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

**MARILEE SPECIAL UTILITY DISTRICT'S
CORRECTIONS AND EXCEPTIONS TO THE PROPOSED ORDER**

COMES NOW, MARILEE SPECIAL UTILITY DISTRICT (the “District”) and files these Corrections and Exceptions (“Corrections and Exceptions”) to the Proposed Order (“Proposed Order”) entered by Honorable Administrative Law Judge (“ALJ”) Hunter Burkhalter on November 1, 2021, proposing that the Public Utility Commission of Texas (the “Commission”) amend the District’s Certificate of Convenience and Necessity (“CCN”) No. 10150 to release property (“Property”) in Collin County, Texas.¹ The Proposed Order requires the parties of this proceeding to file corrections or exceptions by November 15, 2021. Thus, the District’s Corrections and Exceptions are timely filed. In support thereof, the District respectfully shows as follows:

I.

CORRECTIONS AND EXCEPTIONS

The ALJ’s Proposed Order recommending that the Commission grant the First Amended Petition is in error. The ALJ’s Proposed Order is based on factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of Property from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that the Commission its Exceptions and Corrections to the Proposed Order be granted, that the Commission deny the First Amended Petition and dismiss this proceeding.

¹ Proposed Order and Memorandum (Nov. 1, 2021).

A. The ALJ Erred by Failing to Hold Petitioners to Their Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 6, 7, 8, 9, 10, 38, 39, 40, and COL Nos. 6, 9, 10, and Ordering Paragraph 1.).

The Proposed Order does not accurately state the Petitioner’s burden of proof under TWC § 13.2541, 16 TAC § 24.245(h), or caselaw that interprets these provisions. The petitioner in a proceeding brought under Texas Water Code (“TWC”) § 13.2541 and 16 Texas Administrative Code (“TAC”) § 24.245(h) has the burden to prove that the area requested to be decertified is not receiving service. That burden has not been met when a petitioner fails to set forth facts to establish that the property is not receiving service, as here, where in both the Original Petition and the First Amended Petition, Petitioner set forth only an affidavit that claimed, without support, that the Property is not and has not received water service from the District, and provided no facts regarding water service, and further, failed to rebut the District’s affirmative evidence that it provides and has provided and is fully capable of continuing to provide, water service to the Property.

The proper analysis of a Petitioner’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.² The petitioner in that case provided a detailed affidavit by a land broker on the grounds of the property to be decertified, in which the broker stated that he searched the property, which was inhabited, for several hours and found no district water meters or facilities, only “two shuttered ground well heads” and a “small, elevated water storage tank . . . implying that any dwelling on the [p]roperty required that water pressure be generated locally and not from a retail water utility service provider.”³ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.⁴

Here, Petitioner has not met its burden of proof to decertify the Property under TWC § 13.2541 and 16 TAC § 24.245(h). The Proposed Order improperly recommends decertifying

² No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin (May 11, 2018, pet. denied) (mem. op.) (interpreting TWC § 13.2541’s predecessor statute, § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the Water Code. See Tex. S.B. 2272, 86th Leg., R.S. (2019)).

³ *Id.* at **6-7.

⁴ *Id.* at **9-10 (citing the Commission’s Finding of Fact No. 24).

Property that the District is capable of immediately providing service to, as evidenced by the District’s existing meters, waterlines, and facilities. Petitioner disingenuously swears that that the “requested area” is not receiving service, when the meter that is dedicated to providing service is just outside of the requested area—this is why Petitioner amended the Original Petition—to “carve out” that area.⁵ The ALJ’s approval of Petitioner’s “carving out” of the Property from the existing meters, waterlines, and facilities, and acceptance of Petitioners’ insufficient affidavit eviscerates Petitioners’ burden of proof, and improperly puts all the burden on the District to prove that the Property is receiving, has received, and is capable of receiving water from the District’s dedicated facilities, water lines, and meters.

The District takes exception to the Proposed Order as written because it fails to hold Petitioner to its burden of proof. For the above reasons, the Proposed Order’s recommendation that Petitioner has established that the Property is eligible to be decertified is deficient and must be corrected.

B. The ALJ Erred in Holding that the Property Is Not Receiving Water Service from the District (FOF Nos. 38, 39, 40, 42, 43, 44, 46, 47, 48 and COL Nos. 9 and 10 and Ordering Paragraph 1.).

