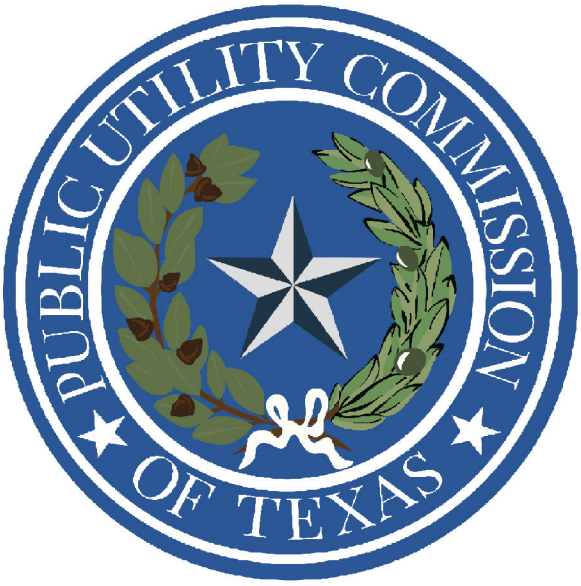

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PETITION OF ELAND ENERGY, INC. TO AMEND MARILEE SPECIAL UTILITY DISITRCT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

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 33.23 acres of property ("Tract of Land") in Collin County, Texas.[1] 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."[2] The 25th day after May 26, 2022, is June 20, 2022, and this Motion is timely filed.[3] 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 Eland Energy, Inc. ("Petitioner"), pursuant to Section 13.2541 of the Texas Water Code ("TWC") and 16 Texas Administrative Code ("TAC") § 24.245(h).[4] The petition alleged that the property sought to be released from the District's CCN was greater than

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[1] Order (May 26, 2022).

[2] Tex. Gov't Code § 2001.146.

[3] 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).

[4] Petition of Eland Energy, Inc. to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release, at 2 (Sept. 28, 2021) (seeking to decertify 49.07 acres of property).

25 acres, not receiving water or sewer service, and is entirely within Collin County.[5]

On October 12, 2021, the District filed a motion to intervene, which the Honorable Administrative Law Judge ("ALJ") Ta granted on October 25, 2021.[6]

On October 29, 2021, 2021, the ALJ held that the Petition was administratively complete.[7]

On October 8, 2021, Petitioner filed supplemental materials in support of the Petition.[8] Commission Staff's review determined that the supplemental materials reflected that the acreage sought to be release was "approximately 33 acres," as opposed to the 49.07 acres that Petitioner originally stated.[9] On December 13, 2021, the ALJ filed a second order holding that the Petition was administratively complete.[10]

On January 3, 2022, the District filed its Verified Response to the Petition, supported by the affidavits of the District's General Manager, the District's engineer, and the Manager of Mustang Special Utility District, a federally indebted district with which the District has been consolidated.[11] In its Verified Response, the District argued that the Petition should be denied because Petitioner failed to meet its burden of proof under TWC § 13.2541 and 16 TAC § 24.245(h); the District has facilities in place to provide water service to the Tract of Land; and granting the Petition would limit and curtail the District's service area in violation of federal law.[12]

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[5] *Id.* at 2.

[6] Marilee Special Utility District's Motion to Intervene (Oct. 12, 2021); Order No. 2 – Granting Intervention (Oct. 25, 2021).

[7] Order No. 3 – Finding Petition Administratively Complete and Notice Sufficient and Establishing Deadlines (Oct. 29, 2021).

[8] Letter filing Updated Maps, Legal Description, and Shapefiles in Petition filed on August 31, 2021 (Nov. 9, 2021).

[9] Commission Staff's Supplemental Recommendation on Sufficiency of Petition and Procedural Schedule (Dec. 10, 2021).

[10] Order No. 4 - Finding Petition Administratively Complete and Establishing Procedural Schedule (Dec. 13, 2021).

[11] Marilee Special Utility District's Verified Response to Petition for Expedited Release from Water CCN No. 10150 (Jan. 3, 2022).

[12] *See* 7 U.S.C. § 1926(b) (prohibiting the limitation or curtailment of the service area of certain federally indebted entities).

The ALJ entered a proposed order decertifying the Property on February 24, 2022.[13] The District filed Exceptions and Corrections to the proposed order on March 11, 2022, which were rejected on March 16, 2022.[14] The Commission entered the Order decertifying the Tract of Land from the District's CCN on May 26, 2022.[15]

The Commission's decision to grant the Petition was an 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 Tract of Land from the District and to prevent the District from being materially prejudiced, as described herein. Accordingly, the District respectfully requests that the Commission grant the District's Motion, reverse the Order, and enter a final order denying the Petition.

II. POINTS OF ERROR

A. Point of Error No. 1—The Commission Erred in Holding that the Tract of Land Is Not Receiving Service from the District (FOF Nos. 19-25 and COL Nos. 7 and 12 and Ordering Paragraph 1.).

The TWC authorizes decertification or expedited release only for property "that is not receiving water or sewer service."[16] 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.[17]

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

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[13] Proposed Order and Memorandum (Feb. 24, 2022).

[14] Marilee Special Utility District's Exceptions and Corrections to the Proposed Order (Mar. 11, 2022); Proposed Order Memo (Mar. 16, 2022).

[15] Order (May 26, 2022).

[16] TWC § 13.2541(b).

