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DOCKET NO. 52533

PETITION OF E REAL ESTATE TO § PUBLIC UTILITY COMMISSION
AMEND MARILEE SPECIAL UTILITY §
DISTRICT' S WATER CERTIFICATE § OF TEXAS
OF CONVENIENCE AND NECESSITY §
IN COLLIN COUNTY BY EXPEDITED §
RELEASE (TRACT 2) §

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 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.¹ According to the U.S. Census Bureau, Collin County has a population of 782,341.² Additionally, Collin County is adjacent to Dallas County, which has a population of 2,368,139.³ E Real Estate filed supplemental information on October 8, 2021, November 4, 2021, and filed a first amended petition on December 13, 2021. On March 10, 2022, Marilee SUD filed a verified response.

On February 18, 2022, the administrative law judge (ALJ) filed Order No. 4, establishing a deadline of March 24, 2022, for the Staff (Staff) of the Public Utility Commission of Texas (Commission) to file a recommendation on final disposition. Therefore, this pleading is timely filed.

I. FINAL RECOMMENDATION

After review, and as supported by the attached memorandum of Jolie Mathis of the Infrastructure Division, Staff recommends approval of the application. Staff’s review indicates that E Real Estate meets the requirements of TWC § 13.2541 and 16 TAC § 24.245(h).

¹ TWC § 13.2541(b) and 16 TAC § 24.245(h)(2).

² U.S. Census Bureau, Census Data for Collin County, QuickFacts Collin County, Texas (2010) <https://www.census.gov/quickfacts/fact/table/collincountytexas/POP010220>

³ U.S. Census Bureau, Census Data for Dallas County, QuickFacts Dallas County, Texas (2010) <https://www.census.gov/quickfacts/fact/table/dallascountytexas/POP010220>

Specifically, the petition shows that the tract of land for which E Real Estate seeks expedited release is located in Collin County, which is a qualifying county, is not receiving water utility service, and is at least 25 contiguous acres. The final water CCN map and water CCN certificate are attached to this filing. Therefore, Staff recommends that the petition be approved.

In its response to the petition, Marilee SUD contends that the application should be denied. Staff will address those arguments here.

A. Burden of Proof

Marilee SUD argues that E Real Estate “has not met its burden of proof to decertify the Property under TWC § 13.2541 “because it has provided only a conclusory one-page affidavit” stating that the requested property is not receiving service.⁴ However, on October 12, 2021, the Commission granted the release of a tract of land from Marilee SUD’s CCN area, partly on the basis of an affidavit that is, in relevant part, identical to the affidavit filed in this docket.⁵ Staff therefore recommends that E Real Estate has met its burden of proof under TWC § 13.2541 and 16 TAC § 24.245(h)(3)(D).

B. Receiving Water Service

Marilee SUD further asserts that E Real Estate cannot meet its burden of proof because the requested area is receiving service.⁶ 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”⁷ Marilee SUD specifically argued that Marilee SUD

⁴ Marilee Special Utility District’s Verified Response at 7 (Mar. 10, 2022) (Response).

⁵ *Petition of Sterling Deason O’Donnell and Darwin Deason, Co-Trustees of the Sterling Deason O’Donnell DD 2012 Trust Under Agreement of the DD 2014-B Grantor Retained Annuity Trust to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 50404, Petition at Exhibit A (Jan. 2, 2020); *Id.*, Order (Oct. 12, 2021).

⁶ Response at 3.

⁷ *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d.130, 140 (Tex. App.—Austin 2014, pet. denied); *Petition of LGI Homes-Texas, LLC to Amend Bolivar Water Supply Corporation’s Water Certificate of Convenience and Necessity in Denton County by Expedited Release*, Docket No. 49433, Finding of Fact Nos. 17-18 (Mar. 2, 2020); *Petition of Frost Bank National Bank as Trustee of the Freeman Educational Foundation*

provides water service to E Real Estate's property through a meter and water lines.⁸ Marilee SUD's argument is flawed in two respects.

