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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**

MERITAGE HOMES OF TEXAS, LLC'S REPLY TO NORTH COLLIN SPECIAL UTILITY DISTRICT'S RESPONSE AND OBJECTION TO FIRST AMENDED PETITION FOR STREAMLINED EXPEDITED RELEASE AND MOTION TO DISMISS

COMES NOW, Meritage Homes of Texas, LLC ("Meritage") and files this Reply to North Collin Special Utility District's Response and Objection to First Amended Petition and Motion to Dismiss ("NCSUD's Response to the Amended Petition") filed with the Public Utility Commission (the "Commission").[1] Order No. 17 Establishing Deadlines issued on September 26, 2022, provided a deadline of October 10, 2022 for Meritage to amend its petition.[2] Meritage filed its First Amended Petition by Meritage Homes of Texas, LLC, for Streamlined Expedited Release on September 29, 2022 ("Amended Petition"). NCSUD's Response to the Amended Petition was filed on October 6, 2022. Therefore, this Reply is timely filed.

I. BACKGROUND

On June 30, 2021, Meritage filed a petition for streamlined expedited release (the "Petition"), seeking to decertify approximately 273.5 acres of real property in Collin County (the "Property") from NCSUD's certificate of convenience and necessity ("CCN") No. 11035 and the City of Melissa's water CCN No. 11482, in the Public Utility Commission of Texas (the "Commission") Docket No. 52293. The Petition included an affidavit from David Aughinbaugh, the Vice President of Land for Meritage, attesting, among other things, that Meritage never requested water service from NCSUD, the tract is not receiving water service from NCSUD,

[1] North Collin Special Utility District's Response and Objection to the First Amended Petition by Meritage Homes of Texas, LLC for Streamlined Expedited Release and Motion to Dismiss (Oct. 6, 2022).
[2] Order No. 17 Establishing Deadlines, at 1 (Sept. 26, 2022).

Meritage has never paid NCSUD anything to initiate or maintain water service, and there are no billing records or other documents evidencing an existing account between NCSUD and Meritage for the Property.[3]

On August 3, 2021, NCSUD filed a Motion to Intervene in Docket No. 52293. On August 13, 2021, Meritage filed a Motion to Sever, requesting the Petition for release from NCSUD's CCN be severed from Docket No. 52293. On August 24, 2021, Order No. 4 issued in Docket No. 52293 and Order No. 1 issued in Docket No. 52442 granted the severance of the dockets.

On September 6, 2021, Commission Staff filed its Recommendation on Administrative Completeness and Notice. On September 13, 2021, NCSUD filed its Response and Objection to the Petition and Motion to Dismiss ("Response"). On September 29, 2021, NCSUD filed its Supplemental Response and Objection to the Petition and Motion to Dismiss ("Supplemental Response").

On March 28, 2022, Meritage filed Supplemental Mapping Items. On May 13, 2022, the Commission Staff filed its Recommendation on Administrative Completeness and Notice recommending that the supplemented petition be found administratively complete and requested the entry of an order consistent with its recommendation. On June 6, 2022, NCSUD filed its Response and Objection to the Administratively Complete Petition and Motion to Dismiss. On June 22, 2022, the Administrative Law Judge ("ALJ") denied NCSUD's Motion to Dismiss.

At the open meeting held on August 4, 2022, the Commission determined that a 2" waterline and meter box were located within the application area and ordered that the petition be remanded to provide Meritage an opportunity to proceed with an amended petition to exclude the area in which the 2" waterline and empty meter box are located. On September 29, 2022, Meritage filed the Amended Petition for release of 272.23 acres ("Amended Property").

[3] Petition at Exhibit A, Affidavit of David Aughinbaugh (Aug. 29, 2021).

II. ARGUMENTS AND AUTHORITIES

A. The Amended Property Does Not Receive Service from NCSUD Pursuant to Case Law from the Johnson County SUD Case and Mountain Peak SUD Case

The Amended Property does not include the 2" waterline and empty meter box shown in NCSUD's Response to the Amended Petition. The pictures submitted with NCSUD's Response to the Amended Petition show that NCSUD without obtaining permission from, or providing any notice to Meritage, entered the Property and started digging with a backhoe in order to locate the 2" waterline and empty meter box after the August 4, 2022, Commission meeting. The pictures illustrate the amount of digging and destruction to Meritage's property that was caused by NCSUD in order for NCSUD to locate this 2" waterline that is attached to an empty meter box. The 2" waterline and empty meter box are *not within* the boundaries of the Amended Property and are located within an area that is *dual certified* to NCSUD and the City of Princeton.

The facts of this case are almost identical to *Johnson County Special Utility District v. Public Utility Commission of Texas*, No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App. May 11, 2018) and *Mountain Peak Special Util. Dist. v. Public Utility Commission of Texas*, No. 03-16-00796-CV, 2017 WL 5078034 (Tex. App. Nov. 2. 2017). The cases referenced above are included with this filing as Exhibit 1 and Exhibit 2. In the *Johnson County Special Utility District (JCS UD)* case, a previous owner of the property requested that JCSUD provide service to the property in 1970.[4] The service to the property in the JCSUD case remained active for 35 years until the meter was locked and the account designated 'inactive' in 2005.[5] In 2006, HMP Ranch, Ltd. acquires the property and does not file its application for streamlined expedited release until August of 2015.

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[4] *Johnson Cty. Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-17-00160-CV, 2018 WL 2170259, at *4 (Tex. App. May 11, 2018), review denied (Aug. 30, 2019).
[5] *Id.*

In 2015, HMP Ranch, Ltd. files its application for streamlined expedited release and JCSUD files a motion to intervene. JCSUD alleged that the HMP Ranch, Ltd. property was receiving service and argued that it had a meter box and provided a map that shows water facilities on and near the property. JCSUD further argued that it had facilities in connection with the property and that when a utility has facilities in connection with certain property, it provides service to the property. Representatives of HMP Ranch, Ltd. were unable to locate any of the facilities that JCSUD was referring to in its filings. JCSUD sent representatives out on the HMP Ranch, Ltd. property without permission and it was only with metal detectors that the JCSUD representatives were able to locate the old meter boxes.[6] The Commission determined that the HMP Ranch, Ltd property was *not receiving service and approved the application* for streamlined expedited release. JCSUD filed an appeal and the *courts upheld the Commission's decision* in determining that the property was not receiving service and should be released from JCSUD's CCN.[7]

In the *Mountain Peak* case, the City of Midlothian filed a decertification petition to remove 104 acres from Mountain Peak's CCN. Mountain Peak filed a motion to intervene and asserted that the property was receiving service from Mountain Peak. The arguments presented by Mountain Peak for the property receiving service were that a 2" waterline running 200 to 300 yards from a connection to a 12-inch water main owned and maintained by Mountain Peak and terminating inside a meter bow with an angle-stop valve on the 104 acre property next to a lift station.[8] The *City of Midlothian amended its petition* to seek decertification of only 97.3 acres of the 104 acres described in the original application. The amended petition excluded 6.7 acres of property on which the lift station was located.

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[6] *Id.* at 6
[7] *Id.* at 7-8
[8] *Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas,* No. 03-16-00796-CV, 2017 WL 5078034, at *4 (Tex. App. – Austin Nov. 2, 2017), review denied (Mar 1, 2019).

The Commission concluded that the City of Midlothian had satisfied the criteria for expedited release. Mountain Peak filed a suit for judicial review in Travis County district court. The trial court rendered judgement *affirming* the Commission's order and approving the expedited release. On appeal, the court looked at the question of did the Commission err by permitting the City of Midlothian to amend its petition to seek expedited release of the Park Property and exclude the 6.7 acres?[9] The appellate court concluded that the Commission permitting the City of Midlothian to amend its petition to remove 6.7 acres is not a basis for reversing the Commission order. The court explained that it has previously concluded that section 13.254(a-5) does not have an "all or nothing" requirement the prevents a landowner from choosing to seek expedited release of some, but not all, of its property.[10]

NCSUD went on Meritage's Property without consulting Meritage representatives. It took multiple NCSUD professionals with heavy equipment moving dirt and damaging Meritage's property in order to locate the 2" waterline and empty meter box that are no longer included in the Amended Petition. NCSUD relies on the very same arguments from the JCSUD and Mountain Peak cases and the Commission determined that JCSUD and Mountain Peak were *not providing service and had not committed facilities* to the tracts. The Amended Petition has removed the 2" waterline and empty meter box that were in question just like Midlothian removed the 6.7 acres in question for the lift station that was carved out in the *Mountain Peak* case.

This docket has seen similar arguments presented by NCSUD. However, in all of the filings since June 30, 2021, NCSUD has *failed to distinguish* how NCSUD's arguments are different in this docket from the facts presented in *JCSUD* case and *Mountain Peak* case. NCSUD has failed to show how valid case precedent that has *not been overturned* does not apply

[9] *Id.* at *8
[10] *Id.*

to NCSUD. The only thing NCSUD has conclusively shown is that the facts of this docket are remarkably similar to the *JCSUD* case and *Mountain Peak* case and for those reasons this Amended Petition should be approved.

B. NCSUD Has Not Committed Facilities For The Amended Property

Pursuant to Texas Water Code (TWC) § 13.2541, the tract of land sought to be released from a CCN must not be receiving water or sewer service. *Service* is defined as "any act performed, anything furnished or supplied, and any facilities or lines committed or used by the retail public utility in the performance of its duties..."[11] In *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, the court held:

> The **mere existence of waterlines or facilities on or near a tract would not necessarily mean that a tract was 'receiving water service.'** Rather...such a determination is essentially a fact-based inquiry requiring the Commission to consider whether the retail public utility has facilities or lines committed to providing water *to the particular tract* or has performed acts or supplied anything *to the particular tract* in furtherance of its obligation to provide water to that tract pursuant to its CCN.[12]

The court in *Crystal Clear* further states that a tract of land would not be receiving service "simply because the retail public utility has performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification."[13]

In the *Petition by Tejas Creek, Ltd.*, the Commission decided that "the requirement that facilities be *committed and dedicated* to serve a tract of land is *not satisfied just by facilities that are available and capable* of providing water or sewer service."[14] Further, in the *Petition of John Kimbro to Amend Monarch Utilities*, the Commission determined that the tract was *not receiving water service* where the CCN holder had lines committed to the property, including a

[11] TWC § 13.002(21); see also 16 TAC § 24.3(33).
[12] 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).
[13] *Id.*
[14] *See Petition of Tejas Creek, Ltd. to Amend Aqua Texas, Inc.'s Certificates of Convenience and Necessity in Montgomery County by Expedited Release*, Docket No. 48824, Final Order at COL 7, 8 (Feb. 28, 2019).

line that ran alongside the property and another line located 400 feet from the property, Monarch included in its planning an assumption that the property would be developed, and had incurred debt in order to be able to provide service within its certificated area.[15]

The Commission and courts have consistently required more than a utility's *nearby* pipes and capacity to demonstrate receipt of *service* by a property. NCSUD's assertion that it has "facilities located *very close* to the Property" as well as "storage facilities *nearby*" does not rise to the level that the Property is "receiving" service from NCSUD or that NCSUD has lines and facilities "committed" to the Property. The claims from NCSUD that it has facilities that *could* provide water service to the Property or that it has facilities that are *available* to provide water service are not proof that the Property *is receiving* water service from NCSUD.

NCSUD avers that the Property is receiving service from NCSUD pursuant to a past account that was established by Altoga Water Supply Corporation ("Altoga WSC"). NCSUD offers an Altoga WSC Service Agreement from 1965 and a handwritten note from 1999 as evidence of service to the Property.[16] A fifty-six-year-old agreement with a different entity and an unverifiable barely legible handwritten note does not rise to the level of *committing* facilities and providing service. However, NCSUD seemed to gloss over the fact that the current owner of the Amended Property has *never* requested service from NCSUD or paid any money to NCSUD regarding water service for the Amended Property.

The establishment of a past account for the Property or a capacity inquiry by a prior owner of the Property *does not* mean the Property is receiving service. These very questions have been addressed by the Commission and upheld by the Austin Court of Appeals. The Commission and the Austin Court of Appeals have determined that the *only* relevant time for

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[15] *Petition of John Kimbro to Amend Monarch Utilities 1, LP's Certificate of Convenience and Necessity in Hays County by Expedited Release*, Docket No. 49360.

[16] *See* NCSUD's Supplemental Response at Attachment 2 and Attachment 3.

consideration is the time that a petition for expedited release is filed and that "[w]hether a tract might have previously received water or sewer service is irrelevant."[17]

In *HMP Ranch Ltd.*, the Commission determined although a feasibility study may have been conducted to determine whether the retail provider could serve the proposed development, the landowner did not request service or consent to any activities conducted by the retail provider on the petition property and therefore the property was not receiving service.[18] In this case, the *current owner* did not request a feasibility study and has *never* requested or consented to any activities conducted by NCSUD.

C. Docket Nos. 50405, 52534 and 51352 Are Distinguishable from This Docket

NCSUD relies on Docket Nos. 50405, 52534 and 51352 as authority for the Commission to deny the Amended Petition. However, Docket Nos. 50405 and 52534 are distinguishable from this docket. Both dockets that NCSUD relies on *had active water meters* located within the application area. Specifically, the applicant in Docket No. 50405 did not alter the application from what was originally filed after discussions with Commission Staff and there was *an active water meter* located within the application area.

NCSUD's second argument relies on the petition of Central Frisco, Ltd. (Docket No. 52534) as authority for the Commission to deny the application in this docket. Similar to NCSUD's first argument of Docket No. 50405, the Central Frisco, Ltd. petition and filings are distinguishable in this docket as well since there were *two active water meters* located on the

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[17] *Petition by HMP Ranch, Ltd. For Expedited Release from Water CCN No. 10081 in Johnson and Tarrant Counties*, PUC Docket No. 45037, December 18, 2015; see also *Johnson Cty. Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-17-00160-CV, 2018 WL 2107259, at *8 (Tex. App.—Austin May 11, 2018), review denied (Aug. 30, 2019); see also, *Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-16-00796-CV, 2017 WL 5078034, at *4 (Tex. App.—Austin Nov. 2, 2017), review denied (Mar. 1, 2019) (upholding a PUC Order that allowed a landowner to carve out a 6.7 acre segment of land that was actually receiving water service and to decertify the remainder of the tract).

