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PETITION OF EAST TIOGA 581, LP	§	PUBLIC UTILITY COMMISSION
TO AMEND MARILEE SPECIAL	§	
UTILITY DISTRICT’S CERTIFICATE	§	OF TEXAS
OF CONVENIENCE AND NECESSITY	§	
IN GRAYSON COUNTY BY	§	
EXPEDITED RELEASE	§	

**MARILEE SPECIAL UTILITY DISTRICT’S
SECOND MOTION TO DISMISS PETITION UNDER 16 TAC § 24.245**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE TA:

COMES NOW, MARILEE SPECIAL UTILITY DISTRICT (the “District”) and files its Second Motion to Dismiss East Tioga 581, LP’s (“Petitioner”) Petition for Expedited Release Pursuant to Texas Water Code § 13.2541 (“Petition”). The Petition seeks to use the streamlined expedited release process found in Texas Water Code (“TWC”) § 13.2541 and 16 Texas Administrative Code (“TAC”) § 24.245(h), to extract approximately 580.889 acres of property (“Property”) from the water utility service area Marilee serves under Certificate of Convenience and Necessity (“CCN”) No. 10150 in Grayson County, Texas.

The TWC authorizes “streamlined expedited release,” where the “owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service” petitions for expedited release “of the area” from a CCN.¹ Marilee asks the Commission to dismiss the petition because the Property is not within a “qualifying county” under TWC § 13.2541.

I. INTRODUCTION

On September 7, 2021, Petitioner filed its Petition for streamlined expedited release to decertify the Property from Marilee’s certificated water service territory, CCN No. 10150, pursuant to TWC § 13.2541 and 16 TAC § 24.245.² The Petition alleges that the Property is

¹ TWC § 13.2541; *see also* 16 Texas Admin. Code (“TAC”) § 24.245(h).
² Petition at 1 (September 7, 2021).

greater than 25 acres, is not receiving water or sewer service, and is located entirely within Grayson County.³

On September 8, 2021, the Honorable Administrative Law Judge (“ALJ”) Ta entered Order No. 1, requiring Commission Staff to file comments regarding the administrative completeness of the Petition and notice by October 7, 2021.⁴

On October 1, 2021, Marilee filed a Motion to Intervene,⁵ which was granted on October 13, 2021.⁶

On October 7, 2021, Commission Staff filed its Recommendation on Administrative Completeness (“Recommendation”). Noting multiple errors and inconsistencies in Petitioner’s maps of the Property, Commission Staff recommended that the Petition be found administratively incomplete. Commission Staff’s Recommendation did not analyze whether Grayson County is a qualifying county for expedited release. In Order No. 3, the ALJ found the Petition to be administratively incomplete and set a deadline of November 8, 2021, to cure the deficiencies identified by Commission Staff.⁷

On October 13, 2021, Commission Staff filed discovery requests for both Petitioner and the District.⁸ The discovery requests did not relate to whether Grayson County is a qualifying county under TWC § 13.2541. The District and Petitioner responded to discovery requests on October 21 and November 2.

On October 20, 2021, the District moved to dismiss the Petition pursuant to 16 TAC § 24.245 for failure to state a claim upon which relief could be granted, based on Grayson County

³ *Id.* at 2.

⁴ Order No. 1 – Requiring Comments on Administrative Completeness, Notice, and Other Matters, and Establishing Procedural Schedule (September 8, 2021).

⁵ Motion to Intervene (October 1, 2021).

⁶ Order No. 3 – Granting Intervention (October 13, 2021).

⁷ Order No. 2 – Requiring Comments on Administrative Completeness, Notice, and Other Matters, and Establishing Procedural Schedule (October 8, 2021).

⁸ Commission Staff’s First Request for Information to East Tioga 581 LP Question No. Staff 1-1 Through Staff 1-3 (Oct. 13, 2021); Commission Staff’s First Request for Information No. Staff 1-1 to Marilee Special Utility District Staff 1-1 Through Staff 1-11 (Oct. 13, 2021)

not being a qualifying County under TWC § 13.2541.⁹ In its Response to the District's Motion, Commission Staff pointed out that the District based its argument on a misreading of the rule¹⁰ and the ALJ justly denied the District's Motion to Dismiss.¹¹

On December 9, 2021, the ALJ ordered the Petition to be administratively complete based on Commission Staff's recommendation and set a procedural schedule, under which the District's verified response to the Petition is due on December 29, 2021.¹²

The District hereby files its Second Motion to Dismiss the Petition because under the Texas Government Code, the "population" of "qualifying counties" for purposes of TWC § 13.2541 and 16 TAC § 24.245(h) must be based on the population counts in the 2010 federal decennial census, not the 2020 federal decennial census. Under the 2010 census, Grayson County does not meet any of the definitions of a "qualifying county." Accordingly, the Petition should be dismissed pursuant to 16 TAC § 24.245 for failure to state a claim upon which relief could be granted.

