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| PETITION OF ELAND ENERGY, INC. TO AMEND MARILEE SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE | § § § § § § | PUBLIC UTILITY COMMISSION OF TEXAS |
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COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION

On September 28, 2021, Eland Energy, Inc. (Eland Energy) filed a petition for streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water certificate of convenience and necessity (CCN) number 10150 under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(h). Eland Energy 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 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

On October 12, 2021, Marilee SUD filed a motion to intervene. Eland Energy filed supplemental information on November 9, 2021. On December 13, 2021, the administrative law judge (ALJ) filed Order No. 4, establishing a deadline of January 18, 2022 for the Staff of the Public Utility Commission of Texas (Staff) to file a recommendation on final disposition. Therefore, this pleading is timely filed.

I. RECOMMENDATION ON FINAL DISPOSITION

As detailed in the attached memorandum of Pai Liu of the Commission's Infrastructure Division, Staff has reviewed the petition and recommends that it be approved. The affidavit, maps and digital data, and warranty deed filed by Eland Energy provide adequate information to demonstrate that the petition satisfies the requirements of TWC § 13.2541(b) and 16 TAC

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>

§ 24.245(h). Specifically, the petition shows that the property for which Eland Energy seeks expedited release is located in Collin County, which is a qualifying county, is not receiving water utility service, and the northwest tract of land 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 regarding the northwest tract of land.

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

A. Receiving Water Service

Marilee SUD argues that Eland Energy “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 Eland Energy has met its burden of proof under TWC § 13.2541.

Marilee SUD further asserts that Eland Energy cannot meet its burden of proof because Marilee SUD is capable of providing water service to the property with two waterlines near the property. Staff recommends that these elements are not sufficient to meet the standard of “receiving” water 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”⁶

The water lines running near the property have not been shown to be committed to providing water to the particular tract. Through its various responses, Marilee SUD has not

⁴ Marilee Special Utility District’s Verified Response at 5 (Oct. 4, 2021) (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 *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 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).

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.⁷ 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.⁸ 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.

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, 2021.⁹ 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.”¹⁰ Marilee SUD claims that, because it can show federal indebtedness and the physical ability to serve a portion of Eland Energy’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.”¹¹ 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.¹² Further, the

⁷ *Crystal Clear*, 449 S.W.3d at 140.

⁸ *Id.*

⁹ Response at 10.

¹⁰ *Id.* at 9.

¹¹ TWC § 13.2541(d).

¹² *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

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.¹³ 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

Staff respectfully requests the entry of an order consistent with the foregoing recommendation.

Dated: January 18, 2022

Respectfully submitted,

PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION

Rachelle Nicolette Robles
Division Director

/s/ Kourtnee Jinks

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¹³ *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 411 and 478 (5th Cir. Aug. 7, 2020) (en banc).

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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 via electronic mail on January 18, 2022, in accordance with the Order Suspending Rules issued in Project No. 50664.

/s/ Kourtnee Jinks

Kourtnee Jinks

Public Utility Commission of Texas

Memorandum

TO: Kourtnee Jinks, Attorney
Legal Division

FROM: Pai Liu, Infrastructure Analyst
Infrastructure Division

DATE: January 11, 2021

RE: Docket No. 52653 – *Petition of Eland Energy, Inc. to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Expedited Release*

On September 28, 2021, Eland Energy, Inc. (Eland Energy) 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). Eland Energy 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.

Gary Horton, Infrastructure Division, determined the map and digital data are sufficient for determining that the tract of land considered for streamlined expedited release is located within Marilee SUD’s water CCN. Furthermore, Eland Energy provided a warranty deed confirming ownership of the tract of land within Marilee SUD’s certificated service area. In addition, Eland Energy submitted a sworn affidavit attesting that the tract of land was not receiving water service from the CCN holder.

Based on the mapping review by Mr. Horton, it was determined that the landowner’s total property is approximately 49 acres. Based on the maps provided, the property is non-contiguous, with only the northwest area meeting the 25-acre requirement. I recommend only the 33 acre tract of land in the northwest area should be released. The tract of land to be released is approximately 33 acres, of which approximately 33 acres overlap Marilee SUD (CCN No. 10150) and are to be decertified from CCN No. 10150.

The petition also includes a statement indicating a copy of the petition was sent via certified mail to Marilee SUD on the date the petition was filed with the Commission.

Marilee SUD requested to intervene.

In accordance with TWC § 13.2541 and 16 TAC § 24.245(h), Eland Energy 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.