



## Filing Receipt

**Received - 2022-07-11 01:12:21 PM**

**Control Number - 52518**

**ItemNumber - 35**

**DOCKET NO. 52518**

<b>PETITION OF CLIFTON VAN</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>MCKNIGHT AND BRYAN JEFFERY</b>	<b>§</b>	
<b>MCKNIGHT TO AMEND MARILEE</b>	<b>§</b>	
<b>SPECIAL UTILITY DISTRICT’S</b>	<b>§</b>	
<b>CERTIFICATE OF CONVENIENCE</b>	<b>§</b>	<b>OF TEXAS</b>
<b>AND NECESSITY IN COLLIN</b>	<b>§</b>	
<b>COUNTY BY EXPEDITED RELEASE</b>	<b>§</b>	

**MARILEE SPECIAL UTILITY DISTRICT’S  
MOTION FOR REHEARING**

**TO THE HONORABLE PUBLIC UTILITY COMMISSION:**

COMES NOW, Marilee Utility District (the “District”), and files this Motion for Rehearing (“Motion”) of the Public Utility Commission of Texas’s (the “Commission”) Order (“Order”) amending the District’s Certificate of Convenience and Necessity (“CCN”) No. 10150 to release 62.7 acres of property (“Tract of Land”) in Collin County, Texas.<sup>1</sup> A party must file a motion for rehearing “not later than the 25<sup>th</sup> day after the date the decision or order that is the subject of motion is signed.”<sup>2</sup> The 25<sup>th</sup> day after June 16, 2022, is July 11, 2022, and this Motion is timely filed.<sup>3</sup> In support thereof, the District respectfully shows as follows:

**I. BACKGROUND**

1. This proceeding for streamlined expedited release was initiated on September 3, 2021, with the filing of a petition by Clifton Van McKnight and Bryan Jeffrey McKnight, pursuant to Section 13.2541 of the Texas Water Code (“TWC”) and 16 Texas Administrative Code (“TAC”)

---

<sup>1</sup> Order (June 16, 2022).

<sup>2</sup> Tex. Gov’t Code § 2001.146.

<sup>3</sup> The District files this Motion, in relevant part, to preserve its rights and remedies on appeal. *See, e.g., Suburban Util. Corp. v. Pub. Util. Com.*, 652 S.W.2d 358, 364 (Tex. 1983) (“[A] motion for rehearing is prerequisite to an appeal.”) (internal quotation marks omitted).

§ 24.245(h).<sup>4</sup> On October 6, 2021, VPTM Cross Creek LB, LLC filed a First Amended Petition.<sup>5</sup>

2. On December 9, 2021, VPTM Cross Creek LB, LLC filed a Second Amended Petition (the “Petition”), which is the subject of the Order.<sup>6</sup> The Petition alleged that the 62.700 acres of property sought to be released from the District’s CCN was greater than 25 acres, not receiving water or sewer service, and is entirely within Collin County.<sup>7</sup>

3. On September 16, 2021, the District filed a motion to intervene, which the Honorable Administrative Law Judge (“ALJ”) Siemankowski granted on October 5, 2021.<sup>8</sup>

4. On November 23, 2021, Commission Staff filed a motion to restyle the docket to change Petitioner from Clifton Van McKnight and Bryan Jeffrey McKnight to VPTM Cross Creek LB, LLC because, “[s]ince VPTM is now the owner of the property, as indicated by the amended petition, it is thus the petitioner of record in this docket.”<sup>9</sup> The ALJ granted Commission Staff’s motion before the District’s time to respond expired.<sup>10</sup> The District timely opposed the motion to restyle the docket, arguing that if the McKnights sold the Tract of Land then they should withdraw their original petition, and that there is no provision of TWC § 13.2541 or 16 TAC § 24.245(h) that permits restyling a docket to “substitute” a new petitioner, and , accordingly, moved the ALJ to dismiss the proceeding because the McKnights failed to state a claim upon which relief could be granted.<sup>11</sup>

---

<sup>4</sup> Petition of VPTM Cross Creek LB, LLC to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release, at 2 (Sep. 3, 2021) (seeking to decertify 62.700 acres of property).

<sup>5</sup> First Amended Petition by VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Oct. 6, 2021).

<sup>6</sup> Second Amended Petition by VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Dec. 9, 2021).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Marilee Special Utility District’s Motion to Intervene (Sept. 16, 2021); Order No. 2 – Finding Petition Administratively Incomplete and Establishing Opportunity to Cure, and Granting Motion to Intervene (Oct. 5, 2021).

