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DOCKET NO. 52101

PETITION OF CCD-NORTHSKY, LLC	§	PUBLIC UTILITY COMMISSION
TO AMEND MARILEE SPECIAL	§	
UTILITY DISTRICT'S CERTIFICATE	§	OF TEXAS
OF CONVENIENCE AND NECESSITY	§	
IN COLLIN COUNTY BY EXPEDITED	§	
RELEASE	§	

COMMISSION STAFF'S SUPPLEMENTAL RECOMMENDATION

On May 10, 2021, CCD-North Sky, LLC (North Sky) filed a petition with the Public Utility Commission of Texas (Commission) requesting streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water certificate of convenience and necessity (CCN) number 10150 under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(h). North Sky asserts that the land to be released is at least 25 contiguous acres, is not receiving water service, and is located in Collin County, which is a qualifying county. On June 16, 2021, Marilee SUD filed a motion to dismiss North Sky's petition. On June 29, 2021, North Sky filed a response to Marilee SUD's motion to dismiss. On July 6, 2021, North Sky amended its petition and mapping data to revise the requested area and filed supplemental maps on July 28 and August 17, 2021. On September 14, 2021, the administrative law judge (ALJ) denied Marilee SUD's motion to dismiss.

On September 15, 2021, the ALJ filed Order No. 10, establishing a deadline of October 21, 2021 for the Staff of the Public Utility Commission of Texas (Staff) to file a recommendation on final disposition. Therefore, this pleading is timely filed.

I. RECOMMENDATION ON FINAL DISPOSITION

As detailed in the memorandum from Jolie Mathis, Infrastructure Division, Staff has reviewed the petition and recommends that it be approved. The affidavit, maps and digital data, and warranty deed filed by North Sky provide adequate information to demonstrate that the petition satisfies the requirements of TWC § 13.2541(b) and 16 TAC § 24.245(h). Specifically, the petition shows that the property for which North Sky seeks expedited release is located in Collin County, which is a qualifying county, is not receiving water utility service, and is at least 25 contiguous acres. The final water CCN map and water CCN certificate are attached to this filing. Therefore, Staff recommends that the petition be approved.

In its response to the petition, Marilee SUD contends that the application should be denied. Staff will address those arguments here.

A. Receiving Water Service

Marilee SUD argues that North Sky “has not met its burden of proof to decertify the Property under TWC § 13.2541 “because it has provided only a “conclusory one-page affidavit” stating that the requested property is not receiving service.¹ However, on October 12, 2021, the Commission granted the release of a tract of land from Marilee SUD’s CCN area, partly on the basis of an affidavit that is, in relevant part, identical to the affidavit filed in this docket.² Staff therefore recommends that North Sky has met its burden of proof under TWC § 13.2541.

Marilee SUD further asserts that North Sky cannot meet its burden of proof because the requested area is receiving service. Marilee SUD’s argument hinges on the fact that North Sky’s property receives water from Marilee SUD water meter #241. However, North Sky requests release of only 219.67 acres of its total property, an area which includes no meters or service lines. In Docket No. 50404, the Commission rejected the same argument, in which Marilee SUD conflated the petitioner’s total property with the release property, arguing that the location of meters and lines on the total property made release inappropriate.³ The Commission approved the release of the property from Marilee SUD’s certificated service area.

Staff recommends that these elements are not sufficient to meet the standard of “receiving” water service. To receive water service, a retail water utility must have “facilities or lines committed to providing water to the particular tract or has performed acts or supplied anything to the particular tract”⁴

¹ Marilee Special Utility District’s Verified Response at 7 (Oct. 7 2021) (Response).

² *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 Collin County by Expedited Release*, Docket No. 50404, Petition at Exhibit A (Jan. 2, 2020); *Id.*, Order (Oct. 12, 2021).

³ *Id.*, Order at Conclusion of Law No. 9.

⁴ *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d.130, 140 (Tex. App.—Austin 2014, pet. denied); *Petition of LGI Homes-Texas, LLC to Amend Bolivar Water Supply Corporation’s Water Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 49433, Finding of Fact Nos. 17-18 (Mar. 2, 2020); *Petition of Frost Bank National Bank as Trustee of the Freeman Educational Foundation to Amend the City of San Marcos’ Water Certificate of Convenience and Necessity in Hays County by Expedited Release*, Docket No. 49366, Findings of Fact Nos.17-18 (Dec. 13, 2019).

First, the active meter #241 is not within the release area. As Marilee SUD's response indicates, the meters are within the metes and bounds of the total property, but the requested area does not include the tracts to which Marilee SUD provides service.⁵ If the active meter is not located within the 219.67 acres for which release is sought they should not be considered when determining whether the requested area is receiving service.

Second, the water line running through the property has not been shown to be committed to providing water to the particular tract. Through its various responses, Marilee SUD has not demonstrated that the water line is committed to the requested area. In *Crystal Clear*, the CCN holder raised the issue of existing water lines and facilities.⁶ The court looked to whether those lines or facilities were constructed for the purpose of providing water to the property in question. Finding that the facilities were constructed to serve the greater area, and not the particular property, the court determined that the facilities were not committed to the particular tract of land, and therefore, the property in question was not receiving service.⁷ Similarly, Marilee SUD does not demonstrate that the water line was installed for the purpose of providing water to the requested area. As such, it cannot be considered to be committed to the particular property and the requested area is not, therefore, receiving water service from Marilee SUD. Accordingly, Staff recommends that the requested area is not receiving water service.