[18] *Petition by HMP Ranch, Ltd. For Expedited Release from Water CCN No. 10081 in Johnson and Tarrant Counties*, PUC Docket No. 45037, Commission's Final Recommendation at 5.

Central Frisco, Ltd. tract and the Amended Petition provided by Central Frisco, Ltd. did not alter or reduce the original application size of 196.87 acres.

The Commission has established precedent that an active water meter would be considered providing service to a tract. However, there are *no active water meters* located on the Property or the Amended Property in this docket. Furthermore, the Amended Petition *removed 1.27 acres* from the original filing that was submitted in June of 2021. Therefore, Meritage respectfully requests that the Commission determine that the *facts of this docket are distinguishable* from Docket No. 50405 and Docket No. 52534 and the argument that NCSUD provides is not relevant or valid case precedent for this docket when there are *no active water meters* in this docket.

The third docket that NCSUD relies on for denial of the Amended Petition is the petition of Carnegie Development, LLC (Docket No. 51352). A copy of the Final Order approving the Carnegie Development, LLC petition is included with this filing as Exhibit 3. NCSUD has not shown how denying the Amended Petition would be "*consistent with the Commission's decisions and statements*" made in Docket No. 51352. The statement made by NCSUD is misleading and the petition in Docket No. 51352 was ***approved*** by the Commission. Meritage believes that it is reasonable for the Commission to have a similar finding in this docket and approve the Amended Petition. NCSUD has *not committed* facilities to serve the Amended Property and Meritage's Amended Petition should be approved.

D. NCSUD Is Not Making Service Available Under *Green Valley*

NCSUD does not have any facilities located on the Amended Property and NCSUD has not shown how NCSUD's facilities located near the Amended Property are *committed* for providing service to the Amended Property. Facilities near the Amended Property *does not rise to the level of providing service* to a property under the "physical ability" test established by *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460 (5th Cir. 2020). NCSUD

has failed to demonstrate how any of the current or anticipated facilities for the NCSUD system are *committed or dedicated* to the Amended Property. The Commission could reasonably conclude that NCSUD's facilities located near the Amended Property were secured for NCSUD's entire certificated area and *not for the specific purpose of being committed to the Amended Property.*

E. NCSUD Does Not Have an Exclusive Right to Serve

NCSUD argues that its CCN "gives NCSUD the legal and *exclusive right* to provide water service to the Amended Property because the Amended Property is located in North Collin's service area." A large portion of the Amended Property is located in an area that is *dual certified* to the City of Princeton under CCN No. 13195 and NCSUD's CCN No. 11035. The 2" waterline and empty meter box that are excluded from the Amended Property are *located within the dual certified area.* A copy of the Final Order from Docket No. 52293 (Meritage's expedited release petition for the portion of the Property within the City of Melissa CCN) is included with this filing as Exhibit 4. The Final Order has the approved final map on the last page. The map shows the CCN boundaries over the Property and the area that is *dual certified* for both Princeton and NCSUD to provide retail service. The Amended Property is entirely located within the city limits of the City of Princeton and the city is currently constructing facilities to provide service to areas within their city limits.

NCSUD has failed to show how NCSUD has the *exclusive right* to serve all of the Amended Property and that the City of Princeton could not legally provide service within the portion of the Amended Property located in the dual certified area today. NCSUD's claim of an *exclusive* right to serve conflicts with 16 Tex. Admin Code § 24.251 (Public Util. Comm'n of Tex., Exclusiveness of Certificates) ("Any certificate granted under this subchapter *shall not* be construed to vest exclusive service or property rights in and to the area certificated.").

F. Federal Indebtedness Does Not Prevent SER

NCSUD avers that the Commission is not permitted to act on a streamlined expedited release petition because it is not permitted under federal law. NCSUD relies on the decision in *Green Valley Special Utility District v. Schertz* for its assertion that 7 U.S.C. § 1926, preempts TWC § 13.2541.[19] However, the Commission has made a decision that considered the *Green Valley* case and the Commission disagreed with NCSUD's analysis. The Commission analyzed *Green Valley* in the *Petition of Alamo Mission LLC*.[20] In Commission Staff's Response to Order No. 12 in the *Alamo Mission LLC* petition, the Commission Staff determined that *Green Valley "offered no opinion on preemption"* and that Commission Staff can "only rely upon the pertinent Texas state statutes" to make a recommendation. Commission Staff further determined that TWC § 13.2541 (d) states, "[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."[21] On December 22, 2020, the ALJ in the *Alamo Mission LLC* petition decided "the Commission may not deny a [streamlined expedited release] petition...based on the fact that a certificate holder is a borrower under a federal loan program" and denied the Motion to Dismiss filed under a preemption argument.[22]

III. CONCLUSION AND PRAYER

NCSUD *has not committed* any facilities to the Amended Property and is *not providing service* to the Amended Property. The City of Princeton has the right to serve portions of the Amended Property that are within the dual certified areas of the Amended Property. Additionally, § 1926(b) preemption *does not* preclude the Commission from considering the Amended Petition. Meritage has fully satisfied the criteria under TWC § 13.2541 for

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[19] *Green Valley Special Util. Dist v. City of Schertz*, 969 F.3d 460 (5th Cir Aug 7, 2020) (en banc).
[20] *Petition of Alamo Mission LLC to Amend Rockett Special Utility District's Water Certificate of Convenience and Necessity by Expedited Release in Ellis County*, Docket No. 49863, *See* Commission Staff Response to Order No. 12 and Order No. 13.
[21] *Id.*
[22] *Id.*

decertification of the Amended Property from NCSUD's CCN. For all the reasons discussed herein, Meritage respectfully requests that the Commission approve the Amended Petition.

Respectfully submitted,

WINSTEAD PC

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record vial electronic mail on October 12, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Scott W. Eidman
Scott W. Eidman

Exhibit 1

Johnson County Special Utility District, Appellant
v.
Public Utility Commission of Texas, Appellee

NO. 03-17-00160-CV

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

May 11, 2018

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 250TH JUDICIAL DISTRICT NO. D-1-GN-16-000898, HONORABLE DARLENE BYRNE, JUDGE PRESIDING

MEMORANDUM OPINION

The Public Utility Commission of Texas (the Commission) granted the petition of a landowner for expedited release of property from the certificated service area of Johnson County Special Utility District (the District). *See* Tex. Water Code § 13.254(a-5) (providing expedited release of property not receiving water or sewer service from holder of certificate of public convenience and necessity). The District filed a suit for judicial review of the order, and the trial court affirmed the Commission's order. For the following reasons, we affirm the trial court's final judgment.

Background

The District is a conservation and reclamation district operating as a special utility district pursuant to Article 16, Section 59 of the Texas Constitution and Chapters 49 and 65 of the Texas Water Code. *See* Tex. Const. art. XVI, § 59; Tex. Water Code §§ 49.001-.512, 65.001-.731.

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The District is the holder of water certificate of convenience and necessity (CCN) No. 10081 and, pursuant to its CCN, it has the exclusive right to provide water service within the CCN territory or certificated service area.

HMP Ranch Ltd.[1] owns an approximately 1,022-acre property (the Property) within the District's certificated service area under CCN No. 10081 (the CCN area). In August 2015, HMP Ranch filed a petition to have the portions of the Property that were within the District's CCN area released pursuant to section 13.254(a-5) of the Texas Water Code on the basis that it was not "receiving water service." Section 13.254(a-5) provides that the owner of a tract of land that is 25 acres or larger and located in certain counties may petition for, and is entitled to, expedited release of that tract from a certificated service area if the tract "is not receiving water or sewer service." *See* Tex. Water Code § 13.254(a-5); *see also id.* § 13.002(21) (defining "service"); 16 Tex. Admin. Code § 24.113(r) (Public Util. Comm'n of Tex., Revocation or Amendment of Certificate). The Commission "shall grant a petition received under Subsection (a-5) not later than the 60th day after the date the landowner files the petition." Tex. Water Code § 13.254(a-6). Upon decertification of the property, the CCN holder no longer has the exclusive right to provide service to the property.

The District intervened in the administrative proceeding shortly after HMP Ranch filed its petition, opposing the petition. After HMP Ranch amended and filed a supplement to its petition, the Commission deemed HMP Ranch's petition administratively complete on

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November 2, 2015, and its administrative law judge ultimately ordered the following deadlines through the statutory 60-day period: (i) the deadline for Commission staff's recommendation on final disposition was November 20, 2015, (ii) HMP Ranch's deadline to respond to staff's recommendation was November 23, 2015, and (iii) the 60-day administrative approval period ended on December 29, 2015. *See id.*; 16 Tex. Admin. Code § 24.8(d) (Public Util. Comm'n of Tex., Administrative Completeness) (stating that

applications under Subchapter G of chapter 24 are not considered filed until Commission makes determination that application is administratively complete).

In early November 2015, the District filed a response to HMP Ranch's supplemental petition. The District disputed HMP Ranch's position that the Property was not receiving water service and submitted an affidavit from its general manager with attachments. The general manager averred about the District's contacts with a representative from HMP Ranch about the feasibility of providing water service for a proposed residential subdivision that was being planned for the Property, the District's ability to serve its current customers and to accommodate future growth, the portion of the District's water supply that it obtained by contract, its current facilities near the Property, and its "numerous lines near the [Property] which serve active meters on all sides of the [Property]." As to the Property, the general manager specifically averred:

> • "[T]here is a six-inch water line and a two-inch water line which cross the south-western portion of the [Property] . . . , and there is a three-inch water line which runs adjacent to the [Property] in a northeast-southwest direction. All of these lines are active and could supply water to the [Property]. At least two of these lines were installed to serve water to the [Property]."

> • "There is a water meter box, which is currently inactive on the southwest side of the [Property] which was installed in 1970 to provide service to . . . the owner of the land [at the time]. The account for this meter remained active for 35 years until the meter was locked and the account designated 'inactive.' The water meter box and associated waterlines and facilities were installed to serve the property known today as the HMP Ranch."
>
> • "Another inactive water meter box and tap, which included a road bore . . . from the three-inch water line to the [Property], is located on the northeast part of the [Property]. The tap is also currently inactive. The water box, tap, road bore, and associated waterlines were installed to serve the [Property]."

Concerning the District's contracts for portions of its water supply, the general manager averred that the District "has planned to use treated water" obtained under these contracts "to serve" the Property.

HMP Ranch filed a reply and submitted an affidavit from a broker with Lands Advisor Organization. The broker, as the designated representative of HMP Ranch, averred:

> • "The Property does not receive water or sewer utility service from any retail water or sewer service provider. There has been no active water or sewer service connection on the Property since HMP Ranch, Ltd. acquired the Property in 2006. HMP Ranch, Ltd. has never requested service from [the District]. HMP Ranch, Ltd. has never consented to [the District] conducting any activities on the Property. To the best of my knowledge, [the District] has not conducted any activities on the Property as long as HMP Ranch, Ltd. has owned the Property."
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> • "HMP Ranch, Ltd. intends to develop the Property into a subdivision with approximately 3,000 to 3,500 single family residences."

> • "On November 11, 2015, I personally inspected the Property in an attempt to locate the water meter boxes described in the affidavit of [the District's general manager] . . . . After a diligent search of the Property over multiple hours, I was not able to locate anything matching [the general manager]'s description. To my knowledge, no representative of HMP Ranch, Ltd. has ever accessed the described facilities or has even been aware of their existence. If any such facilities exist, they are not visible from the surface of

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> the Property, and they are likely decrepit. Regardless, there are no [District] facilities on the Property that are capable of providing water service to the Property, and certainly not to the level required for the planned 3,000 to 3,500 connections on the Property. [The District] has admitted this, as well."
>
> • "In my attempt to locate any water-related infrastructure on the Property, I found only two shuttered groundwater well heads and a former windmill location. Also located on the Property is evidence of the remains of a dwelling structure evidently destroyed by a fire prior to HMP Ranch, Ltd. acquiring the Property. All indications are that this dwelling has been uninhabitable for many years. Regardless, anyone that ever lived on the Property clearly relied on groundwater from the windmill and two private groundwater wells. There is also a small, elevated water storage tank on the Property in proximity of the former windmill location and the two groundwater wells, implying that any dwelling on the Property required that water pressure be generated locally and not from a retail water utility service provider."
>
> • "At least as long as HMP Ranch, Ltd. has owned the Property, and likely for a considerable length of time prior to HMP Ranch, Ltd.'s acquisition of the Property in 2006, there has not been any activity conducted on the Property that required potable water utility service. The Property today, and for at least as long as HMP Ranch, Ltd. has owned the Property, is not receiving water service from [the District]."

On November 20, 2015, Commission staff filed the final recommendation. The staff recommended that the petition be approved, concluding that the "maps, digital data, and affidavit provided by HMP Ranch presented adequate information to demonstrate that HMP Ranch satisfie[d] the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r)." Consistent with the final recommendation, Commission staff filed a proposed order on November 24, 2015, to approve the petition. On December 9, 2015, the District filed exceptions to the proposed order and, a few days later, a supplemental affidavit with attachments and, in the alternative, motion for leave. The District's general manager averred that he had directed District employees "to uncover the water

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meter boxes on the [Property]" and that they had located them "just recently."[2] The attachments included maps and photographs showing the location of the two water meter boxes on the Property.[3] HMP Ranch responded by filing a response to the supplemental affidavit, arguing that it was untimely and that, even if the Commission considered it, the affidavit corroborated HMP Ranch's position that the

Property was not receiving water service.[4] *See* 16 Tex. Admin. Code § 22.78(a) (Public Util. Comm'n of Tex., Responsive Pleadings and Emergency Actions) (generally requiring responsive pleadings to be filed within five working days after receipt of pleading to which response is made).