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

"service" is not dependent upon whether water or sewer is being used or has been requested on the 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.[18]

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."[19]

The Commission's Order errs in its analysis of whether the Tract of Land receives water service. The District's Verified Response provided affirmative evidence that the District maintains the following:

- A 4" waterline, near the north side of the Tract of Land; and
- A 4" waterline, near the east side of the Tract of Land.[20]

Further, the District's engineer provided in his affidavit that, "in his professional opinion, Marilee provides and has the ability and facilities dedicated to provide water service to the Property if requested."[21]

Here, the District has served and is capable of serving the "petitioner's tract of land," as demonstrated in the verified response. The Tract of Land is thus receiving "service" as interpreted by *Crystal Clear*. The Commission's indifference to these facts has now led to the District being

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[18] *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).

[19] *Crystal Clear*, 449 S.W.3d at 140.

[20] Verified Response, ¶¶ 24-25 & Exhibit A (Affidavit of Donna Loiselle) at ¶ 3; Exhibit B (Affidavit of Eddy Daniel) at ¶ 5 (Jan. 3, 2022).

[21] Verified Response, ¶ 25 & Exhibit B (Affidavit of Eddy Daniel) at ¶ 5. (Jan. 3, 2022).

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.[22]

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.[23] For this reason, the District respectfully urges the Commission to grant the District's Motion and issue an order denying and dismissing the Petition because it is receiving "service" under TWC § 13.2541, 16 TAC § 24.245(h), and *Crystal Clear*.

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 4-11, 19-25 and COL Nos. 6, 7, 13, and Ordering Paragraph 1.).

In order to carry their burden of establishing that the Tract of Land 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.

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

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[22] *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).

[23] *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 (enrolled 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.

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.[24] 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*.[25] 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."[26] The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.[27]

Here, Petitioner has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541. The Commission's approval of Petitioner's insufficient affidavit eviscerates Petitioner's burden of proof, and improperly puts all the burden on the District to prove that the Tract of Land is receiving, has received, and is capable of receiving water service under 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 7, COL Nos. 1, 13, 16 and Ordering Paragraph 1.).

The Commission erred in granting the Petition because it did so in clear violation of TWC § 13.2541(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

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[24] *Crystal Clear*, 449 S.W.3d at 140.

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

[26] *Id.* at **6-7.

[27] *Id.* at **9-10 (citing Commission's FOF. 24).

determines that the petition is administratively complete."[28]

The original petition was filed on September 28, 2021, and was held administratively complete on October 29, 2021.[29] Sixty calendar days after October 29, 2021, is December 28, 2021, the date by which the Commission was required to issue a decision either granting or denying the Petition. In violation of TWC § 13.2541(c) and 16 TAC § 24.245(h)(7), the Commission failed to enter a decision on the Petition until May 26, 2022. As a result of the Commission's errors, the District has been required to proceed through nearly five 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."[30] 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.

D. Point of Error 4—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

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[28] 16 TAC § 24.245(h)(7).

[29] Order No. 3 – Finding Petition Administratively Complete and Notice Sufficient, and Establishing Procedural Schedule (Oct. 29, 2021).

[30] TWC § 13.2541(e); 16 TAC § 24.245(h)(8).

> 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.[31]

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*.[32] 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.[33]

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."[34] 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."[35] Based on the District's meters and waterlines located inside the boundaries of the Tract of Land, as reflected in Exhibit B-1, the District is unquestionably providing actual service to the Tract of Land 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,

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[31] 7 U.S.C § 1926(b).

[32] 969 F.3d 460 (5th Cir. 2020) (en banc).

[33] *Green Valley*, 969 F.3d at 477.

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

[35] *Id.* at n.38.

Subchapter H.[36] Voters within the two districts passed measures consolidating the districts on November 2, 2021 and the elections have been canvassed.[37]

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").[38] The District assumed Mustang SUD's federal indebtedness when the District and Mustang SUD were consolidated.[39] The District will be required to make payments on the Bonds until 2055 (2016 Bonds) and 2058 (2018 Bonds).[40]

On July 12, 2021, the District received approval from the USDA for a Water and Wastewater Guaranteed loan of $1,553,000.[41] 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 area by the Commissioners.[42] 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 its service area.

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[36] *See* TWC § 65.723 ("Two or more districts governed by this chapter may consolidate into one district as provided by this subchapter."); *see also* Verified Response, ¶ 30 & Exhibit A (Affidavit of Donna Loiselle), at ¶¶ 7-8 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd), at ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Jan. 3, 2022).

[37] *See* TWC § 65.724 (describing procedure).

[38] Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5 (Jan. 3, 2022).

[39] TWC § 65.726

[40] Verified Response, at Exhibit C (Affidavit of Chris Boyd), at ¶ 5 (Jan. 3, 2022).

[41] Verified Response at Exhibit A (Affidavit of Donna Loiselle) at ¶¶ 4-6 (Jan. 3, 2022).

[42] *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.") (citing *Ex parte Young*, 209 U.S. 123 (1908)).

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 tract of land is at least 25 acres in size; (C) proof that at least part of the tract of land 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 tract of land is not currently receiving service; (E) copies of deeds demonstrating ownership of the tract of land 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).

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.

Respectfully submitted,

By: _____

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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 20th day of June 2022.

_____
Grayson E. McDaniel