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DOCKET NO. 52090

PETITION OF REDBIRD DEVELOPMENT, LLC	§	BEFORE THE
TO AMEND DOBBIN PLANTERSVILLE	§	PUBLIC UTILITY COMMISSION
WATER SUPPLY CORPORATION'S	§	OF TEXAS
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY IN MONTGOMERY COUNTY	§	
BY EXPEDITED RELEASE	§	

INTERVENOR UTILITY'S CORRECTIONS AND EXCEPTIONS
TO PROPOSED ORDER

COMES NOW, Dobbin Plantersville Water Supply Corporation ("Dobbin Plantersville" or "Intervenor") and files these corrections and exceptions to the Administrative Law Judge's Proposed Order and would respectfully show the following:

I. BACKGROUND

On May 6, 2021, Redbird Development, LLC ("Petitioner") filed a petition with the Public Utility Commission of Texas (PUC) for streamlined expedited release from Dobbin Plantersville's water certificate of convenience and necessity (CCN) No. 11052 pursuant to Texas Water Code §13.2541 and 16 Texas Administrative Code (TAC) § 24.245 ("Petition").

On August 4, 2021, the Administrative Law Judge ("ALJ") served on all parties a proposed order and set a deadline of August 18 for the parties to file corrections or exceptions to the proposed order. On August 11, Dobbin Plantersville filed an Agreed Motion for Extension of Time to File Exceptions. In Order No. 8, the ALJ extended the deadline until August 25. On August 20, Dobbin Plantersville filed an Agreed Motion for Second Extension of Time. In Order No. 9, the AJ extended the deadline until September 7; therefore, these corrections and exceptions are timely filed.

The ALJ's proposed order recommends that the Commission release the tract of land ("release property") from Dobbin Plantersville's certificated service area and amend Dobbin Plantersville's CCN number 11052 to reflect the removal of the release property from the water service area.

II. CORRECTIONS AND EXCEPTIONS TO THE ALJ'S PROPOSED ORDER

Intervenor utility objects to certain Findings of Facts and Conclusions of Law in the ALJ's Proposed Order as discussed below. Intervenor disagrees with the ultimate Conclusion of Law that Petitioner is entitled to a streamlined expedited release of the SER Property from Intervenor's CCN.

A. CORRECTIONS AND EXCEPTIONS TO PROPOSED FINDINGS OF FACT

Dobbins Plantersville objects to the following Findings of Fact in the proposed order. Changes that Dobbins Plantersville believes are needed to reflect the factual record more accurately are shown in track-changes.

3. Dobbins Plantersville holds CCN number 11052 that obligates the utility to provide retail water service in its certificated service area in Montgomery County and Grimes County.

SUPPORT: See PUC records for the boundaries of the CCN.

REASONING: Although the release property is in Montgomery County, the CCN covers areas in Montgomery and Grimes counties.

14. On June 29, 2021, the CCN holder filed a motion to dismiss and on July 15, 2021, the CCN holder filed a reply to Petitioner's response to the motion to dismiss. The CCN holder argued that the petition must be dismissed because petitioner is receiving water service from the CCN holder and, in the alternative, that the CCN holder has provided or made service available and enjoys protection under Title 7 United States Code section 1926(b). The motion to dismiss was supported by the affidavits described in Finding of Fact No. 13.

SUPPORT: See CCN holder's response to petition and motion to dismiss at section III; and CCN holder's reply to Redbird's response at section IV (Docket 52090 Items 12 and 20, respectively).

REASONING: If the Commissioners decide that the Motion to Dismiss should have been granted, their order will require facts about the bases for the Motion.

22. The release property is not receiving actual water service from the CCN holder; however, the CCN holder has adequate facilities to provide service to the release property within a reasonable time after a request for service is made and has the legal right to provide service.

SUPPORT: See CCN holder's response to petition and motion to dismiss at Duncan affidavit and Legge affidavit (Docket 52090 at Item 12). See also, PUC CCN records.

REASONING: If the Commissioners decide to apply the standard articulated in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020), their order will require facts that show that the standard was met. See also, "Reasoning" under conclusion of law number 11, below.