B. Marilee's Federal Debt

Marilee SUD asserts that releasing the requested area would impair its ability to service the debt on the Water and Wastewater Guaranteed loan of \$1,553,000, which was approved by the United States Department of Agriculture (USDA) on July 12, 2021.⁸ In its response, Marilee SUD states that, under the Consolidated Farm and Rural Development Act of 1961 and 7 U. S. Code § 1926(b), "it is prohibited by federal law to "curtail or limit" the service area of a USDA debtor."⁹ Marilee SUD claims that, because it can show federal indebtedness and the physical ability to serve a portion of North Sky's total property, the protections of § 1926(b) prohibit the Commission from granting the release of the proposed area.

⁵ See Response at Exhibit B-1.

⁶ *Crystal Clear*, 449 S.W.3d at 140.

⁷ *Id.*

⁸ Response at 11.

⁹ *Id.* at 11.

Staff recommends that Marilee SUD's claim of protection under 7 U.S.C. § 1926(b) is moot. The TWC explicitly states that "[t]he utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program."¹⁰ While a federal district court had previously held that 7 U.S.C. § 1926(b) preempted TWC § 13.2541 (formerly, TWC § 13.254(a-5) and (a-6)), that decision has been vacated by the Fifth Circuit.¹¹ Further, the Fifth Circuit decision in *Green Valley Special Utility District v. City of Schertz* specifically dismissed Green Valley SUD's preemption claim and determined that the court lacked jurisdiction to consider such a claim.¹² Absent any federal court ruling on preemption, Staff's recommendation must comply with state law. As such, Staff's recommendation does not take Marilee SUD's federally indebted status into consideration.

II. CONCLUSION

Staff respectfully requests the entry of an order consistent with the foregoing recommendation.

Dated: October 21, 2021

¹⁰ TWC § 13.2541(d).

¹¹ *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

¹² *Green Valley Special Util Dist v. City of Schertz*, 969 F.3d 460, 411 and 478 (5th Cir. Aug. 7, 2020) (en banc).

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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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 October 21, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Mildred Anaele
Mildred Anaele

Public Utility Commission of Texas

Memorandum

TO: Mildred Anaele, Attorney
Legal Division

FROM: Jolie Mathis, Utility Engineering Specialist
Infrastructure Division

DATE: October 21, 2021

RE: Docket No. 52101 – *Petition of CCD-North Sky, LLC to Amend Marilee Special Utility District's Water Certificate of Convenience and Necessity in Collin County by Expedited Release*

On May 10, 2021, CCD-North Sky, LLC (North Sky) filed a petition for streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water certificate of convenience and necessity (CCN) No. 10150 in Collin County, under Texas Water Code (TWC) § 13.2541(b) and 16 Texas Administrative Code (TAC) § 24.245(h). North Sky asserts that the land is at least 25 contiguous acres, is not receiving water service, and is located in Collin County, which is a qualifying county.

Tracy Montes, Infrastructure Division, determined the map and digital data are sufficient for determining the location of the tract of land considered for streamlined expedited release is located within Marilee SUD's water CCN. Furthermore, North Sky provided a warranty deed confirming ownership of the tract of land within Marilee SUD's certificated service area. In addition, North Sky submitted a sworn affidavit attesting that the property was not receiving water service from the CCN holder.

The entire tract of land is approximately 220.4 acres. The portion of the tract considered for release from Marilee SUD (CCN No. 10150) is approximately 219.67 acres.

Marilee SUD requested to intervene. Marilee SUD provided documentation demonstrating that it is currently providing service to the tract of land.

- (1) Marilee SUD has an active two-inch waterline located within the property served off the 6" waterline at the corner of CR #99 and Louisiana through Meter #241 (the "meter");
- (2) The meter is located within the property and actively supplies water to a billed residential connection located at 3170 North Louisiana Drive, Celina, Texas 75009, and remains on today;

- (3) The meter has been providing water service to the residence there since December 5, 1981;
- (4) Through the meter and the 2" waterline connected to it, Marilee SUD provides actual water service on the property; and
- (5) Though Marilee SUD has not received a request for water service to the requested area specifically from petitioner CCD-North Sky, LLC, if petitioner did request service from Marilee SUD, all facilities are in place to deliver water to the requested area

However, based on my review of the petition, I have determined that the portion of the tract of land considered for streamlined expedited release is not currently receiving service from Marilee SUD.

In accordance with TWC § 13.2541 and 16 TAC § 24.245(h), North Sky have met the Commission's requirements to allow for the release of the tract of land from Marilee SUD's CCN No. 10150. Therefore, I recommend approval of the petition. Enclosed is a final map and certificate for Commission approval.

Additionally, I recommend that a final map and certificate be provided to the CCN holder.