First, the one active meter is not within the release area. As Marilee SUD's response indicates, the meter is just outside of the northern boundary of the tract of land.⁹ If the active meters are not located within the 154.08 acres for which release is sought, they should not be considered when determining whether the requested area is receiving service. In Docket No. 50404, the Commission rejected the same argument, in which Marilee SUD conflated the petitioner's total property with the release property, arguing that the location of meters and lines on the total property made release inappropriate.¹⁰

Second, the water lines running through and adjacent to the property have not been shown to be committed to providing water to the particular tract. Marilee SUD has not demonstrated that these water lines are committed to the requested area. In *Crystal Clear*, the CCN holder raised the issue of existing water lines and facilities.¹¹ The court looked to whether those lines or facilities were constructed for the purpose of providing water to the property in question. Finding that the facilities were constructed to serve the greater area, and not the particular property, the court determined that the facilities were not committed to the particular tract of land, and therefore, the property in question was not receiving service.¹² Similarly, Marilee SUD does not demonstrate that the water lines were installed for the purpose of providing water to the requested area. As such, they cannot be considered to be committed to the particular property and the requested area is not, therefore, receiving water service from Marilee SUD. Accordingly, Staff recommends that the requested area is not receiving water service.

to Amend the City of San Marcos' Water Certificate of Convenience and Necessity in Hays County by Expedited Release, Docket No. 49366, Findings of Fact Nos.17-18 (Dec. 13, 2019).

⁸ Response at 3-6.

⁹ *Id.* at 44.

¹⁰ Docket No. 50404, Order at Conclusion of Law No. 9.

¹¹ *Crystal Clear*, 449 S.W.3d at 140.

¹² *Id.*

B. Marilee’s Federal Debt

Marilee SUD asserts that releasing the requested area would impair its ability to service the debt on the Water and Wastewater Guaranteed loan of \$1,553,000, which was approved by the United States Department of Agriculture (USDA) on July 12, 2021.¹³ In its response, Marilee SUD states that, under the Consolidated Farm and Rural Development Act of 1961 and 7 U. S. Code § 1926(b), “it is prohibited by federal law to “curtail or limit” the service area of a USDA debtor.”¹⁴ Marilee SUD claims that, because it can show federal indebtedness and the physical ability to serve a portion of E Real Estate’s total property, the protections of § 1926(b) prohibit the Commission from granting the release of the proposed area.

Staff recommends that Marilee SUD’s claim of protection under 7 U.S.C. § 1926(b) is moot. The TWC explicitly states that “[t]he utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program.”¹⁵ While a federal district court had 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.¹⁶ Further, 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.¹⁷ Absent any federal court ruling on preemption, Staff’s recommendation must comply with state law. As such, Staff’s recommendation does not take Marilee SUD’s federally indebted status into consideration.

II. CONCLUSION

For the reasons detailed above, Staff respectfully recommends that E Real Estate’s petition be approved.

¹³ Response at 11.

¹⁴ *Id.* at 9.

¹⁵ TWC § 13.2541(d).

¹⁶ *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

¹⁷ *Green Valley Special Util Dist v. City of Schertz*, 969 F.3d 460, 411 and 478 (5th Cir. Aug. 7, 2020) (en banc).

Dated: March 24, 2022

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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DOCKET NO. 52533

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 via electronic mail on March 24, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Andy Aus
Andy Aus

Public Utility Commission of Texas

Memorandum

TO: Andrew Aus, Attorney
Legal Division

FROM: Jolie Mathis, Utility Engineering Specialist
Infrastructure Division

DATE: March 24, 2022

RE: Docket No. 52533 – *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)*

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 tract 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. On October 8, 2021, Marilee SUD filed a motion to intervene. On March 10, 2022, Marilee SUD filed a verified response to E Real Estate’s petition.

Based on the mapping review by Tracy Montes, Infrastructure Division, it was determined the landowner’s total property is approximately 535.315 acres. The tract of land in the petition for streamlined expedited release is approximately 154.08 acres, of which approximately 154 acres overlap Marilee SUD (CCN No. 10150) and would be decertified from CCN No. 10150.

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.



