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PETITION OF HC CELINA 414, LLC	§	PUBLIC UTILITY COMMISSION
TO AMEND MARILEE SPECIAL	§	
UTILITY DISTRICT'S CERTIFICATE	§	
OF CONVENIENCE AND NECESSITY	§	
IN COLLIN COUNTY BY EXPEDITED	§	OF TEXAS
RELEASE	§	

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

COMES NOW, MARILEE SPECIAL UTILITY DISTRICT (the "District") and files these Corrections and Exceptions ("Corrections and Exceptions") to the Proposed Order ("Proposed Order") entered by Honorable Administrative Law Judge ("ALJ") Hunter Burkhalter on January 25, 2022, proposing that the Public Utility Commission of Texas (the "Commission") amend the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release approximately 406.7 acres of property ("Property") in Collin County, Texas.¹ The Proposed Order requires the parties of this proceeding to file corrections or exceptions by February 8, 2022. Thus, the District's Corrections and Exceptions are timely filed. In support thereof, the District respectfully shows as follows:

I.

CORRECTIONS AND EXCEPTIONS

The ALJ's Proposed Order, which recommends that the Commission grant HC Celina 414, LLC's ("Petitioner") First Amended Petition,² is in error. The Proposed Order is based on factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of Property from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that the Commission its Exceptions and

¹ Proposed Order and Memorandum (Jan. 25, 2022).

² First Amended Petition by HC Celina 414, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Nov. 22, 2021).

Corrections to the Proposed Order be granted, that the Commission deny the Petition and dismiss this proceeding.

A. The ALJ Erred in Holding that the Property Is Not Receiving Water Service from the District (FOF Nos. 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and COL Nos. 7 and 12 and Ordering Paragraphs 1 and 2.).

The Proposed Order reflects a lack of understanding of the meaning of “service” under the Texas Water Code (“TWC”), the Texas Administrative Code (“TAC”), and caselaw interpreting the same when it concludes, “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 Corp.*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).”³ In fact, the Findings of Fact in the Proposed Order reflect that the Property is receiving and is capable of receiving service from the District as that term is defined in the TWC and *Crystal Clear*. Accordingly, the Commission should revise the Proposed Order to conclude that, based on Findings of Fact 25, 26, 27, 28, and 30, the Property is receiving water service from the District and is thus not eligible for streamlined expedited release under TWC § 13.2541 and 16 TAC § 24.245(h).

The TWC broadly defines “service” as “any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties[.]”⁴ Whether or not a tract is “receiving water or sewer service” under TWC § 13.2541 is a fact question. The inquiry into whether a tract is “receiving service” requires the Commission to consider any facilities committed to providing water to the tract. As defined by TWC § 13.002(9), “facilities” includes “all the plant and equipment of a retail public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any retail public utility.”

³ Proposed Order at Conclusion of Law 12.

⁴ TWC § 13.002(21); see also 16 TAC § 24.3(33) (same definition).

In *Crystal Clear*,⁵ the Austin Court of Appeals held that facilities or lines “used” or “committed” to providing such service might cause a property to “receive service” under the statutory and regulatory definition. But where water lines are actually present within a tract and committed to the property, the tract is unquestionably “receiving service” and the Commission has determined that a streamlined expedited release petition may not be granted under TWC § 13.2541, as interpreted by *Crystal Clear*, when such facts are present.

The District’s verified response in this proceeding was supported by the affidavits and accompanying exhibits of Michael Garrison, the District’s Assistant Manager, and Eddy Daniel, the District’s engineer. Both swore that the Property, and the tract of land upon which the Property is located, is served by the District’s meter and facilities, including Meter No. 521, located on the Property, and multiple meters and waterlines near the Property. Here, the District has served and is capable of serving the “tract of land,” and is thus receiving “service,” as that term in TWC § 13.002, as that provision is interpreted by *Crystal Clear*.

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

- “The CCN holder operates and maintains an active water meter, meter [N]o. 520, that is located just outside the tract of land, and the meter is used to provide water service to an area outside the tract of land.”⁶
- “The CCN holder operates and maintains an active water meter, meter No. 521, that is located on the tract of land. Meter No. 521 is utilized by the CCN holder, however, to provide water service to an area just outside the tract of land, and it is not used to provide water service to the tract of land.”⁷

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

⁶ Proposed Order at Finding of Fact 25.

⁷ *Id.* at Finding of Fact 26.