MOTION TO DISMISS

Upon the motion of any party, the Commission may dismiss, with or without prejudice, any proceeding for any reason specified in 16 TAC § 22.181.¹³ The Commission may dismiss this proceeding without hearing if the facts necessary to support dismissal are uncontested or are established as a matter of law.¹⁴ The Commission's procedural rules include the following reasons for dismissal: lack of jurisdiction, moot question or obsolete petition, res judicata, collateral estoppel, unnecessary duplication of proceedings, failure to prosecute, failure to amend an application such that it is sufficient after repeated determinations that the application is insufficient, failure to state a claim for which relief can be granted, gross abuse of discovery, withdrawal of an application, or other good cause shown.¹⁵ A party's motion for dismissal must

⁹ Marilee Special Utility District's Motion to Dismiss Petition Under 16 TAC § 22.181 (Oct. 20, 2021).

¹⁰ East Tioga 581, LP's Response to Marilee SUD's Motion to Dismiss (Oct. 25, 2021).

¹¹ Order No. 4 – Denying Motion to Dismiss (Nov. 10, 2021).

¹² Order No. 5 – Finding the Petition Administratively Complete and Notice Sufficient, and Establishing a Procedural Schedule (Dec. 9, 2021).

¹³ 16 TAC § 22.181(a).

¹⁴ 16 TAC § 22.181(c).

¹⁵ 16 TAC § 22.181(d).

specify at least one of the reasons identified in § 22.181(d).¹⁶ The motion must include a statement that explains the basis for the dismissal and, if necessary, a statement of the material facts that support the motion and an affidavit that supports the motion and that includes evidence that is not found in the then-existing record.¹⁷

To obtain release of property from a CCN holder under TWC § 13.2541, a landowner must demonstrate with affirmative evidence 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.¹⁸ A “qualifying county” is defined in the TWC as:

[A] county with a population of at least one million, a county adjacent to a county with a population of at least one million, or a county with a population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more, and not in a county that has a population of more than 45,500 and less than 47,500.¹⁹

A “qualifying county” is further defined in 16 TAC § 24.245(h). The rule was rewritten and replaced effective July 2020,²⁰ and provides:

A qualifying county under paragraph (1)(C) of this subsection:

- (A) has a population of at least one million;
- (B) is adjacent to a county with a population of at least one million, and does not have a population of more than 45,000 and less than 47,500; or
- (C) has a population of more than 200,000 and less than 220,000 and does not contain a public or private

¹⁶ 16 TAC § 22.181(e).

¹⁷ *Id.*

¹⁸ TWC § 13.2541; *see also* 16 TAC § 24.245(h).

¹⁹ TWC § 13.2541(b).

²⁰ *See* Revision of Rules and Forms Relevant to Expedited Release, Project No. 50028, Order Adopting Repeal of 16 TAC § 24.245 and New Rule 16 TAC § 24.245 as Approved at the June 12, 2020 Open Meeting at 27 (June 12, 2020) (adopting quoted language).

university that had a total enrollment in the most recent fall semester of 40,000 or more.²¹

Here, the Property may not be released because Grayson County is not a qualifying county under TWC § 13.2541 or 16 TAC § 245(h). Based on the relevant statutes, Grayson County cannot be considered to be “adjacent to a county with a population of at least one million,” because 2020 census data may not yet be considered,²² and based on the 2010 federal census data, Grayson County is not a “qualifying county.”

A. The Government Code Requires that “Population” Be Measured by the 2010 Federal Census.

The Water Code does not contain a specific definition for “population.” However, the Texas Government Code does, in Chapter 311, the Code Construction Act. The Code Construction Act applies to TWC § 13.2541 and 16 TAC 24.245(h), as it expressly applies to each code enacted “by the 60th or subsequent legislature,” all amendments of codes or code provisions, and all rules adopted under a Texas code.²³

The Code Construction Act defines “population” as “the population shown by the most recent federal decennial census.”²⁴ Though the “most recent” decennial census is the 2020 census, the Texas Local Government Code does not permit the data from the 2020 census to be considered by the Commission yet. Under Section 2058.001 of the Government Code, a governmental entity, including a state agency, may only “recognize and act” on a

²¹ 16 TAC § 24.245(h).

²² See Tex. Gov’t Code § 2058.001(b) (“A governmental entity shall recognize and act on a published report or count relating to a federal decennial census and released by the director of the Bureau of the Census of the United States Department of Commerce *on the later of*: (1) September 1 of the year after the calendar year during which the census was taken; or (2) the first day of the first calendar month occurring after the 150th day after the date of the publication of the report or count.”).

²³ Tex. Gov’t Code § 311.002 (“Application”).

