tex. 1990). However, neither of these doctrines prevent the consideration and granting of Clay Road's petition pending under Docket No. 51455.

To start, res judicata and collateral estoppel are affirmative defenses invoked by parties to prevent an action in court or before a state agency. See *Welch v. Hrabar*, 110 S.W.3d 601, 606 (Tex. App. – Houston [14th] 2003, pet. denied). The party asserting the affirmative defense has the burden of proof. *Id.* In this proceeding, no party has raised either as a defense, and any claims under these defenses are not properly before the Commission. Thus, these doctrines should not be used prevent the processing of Clay Road's petition.

Even if either of these affirmative defenses were properly before the Commission, they would not prevent the consideration and approval of Clay Road's petition in this matter. Both res judicata and collateral estoppel require the party asserting the defense to demonstrate that the facts or issues being litigated in the second matter are the same as those in the first matter. *Amstadt*, 919 S.W.2d at 653; *Bonniwell*, 663 S.W.2d at 818. Clay Road's petition in this second proceeding is not the same as its petition in the first proceeding. While it is true that both petitions involved the same parties and the same tracts of land, Clay Road's second petition includes the settlement agreement between Clay Road and T&W and affidavits from both entities demonstrating that as a result of the settlement both entities agree that Clay Road is not receiving water service from T&W.

See City of San Antonio v. Texas Dept. of Health, 738 S.W.2d 52, 55 (Tex. App. – Austin 1987, writ denied). Clay Road’s petition is not barred by res judicata or collateral estoppel.

Moreover, with respect to collateral estoppel, the doctrine prevents the relitigation of issues “actually litigated.” *Coalition of Cities*, 798 S.W.2d at 563. In Clay Road’s first petition (Docket No. 50261), the question about whether Clay Road was receiving water service from T&W was never actually litigated. Parties are not provided an opportunity for a contested case hearing in streamlined expedited decertification matters. *See* Tex. Water Code § 13.2541; 16 Tex. Admin. Code § 24.254(h)(7). Thus, in Order No. 2 in Docket No. 50261, the ALJ denied T&W request for a contested case hearing, and the parties were given no opportunity to litigate whether Clay Road was receiving service. For this reason, Clay Road’s current petition is not barred by collateral estoppel.

C. Granting Clay Road’s second petition does not conflict with the PUC’s order in Docket No. 50261.

The PUC’s Order Denying Streamlined Expedited Release in Docket No. 50261 found that “T&W Water has performed acts and provides water services committed to the property Clay Road 628 seeks to decertify.” *See* Finding of Fact No. 14. However, since the issuance of that Order circumstances have changed. Any order approving the expedited decertification petition filed by Clay Road in Docket No. 51455 would not conflict with the PUC order in Docket No. 50261 because of those changed circumstances.

Texas Water Code § 13.2541(b) provides that “an 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” (Emphasis added). Under *Johnson County Special Utility District v. Public Utility Commission of Texas*, No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App. – Austin May 11, 2018, pet. denied) (mem. op.) at *8 (citing

Crystal Clear Water), the appropriate inquiry as to whether a property is not receiving services focuses on the following:

- Are there water facilities or lines committed to serving the particular property or used to provide water to that tract?
- Has the entity to be decertified performed any act or supplied anything to the particular property related to providing water?
- The mere existence of water lines or facilities on or near a tract does not necessarily mean that the tract is receiving water service.

Id. at *8.

As a result of a settlement between Clay Road and T&W, both Clay Road and T&W agree that Clay Road *is not receiving water service* from T&W to which both Clay Road and T&W attest in the affidavits of Perry Senn and Ron Payne attached to Clay Road's petition. T&W does not now have water facilities committed to serving the Clay Road property, and T&W is not performing any acts or supplying anything to the particular property related to providing water.² The findings and conclusions made in PUC's Order Denying Streamlined Expedited Release in Docket No. 50261 do not prevent the PUC from making different findings and conclusions in this second Clay Road matter because circumstances have changed.

D. Conclusion

Clay Road is not prohibited from submitting a second petition for streamlined expedited release from T&W's CCN because circumstances have changed. Because of the settlement between Clay Road and T&W, both agree that Clay Road is not receiving water service from T&W. There is no legal bar that would prevent the PUC from considering Clay Road's second

² It should also be noted that T&W's facilities are located in water line and plant and utility easements on the property, and thus, even after the decertification of the Clay Road property, T&W will continue to have access to its water plant and facilities and will be able to continue to provide water service to its existing customers. *See* Instrument Nos. 2013032150, 2003-152019, 2014035538-4 filed in the real property records in Montgomery County, Texas.

petition. Clay Road respectfully requests that the PUC answer the certified question as to whether Clay Road may bring a second petition as “yes.”

Respectfully submitted,

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BY: *Emily W. Rogers*
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CERTIFICATE OF SERVICE

I hereby certify by my signature below that on the 4th day of January, 2021, a true and correct copy of the above and foregoing document was forwarded via electronic mail to all parties of record in accordance with the requirements of 16 Tex. Admin. Code § 22.74 and PUC Order No. 2 in Docket No. 50664.

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