- “The CCN holder owns and operates a one-and-a-half-inch water line that runs parallel to, but just outside of, a portion of the northern boundary of the tract of land.”⁸
- “The CCN holder owns and operates a twelve-inch water line that runs parallel to a portion of the eastern boundary of the tract of land. For roughly half of this distance, the twelve-inch line runs just inside the boundary of the tract of land; for the remainder, it runs just outside of the boundary of the tract of land.”⁹
- “The CCN holder owns and operates additional water system infrastructure located outside of, but in proximity to, the tract of land. None of this infrastructure provides water service to the tract of land.”¹⁰

The Proposed Order’s Findings of Fact 25-28 and 30 are, or should be, informed by the following un rebutted sworn facts in the District’s verified response:

- The sworn affidavit of Michael Garrison: “The District maintains an active water meter, Meter No. 521, on the 413.88 acres of Property (“Property”) sought to be decertified in this proceeding from the District’s water certificate of convenience and necessity (“CCN”) No. 10150. The meter and the District’s facilities near the Property are accurately reflected in Exhibit B-1 to the affidavit of Eddy Daniel.”¹¹
- The sworn affidavit of Eddy Daniel and accompanying exhibit: “The District provides water service to the Property through Meter No. 520, and the District provides water service to an area just outside the Property, through Meter No. 521. Both meters are marked on Exhibits B- 1.”¹²

⁸ *Id.* at Finding of Fact 27.

⁹ *Id.* at Finding of Fact 28.

¹⁰ *Id.* at Finding of Fact 30.

¹¹ Marilee Special Utility District’s Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, Exhibit A, Affidavit of Michel Garrison, at ¶ 3 (Dec. 23, 2021).

¹² Marilee Special Utility District’s Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, Exhibit B, Affidavit of Eddie Daniel, at ¶ 5 (Dec. 23, 2021).

- The sworn affidavit of Eddy Daniel and accompanying exhibit: “The meters were placed with the intent to serve the Property and the tract where the Property is located.”¹³
- The sworn affidavit of Eddy Daniel and accompanying exhibit: “Meter 520 receives water service from the District through a 12” waterline that serves the Property, which waterline is extends along and inside the Eastern border of the Property. The waterline is marked on Exhibit B-1.”¹⁴
- The sworn affidavit of Eddy Daniel and accompanying exhibit: “Additional facilities that are available to provide water service to the Property are:
 - Four 8” waterlines, on the southeast of the Property;
 - A 4” waterline, northeast of the Property;
 - A 2” waterline on the north side of the Property; and
 - A 1 ½” waterline on the north side of the Property.

These facilities are marked on Exhibit B-1.”¹⁵

Because the Proposed Order and the sworn affidavits and exhibits provided by the District reflect that the District has facilities, water lines, and meters dedicated to the Property and the tract of land on which the Property is situated, Petitioner has failed to show that the Property is not receiving “service” under TWC § 13.2541, 16 TAC § 16.245(h), and *Crystal Clear*. The Proposed Order’s recommended conclusion that the Property is not receiving “service” is error and must be corrected. Specifically, proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs are incorrect and should be deleted or corrected:

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

¹³ *Id.* at Exhibit B, Affidavit of Eddie Daniel, at ¶ 6.

¹⁴ *Id.* at Exhibit B, Affidavit of Eddie Daniel, at ¶ 7.

¹⁵ *Id.* at Exhibit B, Affidavit of Eddie Daniel, at ¶ 8.

¹⁶ Proposed Order at Finding of Fact 21.

- “Neither the one-and-a-half-inch line nor the twelve-inch line provides water service to the tract of land.”¹⁷
- “The CCN holder owns and operates additional water system infrastructure located outside of, but in proximity to, the tract of land. None of this infrastructure provides water service to the tract of land.”
- “The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.”
- “The CCN holder has no facilities or lines that provide water service to the tract of land.”
- “The CCN holder has not performed any acts for or supplied anything to the tract of land.”

Additionally, for the aforementioned reasons, the ALJ should enter a Proposed Order that proposes denying the First Amended Petition on the grounds that the Property is receiving service from the District and therefore cannot state a claim upon which relief may be granted under TWC § 13.2541, 16 TAC § 24.245(h), and *Crystal Clear*.

B. The ALJ Erred by Failing to Hold Petitioner to Its Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 6, 7, 8, 9, 10, 38, 39, 40, and COL Nos. 5, 7, 13, and Ordering Paragraph 1.).

The Proposed Order does not accurately state Petitioner’s burden of proof under TWC § 13.2541, 16 TAC § 24.245(h), or caselaw that interprets these provisions. The petitioner in a proceeding brought under TWC § 13.2541 and 16 TAC § 24.245(h) has the burden to prove that the area requested to be decertified is not receiving service via a “statement of facts that *demonstrates* that the tract of land is not currently receiving service.”¹⁸ That burden has not been met here, where in both the Original Petition and the First Amended Petition, Petitioner only claimed, without factual support, that the Property is not and has not received water service from the District, and provided no facts regarding water-service facilities or meters on or near the

¹⁷ *Id.* at Finding of Fact 29.