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On December 17, 2015, the Commission discussed HMP Ranch's petition during an open meeting and approved the petition, as amended.[5] The findings of fact in the Commission's final order included:

> 22. HMP Ranch provided an affidavit stating that the area is not receiving water service from [the District].
>
> 23. Consistent with the Commission's other recent decisions, even though a utility has facilities available and capable of providing water service, that does not mean the facilities are committed and dedicated to serving that particular tract.
>
> 24. The property has not been receiving water service since 2005, and it was not receiving water service at the time the petition was filed.

The findings of fact also included that no request for a hearing was filed that had not been "dealt with in this proceeding." The order does not expressly address the affidavit of the District's general manager that was filed in December 2015 or the District's motion for leave.

The Commission's conclusions of law included:

> 4. The approximately 1,022-acre property is not "receiving water service" from [the District] under TWC § 13.254(a-5).
>
> 5. HMP Ranch is entitled to approval of the Petition having sufficiently satisfied the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r) and (s) by adequately demonstrating ownership of a tract of land that is at least 25 acres, is located in a qualifying county, and is not receiving water service.
>
> 6. The requirements in 16 TAC § 22.35(b)(2) have been met in this proceeding.

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> 7. 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 § 13.254(a-5). Whether a tract might have previously received water or sewer service is irrelevant.

The District filed a motion for rehearing that was overruled and a suit for judicial review of the Commission's order. Following briefing by the parties and a hearing on the merits in November 2016, the trial court denied the District's administrative appeal and affirmed the Commission's final order. This appeal followed.

Analysis

Timeliness of Appeal

We begin our analysis by addressing the Commission's pending motion to dismiss this appeal for want of subject matter jurisdiction. *See Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (explaining that jurisdictional questions must be addressed before merits). The Commission argues that this Court does not have jurisdiction over this appeal because the trial court's order extending the District's appellate

deadlines under rule 306a of the Texas Rules of Civil Procedure was entered outside its plenary power to do so and, thus, that the order was void. *See* Tex. R. Civ. P. 306a(4), (5) (providing procedure for extending post-judgment deadlines when party did not receive notice of judgment); *see also* Tex. R. App. P. 4.2 (authorizing additional time to file documents when, pursuant to Texas Rule of Civil Procedure 306a, party proves no notice of final judgment more than 20 days but less than 90 days from date that judgment was signed). Because the trial court's rule 306a order was void, according to the Commission, the District's notice of

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appeal, filed more than 30 days after the final judgment was signed, was untimely. *See* Tex. R. App. P. 26.1 (generally requiring notice of appeal to be filed within 30 days after judgment is signed).

The trial court signed the final judgment on November 23, 2016. Representing that it did not receive notice of the final judgment until February 16, 2017, the District filed its sworn motion to extend appellate deadlines pursuant to rule 306a(4) and (5) on March 1, 2017, filed its notice of appeal on March 2, 2017, and set the hearing on its motion to extend the appellate deadlines for March 28, 2017. On that day, the trial court held the hearing and granted the District's motion, finding that the District first received notice of the judgment on February 16, 2017, and that this date was more than 20 days but fewer than 90 days after the trial court signed the final judgment. *See* Tex. R. App. P. 4.2(c) (requiring trial court, after hearing 306(a) motion, to "sign written order that finds the date when the party or the party's attorney first either received notice or acquired actual knowledge that the judgment or order was signed").

The Commission does not dispute that the District timely filed its motion pursuant to rule 306a, technically complied with the rule's requirements for the motion, requested a hearing on the motion, and filed its notice of appeal within 30 days of February 16, 2017. *See* Tex. R. Civ. P. 306(a)(4), (5) (requiring party adversely affected "to prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received a notice of the judgment or acquired actual knowledge of the signing and that date was more than twenty days after the judgment was signed"); *In re Lynd Co.*, 195 S.W.3d 682, 685 (Tex. 2006) (orig. proceeding) (explaining requirements of rule 306a). Rather the Commission argues that the trial court did not have plenary power on March 28, 2017, the date that it held the hearing and signed its order with its finding of

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when the District received actual notice, because the date of the hearing and order was more than 30 days after February 16, 2017. According to the Commission, the 30 day window for the trial court to rule on the motion closed March 20, 2017, when its plenary power expired.

We acknowledge that there is authority, including a 1998 opinion from this Court, that supports the Commission's position. *See Wells Fargo Bank, Nat'l Ass'n v. Erickson*, 267 S.W.3d 139, 148 (Tex. App.—Corpus Christi 2008, no pet.) (stating that rule 306a motion "must be filed and ruled upon while the [trial] court retains plenary power, and the time for the [trial] court's plenary power is counted from the date of notice of the judgment as alleged in the rule 306a motion"); *Moore Landrey, L.L.P. v. Hirsch & Westheimer, P.C.*, 126 S.W.3d 536, 541-43 (Tex. App.— Houston [1st Dist.] 2003, no pet.) (dismissing appeal after concluding that trial court's 306a order was void because it was signed outside its plenary power); *Grondona v. Sutton*, 991 S.W.2d 90, 91-92 (Tex. App.—Austin 1998, pet. denied) (stating that complying with provisions of rule 306a was "jurisdictional requisite" and concluding that, even if motion with prima facie evidence had been filed during trial court's plenary power, trial court's order overruling rule 306a motion was of "no effect" because trial court heard and signed order

"beyond the time it would have had power to determine the date of notice of judgment").[6]

The Texas Supreme Court, however, has since explained that a sworn motion in compliance with rule 306a "establishes a prima facie case that the party lacked timely notice and

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invokes a trial court's otherwise-expired jurisdiction for the limited purpose of holding an evidentiary hearing to determine the date on which the party or its counsel first received notice or acquired knowledge of the judgment." *In re Lynd Co.*, 195 S.W.3d at 685; *see Lubbock Cty. v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 585 (Tex. 2002) (explaining that intermediate appellate courts are required to follow supreme court precedent); *Law Offices of Windle Turley, P.C. v. French*, 140 S.W.3d 407, 413 (Tex. App.—Fort Worth 2004, no pet.) (op. on reh'g) (explaining that court of appeals is bound by supreme court precedent); *cf.* Tex. R. Civ. P. 329b(d) (addressing trial court's "plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment"); *John v. Marshall Health Servs.*, 58 S.W.3d 738, 741 (Tex. 2001) (requiring rule 306(a) motion to be filed within trial court's plenary power as determined by date movant received notice of judgment).

The Texas Supreme Court also has found that the trial court's duty to hold the hearing and make a determination was subject to mandamus review and conditionally granted mandamus relief to require a trial court to make a determination under the predecessor rule to rule 306a after the trial court's plenary power had otherwise already expired. *See Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994) (orig. proceeding) (per curiam) (granting mandamus relief in June 1994 to require trial court to hold hearing and make requested finding under predecessor rule to rule 306(a) where motion was filed on October 21,1993, based on allegation that movant did not become aware of judgment until September 21,1993, and trial court failed to hold hearing on motion); *see also Legends Landscapes LLC v. Brown*, No. 06-13-00129-CV, 2014 Tex. App. LEXIS 3276, at *9 (Tex. App.—Texarkana Mar. 27, 2014, no pet.) (mem. op.) (describing rule 306a process and explaining

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that order granting 306a motion "does not result in substantive change in the judgment entered" but "merely permits the timely filing of post-judgment motions").

We also observe that rule 306a and Texas Rule of Appellate Procedure 4.2 do not prescribe when the trial court must conduct the hearing or enter the written order with its finding of actual notice, and Texas Rule of Appellate Procedure 4.2 expressly requires the trial court to enter a written order with its finding of actual notice. *See* Tex. R. Civ. P. 306a; Tex. R. App. P. 4.2; *see, e.g., Garza v. Texas Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 8 (Tex. 2002) (assuming that "Legislature did not intend to deprive a party of appellate remedies on the sole ground that the district court was unable or unwilling to perform its statutory duty"). And the trial court's jurisdiction in this context is limited to determining the date of notice for purposes of post-judgment procedural timetables, and its finding of the actual date of notice does not alter or modify the final judgment. *Compare* Tex. R. Civ. P. 329b (addressing trial court's plenary power to set-aside or modify judgment) *with id.* R. 306a (resetting post-judgment procedural deadlines based on actual notice without modifying or setting aside judgment); *see San Angelo Cmty. Med. Ctr. v. Nelson*, No. 03-16-00146-CV, 2016 Tex. App. LEXIS 3671, at *2-3 (Tex. App.—Austin Apr. 8, 2016, no pet.) (mem. op.) (per curiam); *Brown*, 2014 Tex. App. LEXIS 3276, at *9.

Bound by the Texas Supreme Court's directives, we conclude that the trial court had jurisdiction on March 28, 2017, for the limited purpose of holding a hearing to determine the date on which the District or its counsel first received actual notice or acquired knowledge of the judgment and to enter its finding in an order. *See In re Lynd Co.*, 195 S.W.3d at 685; *see also*

Trammel's Lubbock Bail Bonds, 80 S.W.3d at 585. Thus, we conclude that the District's notice of

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appeal was timely, deny the Commission's motion to dismiss, and turn to the merits of the District's appeal.

The District's Appeal

In two issues, the District argues that this Court should reverse the Commission's final order because (i) the Commission erred in concluding that the Property was not "receiving water service" under section 13.254(a-5) of the Water Code and (ii) the Commission's failure to hold an evidentiary hearing was arbitrary and capricious and violated its own rules and the District's due process rights.

Standard of Review

Judicial review of the Commission's final order is under the substantial evidence standard of review. *See* Tex. Water Code §§ 13.002(16) (defining "proceeding" to include "any hearing, investigation, inquiry, or other fact-finding or decision-making procedure" under chapter 13 of Water Code), .381 (providing that party to "proceeding" before Commission is entitled to judicial review under substantial evidence rule); *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 135 (Tex. App.—Austin 2014, pet. denied) (describing standard of review from Commission's order granting expedited release under section 13.254(a-5) of Water Code).

Under this standard, "a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence or questions committed to agency discretion." Tex. Gov't Code § 2001.174; *see Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953,

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956 (Tex. 1984) ("The reviewing court is concerned only with the reasonableness of the administrative order, not its correctness."). But we must reverse or remand the case to the state agency 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 § 2001.174(2).

"Substantial-evidence analysis entails two component inquiries: (1) whether the agency made findings of underlying facts that logically support the ultimate facts and legal conclusions establishing the legal authority for the agency's decision or action and, in turn, (2) whether the findings of underlying fact are reasonably supported by evidence." *AEP Tex. Commercial & Indus. Retail, Ltd. P'ship v. Public Util. Comm'n of Tex.*, 436 S.W.3d 890, 905 (Tex. App.—Austin 2014, no pet.). An agency's decision "is supported by substantial evidence if the evidence in its entirety is sufficient to allow reasonable minds to have reached the conclusion that the agency must

have reached to justify the disputed action." *Crystal Clear Water Supply*,

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449 S.W.3d at 135 (citing *Texas State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988)). The evidence in the record may preponderate against the agency's decision but still provide a reasonable basis for the agency's decision and thereby meet the substantial evidence standard. *Id.* (citing *Texas Health Facilities Comm'n v. Charter Med.-Dal., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984)). "The question of whether an agency's decision is supported by substantial evidence is a question of law, and we owe no deference to the district court's decision." *Id.* (citing *Brinkmeyer*, 662 S.W.2d at 956).

The District's issues further concern questions of statutory construction, which we also review de novo. *See First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008). Our primary concern in construing a statute is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). "We thus construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results." *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008)). We also "'read the statute as a whole and interpret it to give effect to every part.'" *Railroad Comm'n of Tex. v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011) (quoting *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)); *Scott*, 309 S.W.3d at 930 (explaining that courts give meaning to "language consistent with other provisions in the statute"). With these standards in mind, we turn to the District's issues.

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Was the Property not "receiving water service"?

In its first issue, the District argues that HMP Ranch failed in its burden to demonstrate that the Property was not "receiving water service" and, therefore, that the Commission erred in concluding that the Property was not "receiving water service" under section 13.254(a-5) of the Water Code. *See* Tex. Water Code § 13.254(a-5). The District also argues that the Commission's finding that the Property "was not receiving water service" was a finding of ultimate fact and that the Commission erred by failing to make findings of "underlying, supporting facts" to support this finding of ultimate fact. *See Charter Med.-Dal., Inc.*, 665 S.W.2d at 451 (explaining generally that "underlying findings of fact must be such that the reviewing court can fairly and reasonably say that the underlying findings support the statutorily required criteria"). The District further challenges the Commission's conclusions of law that the only relevant time period for consideration is the time that the petition was filed and that "[w]hether a tract might have previously received water or sewer service is irrelevant." According to the District, the Commission erred by "ignor[ing] the fact that [the District] had provided water service to the property for 35 years and that the facilities to provide that service were and are still in good working order and capable of providing service on demand."

As previously stated, section 13.254(a-5) of the Water Code provides that the owner of a tract of land that is 25 acres or larger and located in certain counties may petition for, and is entitled to, expedited release of that tract from a certificated service area if the tract "is not receiving water or sewer service." Tex. Water Code § 13.254(a-5); *see also id.* § 13.002(21) (defining "service"); 16 Tex. Admin. Code § 24.113(r). The District's challenge is limited to the

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considerations establishing whether the tract of land is "receiving water service."[7] Section 13.002 defines "service" in relevant part 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 under this chapter." *See* Tex. Water Code § 13.002(21). Because "receiving" is not defined statutorily, we apply its plain and common meaning—"tak[ing] possession or delivery of" or "knowingly accept[ing]." *See Webster's Third New Int'l Dictionary* 1894 (2002); *see also Scott*, 309 S.W.3d at 930.

