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

**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 28, 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 154.08 acres of land (“Tract of Land”) in Collin County, Texas.¹ The Proposed Order requires the parties of this proceeding to file corrections or exceptions by July 12, 2022. Thus, the District’s Corrections and Exceptions are timely filed. In support thereof, the District respectfully shows as follows:

I.

CORRECTIONS AND EXCEPTIONS

1. The ALJ’s Proposed Order, which recommends that the Commission grant E Real Estate, LLC’s (“Petitioner”) First Amended Petition (“Petition”),² 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 Property from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that its

¹ Proposed Order and Memorandum (Jun. 28, 2022).

² First Amended Petition by E Real Estate, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (Tract 2) (Dec. 13, 2021).

Exceptions and Corrections to the Proposed Order be granted, and that the Commission deny the Petition and dismiss this proceeding.

A. The ALJ Erred in Holding that the Property Is Not Receiving Water Service from the District (FOF Nos. 24, 28, 29, 30, 31, 32, 33, 34, 35, and 36; COL Nos. 7, 12, and 13, and Ordering Paragraph 1).

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 Corporation*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).”³ In fact, the Findings of Fact in the Proposed Order reflect that the Tract of Land is receiving and is capable of receiving service from the District as that term is defined in the TWC and *Crystal Clear*. Accordingly, the Commission should revise the Proposed Order to conclude that, based on Findings of Fact 28, 29, 30, 31, and 33, the Tract of Land 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).

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.”

³ Proposed Order at Conclusion of Law (“COL”) 12.

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

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. But where water lines are actually present within a tract and committed to the property, the tract is unquestionably “receiving service” and the 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.

The District’s verified response in this proceeding was supported by the affidavits and accompanying exhibits of the District’s Special Project Inspector, Michael Garrison, and Eddy Daniel, the District’s engineer. Both swore that the Tract of Land, and the larger property upon which the Tract of Land is located, is served by the District’s meters and facilities. As described therein, the District maintains the following facilities that currently provide water service to the Tract of Land:

- Meter No. 144, which is in the name of Petitioner’s President, Eland Energy, Inc., just outside northern boundary of the Tract of Land;
- A 2” waterline, inside the western boundary of the Tract of Land;
- A 4” waterline, inside the western boundary of the Tract of Land;
- An 8” waterline just outside the northern boundary of the Tract of Land, and to which Meter No. 144 is connected; and
- A 2” waterline, outside the eastern boundary of the Tract of Land.⁶

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)).

⁶ See Marilee Special Utility District’s Verified Response at ¶ 18 (Mar. 10, 2022) (describing the District’s facilities that provide service to the Tract of Land); see also *id.* at Exhibit A (Affidavit of Michael Garrison) at ¶¶ 3-4; Exhibit B (Affidavit of Eddy Daniel) at ¶¶ 4-6; Ex. B-1 (detailed map showing meters and waterlines inside and near the boundaries of the Tract of Land).

19. Meter No. 144, which is located on the Tract of Land, is a District meter in the name of Eland Energy, Inc.⁷ Eland Energy, Inc. is Petitioner’s manager.⁸ The meter is currently active. The District Service Application, Service Agreement and Cost of Service Notice for the meter provides that the “Customer” of the District is “Eland Energy, Inc.,” and the meter was transferred to Eland Energy Inc. by Jesse and Milo Kirk in August 2015.⁹

20. Based on the District’s service to the Tract of Land, and meters, waterlines, and other facilities the District maintains within or near the Tract of Land, the District’s engineer has stated that in his “professional opinion, the District provides water service to the Tract of Land through its existing meters and waterlines, and has the ability and facilities dedicated to continue to provide water service to the Tract of Land.”¹⁰

The Proposed Order erroneously omits all of these material facts. Further, the ALJ does not explain why the Tract of Land is not receiving “service” when, even as the Proposed Order admits, the following facts are present:

- “The CCN holder provides water service to a portion of the petitioner’s property which lies outside of the tract of land.”¹¹
- “The CCN holder owns and operates a water meter, meter number 144, that is located just inside of the northern boundary of the petitioner’s property, but outside of the tract of land.”¹²
- “The CCN holder owns and operates a water meter, meter number 1316, that is located just outside of the southwestern boundary of the petitioner’s property, and outside of the tract of land.”¹³

⁷ Marilee Special Utility District’s Verified Response at ¶ 19; *see also id.* at Exhibit A (Affidavit Michael Garrison) at ¶ 3(a) and accompanying exhibits.