Petitioner's Perry Senn's affidavit described in Finding of Fact No. 8 states "Redbird plans to develop the property with approximately 575 residential homes at full build out. Because the Redbird development will be a dense development, the water system must be capable of providing fire flows in addition to potable water service. Redbird anticipates there will be 575 water and sewer connections that come online between June 2022 and July 2025." See Senn July 12, 2021, affidavit at 5 (Docket 52090 at Item 17).

Redbird's contention expressed by Mr. Senn is premised on speculation that it will actually build 575 homes (connections) all at once. Although Redbird contends it "intends" to do so, there is no evidence that Redbird has the financial ability to actually construct 575 homes between June 2022 and July 2025. Mr. Senn, who is not an engineer, uses these dates to conclude that water service to these speculative 575 homes would exceed Dobbin Plantersville's ability to satisfy the water demand "within a reasonable period of time." Redbird's Mr. Senn is making predictions that may never come true. Most residential developments are "phased," so the developer does not have too large of an investment in infrastructure (water and sewer lines, etc.) up front, in case lot sales do not occur as predicted.

Redbird's prediction is merely a wish without evidentiary support and may never come true, and the Commissioners should not release the release property on the basis of wishes and guesswork. It is common for developers to exaggerate anticipated water needs as a means to attempt to remove property from a CCN. On information and belief, this case is no different.

As summarized by Steve Duncan, Dobbin Plantersville's engineer, Dobbin Plantersville currently has excess capacity that would allow it to serve approximately 100 additional connections. There are no outstanding requests for service from the undeveloped portions of the CCN area that would use the remainder of the existing capacity. Further, Dobbin Plantersville could expand water plant number 4 because it has acquired property adjacent to the plant to allow expansion. In discussions with Redbird, Dobbin Plantersville stated that alternatively, it could build a new water plant on property that Redbird would provide. The new plant could be built to have the capacity to serve the entire release property with both potable water and fire flow.

23. The petitioner has not requested that the CCN holder provide water service to the release property; however, if the petitioner requests service from the CCN holder, all facilities are in place to deliver water to active water taps located on the release property once petitioner pays for the improvements needed to hook up its water service taps to the 6-inch and 4-inch water lines described in Finding of Fact No. 26.

SUPPORT: See CCN holder's response to petition and motion to dismiss at Duncan affidavit and Legge affidavit (Docket 52090 at Item 12).

REASONING: If the Commissioners decide to apply the standard articulated in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020), their order will require facts that show that the standard was met. See also, "Reasoning" under finding of fact number 23, above, and under conclusion of law number 11, below.

26. A six-inch water line and a four-inch water line owned and operated by the CCN holder run parallel to, but just outside of, the extreme western edge of the release property for a distance of roughly 60 feet. The lines are along Spring Branch Road. The TCEQ approved combined capacity of both lines is 350 connections. The CCN holder currently has approximately 230 active connections on those 2 lines. Thus, the lines have excess capacity for 120 connections.

SUPPORT: See CCN holder's response to petition and motion to dismiss at Duncan affidavit at No. 9 (Docket 52090 at Item 12).

REASONING: If the Commissioners decide to apply the standard articulated in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020), their order will require facts that show that the standard was met. See also, "Reasoning" under finding of fact number 23, above, and under conclusion of law number 11, below.

27. The CCN holder's water plant number four is located approximately 640-700 feet north of the extreme western edge of the release property along Spring Branch Road. Water plant number four has a water well approved by the TCEQ with the capacity for 300 connections and water tanks with TCEQ-approved capacity for 420 connections. The CCN holder has approximately 230 active connections whose water can be provided by water plant number four and has recently purchased adjacent land for future expansion of water plant four.

SUPPORT: See CCN holder's response to petition and motion to dismiss at Duncan affidavit at No. 8 and Attachments 2 and 3 (Docket 52090 at Item 12).

REASONING: The change in distance is based on the Duncan testimony and exhibits described in finding of fact 13. If the Commissioners decide to apply the standard articulated in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020), their order will require facts that show that the standard was met. See also, "Reasoning" under finding of fact number 23, above, and under conclusion of law number 11, below.

