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DOCKET NO. 52531

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

COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION

On September 8, 2021, E Real Estate, LLC (E Real Estate) filed a petition for streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water Certificate of Convenience and Necessity (CCN) No. 10150 under Texas Water Code (TWC) § 13.2541(b) and 16 Texas Administrative Code (TAC) § 24.245(h). E Real Estate asserts that the land to be released is at least 25 contiguous acres, is not receiving water service, and is located in Collin County, which is a qualifying county. On October 1, 2021, Marilee SUD filed a motion to intervene. On November 4, 2021, December 13, 2021, February 18, 2022, April 4, 2022, and June 15, 2022, E Real Estate filed supplemental information. On December 19, 2022, E Real Estate filed a second amended petition.

On January 19, 2023, the administrative law judge filed Order No. 15, requiring the Staff (Staff) of the Public Utility Commission of Texas (Commission) to file a recommendation on final disposition by March 1, 2023. Therefore, this pleading is timely filed.

I. FINAL RECOMMENDATION

Staff has reviewed the petition and supplemental information, and, as detailed in the attached memorandum from Chase Lipscomb of the Infrastructure Division, recommends that the petition be approved.

On August 15, 2022, Marilee SUD filed a response to the petition, requesting a proposed order denying the petition because it argues that (1) the Marilee SUD is providing water service, (2) that E Real Estate has failed to satisfy its burden of proof under TWC § 13.2541, 16 TAC § 24.245(h), and Texas state law; and (3) the federally indebted Consolidated District is protected from limitation or curtailment of its service area under 7 U.S.C. § 1926(b). Staff now addresses these three arguments.

a. Providing Service under Crystal Clear

In support of its request to deny E Real Estate’s petition, Marilee SUD argues that because Marilee SUD has existing facilities on or near the property and this constitutes “receiving water service.” Staff disagrees with this assertion. The Commission has consistently followed the standard articulated in *Crystal Clear* and held that the mere existence of facilities in proximity do not equate to providing service. To receive water service, a retail water utility must have “facilities or lines committed to providing water to the particular tract or has performed acts or supplied anything to the particular tract”¹ Merely having the capacity to serve the requested release area is not sufficient to demonstrate that it is actually receiving water service. Under *Crystal Clear*, unless such acts and funds were performed and supplied in furtherance of providing service to the requested release area, then such acts and funds do not equate to a finding that the requested release area is not receiving service. Here, Marilee SUD has not demonstrated that any of its acts and funds were performed and supplied in any way separate from providing service to the greater area. Staff recommends the ALJ find that the tract of land is not receiving water service from Marilee SUD.

b. Burden of Proof under TWC § 13.2541 and 16 TAC § 24.245(h)

In support of its request to deny E Real Estate’s petition, Marilee SUD argues that E Real Estate has failed to provide a “statement of facts that demonstrates that the property is not receiving service” as a required part of the verified petition. Staff disagrees. In its second amended petition, E Real Estate included a sworn affidavit signed by Van D. Nichols. Mr. Nichols attested to his that reviewing the revised general location map and detailed map of the tracts, attached to the petition as Exhibits A and B, and that they did not include any active water meters. He further attested that the meters referenced in Marilee SUD’s response are not located in the area to be decertified. Accordingly, Staff recommends that the ALJ find that E Real Estate has met the burden of proof for expedited release under TWC § 13.2541 and 16 TAC § 24.245(h).

¹ *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d. 130, 140 (Tex. App.—Austin 2014, pet. denied); *see also* TWC § 13.002(21), 16 TAC § 24.3(33), and Docket No. 50404, Order at Findings of Fact Nos. 38-48.

c. Federal Indebtedness under TWC 13.2541(d)