We also are informed by this Court's analysis in *Crystal Clear Water Supply*. In that case, we faced a similar challenge to a Commission order that approved an expedited decertification petition under section 13.254(a-5). *See* 449 S.W.3d at 132. Although we recognized the "intentionally broad scope" of the definition of "service," we framed the question before the Commission to be not "whether Crystal Clear was *providing* water services to customers within the certificated area . . . but whether the Decertified Property was *receiving* water service from Crystal Clear." *Id.* at 137. Relevant to this inquiry was whether Crystal Clear had water facilities or lines "committed to serving" the particular property or "'used' to provide water to that tract" or had performed any act or supplied anything to the particular property related to providing water to the property. *Id.* at 137, 140. As to the "mere existence of water lines or facilities on or near a tract," we explained that they "would not necessarily mean that the tract was 'receiving water service'" and that "such a determination is essentially a fact-based inquiry." *Id.* at 140. We further explained that:

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(i) "it [was] essential that any qualifying services are being 'received' by the property"; (ii) a dedicated water line that was installed to serve the particular property even if the line was not currently operative might be sufficient to constitute a line or facility used to provide water to a particular tract; and (iii) "a tract of land would not necessarily be 'receiving' water service simply because the retail public utility [had] performed an act, such as entering into a contract to secure water supply, unless the act was performed in furtherance of providing water to the tract seeking decertification." *Id.* And we further explained that "[a]ll of these considerations are matters committed to the Commission's sound discretion and authority to decide issues of fact." *Id.* at 141; *see also Mountain Peak Special Util. Dist. v. Public Util. Comm'n of Tex.*, No. 03-16-00796-CV, 2017 Tex. App. LEXIS 10261, at *13-17 (Tex. App.—Austin Nov. 2, 2017, pet. filed) (mem. op.) (discussing and applying analysis from *Crystal Clear Water Supply*). Guided by this analysis and applying the plain language of the statute, we turn to the District's arguments.

The District focuses on the alleged lack of underlying findings of fact in the Commission's order to support its finding that the Property "was not receiving water service" and on evidence that it contends was undisputed—its general manager's affidavits with attachments that identified the water lines and water meter boxes on the Property that District employees were able to locate in December 2015, additional water lines and facilities near the Property that could supply water to the Property, and the District's contracts for obtaining portions of its water supply. Because this evidence was undisputed, according to the District, the Commission had no room to exercise its discretion to resolve conflicting facts.[8]

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But, even if we consider all of the District's evidence, including the affidavit with its attachments that was not filed until after the staff's final recommendation and proposed order,[9] and agree with the District that whether a tract has previously received water service is relevant to the determination, other evidence showed that there was no water service or District facilities located on the Property capable of providing water service at the time that HMP Ranch filed its petition with the Commission in August 2015 and that the District had not provided water service to the Property during the time that HMP Ranch owned the Property. The representative of HMP Ranch averred that the Property did not receive water or sewer utility service from any retail water or sewer service provider and that, to his knowledge, the District

had not conducted any activities on the Property as long as HMP Ranch owned it.[10]

The representative also averred about his efforts to locate the water meter boxes identified in the District's general manager's initial affidavit. After a "diligent search," the broker averred that he was unable to locate water meter boxes on the Property, finding only "two shuttered groundwater well heads and a former windmill location" near the remains of a dwelling structure and a "small, elevated water storage tank on the Property in proximity of the former windmill location

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and the two groundwater wells, implying that any dwellings on the property required that water pressure be generated locally and not from a retail water utility service provider." He further averred that: (i) no activity conducted on the Property required potable water utility service during the time that HMP Ranch owned the Property "and likely for a considerable length of time prior to HMP Ranch's acquisition of the Property in 2006"; (ii) no representative of HMP Ranch "[had] ever accessed the described facilities or [had] even been aware of their existence"; (iii) any facilities of the District, if they exist, "are not visible from the surface of the Property, and they are likely decrepit"; and (iv) "there are no [District] facilities on the Property that are capable of providing water service to the Property."

The District questions the significance and weight to be given HMP Ranch's evidence in its briefing.[11] The District also focuses on the evidence of its facilities near the Property and contracts that it had obtained to provide portions of its water supply. In his initial affidavit, the District's general manager averred that the District "also owns numerous other facilities near the HMP Ranch, including a 1 million gallon elevated storage tank" and that the District "has planned to use treated water" obtained from 2009 and 2012 contracts "to serve the HMP Ranch." But we may not substitute our judgment for the Commission's judgment "on the weight of the evidence." *See* Tex. Gov't Code § 2001.174. In addition to HMP Ranch's evidence cited above, the Commission could have found significant the delays during the administrative proceeding in the

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District's submissions of evidence as support for the Commission's conclusion that the Property was not receiving water service. HMP Ranch filed its petition in August 2015, but the District did not raise the issue of water service to the Property or file any evidence to support its position that the Property was receiving water service until November 2015. After HMP Ranch filed the broker's affidavit in response, it was another month—and after staff's final recommendation and proposed order were already due and filed—before the District was able to locate the water meter boxes.

As to the District's evidence of contracts for portions of its water supply and its facilities near the HMP Ranch, the Commission reasonably could have concluded that the contracts and facilities were secured for or served its entire certificated area and that they were not "dedicated to or reserved to serve" or "committed" to the HMP Ranch. *See Crystal Clear Water Supply*, 449 S.W.3d at 138-39, 141 (discussing "conflicting evidence regarding whether the water supply contracts were secured in order to provide water to the Decertified Property" and concluding that "the evidence presented to the Commission regarding Crystal Clear's then-existing facilities and lines and water supply contracts provided a reasonable basis for the Commission's finding that the Decertified Property was not 'receiving water service'"); *see also Mountain Peak Special Util. Dist.*, 2017 Tex. App. LEXIS 10261, at *16-17 (discussing facilities and water supply near decertified property and concluding that it was reasonable for Commission to find that property was not receiving water service).

Applying the applicable standard of review, we conclude that the evidence provided a reasonable basis for the Commission's finding of fact that the Property "has not been receiving water service since 2005, and it was not receiving water service at the time the petition was filed."

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See Crystal Clear Water Supply, 449 S.W.3d at 141 (concluding that "Commission could reasonably have declined to attribute any evidentiary weight" to certain evidence in context of conflicting evidence); *see also Mountain Peak Special Util. Dist.*, 2017 Tex. App. LEXIS 10261, at *16-17 (concluding that evidence presented to Commission regarding facilities and water lines "provided a reasonable basis for the Commission's finding that the Park Property was not 'receiving water service'"); *Webster's* at 1894 (defining "receiving" to mean "tak[ing] possession or delivery of" or "knowingly accept[ing]").

Further, this finding of fact, along with other findings, provided a reasonable basis for the Commission's conclusions that the Property "[was] not 'receiving water service' from [the District] under TWC § 13.254(a-5)" and that "HMP Ranch [was] entitled to approval of the Petition having sufficiently satisfied the requirements of TWC § 13.254(a-5) and 16 TAC § 24.113(r) and (s) by adequately demonstrating ownership of a tract of land that is at least 25 acres, is located in a qualifying county, and is not receiving water services." *See Charter Med.-Dal.*, 665 S.W.2d at 451-52; *AEP Tex. Commercial & Indus. Retail*, 436 S.W.3d at 905; *see also Mountain Peak Special Util. Dist.*, 2017 Tex. App. LEXIS 10261, at *16-17 ("Because there was substantial evidence to support the Commission's finding that the Park Property was not receiving water service, the three criteria for expedited decertification pursuant to section 13.254(a-5) were met."); *Crystal Clear Water Supply*, 449 S.W.3d at 137 (framing question before Commission to be not "whether Crystal Clear was *providing* water services to customers within the certificated area . . . but whether the Decertified Property was *receiving* water service from Crystal Clear"). Thus, we conclude that HMP

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Ranch met its burden to establish that it was not receiving water service pursuant to section 13.245(a-5) and overrule the District's first issue.

Was the Commission's failure to hold an evidentiary hearing arbitrary and capricious?

In its second issue, the District argues that the Commission's failure to hold an evidentiary hearing was arbitrary and capricious because the failure to do so violated the plain and unambiguous language of its own rules and violated its due process rights. *See* Tex. Const. art. I, § 19. As support for its position, the District cites Commission Rule 22.35 that addresses applications before the Commission that are qualified for informal disposition, specifically focusing on subsection (a)(2) of Rule 22.35 that authorizes informal disposition when "the decision is not adverse to any party other than the commission staff." *See* 16 Tex. Admin. Code § 22.35(a)(2) (Public Util. Comm'n of Tex., Informal Disposition). Here the District, as an intervenor, was a party at the Commission, and the Commission's order was "adverse" to it. *See id.*; *see also id.* § 22.102(3) (Public Util. Comm'n of Tex., Classification of Parties) (classifying intervenors as parties to proceedings before Commission). The Commission did not cite subsection (a)(2) of Rule 22.35 in its final order, but its conclusions of law included that "[t]he requirements in 16 TAC § 22.35(b)(2) have been met in this proceeding." *See id.* § 22.35(a)(2), (b)(2) (requiring presiding officer to prepare proposed order for certain applications "which shall be served on all parties no less than 20 days before the commission is scheduled to consider the application in open meeting").

We conclude that the District has not preserved its argument based on Rule 22.35(a)(2) for judicial review. Relevant here, the Commission's unchallenged findings of fact in its

final order included that "[n]o . . . request for hearing [was] filed that [was] not dealt with in

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this proceeding." The District did not request an evidentiary hearing until it filed its motion for rehearing with the Commission, and its argument to support its request for an evidentiary hearing was based on its Texas constitutional due process rights, not Rule 22.35. *See Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 156 S.W.3d 91, 104 (Tex. App.—Austin 2004, pet. denied) ("When an agency or board has not had the opportunity to consider claims or arguments, they are waived on appeal."); *BFI Waste Sys. of N. Am., Inc. v. Martinez Envtl. Grp.*, 93 S.W.3d 570, 578 (Tex. App.—Austin 2002, pet. denied) (explaining that sufficiency of content of motion for rehearing goes to preservation of error and that, to preserve error, motion must set forth particular action of agency that claiming was error and "legal basis upon which the claim of error rests"); *see also* 16 Tex. Admin. Code § 22.264(a) (Public Util. Comm'n of Tex., Rehearing) (stating that motions for rehearing shall be governed by Administrative Procedure Act). The District first raised the Commission's failure to follow Rule 22.35 in its briefing with the trial court, which was too late.

As to the District's contention that it had the right to an evidentiary hearing based on its due process rights, this Court has concluded that a CCN is not a vested property right entitled to due process protections. *See Crystal Clear Water Supply*, 449 S.W.3d at 145 (citing *Creedmore Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 525-26 (Tex. App.—Austin 2010, no pet.)); *see also* 16 Tex. Admin. Code § 24.116 (Public Util. Comm'n of Tex., Exclusiveness of Certificates) ("Any certificate granted under this subchapter shall not be construed to vest exclusive service or property rights in and to the area certificated."). Further the Commission's final order has no effect on the District's title to any of its property or facilities, whether located on the Property or elsewhere. *See Crystal Clear Water Supply*, 449 S.W.3d at 144.

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And we observe that section 13.015 of the Water Code expressly authorizes informal proceedings involving retail public utilities, *see* Tex. Water Code § 13.015, and that section 13.254 does not require a hearing of expedited release proceedings as compared with other proceedings in that section, *compare id.* § 13.254(a) (authorizing Commission "at any time after notice and hearing" to revoke or amend CCN) *with id.* § 13.354(a-5), (a-6). We overrule the District's second issue.

Conclusion

For these reasons, we affirm the trial court's final judgment that affirmed the Commission's order.

/s/_____
Melissa Goodwin, Justice

Before Chief Justice Rose, Justices Pemberton and Goodwin

Affirmed

Filed: May 11, 2018

Footnotes:

1. Although this Court received an amicus brief from HMP Ranch, it is not a party to this appeal.

2. The general manager explained that the delay in locating the water meter boxes on the Property was "[d]ue to the Thanksgiving holidays, the duties of these employees to maintain the [District] system, and difficulties with a metal detector."

3. According to the general manager, one of the water meter boxes had a water meter that was connected through a valve to the 6-inch water line that traverses the Property on the northern side of a county road and the other one along with a tap

involved a road bore under a county road "from an existing three-inch water line." He averred that the water meter boxes were "not decrepit and could be readily used to supply retail water to the property." Concerning the water meter connected to the 6-inch water line, the general manager averred that "all that would be necessary to provide water to the property [would be] to set up an account through which the customer could be billed for water service" and that "[t]here [was] sufficient pressure in the water lines and all the necessary facilities to immediately provide potable water upon request." As to the other water meter box, the general manager averred that "all that would be necessary to provide water to the property [would be] to insert a water meter in the water meter box and flush the lines" and that "[t]here [was] sufficient pressure in the water lines to immediately provide potable water upon request."

4. In its response to the District's supplemental affidavit, HMP Ranch argued:

> The length of time [the District] took to file its latest responsive pleading indicates either a pattern of deliberately delaying submissions of new evidence until after reasonable deadlines for doing so or that locating the decades-old infrastructure referred to in the responsive pleadings was such a significant undertaking that it took an experienced utility service provider like [the District] a month to find it. . . . [The District] claims it was only able to locate the infrastructure using a metal detector and then had to uncover the infrastructure, presumably digging earth to access it.

5. The Commission approved the petition, as amended, by two votes to one. One of the commissioners dissented to the approval of the petition.

6. Although our opinion in *Grondona v. Sutton* contains language that is favorable to the Commission, we find the language to be dicta and its facts distinguishable. *See* 991 S.W.2d 90, 91-92 (Tex. App.—Austin 1998, pet. denied). In contrast with the facts before us, the movant in *Grondona* failed to establish a prima facie case of lack of timely notice to invoke the trial court's jurisdiction for the limited purpose of holding a hearing and determining the date of notice. *Id.*

7. The District does not challenge the Commission's findings that the Property was at least 25 acres and within a qualifying county.

