
# Filing Receipt

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**DOCKET NO. 52518**

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| **PETITION OF CLIFTON VAN MCKNIGHT AND BRYAN JEFFERY MCKNIGHT TO AMEND MARILEE SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE** | § § § § § § § | **PUBLIC UTILITY COMMISSION OF TEXAS** |

**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") Siemankowski on March 9, 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 62.7 acres of property ("Property") in Collin County, Texas.[1] The Proposed Order requires the parties of this proceeding to file corrections or exceptions by March 21, 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 the Petition that was originally filed by Clifton Van McKnight and Bryan Jeffrey McKnight, before the docket was erroneously "restyled" such that Petitioner was changed to VPTM Cross Creek LB, LLC,[2] is in

[1] Proposed Order and Memorandum (Mar. 9, 2022).

[2] *Compare* Petition of Clifton McKnight and Bryan Jeffrey McKnight for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Sept. 3, 2021), *with* First Amended Petition of VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Oct. 6, 2021), *with* Second Amended Petition of VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Dec. 9, 2021).

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

### A. The ALJ Erred in Denying the District's Motion to Dismiss (FOF Nos. 1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 19, 21, and COL Nos. 2, 5, 6, 7, 11, 13, 16, and Ordering Paragraphs 1.

On September 3, 2021, Clifton Van McKnight and Bryan Jeffery McKnight ("Petitioners") (together with the District and Commission Staff, the "Parties") filed a petition for streamlined expedited release ("Petition"), seeking to decertify 62.700 acres of property (the "Property") from the District's Certificate of Convenience and Necessity No. 10150 in Collin County, Texas, pursuant to Texas Water Code ("TWC") § 13.2541 and 16 Texas Administrative Code ("TAC") § 24.245(h).

On October 6, VPTM Cross Creek LB ("VPTM Cross Creek") filed a First Amended Petition in the docket.[3] Neither the Petition nor the First Amended Petition had been found administratively complete. Under 16 TAC § 24.8(d), the Petition was not yet considered "filed."

On November 23, 2021, Commission Staff filed a request to "restyle the docket," stating, without legal support, that "Since VPTM is now the owner of the property, as indicated by the amended petition, it is thus the petitioner of record in this docket."[4] The request was not supported by the TWC or TAC. While the Commission's rules allow Petitioners to *amend* their pleadings,[5] they do not allow for the docket to be "restyled" as though the proceeding had been initiated by completely different petitioners. The Commission rules do not provide for a petitioner to completely abandon its case and for a totally different petitioner to take its place. The Commission

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[3] First Amended Petition by VPTM Cross Creek LB, for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Oct. 6, 2021).

[4] Commission Staff's Request for Extension and Request to Restyle the Docket, at 1 (Nov. 23, 2021).

[5] 16 TAC § 22.76.

rules indicate that a petitioner that wishes to withdraw formally withdraw its petition before presenting its direct case.[6] Petitioners presented their direct case in their sworn Petition. Petitioners have never applied to withdraw the Petition. Accordingly, in the docket, there is a Petition that cannot be granted, and a First Amended Petition that was not filed by the Petitioners.

The District timely opposed Commission Staff's request, pointing out that "Commission Staff is legally incorrect in claiming that this proceeding may simply be 'restyled' to have been brought by completely new Petitioners to this proceeding."[7] The District moved to dismiss the Petition pursuant to 16 TAC § 22.181(d), for failure to state a claim for which relief can be granted, or other good cause shown. The District noted that Petitioners, Clifton Van McKnight and Bryan Jeffrey McKnight, do not own the Tract of Land. Therefore, the District argued, the Petition must be denied for failure to state a claim for which relief can be granted, pursuant to 16 TAC § 22.181(d). The correct action for the ALJ to take is to deny and dismiss the Petition for failure to state a claim upon which relief may be granted, as Petitioners cannot establish a right to relief under TWC § 13.2541 and 16 TAC § 24.245(h), since they do not own the Property.

The ALJ denied the District's Motion to Dismiss, based on the conclusion that Petitioners may substitute in for one another without limitation as long as the petition has not yet been found administratively complete.[8] Bizarrely, the ALJ stated that, "As a matter of law, no petition was filed with the Commission until December 29, 2021, the date on which the ALJ deemed the petition administratively complete."[9] Citing 16 TAC § 24.8(d), the ALJ stated, "[S]ince the original

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[6] See 16 TAC § 22.181(g)(1) ("A party that initiated a proceeding may withdraw its application without prejudice to refiling of same, at any time before that party has presented its direct case.").

[7] Marilee Special Utility District's Opposition to Commission Staff's Request to Restyle the Docket and Order No. 4, and Motion to Dismiss Petition, at 2-3 (Dec. 1, 2021); *see also* Marilee Special Utility District's Verified Response to VPTM Cross Creek LB's Second Amended Petition for Expedited Release Pursuant to TWC § 13.2541, at ¶¶ 19-21 (Jan. 18, 2022) (arguing that dismissal is appropriate because VPTM Cross Creek LB is not the Petitioner and that Petitioner does not own the property at issue).