In support of its request to deny E Real Estate's petition, Marilee SUD argues that decertifying the requested tract of land will curtail and limit its ability to service its federal debt. TWC 13.2541(d) provides that the utility commission shall not deny the petition [for streamlined expedited release] on the fact that the certificate holder is a borrower under a federal loan program. The issue of whether or not an expedited release may be granted against claims of federal protection under 7 U.S.C. § 1926(b) is not new. It has been litigated in other matters, both before the Commission and in federal court. While a federal district court previously held that 7 U.S.C. § 1926(b) preempted TWC § 13.2541 (formerly, TWC § 13.254(a-5) and (a-6)) that decision has been vacated by the Fifth Circuit.² Further, the Fifth Circuit decision in *Green Valley Special Utility District v. City of Schertz* specifically dismissed the preemption claim and determined that the court lacked jurisdiction to consider it.³ Absent any controlling federal court ruling on preemption, Staff's recommendation must comply with state law. The pertinent provision of the TWC is unambiguous in its recognition that a utility's federal indebtedness status is not proper grounds to deny a petition. This issue has been raised in numerous other proceedings before the Commission, and the Commission's ALJs have been consistent in ruling that with respect to expedited release cases, federal indebtedness is not proper grounds to deny a petition.⁴ Staff recommends that Marilee SUD's request to deny the petition on the basis of its federal indebtedness be denied.

Staff respectfully recommends that Marilee SUD's request to deny the petition itself be denied.

II. CONCLUSION

For the reasons detailed above, Staff respectfully recommends that Marilee SUD's request to deny the petition be denied and that E Real Estate's petition be approved.

² *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

³ *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 472 and 478 (5th Cir. 2020) (en banc).

⁴ See for example *Petition of Meritage Homes of Texas, LLC to Amend North Collin Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 52442, Order No. 20 (Jan. 11, 2023).

Dated: March 1, 2023

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record on March 1, 2023 in accordance with the Second Order Suspending Rules filed in Project No. 50664.

/s/ Phillip Lehmann
Phillip Lehmann

Public Utility Commission of Texas

Memorandum

TO: Phillip Lehmann, Attorney
Legal Division

FROM: Chase Lipscomb, Infrastructure Analyst
Infrastructure Division

DATE: March 1, 2023

RE: Docket No. 52531 – *Petition of E Real Estate LLC to Amend Marilee Special Utility District's Water Certificate of Convenience and Necessity in Collin County by Expedited Release*

On September 8, 2021, E Real Estate LLC (E Real Estate) filed a petition for streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water Certificate of Convenience and Necessity (CCN) No. 10150 in Collin County, under Texas Water Code (TWC) § 13.2541(b) and 16 Texas Administrative Code (TAC) § 24.245(h). E Real Estate asserts that the land is at least 25 contiguous acres, is not receiving water service, and is located in Collin County, which is a qualifying county.

E Real Estate provided a warranty deed confirming ownership of the tracts of land within Marilee SUD's certificated service area. In addition, E Real Estate submitted a sworn affidavit attesting that the tract of land was not receiving water service from the CCN holder. Marilee SUD requested to intervene.