²⁴ Tex. Gov’t Code § 311.005(3).

published report or count relating to a federal decennial census and released by the director of the Bureau of the Census of the United States Department of Commerce *on the later of*:

- (1) September 1 of the year after the calendar year during which the census was taken; or
- (2) the first day of the first calendar month occurring after the 150th day after the date of the publication of the report or count.²⁵

Moreover, the next provision of the Government Code, which does not expire until September 1, 2023,²⁶ requires the Commission to rely on the population counts in the 2010 census:

[A] statute that applies to a political subdivision having a certain population according to the most recent federal census:

- (1) continues to apply to the same political subdivisions to which the statute applied under the 2010 federal census, regardless of whether the political subdivisions continue to have the population prescribed by the statute according to the 2020 federal census; and
- (2) *does not apply to a political subdivision to which the statute did not apply under the 2010 federal census, regardless of whether the political subdivision has the population prescribed by the statute according to the 2020 federal census.*²⁷

B. Grayson County is not a “Qualifying County” Under the 2010 Federal Census Data.

According to the United States Census Bureau website, the 2010 federal decennial census data reflected that Grayson County’s population was—and is for purposes of TWC § 13.2541 and 16 TAC § 24.245(h)—120,877.²⁸ Additionally, none of the counties adjacent to Grayson County—

²⁵ Tex. Gov’t Code § 2058.001(b) (emphasis added).

²⁶ Tex. Gov’t Code § 2058.0021(b).

²⁷ Tex. Gov’t Code § 2058.0021(a) (emphasis added).

²⁸ U.S. Dep’t of Commerce, Texas 2010: Population and Unit Housing Counts, at Table 4, page 7 (Sept. 2012) available at <https://www.census.gov/prod/cen2010/cph-2-45.pdf>.

Fannin, Denton, Cooke, or Collin—had a population of 1,000,000 or more.²⁹ Therefore, Grayson County is not a “qualifying county” under 16 TAC § 245(h) (A), (B), or (C).

The Commission’s own reference materials also state that Grayson County is not a qualifying county for expedited release under TWC § 13.2541. The Commission’s “Streamlined Expedited Release Guidance” document states that the property is only eligible if it is located in Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, or Wise County.³⁰ The Commission also provides a list of counties that qualify for streamlined expedited release under TWC § 13.2541 and 16 TAC § 24.245(h)—Grayson County is not listed.³¹ These Commission guidance documents are in accordance with Tex. Gov’t Code § 2058.001 and Tex. Gov’t Code § 2058.0021, under which Grayson County may not be considered a qualifying county, because the 2010 census records Collin County—the most populous county adjacent to Grayson County—as having fewer than one million residents.

C. Because Grayson County is not a Qualifying County, the Petition Must be Dismissed.

Because Grayson County is not a qualifying county under TWC § 13.2541 and 16 TAC § 25.254(h), as construed in accordance with Government Code §§ 2058.001 and 2058.0021, the District moves to dismiss the Petition for failure to state a claim for which relief can be granted.³²

²⁹ See *id.* at Table 4, page 6 (reflecting the population of Fannin County as 33,915; the population of Denton County as 662,614; the population of Cooke County as 38,437; and the population of Collin County as 782,341).

³⁰ See “Streamlined Expedited Release Guidance,” at 1 available at <https://www.puc.texas.gov/industry/water/utilities/Streamline.pdf> (last visited Oct. 18, 2021) (providing guidance for petitions under “TWC § 13.2541 and 16 TAC § 24.245(h)”).

³¹ See “Streamlined Expedited Release,” available at https://www.puc.texas.gov/industry/water/Forms/SER_Counties.pdf (last visited Oct. 18, 2021) (stating that the “[a]pproved list of counties” that meet the requirements of TWC § 13.2541 and 16 TAC § 24.254 are: Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, or Wise).

³² 16 TAC § 22.181(8).

The District also moves to dismiss the Petition because whether or not the Property qualifies for expedited release is a moot question, since the Property is not in a qualifying county, which is required under the statute.³³ For the same reason, the District respectfully submits that the Petition is obsolete.³⁴ Finally, the District moves to dismiss the Petition due to other good cause shown—namely, that the Property is not located within a qualifying county.³⁵

PRAYER

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests the Commission to dismiss the Petition, pursuant to 16 TAC § 22.181, because Petitioner has failed to state a claim upon which relief may be granted, the Petition is moot, and the Petition is obsolete, and the District has shown good cause for dismissing the Petition. The District also respectfully requests that the Commission stay all deadlines in this proceeding until the Motion is decided, including the December 23, 2021 deadline for the District’s verified response. The District also seeks all further relief in law or equity to which it may be justly entitled.

³³ 16 TAC § 22.181(2).

³⁴ *Id.*

³⁵ 16 TAC § 22.181(11).

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 20th day of December 2021.

