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PETITION OF MESQUOAKEE RANCH, 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
MOTION FOR REHEARING**

TO THE HONORABLE PUBLIC UTILITY COMMISSION:

COMES NOW, Marilee Utility District (the "District"), and files this Motion for Rehearing ("Motion") of the Public Utility Commission of Texas's (the "Commission") Order ("Order") amending the District's Certificate of Convenience and Necessity ("CCN") No. 10150 to release 554.5 acres of property ("Subject Property") in Collin County, Texas.¹ Subsequently, the Commission's Chief Administrative Law Judge issued a Notice of Approval Making a Determination in Compensation on September 21, 2022 ("Notice of Approval").² A party must file a motion for rehearing "not later than the 25th day after the date the decision or order that is the subject of motion is signed."³ Because the 25th day after September 21, 2022, is October 16, 2022, which is a day that the Commission is closed for business, the deadline is October 17, 2022, and this Motion is timely filed.⁴ In support thereof, the District respectfully shows as follows:

I. INTRODUCTION

This proceeding for streamlined expedited release was initiated on September 9, 2021, with the filing of a petition by Mesquaukee Ranch, LLC ("Petitioner"), pursuant to Section 13.2541 of the Texas Water Code ("TWC") and 16 Texas Administrative Code ("TAC") § 24.245(h).⁵ The

¹ Order (May 26, 2022).

² Notice of Approval Making a Determination on Compensation (September 21, 2022).

³ Tex. Gov't Code § 2001.146 and 16 TAC § 22.4(a).

⁴ The District files this Motion, in relevant part, to preserve its rights and remedies on appeal. *See, e.g.,* *Suburban Util. Corp. v. Pub. Util. Com.*, 652 S.W.2d 358, 364 (Tex. 1983) ("[A] motion for rehearing is prerequisite to an appeal.") (internal quotation marks omitted).

⁵ Petition of Mesquaukee Ranch LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity (September 9, 2021).

petition alleged that the property was greater than 25 acres, not receiving water or sewer service, and is entirely within in Collin County.

On October 1, 2021, the District filed a motion to intervene, which the Honorable Administrative Law Judge ("ALJ") Katie Moore Marx granted on October 11, 2021.⁶

On October 21, 2021, Commission Staff filed its Recommendation on Administrative Completeness.⁷ Commission Staff recommended that the Petition be found administratively incomplete. On September 23, 2021, Petitioner filed its First Amended Petition amending the area being decertified to a portion of a 556.456 acre tract of land, comprised of three separate tracts ("Tract of Land").⁸ On October 26, 2021, the Commission entered Order No. 3, in which it found the First Amended Petition administratively incomplete, and gave Petitioner until November 5, 2021, to cure the deficiencies identified by Commission Staff.⁹

On December 10, 2021, after the District was consolidated with Mustang Special Utility District and after Petitioner submitting additional mapping data to clearly identify the Tract of Land and the portion of the Tract of Land that is the Subject Property, the ALJ held that the First Amended Petition was administratively complete.¹⁰

On December 29, 2021, the District filed its Verified Response to the First Amended Petition, supported by the affidavits of the District's General Manager, Donna Loiselle, and engineer, Eddy Daniel. Mr. Tompkins stated in his affidavit that the Subject Property is not receiving water service from Marilee or any other water service provider, and that Petitioner has not requested water service from Marilee or paid any fees or charges to initiate or maintain water service, and there are no billing records or other documents indicating an existing account for the Property.¹¹ Mr. Thompkins' affidavit contains numerous statements that are false as shown in the District's verified response. The Verified Response provided affirmative evidence through affidavits and exhibits that, contrary to Alan W. Tompkins 's affidavit, the Tract of Land is

⁶ Marilee Special Utility District's Motion to Intervene (October 1, 2021); Order No. 2, Granting Intervention (October 11, 2021).

⁷ Commission Staff's Recommendation on Administrative Completeness and Notice (October 21, 2021).

⁸ Petitioner's First Amended Petition for Expedited Release (September 23, 2021).

⁹ Order No. 3, Finding Petition Administratively Incomplete and Establishing an Opportunity to Cure (October 26, 2021).