<sup>9</sup> Commission Staff’s Unopposed Request for Extension and Request to Restyle the Docket, at 2 (Nov. 23, 2021).

<sup>10</sup> Order No. 4 – Granting Unopposed Extension, Revising Deadlines, and Restyling (Nov. 29, 2021).

<sup>11</sup> Marilee Special Utility District’s Opposition to Commission Staff’s Request to Restyle the Docket and Order No. 4, and Motion to Dismiss Petition (Dec. 1, 2021).

5. On December 29, 2021, the ALJ held that the Petition was administratively complete.<sup>12</sup>

6. On January 4, 2022, Commission Staff served a Request for Information on the District and VPTM Cross Creek LB, LLC.<sup>13</sup> Both the District and VPTM Cross Creek LB, LLC filed responses to Commission Staff's Request for Information on January 24, 2022.<sup>14</sup>

7. On January 18, 2022, the District filed its Verified Response to the Petition, supported by the affidavits of the District's General Manager and engineer. The Verified Response provided affirmative evidence through affidavits and exhibits that the District has adequate facilities to provide service to the Tract of Land upon request, including multiple waterlines.<sup>15</sup> The District maintains an 8" and 4" waterline that run along the northern and western boundaries of the Tract of Land;<sup>16</sup> and the District maintains multiple active water meters on properties directly north of the Tract of Land.<sup>17</sup> The District additionally argued that the Petition should be denied because VPTM Cross Creek did not initiate the proceeding, VOTM Cross Creek LB, LLC, failed to meet its burden of proof under TWC § 13.2541 and 16 TAC § 24.245(h), and because limiting or curtailing the service area of the federally indebted District would violate federal law, namely 7 U.S.C. § 1926(b).

8. On March 2, 2022, the ALJ denied the District's Motion to Dismiss, which had

---

<sup>12</sup> Order No. 6 – Finding Amended Petition, as Supplemented, Administratively Complete, Notice Sufficient and Establishing Procedural Schedule (Dec. 29, 2021).

<sup>13</sup> Commission Staff's First Request for Information to Marilee Special Utility District Question Nos. Staff 1-1 through Staff 1-11 (Jan. 4, 2022); Commission Staff's First Request for Information to VPTM Cross Creek LB, LLC Question Nos. Staff 1-1 through Staff 1-3 (Jan. 4, 2022).

<sup>14</sup> Marilee Special Utility District's Responses to Commission Staff's First Request for Information Question Nos. Staff 1-1 through Staff 1-11 (Jan. 24, 2022); VPTM Cross Creek, LB, LLC's Responses to Commission Staff's First Request for Information (Jan. 24, 2022).

<sup>15</sup> Marilee Special Utility District's Verified Response, at ¶¶ 34-37 and accompanying exhibits (Jan. 18, 2022).

<sup>16</sup> See *id.* 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).

<sup>17</sup> *Id.*

been filed on December 1, 2021. The ALJ reasoned as follows:

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. Pursuant to 16 TAC § 24.8(d), applications under subchapter H of chapter 24 of the Commission's rules are not considered filed until the Commission makes a determination that the application is administratively complete. Petitions for streamlined expedited release under 16 TAC § 24.245(h) fall under subchapter H of chapter 24. As such, since the original petition submitted by the McKnights was never found administratively complete, it was never considered filed. Substitution of information on an application that has not yet been filed is permitted. The ALJ further considers that Marilee's recommendation that this docket to be dismissed and VPTM refile a petition in a new docket would be a waste of resources.<sup>18</sup>

9. The ALJ entered a proposed order decertifying the Property on March 9, 2022.<sup>19</sup> The District filed Exceptions and Corrections to the proposed order on March 21, 2022, which were rejected on May 10, 2022.<sup>20</sup> The Commission entered the Order decertifying the Tract of Land from the District's CCN on June 16, 2022.<sup>21</sup>

10. The Commission's decision to grant the Petition was an error. The Commission's Order contains factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Tract of Land from the District and to prevent the District from being materially prejudiced, as described herein. Accordingly, the District respectfully requests that the Commission grant the District's Motion, reverse the Order, and enter a final order denying the Petition because the Tract of Land is receiving service from the District and is thus ineligible for expedited release under TWC § 13.2541 and 16 TAC § 24.245(h), and because the District's federal indebtedness entitles the District, under 7 U.S.C. § 19267(b), to protection from curtailment or limitation of its service area.