30. The CCN holder has ~~not~~ performed ~~any various~~ acts ~~for or~~ and ~~supplied anything to~~ ~~the~~acquired funds in furtherance of providing service to the release property and to the CCN No. 11052 area in Montgomery County that includes the release property, including:

- a. ~~acquiring property adjacent to water plant number four to allow expansion;~~
- b. ~~discussing with petitioner building a new water plant on the release property on property to be transferred to the CCN holder, such new water plant to be dedicated to serving the entire release property with both potable water and fire flow; and~~
- c. ~~preparing an application for a USDA loan to include improvements to the Montgomery County water service area, which would expand current capacity.~~

SOURCE: See DP Response to Petition and Motion to Dismiss, Duncan Affidavit at Nos. 6 – 10 and Legge Affidavit at No. 5 (Docket 52090 at Item 12).

REASONING: The Petitioner’s affidavit has a conclusory statement that the CCN holder has not done anything to provide service to the release property. Compare this with the testimony of Steve Duncan, the CCN holder’s expert engineering consultant, which details the many ways that the CCN holder has prepared for serving the release property. If the Commissioners decide to apply the standard articulated in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020), their order will require facts that show that the standard was met. See also, “Reasoning” under finding of fact number 23, above, and under conclusion of law number 11, below.

Motion to Take Official Notice

31. On July 9, 2021, the CCN holder filed a Motion to Take Official Notice of its lawsuit filed in the United States District Court for the Western District of Texas, Austin Division, in Case 1:21-cv-00612. A copy of the Original Complaint was attached as Exhibit A. The suit challenges the PUC’s authority to release the release property due to the protections under 7 United States Code section 1926(b).

32. On August 11, 2021, in Order No. 6, the ALJ denied the Motion to Take Official Notice.

SOURCE: See filed pleadings and orders Items 18, 29, and 32 in Docket 50920.

REASONING: If the Commissioners believe it is relevant to their decision that Dobbin Plantersville has filed a lawsuit in federal court, these findings of fact are needed.

B. CORRECTIONS AND EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW

Dobbins Plantersville objects to the following Conclusions of Law in the ALJ's proposed order. Changes that Dobbin Plantersville believes are needed to more accurately reflect conclusions of law based on the factual record are shown in track-changes.

9. The release property is ~~not~~considered to be receiving water service under TWC §§ 13.002(21) and 13.2541(b) and 16 TAC § 24.245(h), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, 449 S.W.3d 130 (Tex. App.-Austin 2014, pet denied) and *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020).

SOURCE: See discussion following exception number 11, below.

REASONING: See discussion following exception number 11, below.

10. The petitioner is not entitled under TWC § 13.2541(6) to the release of the release property from the CCN holder's certificated service area.

SOURCE: See discussion following exception number 11, below.

REASONING: See discussion following exception number 11, below.

11. After the date of this Order, the CCN holder ~~has no obligation~~ continues to be obliged under TWC §13.254(h) to provide retail water service to the petitioner's release property.

SOURCE & REASONING: The record and Dobbin Plantersville’s proposed changes to the findings of fact support proposed changes to the ALJ’s proposed conclusions of law numbers 9 - 11 for the following reasons.

Only property “that is not receiving water service” may be released under Texas Water Code section 13.2541. A determination of whether the release property receives water service from the CCN holder is a fact-specific inquiry and the lack of active water taps or facilities on the release property itself is not determinative.¹ An analysis of the facts begins with the definitions of "service" and “facilities” in the Texas Water Code. “Service” is defined 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.

Tex. Water Code § 13.002(21); *see also*, 16 TAC § 24.3(33) (same definition). The term "facilities" is defined as:

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.

Tex. Water Code § 13.002(9); *see also*, 16 Tex. Admin. Code § 24.3(15) (same definition).