8. According to the District, the evidence established that it "*was and is capable of providing service [to the Property] upon literally a moment's notice.*"

9. The deadline for the Commission staff to file a recommendation was November 20, 2015, and HMP Ranch's deadline to respond to the recommendation was November 23, 2015. The District did not file exceptions to the proposed order until December 9, 2015, and the supplemental affidavit, a few days after that. The record does not reflect whether the District's motion for leave was granted.

10. As conceded by the District, "flowing water was not available on the . . . Property at the moment HMP Ranch filed its petition." *Cf. Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014, pet. denied) ("Certainly an active water tap on the Decertified Property would constitute a facility or line 'used' to supply water to the tract on which it was located.").

11. For example, the District challenges the broker's credentials, arguing that the record does not show that he had the necessary knowledge, training, or experience to locate the water meters or to "opine about their condition or usability." The District also refers to the broker as "untrained."

Exhibit 2

Mountain Peak Special Utility District, Appellant
v.
Public Utility Commission of Texas and The City of Midlothian, Appellees

NO. 03-16-00796-CV

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

November 2, 2017

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-15-002843, HONORABLE ORLINDA NARANJO, JUDGE PRESIDING

MEMORANDUM OPINION

The Public Utility Commission of Texas (the Commission) granted the petition of the City of Midlothian (the City) for expedited release of a portion of property it owned from the certificated service area of Mountain Peak Special Utility District (Mountain Peak). *See* Tex. Water Code § 13.254(a-5) (providing for expedited release of property not receiving water or sewer service from certificate holder). In its suit for judicial review of the Commission's order, Mountain Peak contended that the Commission erred in granting the City's petition for decertification because the statutory requirements for expedited release pursuant to section 13.254(a-5) were not met. Specifically, Mountain Peak argued that the property the City sought to have decertified was in fact "receiving water service" from Mountain Peak and thus was not eligible for expedited release under section 13.254(a-5). Mountain Peak also asserted that the decertification petition should not have been approved because the City excluded from its request for expedited release a 6.7-acre piece of

property that it owned within Mountain Peak's certificated service area. In addition, Mountain Peak asserted that the Commission's approval of the petition for decertification should be set aside because federal law preempted the decertification of any of Mountain Peak's certificated service area. After a hearing, the district court affirmed the Commission's order granting the City's petition for decertification. We will affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Mountain Peak is a conservation and reclamation district operating as a special utility district created under Article XVI, Section 59, of the Texas Constitution and regulated by the Commission. *See* Tex. Const. art. XVI, § 59; Act of May 13, 2013, 83d Leg., R.S., ch. 170, § 2.96, 2013 Tex. Gen. Laws 725, 769 (transferring to Public Utility Commission powers, duties, functions, programs, and activities of Texas Commission on Environmental Quality relating to economic regulation of water and sewer service); *see also* Tex. Water Code §§ 13.002-.515 (establishing comprehensive regulatory system to regulate retail public utilities), .002(19) ("retail public utility" includes political subdivision operating, maintaining, or controlling facilities for providing potable water service for compensation). Mountain Peak holds a certificate of convenience and necessity (CCN) that authorizes it to be the exclusive water-service provider within a specifically defined territory, which is referred to as its "certificated area." *See* Tex. Water Code § 13.244 (setting forth requirements for application for CCN).

The City owns approximately 104 acres of land in Ellis County that was located within Mountain Peak's certificated area. The City filed a petition with the Commission seeking to remove the 104 acres from Mountain Peak's certificated area pursuant to Texas Water Code section

13.254(a-5). Section 13.254(a-5) provides that the owner of a tract of land that is 25 acres or larger and located in certain counties, including Ellis County, may petition for, and is entitled to,

expedited release of that tract from a certificated area if the tract is "not receiving water service." *Id.* § 13.254(a-5).[1] In its petition, the City stated that the 104-acre property was not receiving water or sewer service from Mountain Peak. The petition was supported by the affidavit of Michael G. Adams, the City's Executive Director of Engineering and Utilities, in which he averred that the 104-acre property "currently is not receiving potable water service, or water of any type from [Mountain Peak]," that the City "has not requested water service from Mountain Peak," and "[i]f Mountain Peak has any water facilities near or adjacent to the [104-acre property], those facilities were installed and are used to provide water service to property other than the [104-acre property]."

Mountain Peak filed a motion to intervene and opposed the petition. Mountain Peak asserted that the petition seeking decertification of a part of Mountain Peak's certificated area was in conflict with a contractual commitment between the City and Mountain Peak that had been approved by the Commission's predecessor agency, the Texas Natural Resources Conservation Commission (TNRCC), in 1997. Mountain Peak also asserted that the 104-acre property was "receiving water service" from Mountain Peak because there was a sewer lift station owned and operated by Mountain Peak located on the north part of the property. According to Mountain Peak, there was a two-inch water line running 200 to 300 yards from a connection to a 12-inch water main

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owned and operated by Mountain Peak and terminating inside a meter box with an angle-stop valve on the 104-acre property next to the lift station. Mountain Peak stated that the two-inch water line supplied water from Mountain Peak's public water system to the City for use at the lift station such that the 104-acre property was "receiving water service" from Mountain Peak. Finally, Mountain Peak asserted that the City's petition was not administratively complete because it did not include "evidence that the owner of the tract of land in question—the City of Midlothian—authorized and approved" the petition.[2]

The Commission's Staff reviewed the petition and Mountain Peak's response and recommended that Mountain Peak's petition be deemed deficient until the City provided proof that (1) the request did not seek to violate currently applicable contract terms, and (2) the City did not seek approval of an application that would violate Texas Water Code section 13.254(a-5). The Commission then issued an order directing the City to amend its application to cure the deficiencies identified by the Commission's Staff. The City filed its response arguing that Mountain Peak's bare allegations of a contractual impediment to the decertification request did not render its petition administratively incomplete. Additionally, while maintaining its position that the existence of an unmetered water line to the lift station did not cause the 104-acre property to be "receiving water service" such that it was disqualified from expedited decertification pursuant to section 13.254(a-5), in order to eliminate any question in that regard, the City amended its petition to seek decertification

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of only 97.3 acres (the Park Property) of the 104 acres described in its original application. The amendment excluded 6.7 acres of property on which the lift station was located.[3]

Mountain Peak continued to object to the decertification petition and added a complaint that the City was not authorized to amend its petition to seek decertification of property different from that described in its original petition, and that it could not "arbitrarily" exclude part of its property from the area it sought to remove from Mountain Peak's certificated area. Mountain Peak also argued that, even if it was proper for the City to seek expedited release of only the Park Property, sufficient water lines, facilities, and water supplies existed on or near the Park Property such that it, too, was "receiving water service" and therefore could not qualify for

expedited release under section 13.254(a-5). The administrative record includes additional briefing and evidence in the form of affidavits and exhibits filed by both the City and Mountain Peak relevant to the disputed issues.

The Commission concluded that the City had satisfied the criteria for expedited decertification as set forth in Texas Water Code section 13.254(a-5) and approved the request for expedited release of the Park Property from Mountain Peak's certificated area. Mountain Peak's motion for rehearing was overruled by operation of law. Mountain Peak then filed a suit for judicial review in Travis County district court.

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In the district court, Mountain Peak again asserted that the City could not carve out the 6.7-acre portion of its property from the property for which it sought decertification and, in any event, that the Park Property was "receiving water service" from Mountain Peak. Mountain Peak also continued to maintain that removal of the Park Property from its certificated area was in conflict with the 1997 TNRCC order that, according to Mountain Peak, approved and incorporated an agreement between Mountain Peak and the City to refrain from seeking to alter or amend one another's CCNs or interfere with the boundaries of their respective CCNs. Mountain Peak also argued that federal law preempted the removal of any property from its certificated area. Specifically, Mountain Peak asserted that federal law protects the service area of entities like Mountain Peak that have outstanding debt to the federal government for loans obtained through a federal program designed to assist the development of water distribution and sewer service facilities in rural areas. *See* 7 U.S.C. § 1926 (establishing loan program through United States Department of Agriculture to aid designated associations in developing and operating water distribution and sewer service facilities in rural areas). The Commission filed a general denial of Mountain Peak's claims, and the City intervened in support of the Commission.

Following a hearing, the trial court rendered judgment affirming the Commission's order approving the City's request for expedited release of the Park Property from Mountain Peak's certificated area. Mountain Peak then perfected this appeal.

Standard of Review

Section 13.381 of the Texas Water Code provides that any party to a proceeding before the Commission is entitled to judicial review under the substantial-evidence rule. *See* Tex.

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Water Code § 13.381. Section 13.002 defines "proceeding" to mean "any hearing, investigation, inquiry, or other fact-finding or decision-making procedure" under Texas Water Code chapter 13. *Id.* § 13.002(16). Thus, we must review the Commission's decision in this case "through the prism of substantial evidence review." *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 135 (Tex. App.—Austin 2014, pet. denied) (quoting *Texas Water Comm'n v. Lakeshore Util. Co.*, 877 S.W.2d 814, 818 (Tex. App.—Austin 1994, writ denied)). Under this standard, we may not, with respect to questions committed to the Commission's discretion, substitute our judgment for that of the Commission on the weight of the evidence. *See* Tex. Gov't Code § 2001.174. We must, however, reverse the Commission's decision if it prejudices substantial rights because its findings, inferences, conclusions, or decisions (1) violate a constitutional or statutory provision; (2) exceed the Commission's statutory authority; (3) were made through unlawful procedure; (4) are affected by other error of law; (5) are not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or (6) are arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *Id.* § 2001.174(2).

An agency's decision is presumed to be valid, and it is supported by substantial evidence if the

evidence in its entirety is sufficient to allow reasonable minds to have reached the conclusion the agency must have reached to justify the disputed action. *Texas State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988). The evidence in the record may preponderate against the agency's decision yet still provide a reasonable basis for the decision and thereby meet the substantial-evidence standard. *Texas Health Facilities Comm'n v. Charter*

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Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984). The question of whether an agency's decision is supported by substantial evidence is a question of law, and we owe no deference to the district court's decision. *See Firemen's & Policemen's Civ. Serv. Comm'n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984). We review questions of statutory construction de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011).

Did the Commission err by permitting the City to amend its petition to seek expedited release of the Park Property and not of the 6.7 acres?

Mountain Peak asserts that the Commission erred by permitting the City to file an amended decertification petition that removed 6.7 acres from the area for which it sought expedited release. According to Mountain Peak, because the 6.7 acres was not a "separately deeded and acquired tract," it could not be omitted from the acreage for which decertification was requested, and the Commission's decertification order was therefore erroneous.[4] Mountain Peak has not identified any statutory support for its position that the City could not exclude the 6.7 acres from the property for which it sought expedited release from Mountain Peak's certificated service area. Section 13.254(a-5) requires only that the property sought to be decertified be a tract of land of at least 25 acres located in certain counties and that it not be "receiving water service." *See* Tex. Water Code § 13.254(a-5). The Park Property was of the required size and located in an eligible county, and the Commission found that it was not receiving water service. As this Court has previously concluded, section 13.254(a-5) does not have an "all or nothing" requirement that prevents a

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landowner from choosing to seek expedited release of some, but not all, of its property located in a certificated service area. *See Crystal Clear Water Supply Corp.*, 449 S.W.3d at 136.

Mountain Peak argues that permitting a landowner to seek decertification of some, but not all, of its property in a certificated service area could cause landowners to "simply draw circles around [multiple service] connections, carve them out, and decertify the rest of the property." This argument ignores the fact that one consideration when determining whether a piece of property is "receiving water service" is whether there are water facilities or lines *committed to serving* the property. *See id.* at 137. If those lines or facilities exist, it does not matter whether they are located on or simply near the property for which the landowner seeks expedited release. Carving out the land they are located on from the property they serve does not mean that those lines or facilities are not taken into account when determining whether the property for which decertification is requested is "receiving water service" for purposes of section 13.254(a-5). *Id.* The Commission's having permitted the City to amend its petition to remove 6.7 acres from the property for which it sought expedited release from Mountain Peak's certificated service area does not provide a basis for reversing the Commission's order.

Was the Park Property "receiving water service?"

The Commission determined that the Park Property was not receiving water service from Mountain Peak. It expressly found that the Park Property was "not receiving actual water from

Mountain Peak" nor had Mountain Peak committed facilities or lines providing water to the Park Property or performed acts or supplied anything to the Park Property. *See id.* (property is not "receiving water service" if there are no water facilities or lines committed to serving property and

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CCN holder has not performed any act or supplied anything to that property related to providing water to that property).

In support of its petition for decertification, the City submitted three affidavits from Michael Adams. The contents of Adams's affidavits regarding water service to the Park Property can be summarized as follows:

> • Mountain Peak provides no service to the Park Property.
>
> • There is a sewer lift station located on the 6.7 acres removed from the City's decertification petition. The 6.7 acres was platted for a subdivision adjacent to the Park Property and the lift station was constructed at the expense of the developer of the subdivision.
>
> • Under the City's then-existing subdivision regulation, the developer was required to install a water line to the lift station. Pursuant to the subdivision regulation, a one-inch water line was installed that runs from a water line in the subdivision to the lift station. The City is unaware of any use of the water line other than whatever testing was done upon installation.
>
> • There is no written service or extension agreement between the City and Mountain Peak related to the lift station. The City has never paid for or been billed for the construction of the water line or for the delivery of any water to the lift station. There is no meter or city account for the water line.

Mountain Peak submitted three affidavits from Randel Kirk, Mountain Peak's General Manager. The contents of Kirk's affidavits can be summarized as follows:

> ◦ Mountain Peak provides water service to a sewer lift station through a two-inch water line that runs from one of Mountain Peak's nearby 12-inch water lines to the lift station where it terminates at an angle-stop valve in a meter box.
>
> • Mountain Peak owns a six-inch water line that runs along the southern boundary of, and is located on, the Park Property. This water line "has the capacity to serve" the Park Property.