---

<sup>18</sup> Order No. 7 – Denying Motion to Dismiss, at 1-2 (Mar. 2, 2022).

<sup>19</sup> Proposed Order and Memo with Attachments (Mar. 9, 2022).

<sup>20</sup> Marilee Special Utility District's Exceptions and Corrections to the Proposed Order (Mar. 21, 2022); Proposed Order Correction Memo (May 10, 2022).

<sup>21</sup> Order (June 16, 2022).

## II. POINTS OF ERROR

### A. **Point of Error No. 1—The Commission Erred in Holding that the Tract of Land Is Not Receiving Water Service from the District (FOF Nos. 24-31 and COL Nos. 6-8 and 12 and Ordering Paragraph 1.).**

11. The TWC authorizes decertification or expedited release only for property “that is not receiving water or sewer service.”<sup>22</sup> 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...to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.<sup>23</sup>

12. Whether or not a retail public utility has performed “any act,” “supplied or furnished” anything, or “committed or used” “any facilities or lines” in in the “performance of its duties” is a fact question. According to the plain text of the definition of “service” and how both the Commission and Texas courts have interpreted it, the question of whether or not a tract is receiving “service” is not dependent upon whether water or sewer is being used or has been requested on the tract sought to be decertified. Instead, a tract is “receiving” water or sewer service if either of the following conditions are met:

- Any facilities or lines are committed or used in the performance of the CCN holder’s duties as a retail public utility providing service to the property; or
- Any lines are committed or used in the performance of the CCN holder’s duties as a retail public utility.<sup>24</sup>

13. 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

---

<sup>22</sup> TWC § 13.2541(b).

<sup>23</sup> TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

<sup>24</sup> *See id.*; *see also Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.—Austin 2014, pet. denied).

retail public utility.” *Crystal Clear* held that facilities or lines “used” or “committed” to providing such service can cause a property to “receive service.”<sup>25</sup>

14. The Commission’s Order errs in its analysis of whether the Tract of Land receives water service. The Order fails to explain why it concludes that 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 [*Crystal Clear*]”<sup>26</sup> when the Order itself states that the following facts are present:

- “The CCN holder owns and operates an eight-inch waterline running parallel to, but outside of, the northern boundary of the tract of land, and a four-inch waterline running parallel to, but outside of, the western boundary of the tract of land. Neither of these lines provides water service to the tract of land.”<sup>27</sup>
- “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.”<sup>28</sup>

15. Here, the District is capable of serving the “petitioner’s tract of land,” as demonstrated in the verified response, if service were requested.<sup>29</sup> The Tract of Land is thus receiving “service” as interpreted by *Crystal Clear*. The Commission seems to deliberately overlook the fact that the District provides water service to Petitioner’s land, including the Tract of Land. The Commission’s indifference to these facts has now led to the District being damaged by the Commission taking acreage that the District is capable of serving and which the District relies upon for paying its debts. Such an outcome was not intended by the legislature when the

---

<sup>25</sup> *Crystal Clear*, 449 S.W.3d at 140.

<sup>26</sup> Order, at COL 12.

<sup>27</sup> *Id.* at FOF 27.

<sup>28</sup> *Id.* at FOF 28.

<sup>29</sup> See Marilee Special Utility District’s Verified Response, at ¶¶ 34-37 & 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) (Jan. 18, 2022).

streamlined expedited release process was created.<sup>30</sup>

16. If the Commission permits Petitioners to decertify property that the CCN holder can service, then the Commission is not taking into account the important public policy of preserving a CCN holder's service area and is subjecting CCN holders to abusive tactics of landowners that were not intended by the legislators when they created the mechanism for streamlined expedited release.<sup>31</sup> For this reason, the District respectfully urges the Commission to grant the District's Motion and issue an order denying and dismissing the Petition because it is receiving "service" under TWC § 13.2541, 16 TAC § 24.245(h), and *Crystal Clear*.

**B. Point of Error 2 - The Commission Erred by Failing to Hold Petitioner to Its Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 4-7, 24-31 and COL Nos. 5-8, 12, and Ordering Paragraph 1.).**

17. In order to carry their burden of establishing that the Tract of Land is not receiving water service, 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. It is arbitrary and capricious for the Commission to decertify property from a CCN when a petitioner fails to set forth facts to establish that the property is not receiving service, as here, where Petitioner set forth only an affidavit that provided no facts regarding water service, but merely unsupported claims.