Although the release property is not receiving actual water service from the CCN holder, the CCN holder has adequate facilities to provide service to the release property within a reasonable time after a request for service is made and has the legal right to provide service. Under the quoted statutory definitions, a property can “receive water service” even before development and delivery of water to active water taps.² In the *Crystal Clear* decision, the court stated that facilities or lines “used” or “committed” to providing such service might cause a property to

¹ *See Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 - 141 (Tex. App.- Austin 2014, pet. denied).

² *Id.*

"receive service" under the statutory and regulatory definition.³ Dobbin Plantersville has constructed infrastructure and developed water supply "committed" to the Property; therefore, the Property is "receiving service."

The record supports a conclusion of law that the release property receives water service from the CCN holder under its proposed conclusion of law 9, above, and as summarized here. The CCN holder began planning for service to the area, including the release property, in its plan for the Catahoula Project commissioned several years ago. The CCN holder began the application process for a loan of nearly \$5 million from the USDA for infrastructure in the High Meadows and Catahoula projects plan, which calls for building infrastructure in the service area where growth and development are expected, including the release property. Additionally, the CCN holder has recently purchased land adjacent to water plant number four for future expansion in alignment with the Catahoula Project.⁴

The CCN holder has not received a request for water service from Petitioner, but if Redbird Development requests service from the CCN holder, all facilities are in place to deliver water to active water taps on the release property once Redbird Development pays for improvements needed to hook up its water service taps to the six-inch and four-inch water lines that run parallel to, but just outside of the extreme western edge of the release property for a distance of roughly 60 feet. The CCN holder currently has excess capacity, which would allow it to serve approximately 100 additional connections and Redbird Development has presented no definite information about when a specific number of connections would be needed, and in fact, as with all proposed residential developments, the number of connections will depend on the success in selling lots. There are no outstanding requests for service from the undeveloped portions of the CCN area that would use existing excess capacity. The CCN holder could expand water plant number four because it has acquired property adjacent to the plant to allow expansion. The CCN could, alternatively, build a new water plant on the release property on property that Redbird would

³ Id.

⁴ See CCN holder's response to petition and motion to dismiss at Exhibit A, Duncan Affidavit at Item No. 8, and Attachments 2 and 3 and at Exhibit B, Legge Affidavit (Docket 52090 at Item 12).

provide. The new plant could be built to have the capacity to serve the entire release property with both potable water and fire flow.⁵

While the Commission has granted SER petitions in the past unless the CCN holder had actual infrastructure on the release property, this precedent may be changing under the new commissioners. During deliberations in Docket No. 51352, Commissioners Lake and McAdams discussed a “bright-line” rule to assess whether to grant a SER petition seeking release of property from an existing CCN, stating that the petitioner has the obligation of showing it is entitled to the release. Commissioner McAdams stated that he wanted a clear rule for determining whether a CCN holder “has sufficient facilities committed to providing service to warrant a determination that a tract of land was receiving service in this context.” Both Commissioners agreed that in order to avoid a release, it must be shown that the CCN holder is capable of providing reliable service in a timely manner.⁶ The standard articulated during the discussion reflects the current law as established in *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020).

The record shows that the CCN holder has performed various acts and supplied funds in furtherance of service to the release property and its CCN No. 11052 area that includes the release property, including the acts and funding that are detailed in the record and in Dobbin Plantersville’s proposed findings of fact, above. The CCN holder’s facilities - and the acts planning, funding, installing, and maintaining them - are all plainly "committed" or "used" by the CCN holder in the performance of its duties to supply water service to the release property. The release property “receives water service” from the CCN holder through its commitments to serve, and its existing facilities and capacity sized to serve, the release property. Mr. Duncan's affidavit, Exhibit A to the CCN holder’s response to petition and motion to dismiss, describes all the different ways Dobbin Plantersville has served the release property through its various acts and funds. Under these facts, the Commission must deny the Petitioner's request to release the property from Dobbin

⁵ See CCN holder’s response to petition and motion to dismiss at Exhibit A, Duncan Affidavit at Item No. 10 (Docket 52090 at Item 12).

⁶ See Public Utility Commission of Texas Open Meeting Broadcast (May 21, 2021), Admin Monitor, http://www.adminmonitor.com/tx/puct/open_meeting/20210421/.