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> • Mountain Peak has distribution lines and other facilities near the Park Property that "have the capacity" to provide water service to the Park Property. In a nearby subdivision there are multiple distribution lines including: three 12-inch water lines, two eight-inch water lines, and numerous smaller water lines.
>
> • Mountain Peak has two water plants within a mile of the Park Property, each of which "has the capacity to serve" the Park Property and "capacity committed to" the Park Property. Mountain Peak also owns a one-million gallon storage tank at one of its water plants that was sized to accommodate "potential development on or near"

the Park Property.

- Mountain Peak has five groundwater wells within two miles of the Park Property that "could be used to serve" that property. Two other ground water wells are within approximately one mile of the Park Property.

- Mountain Peak "has water supplies sufficient to serve its customers in the area, including the Park Property."

The determination of whether a tract of land is "receiving water service" is a "fact-based inquiry requiring the Commission to consider whether the [utility] has facilities or lines committed to providing water *to the particular tract* in furtherance of its obligation to provide water to that tract pursuant to its CCN." *Id.* at 140 (emphasis in original). In this suit for judicial review, we consider whether the evidence presented in the decertification proceeding "provided reasonable support" for the Commission's determination that the Park Property was not "receiving water service" from Mountain Peak. *See id.* at 141. We conclude that the evidence presented to the Commission regarding Mountain Peak's facilities and water lines provided a reasonable basis for the Commission's finding that the Park Property was not "receiving water service."

The existence of water lines on or near the Park Property does not necessarily mean that the Park Property was "receiving water service." There was no evidence that the water lines

were committed to or installed for the purpose of providing water to the Park Property. It was reasonable for the Commission to determine that those water lines were in fact installed for the purpose of providing water to different property—the subdivision. Similarly, although Kirk averred that Mountain Peak's water plants have the capacity to provide water to the Park Property, there is nothing in Kirk's affidavit to indicate that the water plants were constructed for that purpose or that they were otherwise "committed" to providing water to the Park Property. The same is true of Mountain Peak's water wells. The evidence regarding the lift station, which is located on the 6.7 acres that are not part of the Park Property, indicates that it was constructed in connection with development of the subdivision and that the water line was likewise installed to provide water to the lift station rather than in furtherance of providing water to the Park Property. Kirk's affidavit states that the storage tank was sized to accommodate future development generally and does not indicate how that storage capacity was intended to or would be used to provide water service to the Park Property. There is substantial evidence supporting the Commission's finding that Mountain Peak had not performed any act; furnished any thing; or used any facilities or lines for, or committed them to, providing water service to the Park Property. Because there was substantial evidence to support the Commission's finding that the Park Property was not receiving water service, the three criteria for expedited decertification pursuant to section 13.254(a-5) were met.

Does the Commission's order conflict with a previous agency order?

It is undisputed, and the Commission found, that in 1996 the City and Mountain Peak entered into an agreement (the 1996 Agreement) providing, among other things, that (1) in an area identified as the "Dual Certificated Area," the City "will provide water distribution service only to

industrial customers and Mountain Peak will provide water distribution service only to other-than-industrial customers" and (2) neither the City nor Mountain Peak "will apply to any regulatory, judicial, or governing body to change, alter, or amend the boundaries between their CCNs . . . and will jointly utilize all reasonable

actions to resist any changes thereto." In 1997, the Commission's predecessor agency, the TNRCC, approved "the portions of the agreement or contract between [the City] and [Mountain Peak] designating areas to be served by them pursuant to their Certificates of Convenience and Necessity." *See* Tex. Water Code § 13.248 (contracts between retail public utilities, when approved by Commission, are valid and enforceable and are incorporated into appropriate areas of public convenience and necessity). Mountain Peak argued to the Commission that the agency's 1997 approval served to prevent the Commission from subsequently issuing an order, such as the one at issue in this suit for judicial review, that granted the City's request to change the boundaries of Mountain Peak's CCN.[5]

The 1996 Agreement arose in the context of a proceeding before the TNRCC to consider Mountain Peak's application to amend its CCN to establish the boundaries of its certificated service area in Ellis County. The 1996 Agreement reflects the City's agreement to support Mountain Peak's application and Mountain Peak's agreement to support the City's application for TNRCC approval of a "Dual Certificated Area," which we understand to be a geographical area that would be within the certificated service areas of both the City and Mountain Peak.[6] The 1996 Agreement

also includes the following three "qualifications" to Mountain Peak's agreement to support the City's application for TNRCC approval of the Dual Certificated Area:[7]

> a. In the Dual Certificated Area, [the City] will provide water distribution service only to industrial customers, and Mountain Peak will provide water distribution service only to other-than-industrial customers, provided that either may consent on a case-by-case basis to the other providing water distribution service to a customer who would otherwise be ineligible for service from that party, without waiving the limitation herein provided;
>
> b. Neither [the City] nor Mountain Peak will apply to any regulatory, judicial or governing body to change, alter or amend the boundaries between their CCNs or the arrangements herein described for the Dual Certificated Area, and will jointly utilize all reasonable actions to resist any change thereto; and
>
> c. [The City] will not allow, encourage or cause any change in regulation, law or ordinance which will result in limiting or prohibiting other-than-industrial customers in the Dual Certificated Area (other than ordinances generally applicable to all geographic areas in the City's jurisdiction).

The TNRCC ultimately approved Mountain Peak's application to amend its CCN and ordered the following:

> The City of Midlothian and Mountain Peak Water Supply Corporation also requested Commission approval of an agreement or contract . . . between the City of Midlothian and Mountain Peak Water Supply Corporation designating the areas to be served by them pursuant to their CCNs. Among other things, the agreement or contract between the City of Midlothian and Mountain Peak Water Supply Corporation provides that in dual certification areas, the City of Midlothian will provide water service only to industrial customers and Mountain Peak Water Supply Corporation will provide water service only to other-than-industrial customers, unless either agrees on a case by case basis

> to the other providing water service to a customer who would otherwise be ineligible for service from that entity.

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> . . . .
>
> The portions of the agreement or contract between the City of Midlothian and Mountain Peak Water Supply Corporation designating the areas to be served by them pursuant to their Certificates of Convenience and Necessity, is hereby approved.

Mountain Peak argues that the TNRCC order approved not just its agreement with the City to serve different classes of customers in the Dual Certificated Area established by the 1996 Agreement, but also approved the qualification in subparagraph b of the 1996 Agreement, which Mountain Peak characterizes as an agreement between them to not seek to change, alter, or amend the boundaries of their respective CCNs.[8] We disagree.

The TNRCC order approves only the portions of the 1996 Agreement "designating the areas to be served" by the City and Mountain Peak respectively. Those portions are (1) the delineation of Mountain Peak's CCN, (2) the delineation of the Dual Certificated Area, and (3) the designation of which customers within the Dual Certificated Area would be serviced by the City and which by Mountain Peak. The City's and Mountain Peak's separate agreement not to seek to alter or amend the boundaries between their CCNs does not itself constitute a designation of a service area but, rather, an agreement not to seek to alter one. The TNRCC order did not approve that agreement. Consequently, the TNRCC order does not stand as an impediment to the Commission's

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approval of the City's request for expedited release of the Park Property from Mountain Peak's certificated service area.[9]

Does federal law preempt the Commission's decertification order?

Mountain Peak argues that the Commission's order is preempted by federal law, specifically 7 U.S.C. section 1926(b). *See* 7 U.S.C. § 1926(b) (imposing federal restrictions on competition and customer choice in areas served by federally indebted associations). Section 1926 establishes a loan program through the United States Department of Agriculture to aid designated associations, including conservation and reclamation districts, in developing and operating water and sewer-service facilities in rural areas. *Id.* § 1926(a). Section 1926(b) provides:

> The service provided or made available through any [federally indebted] 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 as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Id. § 1926(b). This section constitutes "a congressional mandate that local governments not encroach upon the services provided by [federally indebted] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam).

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The prohibition advances two policy purposes: "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [the] loans) by protecting them from the expansion of nearby cities and towns." *Id.* A water utility must establish three elements to invoke the protections of section 1926(b): (1) the utility is an "association" within the meaning of section 1926, (2) the utility has a qualifying federal loan outstanding, and (3) the utility "provided or made [service] available" to the disputed area. *See Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 519 (Tex. App.—Austin 2010, no pet.).

The only dispute in the present case is whether Mountain Peak established that it "provided or made [service] available" to the Park Property. The Commission did not take section 1926(b) into account when considering Mountain Peak's decertification petition because Texas Water Code section 13.254(a-6) expressly forbids the Commission from denying "a petition received under Subsection 13.254(a-5) based on the fact that a certificate holder is a borrower under a federal loan program." *See* Tex. Water Code § 13.254(a-6). Thus, instead of reviewing a Commission determination as part of Mountain Peak's suit for judicial review applying the substantial evidence standard, we are reviewing the trial court's determination that Mountain Peak did not qualify for the protection of section 1926(b).

When, as here, there are no findings of fact or conclusions of law, a trial court's judgment will be upheld on any theory supported by the record, *Davis v. Huey*, 571 S.W.2d 859, 862 (1978), and any necessary findings of fact will be implied, *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). "Conclusions of law that are necessary, but not made, are deemed in support of the judgment." *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996). Implicit in the trial court's

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determination here is the finding that Mountain Peak did not meet its burden of proving that it "provided or made [service] available" to the Park Property. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (when neither party requests findings of fact and conclusions of law, it is implied that trial court made all findings necessary to support judgment or order). Thus, we must consider whether the evidence presented to the trial court supports its findings and ultimate conclusion that Mountain Peak had not "provided or made [service] available" to the Park Property.

This Court has previously analyzed the meaning of "provided or made [service] available" under section 1926. *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 520-23. The Court held:

> We are persuaded by the majority view of the federal circuit courts—to establish that it "provided or made [service] available" to the disputed area [the utility] was required to plead (and ultimately prove) that it either presently was serving the area or at least presently had the physical means to do so.

Id. at 522.[10] The Court noted that the ordinary meaning of the terms "provide" and "make available" "denote actual provision of service or physical capacity and readiness to provide service," and that

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the protection of section 1926(b) is "'defensive' in nature, intended "to protect territory *already served* by a rural water association." *Id.* (quoting *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 708 (6th Cir. 2003)).

Mountain Peak points to the evidence previously detailed in this opinion about its facilities and water lines "on and near" the Park

Property and emphasizes evidence it presented by affidavit that it had the "capacity" to serve the Park Property. For their part, the City and the Commission point to evidence in the record that the existing water lines did not have the present physical capacity to provide sufficient water to serve the needs of the Park Property when developed and that new facilities would have to be constructed to supplement the existing lines.[11] Specifically, attached to one of Kirk's affidavits is the report of a professional engineering firm stating that the six-inch water line along the southern boundary of the Park Property "did not have sufficient capacity to meet the City's projected needs" and "would need to be upsized to a 12" line and then looped through an area of the Park Property, resulting in the installation of approximately 5,300 linear feet of 12" line" at a cost of approximately $450,000 plus associated boring and casing costs. Also attached to the affidavit is a letter from Mountain Peak to the City in which Mountain Peak's representative states that the parties should address two matters, one of which was "providing water

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for the proposed new athletic park" to be built on the Park Property. The letter includes a proposal for constructing a water line at the City's expense that would deliver water to the Park Property. The City and the Commission assert that this evidence supports the trial court's conclusion that, although Mountain Peak had facilities and water lines that were providing service to nearby properties, they had not yet "provided or [made] service available" to the Park Property, and that considerable additional infrastructure would be needed to accomplish that end.

In *Creedmoor*, this Court held that, in the context of a plea to the jurisdiction, uncontroverted record evidence that the utility "lacked both the infrastructure and water to serve" the development negated any allegations in Creedmoor's petition that it had "provided or made [service] available." *Id.* at 523. Here, there is at least disputed evidence on that issue. We must presume that the trial court resolved any disputed facts in favor of its judgment and that the judgment implies all necessary findings of fact to support it. *See Holt Atherton*, 835 S.W.2d at 83; *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). That is, we must imply a finding by the trial court that Mountain Peak did not in fact have the infrastructure needed to demonstrate a "physical capacity and readiness to provide service" to the Park Property. There is evidence in the record to support the trial court's implied finding that, as a matter of fact, Mountain Peak did not have the physical capacity and readiness to provide service to the Park Property. *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.2d at 522. Mountain Peak has not demonstrated that this finding is not supported by legally or factually sufficient evidence. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (party attacking legal sufficiency of evidence supporting adverse finding on issue on which he had burden of proof must demonstrate that evidence establishes as matter of law vital

Page 21

fact in support of issue); *id.* at 242 (party attacking factual sufficiency of evidence supporting adverse finding on which he had burden of proof must demonstrate that finding is against great weight and preponderance of evidence).

The trial court found, based on legally and factually sufficient evidence, that Mountain Peak had not "provided or made [service] available" to the Park Property. We therefore affirm the trial court's conclusion that 7 U.S.C. section 1926 did not preempt the Commission's order.

CONCLUSION

We conclude that it was not error for the Commission to permit the City to amend its decertification petition to seek expedited release of the Park Property, exclusive of the 6.7-acre tract, and that substantial evidence supports the Commission's finding that the Park Property met the criteria for expedited release pursuant to

section 13.254(a-5). We have also affirmed the district court's conclusion that Mountain Peak was not entitled to invoke the protection of 7 U.S.C. section 1926(b) because it had not "provided or made [service] available" to the Park Property. Consequently, we affirm the district court's judgment affirming the Commission's order approving the City's petition for expedited release.

/s/_____
Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Affirmed

Filed: November 2, 2017

Footnotes:

1. A landowner may not seek expedited release of such a tract if it is located (1) within the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the holder of the CCN or (2) in a platted subdivision "actually receiving water or sewer service." *See* Tex. Water Code § 13.254(a-2).