¹⁰ Order No. 5, Finding Petition Administratively Complete and Notice Sufficient, and Establishing Procedural Schedule (December 10, 2021).

¹¹ *see* Exhibit A (Affidavit of Alan W. Tompkins) at ¶ 2-3 (The property is not receiving water service from Marilee Special Utility District or any other water service provider).

receiving service, the Petitioner had requested service from the District and that the District is capable of providing service to the Tract of Land, including the Subject Property.

There is an active District Meter, No. 722, on the Tract of Land, which was carved out of the Subject Property but provides water service to the Tract of Land. The District has waterlines and facilities near the Subject Property to provide it with water service, all of which were detailed in the District's verified response. The District maintains the following facilities that currently provide water service to the Subject Property:

- Meter No. 722, which serves the Tract of Land;
- A 6" waterline that extends along the eastern boundary of the Tract of Land, including the Subject Property;
- A 4" waterline that runs along the southern boundary of the Tract of Land, including the Subject Property.¹²

Additionally, the Petitioner has applied to the District for service. On October 4, 2021, Connor J. Nichols, as Manager of Elevated Property Management, and on behalf of the property owner, Mesquoakee Ranch, LLC, submitted the application attached as Exhibit A-2 to District's Verified Response.¹³ The Subject Property was included in that application. The District processed that application, and the District's engineer provided a recommendation regarding improvements needed to serve the property subject to that application, which was a portion of the Subject Property. The facts presented in the District's verified response are irrefutable and render the First Amendment Petition invalid.

On May 26, 2022, and despite the District's affirmative evidence that the Tract of Land is receiving water service and that the Petitioner had applied for service, the ALJ entered a proposed order decertifying the Property.¹⁴ The District filed Exceptions and Corrections to the proposed order on March 4, 2022, which were rejected on March 9, 2022.¹⁵ On March 14, 2022, the Commission entered the Order decertifying the Subject Property from the District's CCN.¹⁶

On August 4, 2022, the District and Petitioner submitted appraisals addressing the compensation due to the District under TWC § 13.2541(f) and (i). On September 6, 2022, the

¹² Marilee Special Utility District's Verified Response to First Amended Petition for Expedited Release from Water CCN No. 10150, at Exhibit A, Affidavit of Donna Loiselle, ¶¶ 3-5; Exhibit B, Affidavit of Eddy Daniel at ¶ 6-8, Exhibits B-1 through B-4, (December 29, 2021).

¹³ Id. at p. 8, ¶27; Exhibit A, ¶5; Exhibit A-2; Exhibit B, ¶8; Exhibit B-2.

¹⁴ Proposed Order and Memorandum (February 18, 2022).

¹⁵ Marilee Special Utility District's Exceptions and Corrections to the Proposed Order (March 4, 2022).

¹⁶ Order decertifying the Subject Property from the District's CCN No. 10150 (May 26, 2022).

Commission Staff submitted its third appraiser report regarding compensation as required by 13.2541(i). On September 21, 2022, the Chief Administrative Law Judge issued the Notice of Approval.¹⁷

The Commission's decisions to grant the Petition and subsequently issue the Notice of Approval were in error. The Commission's Order contains factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Subject Property from the District and to prevent the District from being materially prejudiced, as described herein. Consequently, the Commissioner's issuance of the Notice of Approval is an error. Accordingly, the District respectfully requests that the Commission grant the District's Motion for Rehearing, rescind the Notice of Approval, reverse the Order, and enter a final order denying the Petition because the Subject Property is receiving service from the District and is thus ineligible for expedited release under TWC § 13.2541 and 16 TAC § 24.245(h), and because the District's federal indebtedness entitles the District to protection from curtailment or limitation of its service area, under 7 U.S.C. § 19267(b).