Plantersville's CCN No. 11052 because such a release would violate Texas Water Code section 13.2541.

C. ALTERNATIVE CORRECTIONS AND EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW

In the alternative, Dobbins Plantersville objects to the following Conclusions of Law in the proposed order. Changes that Dobbins Plantersville believes are needed to more accurately reflect conclusions of law based on the factual record are shown in track-changes.

9. Under the *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir, 2020) the CCN holder is shielded from decertification by the State of Texas because it has adequate facilities to provide service to the release property within a reasonable time after a request is made and has the legal right to provide service. The ALJ erred in denying Dobbins Plantersville's Motion to Dismiss. ~~The release property is not receiving water service under TWC §§ 13.002(21) and 13.2541(b) and 16 TAC § 24.245(h), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, 449 S.W.3d 130 (Tex. App. Austin 2014, pet denied).~~

SOURCE AND REASONING: See discussion following exception number 11, below.

10. The petitioner is not entitled under TWC § 13.2541(6) to the release of the release property from the CCN holder's certificated service area.

SOURCE AND REASONING: See discussion following exception number 11, below.

11. After the date of this Order, the CCN holder has no obligation continues to be obliged under TWC §13.254(h) to provide retail water service to the petitioner's release property.

SOURCE AND REASONING:

The record supports the proposed changes to the ALJ's proposed conclusions of law numbers 9 – 11 for the following reasons. In the recent decision *Green Valley Special Utility District v.*

City of Schertz, 969 F.3d 460, 475 - 477 (5th Circuit, 2020), the Fifth Circuit made a paradigm shift in interpretation of 7 United States Code section 1926(b) and whether it shields a CCN holder from decertification by the Public Utility Commission of Texas. While its decision to overrule *North Alamo Water Supply Corporation v. City of San Juan* (5th Cir. 1996) is significant, the *Green Valley* case does not repeal the benefits that section 1926(b) provides to a CCN holder in protecting its service area. What *Green Valley* accomplishes is a change to the standard by which such protection is judged. The new standard is a physical capability test. Under *Green Valley*, the questions the Public Utility Commission must ask are as follows: Does the borrower CCN holder have (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made, and (2) the legal right to provide service? In fact, Commissioners Lake and McAdams have discussed the application of this standard with favor as discussed above in section II.B. Dobbin Plantersville's legal right to provide service to the release property is not in dispute; the release property falls inside Dobbin Plantersville's certificated area. Thus, the issue is whether Dobbin Plantersville has adequate facilities to provide service to the area within a reasonable time after a request for service is made.

So, what does this mean to the SER being considered in this docket? The Petitioner has never requested service from the CCN holder; however, the utility has adequate facilities to provide service and could provide water service to the release property as soon as a request for service is made by Petitioner. After such a request is received, the next step would be for Petitioner to pay for improvements needed to hook up its water service taps to the nearby lines. Unlike the utility in the *Green Valley* case, the CCN holder has much more than an intention and plan to serve the area to be decertified; the CCN holder has adequate facilities to provide service to the area within a reasonable time after request for service is made. For these reasons, the Petition must be denied.

Intervenor excepts to Conclusion of Law Nos. 14 and 15 because they are not appropriate in an order that denies release of petitioner's release property.

D. EXCEPTIONS TO PROPOSED ORDERING PROVISIONS

Intervenor objects to all Ordering Paragraphs for the reasons provided above and proposes in their place a single Ordering Paragraph as follows:

1. The Commission denies the petition to release the water CCN release property from the CCN holder's service area under CCN number 11052.

III. CONCLUSION AND PRAYER

Dobbin Plantersville respectfully requests the ALJ to revise his proposed order as set out in Section II, and further, that the Commission deny the Petition because it cannot lawfully be granted under *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex. App.- Austin 2014, pet. denied) and *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir, 2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Docket No. 50664, Second Order Suspending Rules (July 16, 2020) the undersigned hereby certifies that a copy of foregoing Corrections and Exceptions to Proposed Order was served on all parties of record in this proceeding September 3, 2021, by electronic mail.

Mary K. Sahs

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