18. Under *Crystal Clear*, the Commission must review the present facts and circumstances, including the service application and agreements (including transfer agreements)

---

<sup>30</sup> See, e.g., House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) (noting in support that the bill would "would protect private property rights by unwanted imposition of a CCN on a landowner" and "address problems where residents of MUDs with *substandard service are unable to receive improvements*" due to the CCN holder's exclusive right to provide service in its area) (emphasis added).

<sup>31</sup> See, e.g., House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) at 4-5 (stating that TWC § 13.254 was designed to prevent "abuses of CCN authority" where "a landowner looking to develop his or her land might find that although the land was in a CCN, that utility was unable or unwilling to extend service to his or her property." Section 13.254 was not meant to arbitrarily deprive CCN holders of property they are actively servicing.). Streamlined expedited release was created in 2019 to be a simplified offshoot of expedited release that better codified the way CCN holders should be compensated for property decertified from their CCN service area. See, e.g., Acts 2019, 86th Leg., R.S., Ch. 688, General and Special Laws of Texas (enrolled bill to be codified at TWC § 13.2541). The policies considered by the legislature regarding the substance of both TWC §§ 13.254 and 13.2541 are best reflected by the legislative history for TWC § 13.254, which was enacted in 2005 in House Bill 2876.



that cover all the acres of the tract at issue. In *Crystal Clear*, 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.<sup>32</sup> But where water lines are actually present within a tract and “committed” to the property in that manner, the tract is unquestionably “receiving service.”

19. The proper analysis of a VPTM Cross Creek LB, LLC’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.<sup>33</sup> 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.”<sup>34</sup> The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.<sup>35</sup>

20. Here, VPTM Cross Creek LB, LLC has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541. The affidavit supporting the Petition states only:

The Property is not receiving water or sewer service from Marilee SUD or any other water or sewer service provider. 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 Property.<sup>36</sup>

21. The Commission’s acceptance of VPTM Cross Creek LB, LLC’s insufficient

---

<sup>32</sup> *Crystal Clear*, 449 S.W.3d at 140.

<sup>33</sup> No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin May 11, 2018, pet. denied) (mem. op.).

<sup>34</sup> *Id.* at \*\*6-7.

<sup>35</sup> *Id.* at \*\*9-10 (citing Commission’s Finding of Fact No. 24).

<sup>36</sup> Second Amended Petition by VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2), at Exhibit A (Affidavit of Brendan Bosman) at ¶ 3 (Dec. 9, 2021).

affidavit eviscerates VPTM Cross Creek LB, LLC's burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land is receiving, has received, and is capable of receiving water service under TWC § 13.2541 and *Crystal Clear*.

**C. Point of Error 3—The Commission Erred When It Failed to Meet the 60-Day Statutory Deadline to Either Grant or Deny Expedited Release (FOF 8, COL Nos. 1, 13, 16 and Ordering Paragraph 1.).**

22. The Commission erred in granting the Petition because it did so in clear violation of TWC § 13.2541(c), which provides, “The utility commission shall grant the petition not later than the 60<sup>th</sup> day after the date the landowner files the petition.” Further, the Order violates the Commission’s substantive rules, which require the Commission to “issue a decision on a petition” for streamlined expedited release “no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.”<sup>37</sup>

23. The Petition was filed on September 9, 2021, and was found administratively complete on December 9, 2021.<sup>38</sup> Sixty calendar days after December 9, 2021, is February 7, 2022, the date by which the Commission was required to issue a decision either granting or denying the Petition. In violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission failed to enter a decision on the Petition until June 16, 2022. As a result of the Commission’s errors, the District has been required to proceed through over four months of additional litigation.

24. The Commission’s error materially prejudiced the District. For example, another Commission rule states that the District should not apply for any federal loan “after the date the petition is filed until the utility commission issues a decision on the petition.”<sup>39</sup> It is prejudicial but for the District to be prevented from seeking financing for needed improvements solely

---

<sup>37</sup> 16 TAC § 24.245(h)(7).

<sup>38</sup> Order No. 6 – Finding Amended Petition, as Supplemented, Administratively Complete, Notice Sufficient and Establishing Procedural Schedule (Dec. 29, 2021).

