



Control Number: 52442



Item Number: 40



PUC DOCKET NO. 52442

PETITION OF MERITAGE HOMES OF TEXAS, LLC TO AMEND NORTH COLLIN SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	§ § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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NORTH COLLIN SPECIAL UTILITY DISTRICT'S RESPONSE, OBJECTIONS, AND CORRECTIONS TO PROPOSED ORDER

North Collin Special Utility District, a political subdivision of the State of Texas (North Collin) files this Response, Objections, and Corrections to the Proposed Order filed on February 25, 2022 (the Proposed Order). The Memorandum attached to the Proposed Order requires any party to file corrections or exceptions to the Proposed Order on or before March 11, 2022; thus, this Response is timely filed. In support thereof, North Collin respectfully shows as follows:

A. The Meritage Property Cannot be Released Because the Property Does Not Qualify for Release.

North Collin proved that the Meritage Property cannot be released from its territory, and its Certificate of Convenience and Necessity (CCN) No. 11035 cannot be amended under Texas Water Code § 13.2541 because the Release Property is receiving water "service" as defined by state law. The Order states incorrect facts and law regarding North Collin's "service" to the Release Property. The Order disregards that North Collin's facilities and waterlines are serving the Release Property and are committed or dedicated to providing water service. For these reasons, the Commission must amend its Proposed Order to deny release of the Meritage Property.

B. The Commission's Proposed Order Would Result in an Improper and Illegal Order Granting Release.

The Commission's findings of fact and conclusions of law violate Texas Government Code § 2001.174(2), which states that a court:

(2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (A) in violation of a constitutional or statutory provision;
- (B) in excess of the agency's statutory authority;
- (C) made through unlawful procedure;

- (D) affected by other error of law;
- (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
- (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Tex. Gov't Code. Section 2001.174(a)(A)-(F). The proposed findings of fact and conclusions of law violate each category in sections (A) through (F). The Commission must revise its Proposed Order to deny release of the Meritage Property.

C. North Collin's Recommended Changes to the Proposed Findings of Fact Must Be Adopted in the Commission's Final Order.

The Proposed Order includes several incorrect Findings of Fact regarding North Collin's water service to the Release Property. Read together, they purport to support the conclusion that "[t]he tract of land is not receiving water service under TWC §§ 13.2541(b) and 16 TAC § 24.245(h)(2). North Collin provided sufficient evidence that it has committed and dedicated facilities and lines, has facilities and lines, and has performed many acts in furtherance of providing water service to the Release Property. The Proposed Order ignores or misconstrues the evidence. The Findings of Fact in the Commission's Proposed Order should be revised as follows:

Finding of Fact # 25 The tract of land is ~~not~~ receiving ~~actual~~ water service from the CCN holder.

Finding of Fact #28 ~~Altogether~~ North Collin is providing ~~provided~~ water service to the tract of land since approximately 15 years ago.

Finding of Fact #29 The CCN holder has a two-inch waterline running onto the tract of land and terminating at an inactive meter; ~~but that line does not provide water service to the tract of land.~~

Finding of Fact #30 The CCN holder has ~~not~~ committed or dedicated ~~any~~ facilities or lines to the tract of land for water service.

Finding of Fact #31 The CCN holder has ~~no~~ facilities or lines that provide water service to the tract of land.

Finding of Fact #32 The CCN holder has ~~not~~ performed ~~any~~ acts for or supplied ~~anything~~ water service to the tract of land.

North Collin's changes are required based on evidence in the record. *See* Exhibits attached and referenced in North Collin's Response to Petition (Item 6 dated 9-13-2021). Only property "that is not receiving water service" may be released under Texas Water Code § 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. *See Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140–41 (Tex.App.—Austin 2014, pet. denied). An analysis of the facts begins with the definitions of "service" and "facilities" in the Texas Water Code. "Service" is defined as:

[A]ny 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 Tex. Admin. Code § 24.3(33) (same definition). The term "facilities" is defined as:

[T]he 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).