II. POINTS OF ERROR

A. **Point of Error No. 1-The Commission Erred in Holding that the Subject Property Is Not Receiving Water Service from the District (FOF Nos. 28 and 29 and COL Nos. 7, 8, and 16 and Ordering Paragraph 1.).**

The TWC authorizes decertification or expedited release only for property "that is not receiving water or sewer service."¹⁸ 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...to its patrons, employees, other retail public utilities, and the public, as well as the interchange of facilities between two or more retail public utilities.¹⁹

Whether or not a retail public utility has performed "any act," "supplied or furnished" anything, or "committed or used" "any facilities or lines" in in the "performance of its duties" is a fact question. According to the plain text of the definition of "service" and how both the Commission and Texas courts have interpreted it, the question of whether or not a tract is receiving "service" is not dependent upon whether water or sewer is being used or has been requested on the

¹⁷ Notice of Approval (September 21, 2022).

¹⁸ TWC § 13.2541(b).

¹⁹ TWC § 13.002(21); *see also* 16 TAC§ 24.3(33) (same definition).

tract sought to be decertified. Instead, a tract is "receiving" water or sewer service if either of the following conditions are met:

- Any facilities or lines are committed or used in the performance of the CCN holder's duties as a retail public utility providing service to the property; or
- Any lines are committed or used in the performance of the CCN holder's duties as a retail public utility.²⁰

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." *Crystal Clear* held that facilities or lines "used" or "committed" to providing such service can cause a property to "receive service."²¹

The Commission's Order errs in its analysis of whether the Subject Property receives water service. The Order fails to explain why it concludes that the Subject Property is "not receiving water service under TWC § 13.002(21) and 13.2541(b) and 16 TAC§ 24.245(h), as interpreted [*Crystal Clear*]"²² when the Order itself states that the following facts are present:

- "The CCN holder owns and operates a six-inch waterline running through the extreme eastern edge of the tract of land, a six-inch waterline running through the extreme southern edge of the tract of land, and a four-inch waterline partially bisecting the tract of land, but none of these lines provide water service to the tract of land."²³
- "The CCN holder own 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."²⁴

Here, the District has served the Tract of Land and is capable of serving the Subject Property, as demonstrated in the verified response. The Subject Property is thus receiving "service" as interpreted by *Crystal Clear*. There are District facilities currently serving the Tract of Land,

²⁰ See *id.*; see also *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 137 (Tex. App.-Austin 2014, pet. denied).

²¹ *Crystal Clear*, 449 S.W.3d at 140.

²² Order, at COL 12.

²³ *Id.* at FOF 28.

²⁴ *Id.* at FOF 29.

including the Subject Property. The Commission seems to deliberately overlook the fact that the District provides water service to Petitioner's Tract of Land, including the Subject Property. The Commission's indifference to these facts has now led to the District being damaged by the Commission taking acreage that the District is serving and which the District relies upon for paying its debts. Such an outcome was not intended by the legislature when the streamlined expedited release process was created.²⁵

If the Commission permits Petitioners to decertify property that the CCN holder can service and is servicing, then the Commission is not taking into account the important public policy of preserving a CCN holder's service area and is subjecting CCN holders to abusive tactics of landowners that were not intended by the legislators when they created the mechanism for streamlined expedited release.²⁶ For this reason, the District respectfully urges the Commission to grant the District's Motion and issue an order denying the Petition.

B. Point of Error 2 - The Commission Erred by Failing to Hold Petitioner to Its Burden of Proof Under TWC § 13.2541 and 16 TAC§ 24.245(h) (FOF Nos. 4, 6, 14, 15, 16, 24, 27, 28, and 29 and COL Nos. 5, 6, 7, 13, and Ordering Paragraph 1.).

In order to carry their burden of establishing that the Subject Property is not receiving water service, 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. It is arbitrary and capricious for the Commission to decertify property from a CCN when a petitioner fails to set forth facts to establish that the property is not receiving service, as here, where Petitioner set forth only an affidavit that provided no facts regarding water service, but merely unsupported claims.