<sup>39</sup> TWC § 13.2541(e); 16 TAC § 24.245(h)(8). However, the Commission does not have authority to enforce these against the District. See Docket 52101, *Petition of CCD North Sky, LLC to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*, Order No. 11 – Denying Petition Request for an Order Requiring Marilee Special Utility District to Withdraw Its Federal Loan Application, at 1 (Oct. 25, 2021).

because the Commission failed to follow its mandatory statutory and rule requirements.

25. Because of the Commission’s error in its treatment of the Petition, the District has been materially prejudiced by, among other things, legal costs, delays to needed financing, and improper limitation and curtailment of its service area.

**D. The Commission Erred by Curtailing and Limiting the Service Area of a Federally Indebted Entity Protected by 7 U.S.C. § 1926(b) (FOF Nos. 13 and COL Nos. 13, 14, and Ordering Paragraph 1.).**

26. 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. To protect a USDA debtor’s ability to service its debt, it is prohibited by federal law to “curtail or limit” the service area of a USDA debtor. The statute provides:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.<sup>40</sup>

27. To be eligible for protection under § 1926(b), the District must show, in addition to federal indebtedness, that it satisfies the “physical abilities” test, as adopted by the U.S. Court of Appeals for the Fifth Circuit, sitting en banc in *Green Valley Special Utility District v. City of Schertz*.<sup>41</sup> Judge Smith, writing for the majority, characterized the “physical abilities” test broadly:

To make the test easy to apply to both water and sewer service, we hold that a utility must show that it has (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made and (2) the legal right to provide service. A utility cannot satisfy that test if it has no nearby infrastructure. But ‘pipes

---

<sup>40</sup> 7 U.S.C § 1926(b).

<sup>41</sup> 969 F.3d 460 (5th Cir. 2020) (en banc).

in the ground’ is a colloquial shorthand, not a strict requirement.<sup>42</sup>

28. The en banc court in *Green Valley* cited with approval precedent from the U.S. Court of Appeals for the Sixth Circuit stating that, to satisfy the “physical abilities” test, the utility must have “something in place to merit § 1926(b)’s protection.”<sup>43</sup> The Court further explained the broad interpretation, “[s]ervice may be ‘available’ even if it cannot be immediately used. No water or sewer utility can make service immediately available to rural, undeveloped land; providing such service involves building or installing facilities, which necessarily takes time to accomplish.”<sup>44</sup> Additionally, upon remand of the case to the U.S. District Court for the Western District of Texas, Judge Yeakel, in granting *Green Valley*’s motion for a new trial, held that “a request for service is a prerequisite for obtaining decertification rather than for resisting decertification.”<sup>45</sup>

29. A recent report and recommendation by Magistrate Judge Lane, which was adopted in full by Judge Pitman in the U.S. District Court for the Western District of Texas, upheld plaintiff’s right to protection under § 1926(b) in a TWC § 13.2541 case, recommended that plaintiff had standing to receive protection in both final Commission cases and pending Commission cases.<sup>46</sup> The Magistrate Judge’s analysis of issues included the following:

- “As *Green Valley* makes clear, the court can enjoin enforcement of [the Commission’s] orders or entry of future orders or enjoin the certification of the land to another provider.”<sup>47</sup>
- “*Green Valley* provided a different standard from the PUC’s determination for courts to use to analyze whether an entity was entitled to § 1926(b) protections. . . . [I]f [Plaintiff] is

---

<sup>42</sup> *Green Valley*, 969 F.3d at 477.

<sup>43</sup> *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

<sup>44</sup> *Id.* at n.38.

<sup>45</sup> *Green Valley Special Utility District v. Marquez*, Cause No. 1:17-CV-819-LY (W.D. Tex. Mar. 25, 2022) (order remanding for new trial).

<sup>46</sup> See *Rockett Special Util. Dist. v. McAdams*, Case No. A-20-CV-1207-RP (W.D. Tex. Jul. 30, 2021) (Report and Recommendation of the United States Magistrate Judge); *Rockett Special Util. Dist. v. McAdams*, Case No. A-20-CV-1207-RP, at 2 (W.D. Tex. Sept. 30, 2021) (ordering that “the report and recommendation of Magistrate Judge Mark Lane, (Dkt. 45), is adopted”).

<sup>47</sup> *Id.* at 14.

victorious on its claims, then the PUC’s Decertification Order is not entitled to enforcement.”<sup>48</sup>

30. Based on the District’s facilities and waterlines near Tract of Land, as reflected in Exhibit B-1, the District satisfies the “physical abilities” test. Moreover, Petitioner cannot show that it has ever requested service from the District, which Judge Yeakel’s order of March 25, 2022, indicates is necessary for Petitioner to show that the District does not satisfy the “physical abilities” test.