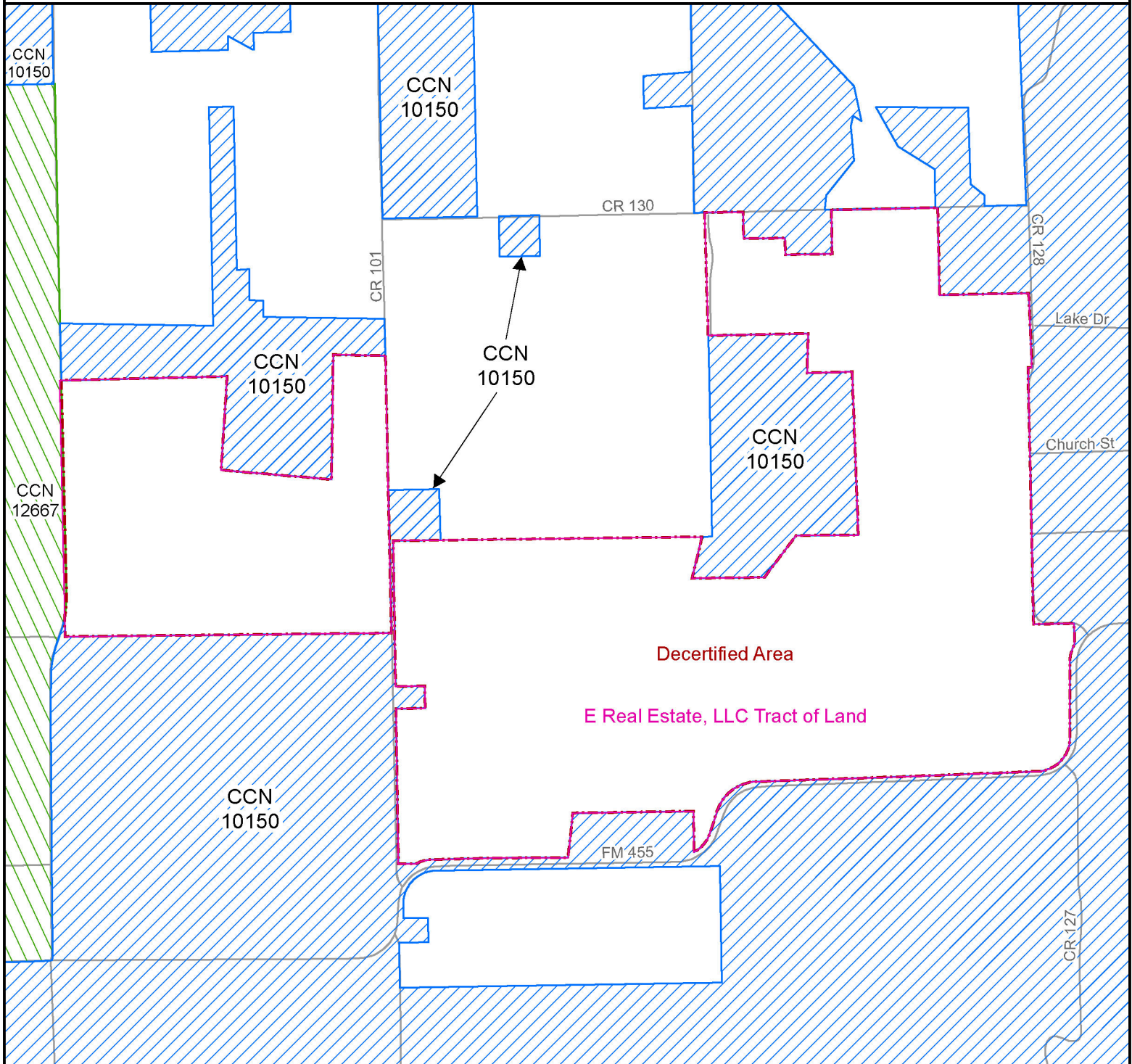
Based on the mapping review by Tracy Montes, Infrastructure Division, it was determined that the petitioner's revised general location map named Exhibit "A" (Item No. 38 filed on December 19, 2022) indicates that County Road (CR) 101 divides the landowner's total property (called "Overall Property") into two non-contiguous tracts of land called the "West Tract" and "East Tract." The "West Tract" located to the west of CR 101 includes approximately 114.5 acres and the "East Tract" located to the east of CR 101 includes approximately 370.5 acres. Both the "West Tract" and the "East Tract" both meet the 25-acre requirement. The two tracts of land in the revised petition for streamlined expedited release is approximately 485 acres, of which approximately 484 acres overlap Marilee SUD (CCN No. 10150) and would be decertified from (CCN No. 10150).

Marilee SUD requested to intervene; they provided documentation showing that they had meters on the property and are capable of providing service. E Real Estate filed a revised petition and mapping, showing the meters were outside the amended maps.



In accordance with TWC § 13.2541 and 16 TAC § 24.245(h), E Real Estate has met the Commission's requirements to allow for the release of the tract of land from Marilee SUD's CCN No.10150. Therefore, I recommend approval of the petition. Enclosed is a final map and certificate for Commission approval.



Additionally, I recommend that a final map and certificate be provided to the CCN holder.

Marilee Special Utility District
Portion of Water CCN No. 10150
PUC Docket No. 52531
Petition by E Real Estate, LLC to Amend
Marilee Special Utility District's CCN by Streamlined Expedited Release in Collin County



Water CCN

-  10150 - Marilee SUD
-  12667 - City of Celina

-  Decertified Area
-  Tract of Land

0 575 1,150
Feet





Public Utility Commission of Texas

By These Presents Be It Known To All That

Marilee Special Utility District

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, Marilee Special Utility District is entitled to this

Certificate of Convenience and Necessity No. 10150

to provide continuous and adequate water utility service to that service area or those service areas in Collin and Grayson County as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 52531 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the Marilee Special Utility District to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.