



Filing Receipt

Received - 2022-03-01 01:13:49 PM
Control Number - 52434
ItemNumber - 25

DOCKET NO. 52434

PETITION OF CELINA PARTNERS,	§	PUBLIC UTILITY COMMISSION
LTD. TO AMEND MARILEE SPECIAL	§	
UTILITY DISTRICT'S CERTIFICATE	§	
OF CONVENIENCE AND NECESSITY	§	
IN COLLIN COUNTY BY EXPEDITED	§	OF TEXAS
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") Gregory R. Siemankowski on February 15, 2022, proposing that the Public Utility Commission of Texas (the "Commission") amend the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release 295.854 acres (the "Tract of Land") in Collin County, Texas.¹ The Proposed Order requires the parties of this proceeding to file corrections or exceptions by March 1, 2022. 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 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 Tract of Land from the District and to prevent the District from being materially prejudiced.

In particular, the Proposed Order omits all of the District's affirmative evidence that affiant for Petitioner, Jody O'Donnell, has an active meter with the District and the District provides him

¹ Proposed Order and Memorandum at Finding of Fact 14 (Feb. 15, 2022).

with water service to LMI Tree Farm, which is located on the Tract of Land²—this omission of material facts must be corrected.

Accordingly, the District respectfully requests that the Commission grant its Exceptions and Corrections to the Proposed Order, that the Commission deny the Petition, and dismiss this proceeding.

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. 5, 6, 13, 14, 23, 24, 25, 26, 27, 28, 29, 30, 31, and COL Nos. 7, 12, 13, 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 the Petition, Petitioner set forth only an affidavit that claimed, without support, that the Tract of Land 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 Tract of Land.

The proper analysis of a Petitioner’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.³ 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

² Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at Ex. A (Affidavit of Donna Loiselle) ¶¶ 2-12 (Nov. 29, 2021).

³ 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)).

not from a retail water utility service provider.”⁴ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.⁵

Here, Petitioner has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541 and 16 TAC § 24.245(h). The Proposed Order improperly recommends decertifying Tract of Land that the District is currently 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 Tract of Land —Petitioner has “carved out” the Tract of Land, which is 295.854 acres, from the 298.075 acres of property upon which the Tract of Land is situated.⁶ The ALJ’s approval of Petitioner’s “carving out” of the Tract of Land from the existing meters, waterlines, and facilities, and acceptance of Petitioners’ insufficient affidavit eviscerates Petitioner’s burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land 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 Tract of Land 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. 23, 24, 25, 26, 27, 28, 29, 30, 31 and COL Nos. 12 and 13 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

⁴ *Id.* at **6-7.

⁵ *Id.* at **9-10 (citing the Commission’s Finding of Fact No. 24).

⁶ *See* Proposed Order and Memorandum at Findings of Fact 13, 14.

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:

- 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.*,⁷ 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.

⁷ 449 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)).

The Proposed Order fails to explain why it determined that the Tract of Land is not receiving service as interpreted in *Crystal Clear* when, as the Proposed Order states, the following facts are present:

- “The CCN holder owns and operates a six-inch waterline *running through the eastern-most portion of the tract* along County Road 132, but the waterline does not provide water service to the tract of land.”⁸

The fact is that the facilities mentioned in the Proposed Order do serve Petitioner’s Tract of Land. The fact that the Tract of Land is receiving service from the District should be evident from the fact that it is a tree farm, which requires water service. Additionally, as explained in the District’s verified response, affidavits, and exhibits, contrary to Mr. O’Donnell’s affidavit, he is a District customer.⁹ Mr. O’Donnell initiated water service to the Tract of Land by applying for the Meter in 2001 and paying the fees for District membership and to have a water line extended and the Meter placed.¹⁰ The District’s records for the Meter reflect that it has been supplying water service continually since Mr. O’Donnell took the necessary steps to have the District put the Meter in service.¹¹ The most recent Meter reading date is August 23, 2021.¹² The District does not have any records indicating a request for termination of water service or of the Mr. O’Donnell’s Membership.¹³

In addition to the active District meter providing continual water service to the Tract of Land, which is a tree farm, the District has ample waterlines and facilities near the Tract of Land to provide it with water service, all of which were detailed in the District’s verified response. These waterlines and facilities include, but are not limited to, the following:

⁸ Proposed Order at Finding of Fact 27 (emphasis added).

⁹ Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at ¶¶ 21-22 (Nov. 29, 2021).

¹⁰ *Id.* at nn.31-32 and accompanying text.

¹¹ *Id.*

¹² *Id.* at n.33 and accompanying text.

¹³ *Id.*

- Well No. 7, south of the Tract of Land;
- A 10" well line, south of the Tract of Land;
- An 8" waterline, east of the Tract of Land;
- A 6" waterline, north of the Tract of Land;
- A 2" waterline on the northwest corner of the Tract of Land; and
- A 1 ½" waterline on the south side of the Tract of Land.¹⁴

Because the District has dedicated facilities, water lines, and meters dedicated to the Tract of Land and the tract of land on which the Tract of Land is situated, Petitioner has failed to show that the Tract of Land is not receiving "service" under TRWC § 13.2541, 16 TAC § 16.245(h), and *Crystal Clear*. The Proposed Order's recommended conclusion that the Tract of Land is not receiving "service" is error and must be corrected. Also, the Proposed Order's omission of the material facts regarding service provided by the District—specifically, the omission of the fact that Petitioner's manager and affiant has meters in his name with the District—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

¹⁴ *Id.* at n.34 and accompanying text.

as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.¹⁵

On July 12, 2021, the District received approval from the United States Department of Agriculture (“USDA”) for a Water and Wastewater Guaranteed loan of \$1,553,000.¹⁶ The District has not closed on the USDA loan but is working diligently to do so.

