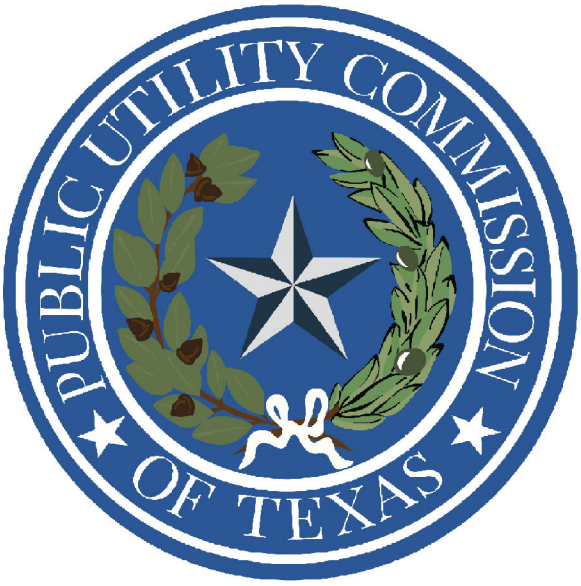

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PETITION OF E REAL ESTATE, LLC TO AMEND MARILEE SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	**§ § § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

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") Burkhalter on June 10, 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 55.88 acres of property (the "Tract of Land") in Collin County, Texas.[1] The Proposed Order requires the parties of this proceeding to file corrections or exceptions by June 24, 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 First Amended Petition that was filed by E Real Estate, LLC[2] (the "Petition"), 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 Tract of Land from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that the

[1] Proposed Order and Memorandum (June 10, 2022).

[2] First Amended Petition of E Real Estate, LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release (Dec. 13, 2021).

Commission its Exceptions and Corrections to the Proposed Order be granted and that the Commission enter an order denying the Petition.

A. The ALJ Erred in Holding that the District is Not Capable of Providing Water Service to the Property (FOF Nos. 21-32, 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]

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."

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. Where water lines are actually present and capable of providing service to the property, a tract is unquestionably capable of "receiving service" and the

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[3] Proposed Order at Conclusion of Law 12.

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

[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)).

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. Additionally, the court stated, "the term 'service' is of *intentionally broad scope* and encompasses *an array of activities* that a retail public utility might engage in as part of its mission of providing potable water service or sewer service, or both, for compensation[.]"[6]

In fact, the Findings of Fact in the Proposed Order reflect that the Property is receiving service from the District as that term is defined in the TWC and *Crystal Clear*, as the ALJ noted the following:

- "The CCN holder provides water service to a portion of the petitioner's property which lies outside of the tract of land."[7]
- "The CCN holder owns and operates a water meter, meter number 78, that is located just inside of the western boundary of the petitioner's property, but outside of the tract of land."[8]
- "The CCN holder owns and operates a two-inch water line that runs, east to west, through the northern portion of the tract of land; and a two-inch waterline that runs just inside the northwestern boundary of the tract of land."[9]

Additionally, the District's Verified Response provided additional affirmative evidence of service to the Tract of Land that the Proposed Order does not include. The District demonstrated through affidavits and evidence that Gregg Allen, who signed the affidavit accompanying the Petition, is the President of Eland Energy, Inc., which owns an active District Meter No. 78 that was carved out of the Tract of Land but that currently provides water service to the Tract of Land.[10] The District also maintains a 2" waterline, inside the western boundary of the Tract of Land; and

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[6] *Crystal Clear*, 449 S.W.3d at 137 (emphasis added).

[7] Proposed Order at FOF 25.

[8] *Id.* at FOF 26.

[9] *Id.* at FOF 27.

[10] Verified Response at 2 & Exhibit A (Affidavit of Michael Garrison) at ¶ 3 and accompanying exhibits (providing account details for Meter No. 78, as well as the waterlines the District maintains within and near to the Property boundaries).

a 2" waterline that runs across the entire length of the property, from the western to the eastern boundaries of the Tract of Land.

The ALJ does not deem that the above Findings of Fact, or the additional evidence in the Verified Response, constitute "service" under *Crystal Clear*.[11] The ALJ's interpretation of *Crystal Clear* is far too narrow. What the Proposed Order does is permit the Petitioner to carve out a portion of the property that the District *is* servicing to create a "Tract of Land" that skirts the District's facilities. This is the same as if a Petitioner had an active District meter that it uses to water its pasture, and merely by removing the meter from its "Tract of Land," swear that the pasture is not "receiving service" and that the meter was not "placed" to serve the "Tract of Land" even though it is being irrigated with water from that meter. Merely because the *meter* is not physically located on the "Tract of Land" does not mean that the "Tract of Land" is not receiving *water* that *flows from that same meter*. Overlooking this obvious fact means that the District is being deprived of property to which it provides active water service, which is contrary to *Crystal Clear* and the Water Code.