The Proposed Order does not accurately state the definition of “service” under the TWC or caselaw. The TWC broadly defines “service” 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[.]” Whether or not a tract is “receiving water or sewer service” under TWC § 13.2541 is a fact question. According to the plain text of that definition and the Commission’s and Texas courts’ interpretation of it, whether or not a tract is receiving “service” is not dependent on whether water or sewer is being used or has been requested on the tract sought to be decertified. Instead, a tract is “receiving” water or sewer service if either of the following conditions are met:

⁵ Compare Petition of CCD-North Sky, LLC, at 2 (May 10, 2021) (seeking to decertify 219.976 acres of property), to First Amended Petition of CCD-North Sky, LLC, at 2 (seeking to decertify 219.67 acres of property, reduced to remove the area of property where Marilee’s meter is located) (July 6, 2021).

- Any facilities or lines are committed or used in the performance of the CCN holder’s duties as a retail public utility; or
- Any lines are committed or used in the performance of the CCN holder’s duties as a retail public utility.

The inquiry into whether a tract is “receiving service” requires the Commission to consider any lines or facilities committed to providing water to the tract. As defined by TWC § 13.002(9), “facilities” includes “all 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.” In *Texas General Land Office v. Crystal Clear Water Supply Corp.*,⁶ the Austin Court of Appeals held that facilities or lines “used” or “committed” to providing such service might cause a property to “receive service” under the statutory and regulatory definition. But where water lines are actually present within a tract and “committed” to the property in that manner, the tract is unquestionably “receiving service” and the Commission has determined that a streamlined expedited release petition may not be granted under TWC § 13.2541, as interpreted by *Crystal Clear*, when such facts are present.

The Proposed Order fails to explain why it determined that the Property is not receiving service as interpreted in when, as the Proposed Order states, the following facts are present:

- “The CCN holder owns and operates a two-inch waterline running through the extreme eastern edge of the release property.”⁷

⁶ 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied) (interpreting TWC § 13.2541’s predecessor statute, § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the Water Code. See Tex. S.B. 2272, 86th Leg., R.S. (2019)).

⁷ Proposed Order at Finding of Fact 29.

- “The two-inch waterline is connected to a water meter on the petitioner's tract of land, but the meter is not located within the release property and does not provide water service to the release property.”⁸
- “The CCN holder provides water service to a small lot within the petitioner's tract of land, but this lot does not lie within the release property.”⁹
- Here, the District has served and is capable of serving the “petitioner’s tract of land,” as Findings of Fact 29-31 demonstrate. The Property is thus receiving “service” as interpreted by *Crystal Clear*.

Because the District has dedicated facilities, water lines, and meters dedicated to the Property and the tract of land on which the Property is situated, Petitioner has failed to show that the Property is not receiving “service” under TRWC § 13.2541, 16 TAC § 16.245(h), and *Crystal Clear*. The Proposed Order’s recommended conclusion that the Property is not receiving “service” is error and must be corrected.

C. The ALJ Erred by Proposing the Curtailment or Limitation of the District’s Service Area Because the District is Entitled to Protection Under 7 U.S. Code § 1926.

Pursuant to the Consolidated Farm and Rural Development Act of 1961 and 7 U.S. Code § 1926, the USDA may make or insure loans to associations and public and quasi-public agencies. In order to protect a USDA debtor’s ability to service its debt, it is prohibited by federal law to “curtail or limit” the service area of a USDA debtor. The statute provides:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit

⁸ *Id.* at Finding of Fact 30.

⁹ *Id.* at Finding of Fact 31.

as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.¹⁰

On July 12, 2021, Marilee received approval from the United States Department of Agriculture (“USDA”) for a Water and Wastewater Guaranteed loan of \$1,553,000.¹¹ Marilee has not closed on the USDA loan, but is working diligently to do so.

To be eligible for protection under § 1926(b), Marilee must show, in addition to federal indebtedness, that it satisfies the “physical abilities” test, as adopted by the U.S. Court of Appeals for the Fifth Circuit, sitting en banc in *Green Valley Special Utility District v. City of Schertz*.¹² To satisfy the “physical abilities,” the District must show that it has “adequate facilities to provide service to the area within a reasonable time” after service is requested, and that the District has “the legal right to provide service.”¹³ The District need not show “pipes in the ground” at the specific tract, as long as it has some “nearby infrastructure.”¹⁴

Under *Green Valley*, a federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or curtailment of its service area by the Commissioners. Marilee’s ability to provide service to Petitioner satisfies the “physical abilities” test. With the scheduled closing of Marilee’s USDA loan approaching, equity favors granting Marilee protection from the limiting or curtailment of its service area.