A federal law, such as 7 U.S.C. § 1926(b), is supreme and binding authority over a state law, such as TWC § 13.02541.¹⁷ 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, in the event that the Commission enters an order curtailing or limiting the CCN holder’s service area in violation of 7 U.S.C. § 1926(b).¹⁸

To be eligible for protection under § 1926(b), the District 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*.¹⁹ 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.”²⁰ The District need not show “pipes in the ground” at the

¹⁵ 7 U.S.C § 1926(b).

¹⁶ Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at Exhibit A (Affidavit of Donna Loiselle) at ¶¶ 13-15 and accompanying exhibits (Nov. 29, 2021).

¹⁷ See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (“[F]ederal law is supreme in case of a conflict with state law.”); see also *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 492 (5th Cir. 2020) (en banc) (Jones, J., concurring) (noting, “the final PUC decision” in a case involving streamlined expedited release, “is reviewable de novo in state courts, which would have to enforce Section 1926(b) pursuant to the Supremacy Clause.”).

¹⁸ See, e.g., *Green Valley*, 969 F.3d at 475 (“Because . . . Green Valley has satisfied *Young*’s requirements, its suit for injunctive relief against the PUC Officials may go forward.”) (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

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

²⁰ *Id.* at 477.

specific tract, as long as it has some “nearby infrastructure.”²¹ The District’s ability to provide service to the Property satisfies the “physical abilities” test.²²

In addition to satisfying the “physical abilities” test, an entity must show federal indebtedness to qualify for protection under 7 U.S.C. § 1926(b). The District has been consolidated with Mustang Special Utility District (“Mustang SUD”), pursuant to the provisions of TWC Chapter 65, Subchapter H.²³ Mustang SUD is indebted to the USDA, Rural Utilities Service, which has twice purchased bonds from Mustang SUD: in 2016, in the amount of \$2,442,000, and 2018, in the amount of \$1,000,000 (collectively, the “Bonds”).²⁴ The District assumed Mustang SUD’s federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.²⁵ In addition to its existing federal indebtedness, the District is also working diligently to close on a USDA loan that was approved in July 2021.²⁶

As the District is federally indebted and satisfies the “physical abilities” test, curtailing or limiting the District’s service area with regard to the Tract of Land is prohibited by 7 U.S.C. § 1926(b). The Proposed Order must be revised and corrected to propose the denial of the Petition

²¹ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

²² *See supra* notes 10-15 & accompanying text (describing the District’s meters and waterlines on and near the Property).

²³ *See* TWC § 65.723 (“Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter.”); *see also* *Petition of Central Frisco, Ltd. to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 52534, Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at Exhibit A (Affidavit of Donna Loiselle) ¶¶ 7-8 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Dec. 29, 2021).

²⁴ *Petition of Central Frisco, Ltd. to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 52534, Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5. (Note that there is a typographical error in the amount of the 2016 bonds—the correct amount is \$2,442,000, not \$14,442,000).

²⁵ *See* TWC § 65.726

²⁶ Marilee Special Utility District’s Verified Response to Petition for Expedited Release from Water CCN No. 10150, at Exhibit A (Affidavit of Donna Loiselle) at ¶¶ 13-15 and accompanying exhibits.

on the grounds that the 7 U.S.C. § 1926(b) prohibits the Commission from curtailing or limiting the District's 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 respectfully requests that the Proposed Order be revised to correct Finding of Fact 12; and to include new Findings of Fact and Conclusions of Law substantially similar to the following:

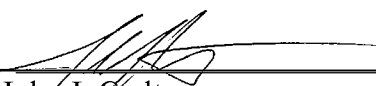
- **Proposed FOF 6A.** On September 14, September 29, and October 15, 2021, Commission Staff moved for extensions of time to file recommendation on the administrative completeness of the petition and sufficiency of notice, which were granted. In Order No. 6, issued on October 18, 2021, the ALJ extended Commission Staff's deadline to file a recommendation on the administrative completeness of the petition and sufficiency of notice to November 8, 2021.
- **Proposed FOF 7A.** The 60-day period for administrative approval of streamlined expedited release expired on January 7, 2022.
- **Corrected FOF 12.** The CCN holder's response included an affidavit, dated November 24, 2021, of Donna Loiselle, the CCN holder's general manager, with attachments including a membership application of Jody M. O'Donnell, dated August 20, 2001, with Gunter Rural Water Service Corporation; a Gunter Rural Water Service Corporation Membership Certificate for Jody M. O'Donnell's ownership of Meter No. 1344, dated January 18, 2002; the CCN Holder's account details for Meter No. 1344 in the name of LMI Trees, indicating active service to the meter as of January 2022; 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; and a supporting affidavit, dated November 24, 2021, of Jacob Dupuis, the CCN holder's engineer, attaching maps identifying the tract of land and the CCN holder's waterlines, meters, and wells in relationship thereto, and an aerial photograph of the location of Meter No. 1344 in the name of LMI Tree Farm.
- **Proposed COL 4A.** Under 16 TAC § 24.245(h)(7), "[t]he commission will issue a decision on a petition filed under this subsection no later than 60 calendar days after the presiding officer by order determines that the petition is administratively complete."

II.

PRAYER

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

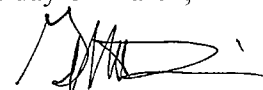
Respectfully submitted,

By: 
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 1st day of March, 2022.


Grayson E. McDaniel