Public Utility Commission of Texas

By These Presents Be It Known To All That

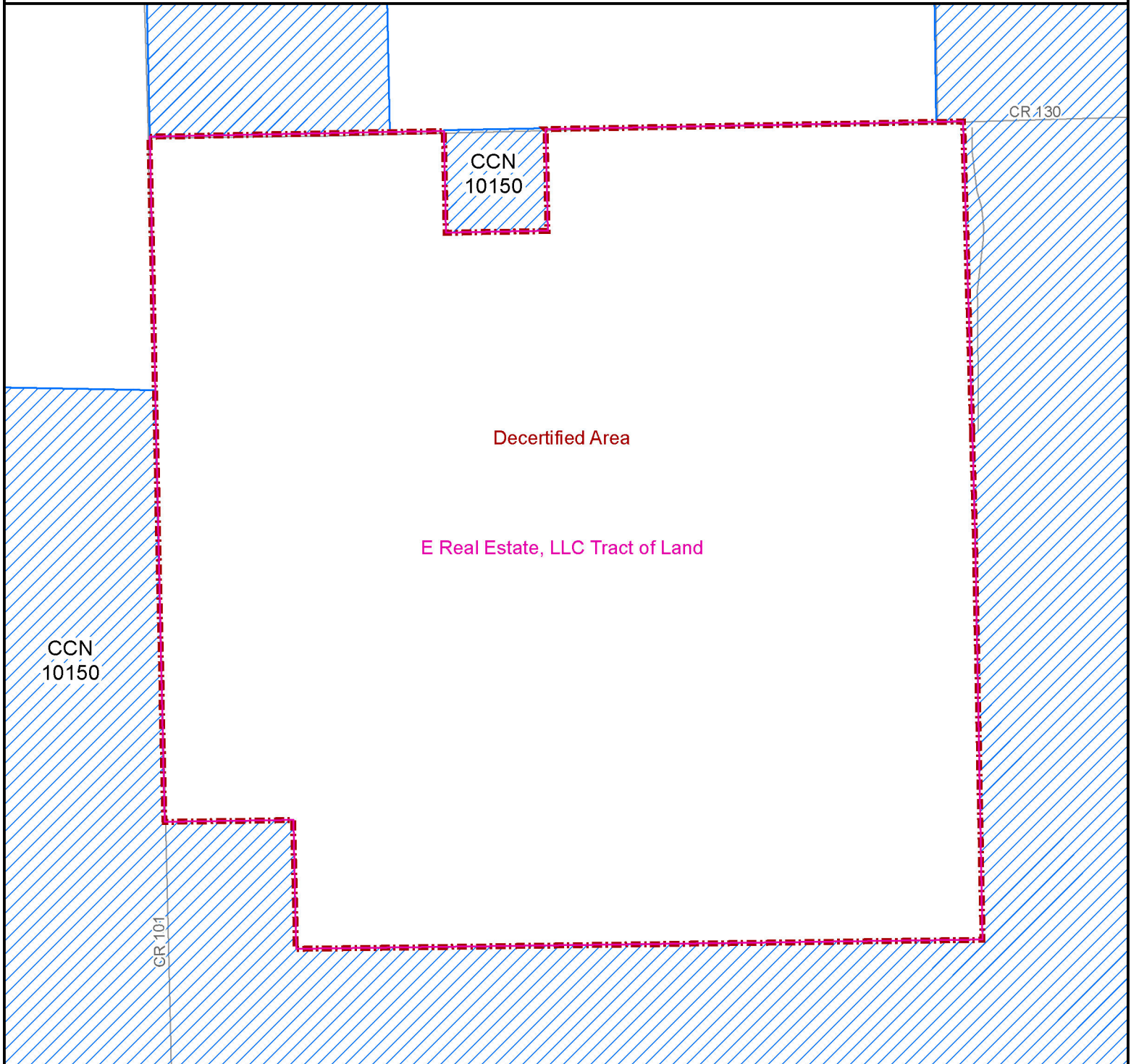
Marilee Special Utility District


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 Counties as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 52533 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.

Marilee Special Utility District
Portion of Water CCN No. 10150
PUC Docket No. 52533
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

 Decertified Area
 Tract of Land

0 225 450
Feet