⁸ *See* First Amended Petition by E Real Estate, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541, at Ex. A (Affidavit of Gregg Allen) at ¶ 2 (stating, “I am the *President of Eland Energy, Inc., Manager for E Real Estate, LLC, the Petitioner in the above-captioned matter.*”) (emphasis added).

⁹ Marilee Special Utility District’s Verified Response at ¶ 19; *see also id.* at Exhibit A (Affidavit Michael Garrison) at ¶ 3(a) and accompanying exhibits.

¹⁰ *Id.* at Exhibit B (Affidavit of Eddy Daniel) at ¶ 6.

¹¹ Proposed Order at Finding of Fact (“FOF”) 28.

¹² *Id.* at FOF 29.

¹³ *Id.* at FOF 30.

- “The CCN holder owns and operates a two-inch water line and a four-inch water line, both of which run parallel to and just inside the western boundary of the tract of land.”¹⁴

Because the Proposed Order and the sworn affidavits and exhibits provided by the District reflect that the District has facilities, water lines, and meters on the Tract of Land and is capable of receiving service if requested, Petitioner has failed to show that the Tract of Land is not receiving “service” under TWC § 13.2541, 16 TAC § 16.245(h), and *Crystal Clear*. The Proposed Order’s recommended conclusion that the Tract of Land is not receiving “service” is in error. Specifically, the following proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs are incorrect and should be corrected:

- “The tract of land is not receiving actual water service from the CCN holder or any other water utility.”¹⁵
- “Water meter numbers 144 and 1316 and the two-inch and four-inch lines do not provide water service to the tract of land.”¹⁶
- “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.”¹⁷
- “The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.”¹⁸
- “The CCN holder has no facilities or lines that provide water service to the tract of land.”¹⁹
- “The CCN holder has not performed any acts for or supplied anything to the tract of land.”²⁰

¹⁴ *Id.* at FOF 31.

¹⁵ Proposed Order at FOF 24.

¹⁶ *Id.* at FOF 32.

¹⁷ *Id.* at FOF 33.

¹⁸ *Id.* at FOF 34.

¹⁹ *Id.* at FOF 35.

²⁰ *Id.* at FOF 36.

- “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 Corporation*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).”²¹
- “The petitioner is entitled under TWC § 13.2541(b) to the release of the tract of land from the CCN holder’s certificated service area.”²²
- “The Commission releases the tract of land identified in the amended and supplemented petition from the CCN holder’s certificated service area under CCN number 10150.”²³

Additionally, for the aforementioned reasons, the ALJ should enter a Proposed Order that proposes denying the Petition on the grounds that the Tract of Land is receiving service from the District and is not eligible for streamlined expedited release under TWC § 13.2541, 16 TAC § 24.245(h), and *Crystal Clear*.

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, 6, 7, 8, 9, 11, 12, COL Nos. 5, 7, 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.”²⁴ That burden has not been met here, where in both the Original Petition and the First Amended Petition, Petitioner has 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 Tract of Land, and failed to rebut the District’s evidence that it is capable of providing water service to the Tract of Land.²⁵

²¹ Proposed Order at COL 12.

²² *Id.* at COL 13.

²³ *Id.* at Ordering Paragraph 1.

²⁴ 16 TAC § 24.245(h)(3)(D) (emphasis added).

²⁵ 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) at Ex. A (Affidavit of Gregg Allen) at ¶ 3 (“The Property is not receiving water or sewer service from Marilee SUD[.] The Property has not requested water or sewer

The proper analysis of a Petitioner’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.²⁶ 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.”²⁷ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.²⁸

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.”²⁹

Petitioner here has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541 and 16 TAC § 24.245(h). The Proposed Order improperly recommends decertifying the Tract of Land that the District is capable of providing service to, as evidenced by the District’s existing meters and waterlines. The ALJ’s approval eviscerates Petitioners’ burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land is receiving, has

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.”) (Sept. 8, 2021); *see also* 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 (Tract 2) at Ex. A (Affidavit of Gregg Allen) at ¶ 3 (Dec. 13, 2021) (identical).