The CCN holder has adequate facilities to provide service to the Release Property. Under the quoted statutory definitions, a property can "receive water service" even before development and delivery of water to active water taps. *See Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140–41 (Tex.App.—Austin 2014, pet. denied). In the *Crystal Clear* decision, the court stated that facilities or lines "used" or "committed" to providing such service might cause a property to "receive service" under the statutory and regulatory definition. *Id.* North Collin has constructed infrastructure and developed water supply "committed" to the Meritage Property and the property is "receiving service."

The record supports a conclusion of law that the Release Property is receiving water service. North Collin explained in detail the numerous ways that the Release Property is “receiving” water service¹:

- North Collin “installed and provided water to the Property through a 5/8” x 3/4” meter *and 2-inch (2”) waterline on the Property*, extended from a 4-inch (4”) waterline and connected to its 8-inch (8”) waterline which transmits water from its facilities at two locations: (1) at the corner of FM 1827 and FM 75, facilities consisting of a pump stations, 138 gallon per minute (GPM) well, 150,000 gallon ground storage tank, and 10,000 gallon pressure tank, and (2) through various 2”, 4”, 6”, 8”, and 10” waterlines from Well #2 located at 200 Crystal Creek Lane, McKinney, Texas, located northeast of the Property.”
- North Collin is “in the process of constructing a proposed 500,000-gallon elevated tank located southwest of the Property and installing proposed 12-inch (12”) waterlines that will provide additional capacity and water service.”
- The planned construction of the 500,000 gallon-elevated water tank and “the 12” waterline along CR 409” will directly provide service to the Property.

North Collin has not received a request for water service from Petitioner. If Meritage requests service from North Collin, facilities are in place to deliver water to the Release Property within a reasonable amount of time.

D. North Collin’s Recommended Changes to the Proposed Order’s Conclusions of Law Must be Adopted in the Commission’s Final Order.

Since the proposed Findings of Fact are erroneous, the Commission’s proposed Conclusions of Law that rely on those factual errors should be changed as follows:

Conclusion of Law #1 The Commission does not have ~~has~~ authority over the petition because this petition does not qualify for streamlined expedited release under TWC §§ 13.254 and 13.2541.

See North Collin’s Response to Petition, p. 3.

Conclusion of Law #4 Petitions for streamlined expedited release filed under TWC §§ 13.254 and 13.2541 and 16 TAC 24.245(h) ~~are not~~ can be contested cases and North Collin stated that this is a contested case in its Response and Objection to the

¹North Collin’s Response and Objection to the Petition by Meritage Homes of Texas, LLC for Streamlined Expedited Release and Motion to Dismiss, p. 4–7 (North Collin Response to Petition, Item 6 dated 9-13-2021).

Petition by Meritage Homes of Texas, LLC for Streamlined Expedited Release and Motion to Dismiss.

The text of Texas Water Code §§ 13.254 and 13.2541 does not state that petitions for streamlined expedited release are uncontested cases. Nor does the text of 16 Tex. Admin. Code 24.245(h) state that these types of proceedings are uncontested. North Collin affirmatively acknowledged in the record that this is a contested proceeding, and North Collin is entitled to have that fact accurately reflected in the Commission's final order.

[DELETE ENTIRELY] Conclusion of Law #8 The time that the petition is filed is the only relevant time period to consider when evaluating whether a tract of land is receiving water service under TWC § 13.2541(b). Whether a tract of land might have previously received water service is irrelevant.

There is nothing in Texas Water Code § 13.2541(b), or any other Commission rules, that supports the Commission's interpretation about timing of receiving water service as stated in this conclusion of law. Texas Water Code § 13.2541 only states that the property may be released if it is not receiving water service. North Collin submitted sufficient evidence into the record to show that the Release Property has been receiving water service for many years and is "receiving water service" consistent with the opinion in *Crystal Clear Water Supply Corp.*, 449 S.W.3d at 140.

Conclusion of Law #12 The tract of land 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).

See North Collin's Response to Petition, p. 4–7 (describing the water lines and meters on the Release Property, the facilities committed to providing water service to the Release Property, and acts performed to dedicate facilities and lines to the Release Property).