²⁵ See, e.g., House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) (noting in support that the bill would "would protect private property rights by unwanted imposition of a CCN on a landowner" and "*address problems where residents of MUDs with *substandard service are unable to receive improvements*" due to the CCN holder's exclusive right to provide service in its area) (emphasis added).*

²⁶ See, e.g., House Comm. Bill Analysis at 4-5, C.S.H.B. 2876, 79th Leg., R.S. (May 11, 2005) at 4-5 (stating that TWC § 13.254 was designed to prevent "abuses of CCN authority" where "a landowner looking to develop his or her land might find that although the land was in a CCN, that utility was unable or unwilling to extend service to his or her property." Section 13.254 was not meant to arbitrarily deprive CCN holders of property they are actively servicing.). Streamlined expedited release was created in 2019 to be a simplified offshoot of expedited release that better codified the way CCN holders should be compensated for property decertified from their CCN service area. See, e.g., Acts 2019, 86th Leg., R.S., Ch. 688, General and Special Laws of Texas (emolled bill to be codified at TWC § 13.2541). The policies considered by the legislature regarding the substance of both TWC §§ 13.254 and 13.2541 are best reflected by the legislative history for TWC § 13.254, which was enacted in 2005 in House Bill 2876.

Under *Crystal Clear*, the Commission must review the present facts and circumstances, including the service application and agreements (including transfer agreements) that cover all the acres of the tract at issue. In *Crystal Clear*, 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.²⁷ But where water lines are actually present within a tract and "committed" to the property in that manner, the tract is unquestionably "receiving service."

The proper analysis of a Petitioner's burden is reflected in *Johnson County Special Utility District v. Public Utility Comm'n of Texas*.²⁸ 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."²⁹ The Commission, based on these facts, properly decertified the property as not having water service from at least 2005.³⁰

Here, Petitioner has not met its burden of proof to decertify the Subject Property under TWC § 13.2541. Petitioner has provided no facts to support the sworn contention that the property is not receiving or cannot receive service. If Petitioner had provided a statement of facts, Petitioner would have to acknowledge that Marilee either serves or is readily able to serve the Subject Property with its existing waterlines and facilities. The Order improperly permits Petitioner to decertify the Subject Property that the District is providing service to, as evidenced by the District's existing meters, waterlines, facilities, and billing and membership records. The Commission's approval of Petitioner's "carving out" portions of the Subject Property from the existing meters, waterlines, and facilities, and acceptance of Petitioner's insufficient affidavit eviscerates Petitioner's burden of proof, and improperly puts all the burden on the District to prove that the Subject Property is receiving, has received, and is capable of receiving water service under TWC § 13.2541 and *Crystal Clear*.³¹

²⁷ *Crystal Clear*, 449 S.W.3d at 140.

²⁸ No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App-Austin May 11, 2018, pet. denied) (mem. op.).

²⁹ *Id.* at **6-7.

³⁰ *Id.* at **9-10 (citing Commission's Finding of Fact No. 24).

³¹ TWC §13.2541 and *Crystal Clear*.

C. Point of Error 3-The Commission Erred When It Failed to Meet the 60-Day Statutory Deadline to Either Grant or Deny Expedited Release (FOF 8, COL Nos. 1, 13, 16 and Ordering Paragraphs 1.).

The Commission erred in granting the Petition because it did so in clear violation of TWC § 13.254l(c), which provides, "The utility commission shall grant the petition not later than the 60th day after the date the landowner files the petition." Further, the Order violates the Commission's substantive rules, which require the Commission to "issue a decision on a petition" for streamlined expedited release "no later than 60 calendar days after the presiding officer determines that the petition is administratively complete."³²

The original petition was filed on September 9, 2021, and the First Amended Petition was found administratively complete on December 10, 2021.³³ Sixty calendar days after December 10, 2021, is February 8, 2022, the date by which the Commission was required to issue a decision either granting or denying the Petition. In violation of TWC § 13.254l(c) and 16 TAC§ 24.245(h)(7), the Commission failed to enter a decision on the Petition until May 26, 2022.³⁴ As a result of the Commission's errors, the District has been required to proceed through nearly seven months of additional litigation.

The Commission's error materially prejudiced the District. For example, another Commission rule states that the District should not apply for any federal loan "after the date the petition is filed until the utility commission issues a decision on the petition."³⁵ It is prejudicial but for the District to be prevented from seeking financing for needed improvements solely because the Commission failed to follow its mandatory statutory and rule requirements.