31. As described in the District’s Verified Response, the District is consolidated with Mustang Special Utility District (“Mustang SUD”) (together with the District, the “Consolidated District”), in accordance with TWC Chapter 65, Subchapter H.<sup>49</sup> Voters within the two districts passed measures consolidating the districts on November 2, 2021 and the elections have been canvassed.<sup>50</sup>

32. Prior to consolidation with the District, Mustang SUD was already indebted to the United States of America Department of Agriculture, Rural Utilities Service, which 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”).<sup>51</sup> The District assumed Mustang SUD’s federal indebtedness when the District and Mustang SUD were consolidated.<sup>52</sup> The District will be required to make payments on the Bonds until 2055 (2016 Bonds) and 2058 (2018 Bonds).

33. On July 12, 2021, the District received approval from the USDA for a Water and Wastewater Guaranteed loan of \$1,553,000.<sup>53</sup> The District has not closed on the USDA loan but is working diligently to do so.

---

<sup>48</sup> *Id.* at 17.

<sup>49</sup> See TWC § 65.723 (“Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter.”); see also Verified Response at ¶ 42, Exhibit A (Affidavit of Donna Loiselle), at ¶¶ 7-8 & Exhibit C (Affidavit of Chris Boyd), at ¶¶ 3-4 (Jan. 18, 2022).

<sup>50</sup> See TWC § 65.724 (describing procedure).

<sup>51</sup> Verified Response at ¶ 43 & Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

<sup>52</sup> TWC § 65.726

<sup>53</sup> *Id.* at ¶ 37 & Exhibit A (Affidavit of Donna Loiselle), at ¶¶ 4-6 & accompanying exhibits.

34. Under *Green Valley*, 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.<sup>54</sup> As the Consolidated District is federally indebted, and with the scheduled closing of the USDA loan approaching, the District has a federal equitable cause of action against the Commissioners should the Commissioners take action to limit or curtail of its service area.

**E. Point of Error 5—The Commission Erred by Omitting Relevant Facts and Law from the Order, Thereby Creating an Unclear Record.**

The 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 Order be revised to include new Conclusions of Law substantially similar to the following:

- **Proposed COL 2A.** Under TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission must issue a decision on a petition for streamlined expedited release no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.
- **Proposed COL 6A.** A petitioner seeking streamlined expedited release must file with the Commission a petition and supporting documentation verified by a notarized affidavit and containing (A) a statement that the petition is being submitted under TWC §13.2541 and 16 TAC § 24.245(h); (B) proof that the tract of land is at least 25 acres in size; (C) proof that at least part of the tract of land is located in the current CCN holder’s certificated service area and at least some of that part is located in a qualifying county; (D) a statement of facts that demonstrates that the tract of land is not currently receiving service; (E) copies of deeds demonstrating ownership of the tract of land by the landowner; (F) proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission; and (G) the mapping information described in 16 TAC § 24.245(k).

---

<sup>54</sup> See *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)).

**III. CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that the Commission grant its Motion for Rehearing, deny the Petition, all as set forth above, in all respects and grant the District such additional and further relief to which it may be entitled.

Respectfully submitted,

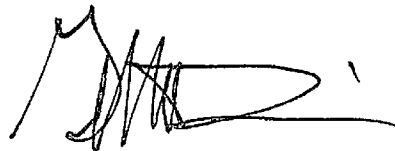
By: 

John J. Carlton  
State Bar No. 03817600  
Grayson E. McDaniel  
State Bar No. 24078966  
The Carlton Law Firm P.L.L.C.  
4301 Westbank Drive, Suite B-130  
Austin, Texas 78746  
(512) 614-0901  
Fax (512) 900-2855  
[john@carltonlawaustin.com](mailto:john@carltonlawaustin.com)  
[grayson@carltonlawaustin.com](mailto:grayson@carltonlawaustin.com)

ATTORNEYS FOR MARILEE SPECIAL  
UTILITY DISTRICT

**CERTIFICATE OF SERVICE**

I hereby certify that I have served or will serve a true and correct copy of the foregoing document via hand delivery, facsimile, electronic mail, overnight mail, U.S. mail and/or Certified Mail Return Receipt Requested to all parties on this 11<sup>th</sup> day of July 2022.



Grayson E. McDaniel