D. The ALJ Erred by Omitting Relevant Facts and Law from the Proposed Order.

The Proposed Order omits significant procedural events that occurred during this proceeding from its Findings of Fact. In order to have a clear record on appeal, the District

¹⁰ 7 U.S.C § 1926(b).

¹¹ Marilee Special Utility District’s Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, Exhibit A, Affidavit of Donna Loiselle, at ¶¶ 15-16 (Oct. 7, 2021).

¹² 969 F.3d 460 (5th Cir. 2020) (en banc).

¹³ *Id.* at 477.

¹⁴ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

respectfully requests that the Proposed Order be revised to correct Findings of Fact 7, 8, and 16; and to include new Findings of Fact and Conclusions of Law substantially similar to the following:

- **Proposed FOF 6A.** In Order No. 3, entered on June 11, 2021, the petition was ordered administratively incomplete based on Commission Staff's recommendation, and petitioner was given a deadline of July 7, 2021, to cure deficiencies.
- **Corrected FOF 7.** On July 6, 2021, the petitioner filed its first amended petition, which includes an affidavit, dated July 6, 2021, of Lawrence Corson, co-manager of the petitioner; maps; a special warranty deed with vendor's lien dated March 24, 2021; and digital mapping data.
- **Proposed FOF 7A.** In Order No. 6, entered on July 20, 2021, the ALJ required CCN Holder to file additional maps.
- **Proposed FOF 7B.** In Order No. 8, entered on August 31, 2021, the ALJ ordered Commission Staff to file a supplemental recommendation on the administrative completeness of the petition by September 13, 2021.
- **Corrected FOF 8.** In Order No. 10 filed on September 15, 2021, the administrative law judge (ALJ) found the first amended petition administratively complete.
- **Proposed FOF 11A.** On May 24, 2021, the CCN holder filed a Motion to Intervene.
- **Corrected FOF 16.** On October 7, 2021, the CCN holder filed a response to the first amended petition, which includes an affidavit, dated October 6, 2021, of Ms. Loiselle; duplicates of documents provided by the CCN holder on June 16, 2021; a resolution dated February 11, 2021 by the CCN holder's board of directors authorizing Ms. Loiselle to prepare and submit application documents to secure funding for construction of a water tank; an April 13, 2021 commitment letter committing to provide the CCN holder a loan through the United States Department of Agriculture (USDA) Water and Environmental Guaranteed Loan Program; a USDA letter dated July 19, 2021 approving the loan; an affidavit, dated October 6, 2021, of Jacob Dupuis, the CCN holder's engineer of record; and maps identifying the tract of land and the CCN holders' waterlines, meters, and wells in relationship thereto.
- **Proposed FOF 16A.** On October 15, 2021, petitioner filed an objection to CCN holder's application for federal debt and request for order of withdrawal.
- **Proposed FOF 16B.** On October 21, 2021, the CCN holder filed a response to petitioner's objection and request for order of withdrawal.

- **Proposed FOF 16C.** In Order No. 11, entered on October 25, 2021, the ALJ denied petitioner's request for an order requiring CCN holder to withdraw its application for federal debt.
- **Proposed FOF 17A.** In Order No. 4, entered on June 23, 2021, the ALJ ordered the petitioner to respond to the CCN holder's objections to the petition by June 30, 2021, and ordered Commission Staff to file a reply to CCN Holder's motion to dismiss and petitioner's response.

III.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Marilee respectfully requests that its Exceptions and Corrections to the Proposed Order be granted, that the Commission deny the Petition and dismiss this proceeding. Marilee also respectfully requests all other relief in law and equity to which it may be entitled.

Respectfully submitted,

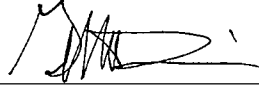


John J. Carlton
State Bar No. 03817600
Grayson E. McDaniel
State Bar No. 24078966
The Carlton Law Firm P.L.L.C.
4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
Fax (512) 900-2855
john@carltonlawaustin.com
grayson@carltonlawaustin.com

ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this 15th day of November 2021.



Grayson E. McDaniel