Because of the Commission's error in its treatment of the Petition, the District has been materially prejudiced by, among other things, legal costs, delays to needed financing, and improper limitation and curtailment of its service area.

³² 16 TAC§ 24.245(h)(7).

³³ See Order No. 5 - Finding Amended Petition Administratively Complete and Notice Sufficient and Establishing Procedural Schedule (December 10, 2021).

³⁴ Order (May 26, 2022).

³⁵ TWC § 13.254l(e); 16 TAC§ 24.245(h)(8). However, the Commission does not have authority to enforce these against the District. See Docket 52101, *Petition of CCD North Sky, LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*, Order No. 11 - Denying Petition Request for an Order Requiring Marilee Special Utility District to Withdraw Its Federal Loan Application, at 1 (Oct. 25, 2021).

D. The Commission Erred by Curtailing and Limiting the Service Area of a Federally Indebted Entity Protected by 7 U.S.C. § 1926(b) (FOF Nos. 18 and COL Nos. 13, 14, and 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. To protect a USDA debtor's ability to service its debt, it is prohibited by federal law to "curtail or limit" 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.³⁶

To be eligible for protection under § 1926(b), the District must show, in addition to federal indebtedness, that it satisfies the "physical abilities" test, as adopted by the U.S. Court of Appeals for the Fifth Circuit, sitting en banc in *Green Valley Special Utility District v. City of Schertz*.³⁷ Judge Smith, writing for the majority, characterized the "physical abilities" test broadly:

To make the test easy to apply to both water and sewer service, we hold that a utility must show that it has (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made and (2) the legal right to provide service. A utility cannot satisfy that test if it has no nearby infrastructure. But 'pipes in the ground' is a colloquial shorthand, not a strict requirement.³⁸

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."³⁹ The Court further explained the broad interpretation, "[s]ervice may be 'available' even if it cannot be immediately used. No water or

³⁶ 7 U.S.C. § 1926(b).

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

³⁸ *Green Valley*, 969 F.3d at 477.

³⁹ *Id.* at 477 & n.36 (quoting *Lexington-S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

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."⁴⁰ Based on the District's meters and waterlines located inside the boundaries of the Subject Property, as reflected in Exhibit B-1, the District is unquestionably providing actual service to the Subject Property and, accordingly, more than satisfies the "physical abilities" test.

The District is now consolidated with Mustang Special Utility District ("Mustang SUD") (together with the District, the "Consolidated District"), in accordance with TWC Chapter 65, Subchapter H.⁴¹ Voters within the two districts passed measures consolidating the districts on November 2, 2021 and the elections have been canvassed.⁴²

Prior to consolidation with the District, Mustang SUD was already indebted to the United States of America Department of Agriculture, Rural Utilities Service, which 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").⁴³ The District assumed Mustang SUD's federal indebtedness when the District and Mustang SUD were consolidated.⁴⁴ The District will be required to make payments on the Bonds until 2055 (2016 Bonds) and 2058 (2018 Bonds).⁴⁵

On July 12, 2021, the District received approval from the USDA for a Water and Wastewater Guaranteed loan of \$1,553,000.⁴⁶ The District has not closed on the USDA loan but is working diligently to do so.

Under *Green Valley*, a federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or curtailment of its service

⁴⁰ *Id.* at n.38.

⁴¹ See TWC § 65.723 ("Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter."); see also, e.g., *Petition of Sater L.P. to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Streamlined Expedited Release*, Docket No. 52739 (pending) Marilee Special Utility District's Verified Response, at Exhibit A (Affidavit of Michael Garrison) at ¶¶ 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) (Mar. 3, 2022).

⁴² See TWC § 65.724 (describing procedure).

⁴³ See Docket No. 52739, Marilee Special Utility District's Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

⁴⁴ TWC § 65.726.

⁴⁵ See Docket No. 52739, Marilee Special Utility District's Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

⁴⁶ See Marilee Special Utility District's Verified Response to Petition of Celina Partners, Ltd at ¶¶ 27-32 (describing District's pending federal indebtedness); *id.* at Exhibit A (Affidavit of Donna Loiselle) at ¶¶13-15 and accompanying exhibits (describing District's pending federal indebtedness).

area by the Commissioners.⁴⁷ As the Consolidated District is federally indebted, and with the scheduled closing of the USDA loan approaching, the District has a federal equitable cause of action against the Commissioners should the Commissioners take action to limit or curtail of its service area.