²⁶ 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)).

²⁷ *Id.* at **6-7.

²⁸ *Id.* at **9-10 (citing the Commission’s Finding of Fact No. 24).

²⁹ *Crystal Clear*, 449 S.W.3d at 134.

received, and is capable of receiving water from the District’s dedicated facilities, water lines, and meters.

The District takes exception to the Proposed Order as written because it fails to hold Petitioner to its burden of proof. For the above reasons, the Proposed Order’s recommendation that Petitioner has established that the Tract of Land 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.³⁰

A federal law, such as 7 U.S.C. § 1926(b), is supreme and binding authority over a state law, such as TWC § 13.02541.³¹ A federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or curtailment of its

³⁰ 7 U.S.C § 1926(b).

³¹ 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 release, “is reviewable de novo in state courts, which would have to enforce Section 1926(b) pursuant to the Supremacy Clause.”).

service area by the Commissioners, in the event that the Commission enters an order curtailing or limiting the CCN holder’s service area in violation of 7 U.S.C. § 1926(b).³²

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*.³³ To satisfy the “physical capabilities,” the District must show that it has “adequate facilities to provide service to the area within a reasonable time” after service is requested, and that the District has “the legal right to provide service.”³⁴ The District need not show “pipes in the ground” at the specific tract, as long as it has some “nearby infrastructure.”³⁵ The District’s ability to provide service to the Property satisfies the “physical capabilities” test.³⁶

1. 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.”³⁷ 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.”³⁸ 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

³² 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)).

³³ 969 F.3d 460 (5th Cir. 2020) (*en banc*).

³⁴ *Id.* at 477; see also *Green Valley Special Utility District v. Marquez*, Cause No. 1:17-CV-819-LY, at 4-6 (W.D. Tex. Mar. 25, 2022) (granting a new trial to CCN holder to demonstrate that CCN holder satisfies “physical capabilities” test).

³⁵ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

³⁶ See *infra* notes 6-9 & accompanying text (describing the District’s meters and waterlines on and near the Property).

³⁷ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

³⁸ *Id.* at n.38.

a prerequisite for obtaining decertification rather than for resisting decertification.”³⁹

2. 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.⁴⁰ 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.”⁴¹
- “*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.”⁴²

3. 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.

In addition to satisfying the “physical capabilities” 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.⁴³ Mustang SUD

³⁹ *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).

⁴⁰ 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”).

⁴¹ *Id.* at 14.

⁴² *Id.* at 17.

⁴³ See TWC § 65.723 (“Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter.”); see also Marilee Special Utility District’s Verified Response to Petition of E Real Estate, LLC’s to Amend Certificate of Convenience and Necessity in Collin County by Expedited Release, at Exhibit A (Affidavit of Michael Garrison) ¶¶ 8-9 & accompanying exhibits (affirming that the District has been consolidated

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”).⁴⁴ The District assumed Mustang SUD’s federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.⁴⁵ In addition to its existing federal indebtedness, the District is also working diligently to close on a USDA loan that was approved in July 2021.⁴⁶

As the District is federally indebted and satisfies the “physical abilities” test, curtailing or limiting the District’s service area with regard to the Property 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.

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 the Property is receiving service from the District, and that 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.

with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Mar. 10, 2022).

⁴⁴ See *id.* at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

⁴⁵ See TWC § 65.726

⁴⁶ Marilee Special Utility District’s Verified Response to Petition of E Real Estate, LLC’s to Amend Certificate of Convenience and Necessity in Collin County by Expedited Release, Exhibit A (Affidavit of Michael Garrison), at ¶¶ 5-7 (Mar. 10, 2022).

Respectfully submitted,

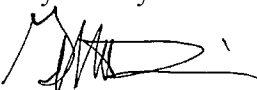
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ATTORNEYS FOR MARILEE SPECIAL
UTILITY DISTRICT

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 12th day of July 2022.



Grayson E. McDaniel