¹⁸ 16 TAC § 24.245(h)(3)(D) (emphasis added).

Property, and further, failed to rebut the District’s affirmative evidence that it provides and has provided and is fully capable of continuing to provide, water service to the Property.¹⁹

The proper analysis of a Petitioner’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.²⁰ The petitioner in that case provided a detailed affidavit by a land broker on the grounds of the property to be decertified, in which the broker stated that he searched the property, which was inhabited, for several hours and found no district water meters or facilities, only “two shuttered ground well heads” and a “small, elevated water storage tank . . . implying that any dwelling on the [p]roperty required that water pressure be generated locally and not from a retail water utility service provider.”²¹ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.²²

The “statement of facts” that Petitioner must show in its verified petition to meet its burden under 16 TAC § 24.245(h) is also reflected in *Crystal Clear*. Petitioner in that case, the Texas General Land Office, supported the contention that the area requested to be decertified was not receiving water service by explaining that there were “no active water meters or water connections on and no facilities providing current service” and that there was “one abandoned, empty meter box on the eastern portion of the property, which Crystal Clear itself classifies as inoperative.”²³

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

¹⁹ See Petition by HC Celina 414, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541, at Exhibit A (Affidavit of Phillip Huffines) at ¶ 3 (“Petitioner’s property is not receiving water or sewer service from Marilee SUD[.] The property has not requested water or sewer service from Marilee SUD or paid any fees or charges to initiate or maintain water or sewer service, and there are no billing records or other documents indicating an existing account for the Properties.”) (Sept. 1, 2021) (the “Original Petition”). The First Amended Petition does not attach any factual materials in support, but instead refers to the affidavit Mr. Huffines attached to the Original Petition.

²⁰ No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin (May 11, 2018, pet. denied) (mem. op.) (interpreting TWC § 13.2541’s predecessor statute, TWC § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the TWC. See Tex. S.B. 2272, 86th Leg., R.S. (2019)).

²¹ *Id.* at **6-7.

²² *Id.* at **9-10 (citing the Commission’s Finding of Fact No. 24).

²³ *Crystal Clear*, 449 S.W.3d at 134.

Property that the District is capable of immediately providing service to, as evidenced by the District's existing meters, waterlines, and facilities. Petitioner disingenuously swears that that the "requested area" is not receiving service, when the meter that is dedicated to providing service is just outside of the requested area—this is why Petitioner amended the Original Petition—to "carve out" that area.²⁴ The ALJ's approval of Petitioner's "carving out" of the Property from the existing meters, waterlines, and facilities, and acceptance of Petitioners' insufficient affidavit eviscerates Petitioners' burden of proof, and improperly puts all the burden on the District to prove that the Property is receiving, has received, and is capable of receiving water from the District's dedicated facilities, water lines, and meters.

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

C. The ALJ Erred by Proposing the Curtailment or Limitation of the District's Service Area Because the District is Entitled to Protection Under 7 U.S. Code § 1926 (COL 13, Ordering Paragraph 1).

Pursuant to the Consolidated Farm and Rural Development Act of 1961 and 7 U.S. Code § 1926, the United States Department of Agriculture ("USDA") may make or insure loans to associations and public and quasi-public agencies. In order to protect a USDA debtor's ability to service its debt, Congress enacted 7 U.S.C. § 1926(b) to prohibit "curtail[ing] or limit[ing]" the service area of a USDA debtor. The statute provides:

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

²⁴ Compare Original Petition, at 2 (seeking to decertify 413.88 acres of property), to First Amended Petition, at 2 (seeking to decertify 406.7 acres of property, reduced to remove the areas of property receiving water service from the District).

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.²⁵

A federal law, such as 7 U.S.C. § 1926(b), is supreme and binding authority over a state law, such as TWC § 13.02541.²⁶ A federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or curtailment of its service area by the Commissioners, in the event that the Commission enters an order curtailing or limiting the CCN holder's service area in violation of 7 U.S.C. § 1926(b).²⁷

To be eligible for protection under 7 U.S.C. § 1926(b), the District must show that it satisfies the “physical abilities” test, as adopted by the United States Court of Appeals for the Fifth Circuit, sitting *en banc* in *Green Valley Special Utility District v. City of Schertz*.²⁸ To satisfy the “physical abilities,” the District must show that it has “adequate facilities to provide service to the area within a reasonable time” after service is requested, and that the District has “the legal right to provide service.”²⁹ The District need not show “pipes in the ground” at the specific tract, as long as it has some “nearby infrastructure.”³⁰ The District's ability to provide service to the Property satisfies the “physical abilities” test.³¹

In addition to satisfying the “physical abilities” test, an entity must show federal indebtedness to qualify for protection under 7 U.S.C. § 1926(b). As described in the District's

²⁵ 7 U.S.C § 1926(b).