2. The petition was filed by the President of Harkins Engineering, Inc.

3. Attached to the City's filing is a second affidavit of Michael Adams in which he avers:

> City records confirm that the northernmost approximately 6.7 acres of the [104-acre property] that includes this lift station was included as part of a 2006 final plat of Phase 2A of the Lawson Farms subdivision (the "Phase 2A Park Property"). [] The sewer lift station, required under an earlier final plat (Plat One), was constructed at developer expense and was accepted by [the City] in 2006 as part of the Phase One improvements for the Lawson Farms subdivision. [] Under [the City's] then existing subdivision regulations, the developer was required to install a water line to the lift station, which might be installed later, or "phased-in."

4. Mountain Peak does not specifically identify how such error could be the basis for reversal of the Commission's order in this suit for judicial review, but we note that it could conceivably fall under the heading of "exceeding the Commission's statutory authority" or "affected by other error of law." *See* Tex. Gov't Code § 2001.174(2)(B), (D).

5. Mountain Peak also suggests that the City's request for release of the Park Property from Mountain Peak's certificated service area is a breach of their agreement. We express no opinion as to the merits of this assertion.

6. No portion of the Park Property is within the Dual Certificated Area.

7. The boundaries of the Dual Certificated Area were also established by the 1996 Agreement and a map showing the location of the Dual Certificated Area within Mountain Peak's proposed CCN was attached as an exhibit to that agreement.

8. Although not relevant to our analysis of this issue, we observe that the agreement does not state that the parties agree to refrain from seeking to change, alter, or amend the boundaries *of* their CCNs, but the boundaries *between* their CCNs.

9. The City also asserts that the agreement not to seek to alter or amend boundaries applies only to the boundaries of the Dual Certificated Area and not to other portions of Mountain Peak's or the City's certificated service areas. We need not address this issue and express no opinion in that regard.

10. In *Creedmoor*, this Court reviewed the trial court's ruling on a plea to the jurisdiction. Consequently, the Court reviewed whether Creedmoor's pleadings contained allegations that, if true, would demonstrate that it had "provided or made [service] available" to the disputed area. *See Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 513 (Tex. App.—Austin 2010, no pet.). In this case, we are called upon to determine whether the evidence presented to the trial court supports its conclusion that Mountain Peak had "provided or made [service] available." The *Creedmoor* court's analysis of the legal implications of Creedmoor's allegations are instructive to our review of whether the evidence presented to the trial court supports its conclusion that Mountain Peak had not "provided or made [service] available" to the Park Property.

11. This evidence was part of the administrative record that was admitted as an exhibit in the trial court proceedings. Although Mountain Peak complains that the evidence was not timely filed in the agency proceeding, it provides no supporting authority, and the evidence was not stricken from the agency record. Moreover, Mountain Peak did not object to the admission of that evidence when the administrative record was offered into evidence before the trial court, nor did Mountain Peak seek to prevent the trial court's consideration of that evidence or obtain any ruling with regard to any objections to its admissibility. Thus, this evidence was before the trial court when it made its determination of whether Mountain Peak met the requirements for protection under section 1926(b).

Exhibit 3

Control Number: 51352

Item Number: 18

Addendum StartPage: 0

DOCKET NO. 51352

PETITION OF CARNEGIE DEVELOPMENT, LLC TO AMEND JAMES A. DYCHE DBA CREST WATER COMPANY CERTIFICATE OF CONVENIENCE AND NECESSITY IN JOHNSON COUNTY BY STREAMLINED EXPEDITED RELEASE	§ § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER

This Order addresses the petition by Carnegie Development, LLC for streamlined expedited release of a tract of land in Johnson County from the service area under water certificate of convenience and necessity (CCN) number 12037. James A. Dyche, who operates under the name Crest Water Company, is the holder of CCN number 12037. For the reasons stated in this Order, the Commission releases the tract of land from Crest Water's certificated service area. In addition, the Commission amends Crest Water's CCN number 12037 to reflect the removal of this property from the service area.

Following entry of this Order, the Commission will determine the amount of compensation, if any, to be awarded to Crest Water, which will be addressed by separate order.

I. Findings of Fact

The Commission makes the following findings of fact.

Petitioner

1. Carnegie Development's status as an LLC was forfeited on February 14, 2003.
2. Carnegie Development is operating as a general partnership in the State of Texas.

CCN Holder

3. James A. Dyche is an individual doing business as Crest Water Company.
4. Crest Water holds CCN number 12037 that obligates Crest Water to provide retail water service in its certificated service area in Johnson County.

Petition

5. On September 21, 2020, the petitioner filed a petition for streamlined expedited release of a tract of land from the CCN holder's service area under CCN number 12037.

6. The petition includes a special warranty deed with vendor's lien dated December 28, 2018, which includes a metes-and-bounds description of the tract of land; a vicinity map of the tract of land and compact disk with mapping information; a copy of the notice provided to the CCN holder; and the affidavit, dated September 15, 2020, of Tim Barton, Carnegie Development's president.

7. On September 24, 2020, Carnegie Development supplemented the petition with electronic shapefiles.

8. In Order No. 2 filed on October 30, 2020, the administrative law judge (ALJ) found the petition administratively complete.

Notice

9. The petitioner sent a copy of the petition by certified mail, return receipt requested, to the CCN holder, on or about September 17, 2020.

10. In Order No. 2 filed on October 30, 2020, the ALJ found the notice sufficient.

Intervention and Response to Petition

11. On September 30, 2020, Crest Water filed motions to intervene and dismiss.

12. In Order No. 2 filed on October 30, 2020, the ALJ granted the CCN holder's motion to intervene.

The Tract of Land

13. The tract of land for which the petitioner seeks expedited release is 195.47 acres and is in Johnson County.

14. The petitioner's tract of land is located within the CCN holder's certificated service area for water service.

Ownership of the Land

15. The petitioner acquired the tract of land by special warranty deed with vendor's lien dated December 28, 2018.

Qualifying County

16. Johnson County abuts Tarrant County and does not have a population of more than 45,000 and less than 47,500.

17. Tarrant County has a population greater than one million people.

Water Service

18. The tract of land is not receiving actual water service from the CCN holder.

19. There are no water connections or meters on the tract of land.

20. The petitioner has never paid any fees or charges to the CCN holder to initiate or maintain water service and does not have an account with the CCN holder for water service.

21. The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.

22. The CCN holder has no facilities or lines that provide water service to the tract of land.

23. Prior to May 31, 2018, the petitioner sent a letter to Crest Water requesting water service for the tract of land.

24. On May 31, 2018, the CCN holder filed an application to amend its certificated service area to include the tract of land.

25. On March 25, 2019, the Commission granted the CCN holder's application to amend its certificated service area to include the tract of land.

26. The CCN holder has not performed any acts for or supplied anything to the tract of land.

Map and Certificate

27. On November 12, 2020, Commission Staff filed its recommendation on final disposition that included a certificate and map on which it identified the tract of land in relation to the CCN holder's certificated service area.

II. Conclusions of Law

The Commission makes the following conclusions of law.

1. The Commission has authority over this petition for streamlined expedited release under TWC §§ 13.254 and 13.2541.

2. The petitioner is currently operating as a general partnership as per Texas Business Organizations Code §§ 152.051 and 152.052.

3. The petitioner provided notice of the petition in compliance with 16 TAC § 24.245(h)(3)(F).

4. No opportunity for a hearing on a petition for streamlined expedited release is provided under TWC § 13.2541 or 16 TAC § 24.245(h)(7).

5. Petitions for streamlined expedited release filed under TWC § 13.2541 and 16 TAC § 24.245(h) are not contested cases.

6. Landowners seeking streamlined expedited release under TWC § 13.2541 and 16 TAC § 24.245(h) are required to submit a verified petition through a notarized affidavit, and the CCN holder may submit a response to the petition.

7. To obtain release under TWC § 13.2541, a landowner must demonstrate that the landowner owns a tract of land that is at least 25 acres, that the tract of land is located in a qualifying county, and that the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.

8. The petitioner owns the tract of land, which is at least 25 acres, for which it seeks streamlined expedited release through the petition.

9. Johnson County is a qualifying county under TWC § 13.2541(b) and 16 TAC § 24.245(h)(2).

10. 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).

11. The petitioner is entitled under TWC § 13.2541(b) to the release of its tract of land from the CCN holder's certificated service area.

12. After the date of this Order, the CCN holder has no obligation under TWC §13.254(h) to provided retail water service to the petitioner's tract of land.

13. The Commission has no authority to decertificate any facilities or equipment owned and operated by the CCN holder to provide retail water service or retail sewer service through the streamlined-expedited-release process under Texas Water Code § 13.2541(b).

14. The Commission processed the petition in accordance with the TWC and Commission rules.

15. Under TWC § 13.257(r) and (s), the CCN holder is required to record certified copies of the approved certificate and map, along with a boundary description of the service area, in

the real property records of Johnson County no later than the 31st day after the date the CCN holder receives this Order.

16. A retail public utility may not under TWC § 13.254(d) provide retail water service to the public within the tract of land unless just and reasonable compensation under TWC § 13.254(g) has been paid to the CCN holder.

III. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders.

1. The Commission releases the tract of land identified in the petition from the CCN holder's service area under CCN number 12037.

2. The Commission does not decertificate any of the CCN holder's equipment or facilities that may lay on or under the petitioner's tract of land.

3. The Commission amends CCN number 12037 in accordance with this Order.

4. The Commission approves the attached map.

5. The Commission approves the attached certificate.

6. The CCN holder must file in this docket proof of the recording required in TWC § 13.257(r) and (s) within 45 days of the date of this Order.

7. The proceeding to determine the amount of compensation to be awarded to the CCN holder, if any, commences with the filing of this Order in accordance with the schedule adopted in Order No. 2. Any decision on compensation will be made by a separate order.

8. The Commission denies all other motions and any other requests for general or specific relief not expressly granted by this Order.

Signed at Austin, Texas the 24th day of May 2021.

PUBLIC UTILITY COMMISSION OF TEXAS

PETER M. LAKE, CHAIRMAN

WILL MCADAMS, COMMISSIONER

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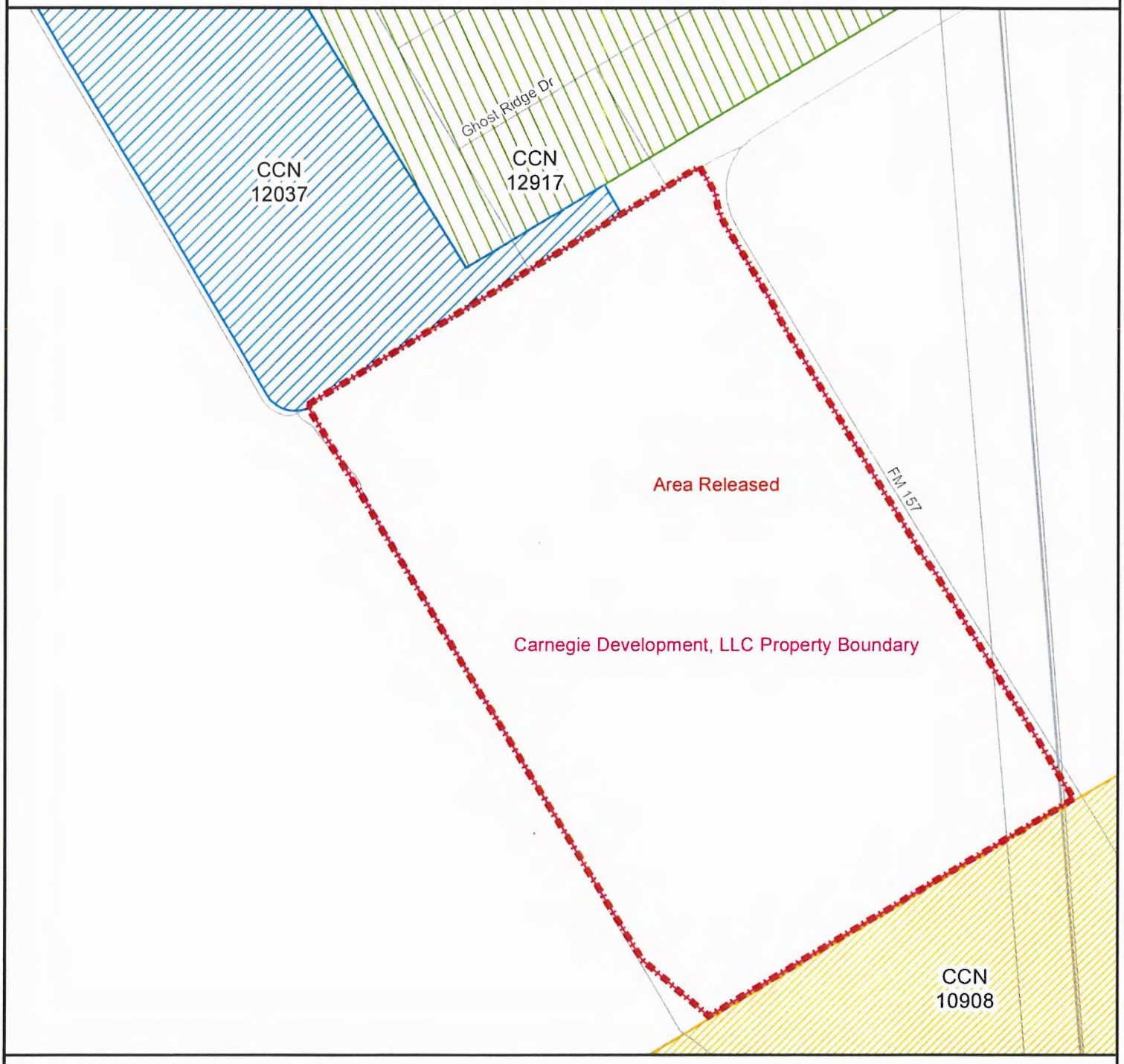
James A. Dyche dba Crest Water Company
Portion of Water CCN No. 12037
PUC Docket No. 51352
Petition by Carnegie Development, LLC to Amend
James A. Dyche dba Crest Water Company's CCN by Expedited Release in Johnson County



Water CCN

- 12037 - James A Dyche
- 12917 - Mauka Water LTD
- 10908 - Mountain Peak SUD

- Area Released
- Property Boundary

0 350 700
Feet

N

Public Utility Commission of Texas
1701 N. Congress Ave
Austin, TX 78701

Map by: Komal Patel
Date created: November 9, 2020
Project Path: n:\finalmapping\51352JamesADyche.mxd

Public Utility Commission

of Texas

By These Presents Be It Known To All That

James A. Dyche dba Crest Water Company

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, James A. Dyche dba Crest Water Company is entitled to this

Certificate of Convenience and Necessity No. 12037

to provide continuous and adequate water utility service to that service area or those service areas in Ellis, Hill, Johnson and Somervell Counties as by Final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 51352 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of James A. Dyche dba Crest Water Company to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Exhibit 4

Filing Receipt

Received - 2022-07-01 10:40:49 AM
Control Number - 52293
ItemNumber - 25

DOCKET NO. 52293

PETITION OF MERITAGE HOMES OF TEXAS, LLC, TO AMEND THE CITY OF MELISSA'S CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	§ § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

ORDER NO. 11
GRANTING STREAMLINED EXPEDITED RELEASE

This Order addresses the petition of Meritage Homes of Texas, LLC for streamlined expedited release of a tract of land in Collin County from the City of Melissa's the service area under water certificate of convenience and necessity (CCN) number 11482. For the reasons stated in this Order, the Commission releases the tract of land from the City of Melissa's certificated service area. In addition, the Commission amends the City of Melissa's CCN number 11482 to reflect the removal of this tract of land from the service area.