The Commission should revise the Proposed Order to conclude that, based on Finding of Fact 27, 28, and 29, as well as the evidence reflected in the District's Verified Response and supporting affidavits and evidence, 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). Additionally, for the aforementioned reasons, the District respectfully requests that the ALJ 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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[11] *Id.* at COL 12.

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. 5-10, 15, 16 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."[12] That burden has not been met here, where in the Petition, Petitioner only claimed, without factual support, that the Tract of Land 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 providing water service to the Tract of Land and property.[13] For example, how difficult is it to obtain water for the Tract of Land from the District's Meter No. 78? Is it possible for the Petitioner to run a hose or other method of irrigation to the Tract of Land from Petitioner's property that is being served by the meter? If so, how can it be that the Tract of Land does not receive water service from the District? *Choosing* not to avail oneself of available water is not the same as "not receiving service" under TWC § 13.2541, 16 TAC § 24.245(h), or *Crystal Clear*.

The proper analysis of a Petitioner's burden is reflected in *Johnson County Special Utility District v. Public Utility Comm'n of Texas*.[14] 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

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[12] 16 TAC § 24.245(h)(3)(D) (emphasis added).

[13] *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).

[14] 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)).

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."[15] These facts demonstrate that it is not possible for the tract to be watered—that is the proper test for Petitioner—not merely whether Petitioner *chooses* to use the water that is readily available. The Commission, based on these facts, properly decertified the property in *Johnson County* as having not water service from at least 2005.[16]

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."[17] Again, these facts demonstrate that it is not possible for the tract to be watered—that is the proper test for Petitioner—not merely whether Petitioner *chooses* to use the water that is readily available.

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 Tract of Land 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 District's active meter and waterlines dedicated to providing service is just outside of the Tract of Land, on Petitioner's property. The ALJ's recommendation that the Tract of Land 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 Tract of Land is capable of receiving water, and further seems to demand that the District demonstrate to the ALJ and

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

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

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

Commission that Petitioner is not only *choosing not to* avail itself of water service, but actually cannot receive service. This is not a proper allocation of the burden of proof in a case brought under TWC § 13.2541 and 16 TAC § 24.245(h), especially because the District has no right to discovery in these proceedings and no right to present on or cross-examine witnesses in a hearing.[18]

The District takes exception to the Proposed Order as written because it fails to hold Petitioner to its burden of proof and allows the Petitioner to claim that it is not receiving water service to the Tract of Land when Petitioner is merely choosing not to avail itself of the District's active service. 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 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.[19]

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[18] *See* 16 TAC § 24.245(h)(7) ("No hearing will be held.").

[19] 7 U.S.C § 1926(b).

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.[20]

1. 7 U.S.C. § 1926(b) Is Binding Law that Must Be Considered by the Commission.

In at least one other case in which the District is a party, Commission Staff has stated that the issue of Commission's curtailment and limitation of the District's service area, in violation of 7 U.S.C. § 1926(b), is "moot," because "the Fifth Circuit decision in *Green Valley Special Utility District v. City of Schertz* specifically dismissed Green Valley SUD's preemption claim and determined that the court lacked jurisdiction to consider such a claim."[21] Commission Staff stated that "[a]bsent any federal court ruling on preemption," the Commission should continue to disregard 7 U.S.C. § 1926(b).[22]

The issue of the Commission curtailing and limiting the District's service area in violation of 7 U.S.C. § 1926(b) is not moot. It is not necessary for the federal law to "preempt" a state law in order for the federal law to be binding and enforceable. That is why the United States Court of Appeals for the Fifth Circuit, sitting *en banc* in *Green Valley Special Utility District v. City of Schertz*, squarely held that a federally indebted CCN holder has an equitable cause of action for prospective injunctive relief against the Commissioners to prevent ongoing or future limitation or curtailment of its service area in violation of 7 U.S.C. § 1926(b).[23]

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[20] *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.").

[21] *See Petition of E Real Estate, LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release (Tract 2)*, Docket No. 52533, Commission Staff's Revised Recommendation on Final Disposition, at 4 (June 21, 2022) (citing *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc).

[22] *Id.*

[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)).

