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PETITION OF RODNEY EARL	§	PUBLIC UTILITY COMMISSION
MOHNKE, STEPHEN LEE MOHNKE,	§	
MELVIN MAX MOHNKE, KENNETH	§	OF TEXAS
WAYNE MOHNKE, KATHLEEN ANN	§	
MOHNKE-BLAKELY, AND MEL	§	
MOHNKE, TRUSTEES OF THE	§	
MOHNKE LIVING TRUST, TO AMEND	§	
H-M-W SPECIAL UTILITY	§	
DISTRICT'S CERTIFICATE OF	§	
CONVENIENCE AND NECESSITY IN	§	
HARRIS COUNTY BY EXPEDITED	§	
RELEASE	§	

COMMISSION STAFF'S CORRECTED SUPPLEMENTAL RECOMMENDATION ON ADMINISTRATIVE COMPLETENESS

On April 1, 2021, Rodney Earl Mohnke, Stephen Lee Mohnke, Melvin Max Mohnke, Kenneth Wayne Mohnke, Kathleen Ann Mohnke-Blakely, and Mel Mohnke, Trustee of the Mohnke Living Trust dated December 7, 1996 (collectively, the Petitioners) filed a petition to amend H-M-W Special Utility District's (HMW SUD's) water certificate of convenience and necessity (CCN) in Harris County by streamlined expedited release. The Petitioners seek the expedited release of 99.2669 acres of land that lie within HMW SUD's CCN number 10342. HMW SUD filed a Motion to Intervene on June 4, 2021, which was granted. The Petitioners filed supplemental information on April 6, 2021, April 13, 2021, and May 27, 2021.

On August 4, 2021, HMW SUD filed a response to Order No. 5 and requested in part that the petition be dismissed. On August 11, 2021, the administrative law judge (ALJ) filed Order No. 6, directing the Staff of the Public Utility Commission of Texas (Staff) to file a response to HMW SUD's motion to dismiss and a recommendation on final disposition on or before August 31, 2021. Therefore, this pleading is timely filed.

I. ISSUES NOT TO BE ADDRESSED BY STAFF

HMW SUD objects to the finding of administrative completeness in this matter in its August 4, 2021 filing.¹ HMW SUD argued that the Petitioners have not proved a conveyance to

¹ Response to Petition Approved as Administratively Complete at 1-10. (Aug. 4, 2021) (HMW SUD's Response).

the correct Max Mohnke. In addition, HMW SUD argued that the chain of title in this matter cannot establish ownership under the meaning of relevant statutes and rules because Petitioners have not shown ownership of the mineral estate; and that the provision of water service at the property by another entity is a material issue in this matter. The ALJ deferred on its ruling on certain issues within HMW SUD's motion until the timeline for responses has passed.²

However, in Order No. 6, the ALJ also denied HMW SUD's motion to dismiss regarding the arguments pertaining to proof of ownership and provision of water service.³ Therefore, Staff will not address these arguments in this filing.⁴ In addition, the ALJ stated in Order No. 6 that Commission ALJs lack the authority to consider constitutional issues. Staff does not contest these findings in Order No. 6, and therefore, will not address these topics in this filing.

II. STAFF'S RESPONSE TO HMW SUD'S MOTION TO DISMISS FOR OTHER GOOD CAUSE SHOWN DUE TO PREEMPTION UNDER THE TNRCC ORDER

As outlined in Order No. 6, HMW SUD argues that the tract of land at issue in this matter is located within the certificated service area of HMW SUD's CCN No. 10342. Further, HMW SUD argues that the Texas Natural Resources Conservation Commission (TNRCC) order entered on March 13, 1998 governs and that this immediate petition is impermissible and violates the Order. HMW SUD cites Texas Water Code (TWC) § 49.215 and § 13.252 in support of its position. In addition, the ALJ in Order No. 6 interpreted these arguments by HMW SUD as a motion to dismiss for "other good cause shown" under 16 Texas Administrative Code (TAC) § 22.181(d)(11).⁵

Staff is unpersuaded by HMW SUD's interpretation that a TNRCC order preempts the application of the expedited release provisions of TWC § 13.2541. To interpret an order by the TNRCC as being indefinite in nature and incapable of being reviewed, amended, or altered by subsequent rules or statutes would create an instantly absurd result in which no order provided by any agency could ever be revised, amended, or altered no matter the legislature's (or the

² Order No. 6 at 2 (Aug. 11, 2021).

³ *Id.* at 3.

⁴ *Id.*

⁵ *Id.* at 2.