E. Point of Error 5-The Commission Erred by Omitting Relevant Facts and Law from the Order, Thereby Creating an Unclear Record.

The Order omits significant procedural events that occurred during this proceeding from its Findings of Fact. In order to have a clear record on appeal, the District respectfully requests that the Order be revised to include new Conclusions of Law substantially similar to the following:

- **Proposed COL 2A.** Under TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission must issue a decision on a petition for streamlined expedited release no later than 60 calendar days after the presiding officer determines that the petition is administratively complete.
- **Proposed COL 6A.** A petitioner seeking streamlined expedited release must file with the Commission a petition and supporting documentation verified by a notarized affidavit and containing (A) a statement that the petition is being submitted under TWC §13.2541 and 16 TAC§ 24.245(h); (B) proof that the Subject Property is a legal Tract of Land at least 25 acres in size; (C) proof that at least part of the Subject Property is located in the current CCN holder's certificated service area and at least some of that part is located in a qualifying county; (D) a statement of facts that demonstrates that the Subject Property is not currently receiving service; (E) copies of deeds demonstrating ownership of the Subject Property by the landowner; (F) proof that a copy of the petition was mailed to the current CCN holder via certified mail on the day that the landowner filed the petition with the commission; and (G) the mapping information described in 16 TAC§ 24.245(k).

F. Point of Error 6 -The Commission Erred by issuing a Notice of Approval Making Determination on Compensation that is based on facts not supported by the record.

The Commission-appointed appraiser, Vantage Point Advisors, Inc., issued an appraisal on September 6, 2022 (“Commission Appraisal”), concluding that the Petitioner is required to compensate

⁴⁷ See *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”).

the District an amount of \$66,184.⁴⁸ The Notice of Approval adopted the Commission Appraisal.⁴⁹ The Commission Appraisal improperly evaluates “Factor 2” because it asserts that build out will occur over a longer period of time than the information admitted to by Petitioner in the filings made with the Commission in this matter. Petitioner admits that there will be 2,600 new connections on the Subject Property within the next 10 years, or 260 new connections per year.⁵⁰ The Commission Appraisal ignores this uncontroverted evidence and concludes that there will only be 88 new connections on the District’s system in 2022 and another 88 in 2023.⁵¹ As stated in the District’s Appraisal, “the facilities have the capacity to serve maximum of 892 connections and currently serve approximately 714 connections.”⁵² The allocation of debt should be based upon the availability of an additional 178 connections for the Subject Property within 2022, which is well below the connections projected by Petitioner. If the factually correct number of additional connections is used in evaluating the amount of debt allocable for service to the area in question, the District is entitled to compensation of \$73,056. for this factor, and not limited to the \$66,184. as stated in the Commission’s Appraisal. There is no evidence in the record to support the Commission Staff’s Third-Party Appraisal Report.

For this reason, Finding of Fact No. 11 in the Order should be amended to provide for compensation to the District in the amount of \$73,056.⁵³

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that the Commission grant its Motion for Rehearing, deny the Petition, all as set forth above, in all respects and grant the District such additional and further relief to which it may be entitled.

⁴⁸ Commission Staff’s Submission of Third-Party Appraisal Report (September 6, 2022).

⁴⁹ Commission Staff’s Notice of Approval (September 21, 2022) at FOFs 9 and 11.


⁵⁰ See Petitioner’s Response to the Public Utility Commission Staffs First Request for Information (December 12, 2021).

⁵¹ See Commission Staff’s Submission of Third-Party Appraisal Report at p. 5 and Schedule 3.

⁵² Marilee Special Utility District’s Submission of Appraisal (August 4, 2022) at 8.

⁵³ Marilee Special Utility District’s Submission of Appraisal (August 4, 2022) at 13.

Respectfully submitted,


By:  _____

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ATTORNEY 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 14th day of October 2022.



John J. Carlton