²⁶ See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) (“[F]ederal law is supreme in case of a conflict with state law.”); see also *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 492 (5th Cir. 2020) (en banc) (Jones, J., concurring) (noting, “the final PUC decision” in a case involving streamlined expedited release, “is reviewable de novo in state courts, which would have to enforce Section 1926(b) pursuant to the Supremacy Clause.”).

²⁷ See, e.g., *Green Valley*, 969 F.3d at 475 (“Because . . . Green Valley has satisfied *Young*'s requirements, its suit for injunctive relief against the PUC Officials may go forward.”) (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

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

²⁹ *Id.* at 477.

³⁰ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

³¹ See *infra* notes 6-16 & accompanying text (describing the District's meters and waterlines on and near the Property).

verified response, the District has been consolidated with Mustang Special Utility District (“Mustang SUD”), pursuant to the provisions of TWC Chapter 65, Subchapter H.³² Mustang SUD is indebted to the USDA, Rural Utilities Service, which has twice purchased bonds from Mustang SUD: in 2016, in the amount of \$2,442,000, and 2018, in the amount of \$1,000,000 (collectively, the “Bonds”).³³ The District assumed Mustang SUD’s federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.³⁴ In addition to its existing federal indebtedness, the District is also working diligently to close on a USDA loan that was approved in June 2021.³⁵

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

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

The Proposed Order omits significant procedural events that occurred during this proceeding from its Findings of Fact. In order to have a clear record on appeal, the District respectfully requests that the Proposed Order be revised to correct Findings of Fact 7, 8, and 16; and to include new Findings of Fact and Conclusions of Law substantially similar to the following:

- **Proposed FOF 5A.** In Order No. 2, entered on October 4, 2021, the petition was ordered administratively incomplete based on Commission Staff’s recommendation, and petitioner was given a deadline of November 1, 2021, to cure deficiencies.

³² See TWC § 65.723 (“Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter.”); see also Marilee Special Utility District’s Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, at Exhibit A (Affidavit of Mike Garrison) ¶¶ 7-8 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Oct. 7, 2021).

³³ See *id.* at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

³⁴ See TWC § 65.726

³⁵ Marilee Special Utility District’s Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, Exhibit A, Affidavit of Michel Garrison, at ¶¶ 15-16 (Dec. 23, 2021).

- **Corrected FOF 8.** On November 22, 2021, the petitioner filed its first amended petition, which in which the petitioner clarified the acreage for which it seeks streamlined expedited release, incorporating by reference the affidavit, maps, and special warranty deed included with the September 1, 2021 petition.
- **Proposed FOF 12A.** On October 5, 2021, the CCN holder filed a Motion to Intervene.
- **Corrected FOF 14.** On December 23, 2021, the CCN holder filed a response to the petition, which includes an affidavit, dated December 21, 2021, of Michael Garrison, the CCN holder's assistant manager; a loan commitment letter dated April 13, 2021; a letter from the United States Department of Agriculture dated July 19, 2021, with attachments; a voting proposition form from the CCN holder dated November 2, 2021; a summary results report of general and special elections held by the CCN holder on November 2, 2021, dated November 8, 2021; an affidavit, dated December 22, 2021, of Eddy Daniel, the CCN holder's engineer of record; a detailed map of the tract of land and the District's facilities on and near to the tract of land; an affidavit, dated December 21, 2021, of Chris Boyd, general manager for the Mustang Special Utility District; an active contests options list dated November 2, 2021 for Mustang SUD; a cumulative results report for a Mustang SUD election held on November 2, 2021, dated November 9, 2021.
- **Proposed FOF 9A.** In Order No. 5, entered on December 3, 2021, the ALJ entered a procedural schedule reflecting that the 60-day administrative approval period for expedited release expired on February 1, 2022.
- **Proposed COL 8.** Under 16 TAC § 24.245(h)(7), “[t]he commission will issue a decision on a petition filed under this subsection no later than 60 calendar days after the presiding officer by order determines that the petition is administratively complete.”

II.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that its Exceptions and Corrections to the Proposed Order be granted, that the ALJ enter a corrected and revised Proposed Order that proposes denying the Petition and dismissing this proceeding on the independently sufficient grounds that the Property is receiving service from the District, and that 7 U.S.C. § 1926(b) prohibits the curtailment or limitation of the federally indebted District. The District also respectfully requests all other relief in law and equity to which it may be entitled.

Respectfully submitted,

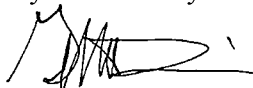


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ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this 8th day of February 2022.



Grayson E. McDaniel