Commission's) subsequent actions under statute (or rule). Plainly stated, HMW SUD's TNRCC Order dated 1998 should not be deemed indefinite, immortal, or immune to the expedited release provisions explicitly provided under TWC § 13.2541, which Staff views to be the practical effect of HMW SUD's arguments in its motion to dismiss.

III. STAFF'S RESPONSE TO HMW SUD'S MOTION TO DISMISS DUE TO FOR OTHER GOOD CAUSE SHOWN DUE TO VIOLATION OF HMW SUD'S RIGHTS UNDER TWC §§ 13.252 AND 49.215 AND COMPENSATION FOR EXPEDITED RELEASES

HMW SUD further argues in its August 4, 2021 filing that water districts can expand without geographic limits and without possessing a CCN under TWC § 49.215. In addition, HMW SUD argues that TWC § 13.252 provides that any of the Petitioner's successors who are likely to be a water provider will possess or be required to obtain a CCN in violation of TWC § 13.252. The ALJ interpreted this argument as a motion to dismiss for other good cause shown under 16 TAC § 22.181(d)(11).

Staff disagrees with HMW SUD's interpretation of these sections and believes they fail to meet the threshold for a motion to dismiss under 16 TAC § 22.181(d)(11) for "other good cause shown."⁶ First, TWC § 49.215 provides that water districts may purchase, own, operate, and provide similar improvements or equipment necessary to provide service, that a district may furnish financial resources or bonds for such purposes, and that a district can maintain or collect relevant charges or fees to meet the expense of operating its services for a water and sanitary sewer system.⁷ However, Staff does not interpret TWC § 49.215 to provide that a SUD may unilaterally veto a petition for streamlined expedited release under TWC § 13.2541, which is the practical effect of HMW SUD's argument.

TWC § 49.215 does not mention or contemplate explicitly petitions for expedited release under TWC § 13.2541. Therefore, Staff believes the decision whether to grant a petition for streamlined expedited release is controlled not by TWC § 49.215, but instead by TWC § 13.2541. This conclusion is further supported by the fact that a petitioner is required to show that the property for which release is sought is not receiving water or sewer service before the

⁶ 16 TAC § 22.181(d)(11).

⁷ TWC § 49.215(a)-(f).

Commission may grant the petition.⁸ Staff notes that TWC § 13.2541 is similarly silent on the protest and legal claim raised by HMW SUD.⁹ By contrast, Staff agrees with HMW SUD's argument that it is entitled to the consideration of compensation for expedited releases under TWC § 13.2541, as the issue of compensation under petitions for expedited releases is explicitly contemplated by the expedited release provisions provided under TWC § 13.2541(f)-(j), as well as TWC § 13.254(g).

Second, Staff disagrees with HMW SUD's interpretation of TWC § 13.252. This provision states:

[i]f a retail public utility in constructing or extending a line, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other retail public utility, or furnishes, makes available, renders, or extends retail water or sewer utility service to any portion of the service area of another retail public utility that has been granted or is not required to possess a certificate of public convenience and necessity, *the utility commission may issue an order prohibiting* the construction, extension, or provision of service or prescribing terms and conditions for locating the line, plant, or system affected or for the provision of the service.¹⁰

Staff disagrees that TWC § 13.252 was intended to apply to an extension of service following the approval of a request for release under TWC § 13.2541. As noted above, this is one of the reasons why TWC § 13.2541(b) includes an inquiry into whether the property to be released is receiving service. Moreover, even if TWC § 13.252 is interpreted in HMW SUD's favor as applying to petitions for expedited release from a SUD's CCN, TWC § 13.252 is explicitly permissive in nature, and therefore, the section does not bind the Commission to any specific outcome or action.

⁸ TWC § 13.2541(b).

⁹ TWC § 13.2541.

¹⁰ TWC § 13.252 (emphasis added).

IV. STAFF'S FINAL RECOMMENDATION

Due to the ALJ's deference on ruling on the above issues until the filing of responses by Staff, and in the interest of judicial and administrative efficiency, Staff respectfully requests that its deadline to file its final recommendation in this matter be extended until a date subsequent to the ALJ's ruling on the immediate motion to dismiss. Specifically, Staff requests an extension of its deadline until 10 business days following the filing of an order by the ALJ ruling on the issues discussed above. Therefore, Staff does not propose an additional procedural schedule at this time.

V. CONCLUSION

For the reasons detailed above, Staff recommends that the ALJ issue an order consistent with Staff's recommendations, that the motion to dismiss be denied, and that its deadline to file a final recommendation in this matter be extended until 10 business days following the filing of an order by the ALJ ruling on the issues discussed herein.

Dated: August 31, 2021

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on August 31, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Kevin R. Bartz

Kevin R. Bartz