Green Valley is one of numerous federal-court decisions that make it clear that 7 U.S.C. § 1926(b) must not be disregarded in in cases brought under TWC § 134.2541 (and its predecessor statute, TWC § 13.254(a-1)).[24] In a recent order entered in the United States District Court for the Western District of Texas, for example, Judge Yeakel followed *Green Valley* in applying 7 U.S.C. § 1926(b) in a case brought under TWC § 13.2541, and affirmed that the statute applies to protect a federally indebted utility in a TWC § 134.2541 case.[25] The court's seven-page order, which granted the plaintiff's motion for a new trial, noted,"[T]he protections of Section 1926(b) *are federal and cannot be curtailed* unless the federally-indebted utility cannot provide service within a reasonable time after a request has been made."[26] Additionally, the court held that "a request for service is a prerequisite for obtaining decertification rather than for resisting decertification."[27]

Similarly, in a recent report and recommendation by Magistrate Judge Lane in a similar case, which was adopted in full by Judge Pitman, recommended that each defendants' Rule 12(b)(6) motion to dismiss be denied, and upheld plaintiff's right to protection under 7 U.S.C. § 1926(b).[28] Magistrate Judge's analysis of these issues included the following:

- "Because . . . [Plaintiff] has satisfied *Young*'s requirements, its suit for injunctive relief against the PUC Officials may go forward. . . . [Plaintiff] has sufficiently pleaded a claim against the PUC Defendants challenging the decertification process in light of § 1926(b)."[29]
- "In order to qualify for § 1926(b) protection, a water provider must have the physical ability to provide water, which includes two considerations: 'whether the utility has (1) "adequate facilities within or adjacent to the area to provide service to the area within a reasonable

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[24] *See, e.g.*, *Green Valley Special Util. Dist. v. City of Cibolo*, 866 F.3d 339 (5th Cir. 2017); *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556, 2020 U.S. App. LEXIS 42584, at *2 (5th Cir. 2020);

[25] *See Green Valley Special Utility District v. Marquez*, Cause No. 1:17-CV-819-LY (W.D. Tex. Mar. 25, 2022) (Order granting Motion for New Trial and to Alter Judgment).

[26] *Id.* at 6.

[27] *Id.*

[28] *See Rockett Special Utility District 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 Utility District 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").

[29] *Id.* at 8.

time after a request for service is made" and (2) the legal right to provide service.' [Plaintiff] pleaded that it has 'nearby facilities and infrastructure' and it has 'adequate facilities to provide water service to the areas specified in the Decertification Petitions within a reasonable time after a request for service is made.' . . . [Plaintiff's] pleadings . . . are adequate to plead entitlement to § 1926(b) protections."[30]

- *Green Valley* held the plaintiffs sought relief of preventing future decertification and prohibiting another entity from servicing the plaintiff's decertified area was sufficiently prospective. The Fifth Circuit considered the relief "a request to restrain state officials from enforcing an unlawful order."[31]

- "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."[32]

- "*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 victorious on its claims, then the PUC's Decertification Order is not entitled to enforcement."[33]

For the reasons described above, the Commission's violation of 7 U.S.C. § 1926(b) are not in any way moot. Multiple federal rulings reflect that the District has an equitable right of action to enjoin the Commission's enforcement of its decertification orders, in the event that the District establishes that it is eligible for protection of its service area under *Green Valley*. The District is eligible for protection in this case, as described below.

2. The District Satisfies 7 U.S.C. § 1926(b) and *Green Valley*'s Requirements for Protection of Its Service Area.

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*.[34] To satisfy the "physical abilities," the District must show that it has "adequate facilities to provide service to the

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[30] *Id.* at 12-13 (quoting *Green Valley*, 969 F.3d at 476).

[31] *Id.* at 13 (internal citation omitted)

[32] *Id.* at 14.

[33] *Id.* at 17.

[34] 969 F.3d 460 (5th Cir. 2020) (en banc).

area within a reasonable time" after service is requested, and that the District has "the legal right to provide service."[35] The District need not show "pipes in the ground" at the specific tract, as long as it has some "nearby infrastructure."[36] The District's service to the Tract of Land satisfies the "physical abilities" test.[37]

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.[38] 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").[39] The District assumed Mustang SUD's federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.[40] 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.[41]

As the District is federally indebted and satisfies the "physical abilities" test, curtailing or limiting the District's service area with regard to the Tract of Land 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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[35] *Id.* at 477.

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

[37] *See infra* notes 7-11 & accompanying text (describing the District's facilties that provide service to the Tract of Land).

[38] *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 Exhibit A (Affidavit of Michael Garrison) ¶¶ 8-9 & 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).

[39] *See* Verified Response at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

[40] *See* TWC § 65.726

[41] Verified Response, at Exhibit A (Affidavit of Michael Garrison), at ¶¶ 5-7 and accompanying exhibits.

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 (1) the Property is receiving service from the District, (2) Petitioner has not satisfied its burden to prove that the Tract of Land is not receiving service from the District; and (3) binding federal law, 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,

By: 

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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 24th day of June 2022.

Grayson E. McDaniel