[8] Order No. 7 – Denying Motion to Dismiss, at 1-2 (Mar. 2, 2022).

[9] *Id.* at 2 (citing 16 TAC § 24.8(d)).

petition submitted by the McKnights was never found administratively complete, it was never considered filed."

The District recognizes that 16 TAC § 24.8(d) provides that a TWC § 13.0541 petition is not "considered filed" until administratively complete, but the District disagrees that this status means that a petitioner may "substitute out" for another petitioner merely by "restyling" the docket. The District respectfully urges that its was error for its Motion not Dismiss to be denied.

### B. The ALJ Erred in Holding that the District is Not Capable of Providing Water Service to the Property (FOF Nos. 24, 25, 26, 27, 28, 29 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)."[10]

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[.]"[11] 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."

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[10] Proposed Order at Conclusion of Law 12.

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

In *Crystal Clear*,[12] 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 and capable of providing service to the property, the tract is unquestionably capable of "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.

In fact, the Findings of Fact in the Proposed Order reflect that the Property is capable of receiving service from the District as that term is defined in the TWC and *Crystal Clear*. Here, the District owns facilities capable of providing service to the Property: The District maintains an 8" and 4" waterline that run along the northern and western boundaries of the Property;[13] and the District maintains multiple active water meters on properties directly north of the Property.[14]

Accordingly, the Commission should revise the Proposed Order to conclude that, based on Finding of Fact 27 and 28, as well as the evidence reflected in the District's Verified Response and supporting affidavits and evidence, the Property is capable of 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). 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*.

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[12] 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)).

[13] *See* Marilee Special Utility District's Verified Response to VPTM Cross Creek LB's Second Amended Petition for Expedited Release Pursuant to TWC § 13.2541, at Exhibit B (Affidavit of Jacob Dupuis) at ¶¶ 5-6 and accompanying exhibit (describing the District's waterlines that border the Property and active District meters providing water service to neighboring properties).

[14] *Id.*

### 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. 5, 6, 7, 25, 26, 27, 28, 29, 30 and COL Nos. 5, 7, 12, 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."[15] That burden has not been met here, where in the 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 Property, and further, failed to rebut the District's affirmative evidence that it is fully capable of providing water service to the Property.[16]

The proper analysis of a Petitioner's burden is reflected in *Johnson County Special Utility District v. Public Utility Comm'n of Texas*.[17] 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."[18] The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.[19]

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[15] 16 TAC § 24.245(h)(3)(D) (emphasis added).

[16] *See* Second Amended Petition by VPTM Cross Creek LB for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Dec. 9, 2021), at Exhibit A (Affidavit of Brendan Bosman) 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. 28, 2021).

[17] 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)).

[18] *Id.* at **6-7.

[19] *Id.* at **9-10 (citing the Commission's Finding of Fact No. 24).

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."[20]

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 Property that the District is capable of providing service to, as evidenced by the District's waterlines. Petitioner disingenuously swears that that the "requested area" is not receiving service, when the waterline that is dedicated to providing service is just outside of the requested area. The ALJ's recommendation that the Property be decertified 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 capable of receiving water from the District's dedicated water lines.

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

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[20] *Crystal Clear*, 449 S.W.3d at 134.

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 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.[21]

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.[22] 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).[23]

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*.[24] 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."[25] The District need not show "pipes in the ground" at the specific tract, as long

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[21] 7 U.S.C § 1926(b).

[22] *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 relèase, "is reviewable de novo in state courts, which would have to enforce Section 1926(b) pursuant to the Supremacy Clause.").

[23] *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)).

[24] 969 F.3d 460 (5th Cir. 2020) (en banc).

[25] *Id.* at 477.

as it has some "nearby infrastructure."[26] The District's ability to provide service to the Property satisfies the "physical abilities" test.[27]

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 verified response, the District has been consolidated with Mustang Special Utility District ("Mustang SUD"), pursuant to the provisions of TWC Chapter 65, Subchapter H.[28] Mustang SUD is indebted to the USDA, Rural Utilities Service, which has twice purchased bonds from Mustang SUD: in 2016, in the amount of $14,142,000, and 2018, in the amount of $1,000,000 (collectively, the "Bonds").[29] The District assumed Mustang SUD's federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.[30] 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.[31]

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.

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

[27] *See infra* notes 7-10 & accompanying text (describing the District's waterlines near the Property).

[28] *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 Second Amended Petition for Expedited Release from Water CCN No. 10150, at Exhibit A (Affidavit of Donna Loiselle) ¶¶ 7-8 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District).

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

[30] *See* TWC § 65.726

[31] Marilee Special Utility District's Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, Exhibit A, Affidavit of Donna Loiselle, at ¶¶ 15-16.

## 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 capable of 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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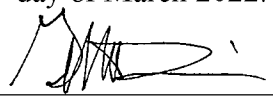
ATTORNEYS FOR MARILEE SPECIAL UTILITY DISTRICT

## 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 21st day of March 2022.



Grayson E. McDaniel