Following entry of this Order, the Commission will determine the amount of compensation, if any, to be awarded to City of Melissa, which will be addressed by separate order.

I. Background

This case originated with the petition filed on June 30, 2021, by Meritage Homes to amend North Collin Special Utility District's and the City of Melissa's water CCNs in Collin County by streamlined expedited release. Meritage Homes seeks streamlined expedited release of a tract of land it owns that lies within the dually-certificated area held under North Collin SUD's CCN number 11035 and the City of Melissa's CCN number 11482.

On August 13, 2021, Meritage Homes filed a response to Order No. 2 and a motion to sever the application into two separate applications by Meritage Homes for the City of Melissa and for the North Collin Special Utility District. On August 19, 2021, the administrative law judge (ALJ) granted the motion to sever the two applications into the current docket and Docket No. 52442.[1] On August 23, 2021, Meritage Homes filed a clean copy of the petition in the current docket.

[1] *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*, Docket No. 52442, (pending).

II. Findings of Fact

The Commission makes the following findings of fact.

Petitioner

1. Meritage Homes is an Arizona limited liability company registered with the Texas secretary of state under filing number 800832535.

CCN Holder

2. City of Melissa is a Texas water district under chapters 49 and 65 of the Texas Water Code (TWC).

3. City of Melissa holds CCN number 11482 that obligates it to provide retail water service in its certificated service area in Collin County.

Petition and Supplemental Filing

4. On August 23, 2021, the petitioner filed a petition for streamlined expedited release of a tract of land from the CCN holder's service area under CCN number 11482.

5. The petition includes an affidavit, dated August 23, 2021, of David Aughinbaugh, vice president of land for the petitioner; general and detail location maps; a special warranty deed including metes and bounds dated December 23, 2020; and mapping data

6. On March 28, 2022, the petitioner filed supplemental mapping items.

7. In Order No. 10 filed on May 12, 2022, the administrative law judge (ALJ) found the supplemented petition administratively complete.

Notice

8. The petitioner sent a copy of the petition by certified mail, return receipt requested, to the CCN holder on September 8, 2021.

9. In Order No. 7 filed on September 24, 2021, the ALJ found the notice sufficient.

The Tract of Land

10. The petitioner owns property in Collin County that is approximately 273.5 acres.

11. The tract of land for which the petitioner seeks streamlined expedited release is a portion of the petitioner's property that is approximately 60 acres.

12. The tract of land is located within the CCN holder's certificated service area.

Ownership of the Tract of Land

13. The petitioner acquired their property by a special warranty deed dated December 23, 2020.

Qualifying County

14. Collin County has a population of more than 47,500 and is adjacent to Dallas County.

15. Dallas County has a population of at least one million.

Water Service

16. The tract of land is not receiving actual water service from the CCN holder.

17. The petitioner has not requested that the CCN holder provide water service to the tract of land.

18. The petitioner has not paid any fees or charges to initiate or maintain water service to the CCN holder.

19. There are no billing records or other documents indicating an existing account with the CCN holder for the provision of water service to the tract of land.

20. The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.

21. The CCN holder has no facilities or lines that provide water service to the tract of land.

22. The CCN holder has not performed any acts for or supplied anything to the tract of land.

Map and Certificate

23. On June 15, 2022, Commission Staff filed its supplemental recommendation on final disposition that included a certificate and a map on which it identified the tract of land in relationship to the CCN holder's certificated service area.

III. Conclusions of Law

The Commission makes the following conclusions of law.

1. The Commission has authority over this petition for streamlined expedited release under TWC §§ 13.254 and 13.2541.

2. The petitioner provided notice of the petition in compliance with 16 Texas Administrative Code (TAC) § 24.245(h)(3)(F).

3. No opportunity for a hearing on a petition for streamlined expedited release is provided under TWC §§ 13.254 or 13.2541 or and under 16 TAC § 24.245(h)(7) no hearing will be held on such a petition.

4. Petitions for streamlined expedited release filed under TWC §§ 13.254 or 13.2541 and 16 TAC § 24.245(h)(7) are not contested cases.

5. Landowners seeking streamlined expedited release under TWC §§ 13.254 and 13.2541 and 16 TAC § 24.245(h) are required to submit a verified petition through a notarized affidavit, and the CCN holder may submit a response to the petition.

6. Under 16 TAC § 24.245(h)(7), the Commission's decision is based on the information submitted by the landowner, the CCN holder, and Commission Staff.

7. To obtain release under TWC § 13.2541(b), a landowner must demonstrate that the landowner owns a tract of land that is at least 25 acres, that the tract of land is located in a qualifying county, and that the tract of land is not receiving service of the type that the current CCN holder is authorized to provide under the applicable CCN.

8. The time that the petition is filed is the only relevant time period to consider when evaluation whether a tract of land is receiving water service under TWC § 13.2541(b). Whether a tract of land might have previously received water or sewer service is irrelevant.

9. A landowner is not required to seek the streamlined expedited release of all of its property.

10. The petitioner owns the tract of land that is at least 25 acres for which it seeks streamlined expedited release.

11. Collin County is a qualifying county under TWC § 13.2541(b) and 16 TAC § 24.245(h)(2).

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).

13. The petitioner is entitled under TWC § 13.2541(b) to the release of the tract of land from the CCN holder's certificated service area.

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 tract of land.

15. The Commission may release only the property of the landowner from a CCN under TWC § 13.2541(b). The Commission has no authority to decertificate any facilities or equipment owned and operated by the CCN holder to provide retail water service through the streamlined-expedited-release process under TWC § 13.2541(b).

16. The Commission processed the petition in accordance with the TWC and Commission rules.

17. Under TWC § 13.257(r) and (s), the CCN holder is required to record certified copies of the approved certificate and map, along with a boundary description of the service area, in the real property records of Collin County no later than the 31st day after the date the CCN holder receives this Order.

18. A retail public utility may not under TWC § 13.254(d) provide retail water service to the public within the release property unless just and adequate compensation under TWC § 13.254(g) has been paid to the CCN holder.

IV. Ordering Paragraphs

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders.

1. The Commission releases the tract of land identified in the petition from the CCN holder's certificated service area under CCN number 11482.

2. The Commission does not decertificate any of the CCN holder's equipment or facilities that may lay on or under the petitioner's tract of land.

3. The Commission amends CCN number 11482 in accordance with this Order.

4. The Commission approves the attached map.

5. The Commission issues the attached certificate.

6. The CCN holder must file in this docket proof of the recording required in TWC § 13.257(r) and (s) within 45 days of the date of this Order.

7. The proceeding to determine the amount of compensation to be awarded to the CCN holder, if any, commences with the filing of this Order in accordance with the schedule adopted in Order No. 10. Any decision on compensation will be made by a separate order.

8. The Commission denies all other motions and any other requests for general or specific relief not expressly granted by this Order.

Signed at Austin, Texas the 1st day of July 2022.

PUBLIC UTILITY COMMISSION OF TEXAS

GREGORY R. SIEMANKOWSKI
ADMINISTRATIVE LAW JUDGE

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Public Utility Commission of Texas

By These Presents Be It Known To All That

City of Melissa

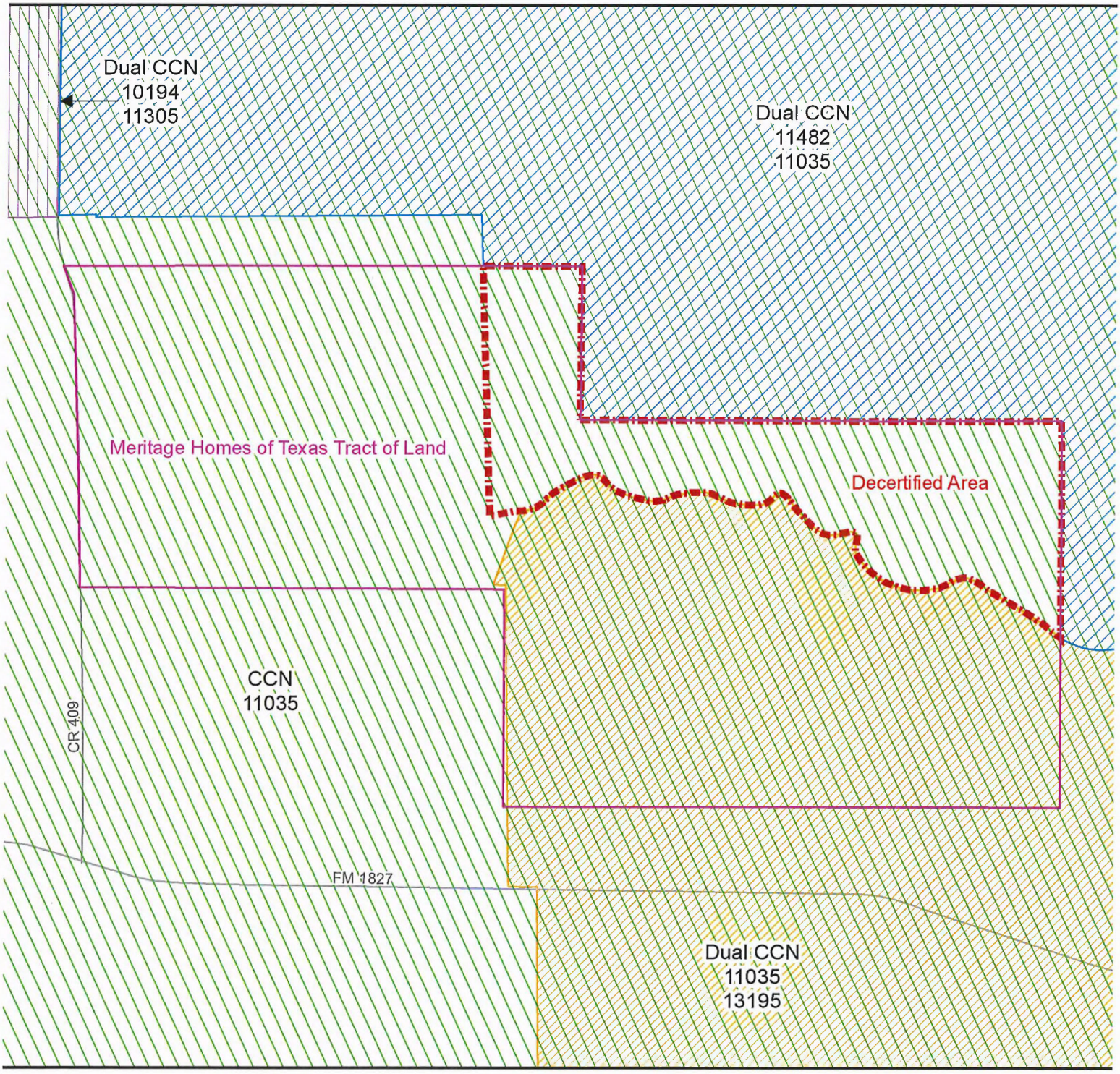
having duly applied for certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this commission that the public convenience and necessity would in fact be advanced by the provision of such service by this Applicant, is entitled to and is hereby granted this

Certificate of Convenience and Necessity No. 11482

to provide continuous and adequate water utility service to that service area or those service areas in Collin County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Application No. 52293 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the City of Melissa to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.

Note: The provision of utility service under this certificate is governed by a settlement agreement between the Cities of Anna, McKinney, Melissa and the North Collin Water Supply Corporation. Please contact these entities for information regarding the terms of this agreement.

City of Melissa
Portion of Water CCN No. 11482
PUC Docket No. 52293
Petition by Meritage Homes of Texas to Amend
City of Melissa's CCN by Streamlined Expedited Release in Collin County



Water CCN

- 11482 - City of Melissa
- 11035 - North Collin SUD
- 13195 - City of Princeton
- 10194 - City of McKinney

- Decertified Area
- Tract of Land

0 400 800
Feet

N

Public Utility Commission of Texas
1701 N. Congress Ave
Austin, TX 78701

Map by: Komal Patel
Date: May 23, 2022
Project: 52293CityofMelissa.mxd