Conclusion of Law #13 The petitioner is not entitled under TWC § 13.2541(b) to the release of the tract of land from the CCN holder's certificated service area because the Release Property does not qualify for expedited streamlined release under TWC § 13.2541(b).

The Release Property is receiving water service, so it does not qualify for streamlined expedited release under Texas Water Code § 13.2541(b). See North Collin's Response to Petition, p. 4–7.

[DELETE ENTIRELY] Conclusion of Law #14 After the date of this Order, the CCN holder has no obligation under TWC §§ 13.254(h) to provide retail water service to the petitioner's tract of land.

North Collin is entitled and obligated to provide water service to the properties within its CCN as part of its federal rights under 7 U.S.C. § 1926(b). North Collin is not asking the Commission to

adjudicate its federal rights, but the Commission's unlawful Proposed Order that violates the U.S. Constitution and North Collin's § 1926(b) rights does not absolve North Collin of its federally protected rights and obligations. North Collin requested that the Commission abate this proceeding until its federal rights were fully adjudicated and the Commission denied that request.

[DELETE ENTIRELY] Conclusion of Law #16 The Commission processed the petition in accordance with the TWC and Commission rules.

Conclusion of Law #16 should be deleted in its entirety because the conclusion is contrary to Texas Water Code § 13.2541(b), which only allows expedited streamlined release for property that is not receiving water service.

The Conclusions of Law that reference the Property receiving water service are misleading. North Collin does not have to provide actual present delivery of water to the Property in order for the Petition to be denied. The *Crystal Clear* Court held that "it is important to consider whether the facilities and lines are 'committed' to the tract seeking expedited release or 'used' to provide water to that tract." *Crystal Clear*, 449 S.W.3d at 140. Under this standard, North Collin is providing water service to the Property through the existing waterline, meter, and nearby facilities dedicated to service the Property.

E. Conclusion.

North Collin has established that it is providing water service to the Property under Texas Water Code § 13.002(21), 13.2541 and 16 Tex. Admin. Code § 24.245(h) and is consistent with the *Crystal Clear* decision. North Collin has provided ample evidence that the Property is receiving water "service" by existing waterlines and meters on the Property and planned facilities that will also service the Property.

WHEREFORE, because North Collin has provided the evidence to correct the Proposed Order's Findings of Fact and Conclusions of Law, notwithstanding protection under 7 U.S.C. § 1926(b) that the Commission chooses to disregard, the Property does not qualify to be released from North Collin's CCN. North Collin respectfully requests that the Commission revise the Proposed Order as provided herein and deny the Petition and dismiss this proceeding.

Respectfully submitted,

ALLENSWORTH & PORTER, LLP

303 Colorado Street, Suite 2800

Austin, Texas 78701

(512) 708-1250 (Phone)

(512) 708-0519 (Fax)

/s/ Karly A. Houchin

By: _____

Will W. Allensworth

State Bar No. 24073843

Wallensworth@allensworthlaw.com

Karly A. Houchin

State Bar No. 24096601

khouchin@allensworthlaw.com

and

Maria Huynh

State Bar No. 24086968

James W. Wilson

State Bar No. 00791944

JAMES W. WILSON & ASSOCIATES, PLLC

103 W. Main Street

Allen, Texas 75013

Tel: (972) 727-9904

Fax: (972) 755-0904

mhuynh@jww-law.com

jwilson@jww-law.com

**ATTORNEYS FOR NORTH COLLINS
SPECIAL UTILITY DISTRICT**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following parties of record on March 11, 2022, via e-mail in accordance with the Commission's Order.²

via e-mail: forrest.smith@puc.texas.gov

Forrest Smith
Attorney-Legal Division
Public Utility Commission
1701 N. Congress
P.O. Box 13326
Austin, Texas 78711-3326

Attorney for the Commission

via e-mail: seidman@winstead.com

Scott W. Eidman
Winstead PC
2728 N. Harwood Street, Suite 500
Dallas, Texas 75201

Attorney for Petitioner

/s/ Karly A. Houchin

Karly A. Houchin

² *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Second Order Suspending Rules (Jul. 16, 2020).