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**PETITION OF MICHAEL D. DRY TO
AMEND MONARCH UTILITIES I LP'S
CERTIFICATE OF CONVENIENCE AND
NECESSITY IN TARRANT COUNTY BY
STREAMLINED EXPEDITED RELEASE**

**PUBLIC UTILITY COMMISSION
OF TEXAS**

**PETITIONER'S APPEAL OF INTERIM ORDER NO. 3 AND MOTION FOR
STAY**

Michael D. Dry ("Dry") respectfully appeals Order No. 3 pursuant to 16 Tex. Admin. Code § 22.123.¹ Specifically, the presiding officer's ruling is unjustified and immediately prejudices Dry's right to a streamlined expedited release. Dry is ultimately entitled to a streamlined expedited release of his property under Section 13.2541(b) of the Texas Water Code, which permits an owner of a tract of land under common ownership to seek such a release. Dry has demonstrated that the nature of his ownership, control, possession, and use of the four contiguous tracts of land at issue equates to common ownership as that term is commonly used and understood by courts and lawmakers. Public Utility Commission ("PUC") staff has rightfully recognized that the agency's rules and rulings do not define "common ownership," and has asked for the question of common ownership to be certified to the Commission for clarification, as is the intent of the PUC certification rule at 16 Texas Administrative Code section 22.127(b). Certifying the question will afford Dry the benefit of certainty regarding what is required of him to obtain a streamlined expedited release for his land, while giving the Commission the opportunity to provide regulatory clarity for future requests. The presiding officer's explanation for denying the Commission Staff's request for certification provides no discernible legal

¹ Order No. 3 Denying Request for Good Cause Exception, Declining to Certify Issue, Finding Petition Remains Administratively Incomplete, and Providing Opportunity to Cure (April 4, 2022).

or procedural reasoning but begs the primary question that needs to be answered in this matter—underscoring the need for further clarification from the Commission.

In the absence of a determination that the tracts of land at issue here have common ownership, Dry has sought a “good cause” exception to a rigid and strict construction of the term common ownership. While Dry implores the Commission to properly interpret common ownership in a manner that is consistent with historical interpretation of the term(s), the Commission should also be presented with the question as to whether “good cause” exists to except Dry from that requirement in this case, given the common possession, control, and use of the tracts of land at issue here. A “good cause” exception is expedient and proper here because it avoids needlessly requiring Dry to reorder his affairs to comply with an overly restrictive understanding of ownership, only to begin anew the process for obtaining the streamlined expedited release he is ultimately entitled to. Here again, the presiding officer provides no reason for denying the Commission Staff’s request to certify this question to the Commission, declaring only that “it is unnecessary to do so.”

For these reasons and as explained in further detail below, Dry appeals Order No. 3 and requests that the Commission clarify that a landowner owning contiguous tracts of land may seek a streamlined expedited release where common ownership exists, albeit under differing legal entities. Alternatively, and for similar reasons, the Commission should clarify that “good cause” exists here to except Dry from a strict construction of “common ownership” because Dry exclusively possesses, controls and uses these contiguous tracts of land, albeit under different legal entities.

I. THIS APPEAL IS TIMELY

The Commission’s procedural rules provide that an “appeal to the commission from an interim order shall be filed within ten days of the issuance of the written order.” 16 Tex. Admin. Code § 22.123(a)(2). Order No. 3 was entered on April 4, 2022, so the deadline for filing this appeal is April 14, 2022. Hence this appeal is timely filed.

II. STANDARD FOR APPEAL

“Appeals are available for any order of the presiding officer that immediately prejudices a substantial or material right of a party, or materially affects the course of the hearing, other than evidentiary rulings.” 16 Tex. Admin. Code § 22.123(a)(1). In Order No. 3, the presiding officer decided that, despite PUC Staff’s request, it would not certify to the Commissioners the issue of whether each of the four parcels of land are under common ownership. The presiding officer gave no substantive reasoning for its denial of certification, other than to say, “Dry lacks the right to pursue release for land owned by someone else.”² And then the presiding officer averred that Dry could file separate SERs if he really is sole manager or trustee of the entities owning the parcels at-issue.

The presiding officer’s ruling “immediately prejudices [a] substantial or material right” of Dry’s by thwarting his entitlement to streamlined expedited release of contiguous tracts of land that are under Dry’s exclusive ownership, possession, and control. The presiding officer’s ruling also “materially affects the course of the hearing” by rendering a streamlined expedited release of the contiguous tracts of land impossible if Dry were forced to file separate SERs for each tract of land because only three out of the four tracts of land exceed the minimum of 25 acres of land to qualify for SER. Indeed, because of the impossibility of pursuing SERs for each tract, the presiding officer’s Order No. 3 has essentially ended the entire SER process that should be available to Dry.

The Commission should reverse the presiding officer’s ruling and certify the substantive issue of whether common ownership exists, and, alternatively, whether good cause exists to proceed anyway.

² Order No. 3 at 1.

III. BACKGROUND

On December 22, 2021, Dry filed a request for streamlined expedited release to release his property within the boundaries of Certificate of Convenience and Necessity (“CCN”) No. 12983 held by Monarch Utilities I LP (“Monarch”).

On January 24, 2022, PUC Staff (“Staff”) recommended that Dry’s petition was administratively incomplete because of mapping deficiencies and raised the issue of whether each of the four parcels of land included in the SER were under common ownership. Two days later, on January 26, 2022, the presiding officer ordered Dry to cure the deficiencies by February 23, 2022. Staff was required to submit its recommendation of administrative completeness by March 25, 2022.

On February 23, 2022, Dry filed briefing with revised detail and location maps and evidence showing that Dry either owns the tracts individually or serves as the sole manager or trustee of the entities that do.

On March 25, 2022, Staff filed briefing that reiterated the mapping deficiencies and requested the presiding officer certify to the Commission two issues: (1) whether the four parcels are under common ownership as the term is used in Chapter 13 of the Water Code or in the PUC rules, and (2) alternatively, whether a good cause exception to the common ownership requirement exists given Dry’s control over the parcels and strategic reasons for having the parcels under different ownership.

Yet on April 4, 2022, the presiding officer denied Dry’s good cause request and denied Staff’s request to certify the issues to the Commission.

Dry has been engaged throughout the entirety of the proceedings, such as filing supplemental briefing and supporting affidavits by counsel that have clarified his ownership of the land. Dry’s mapping experts are also actively trying to resolve any mapping deficiencies on a real-time basis. Yet all these efforts by a responsible landowner trying to utilize a procedure created by the Legislature and Commission for landowners like Dry have been met with resistance.

IV. REFUSING CERTIFICATION IS UNJUSTIFIED AND IMMEDIATELY PREJUDICIAL

A. Common ownership is undefined and a proper issue to be certified to the Commission.

The presiding officer has improperly limited the requirement of an “owner of a tract of land” within Section 13.2541(b) to a narrow reading of ownership that conflicts with Texas law. Section 13.2541(b) of the Water Code allows an owner of a tract of land to petition for a streamlined expedited release provided the land is at least 25 acres and is not receiving water or sewer service. Tex. Water Code § 13.2541(b). A “tract of land” is defined as an “area of land that has common ownership and is not severed by other land under different ownership...” 16 Tex. Admin. Code § 24.3(38). But “common ownership” is not defined in Chapter 13 of the Water Code or in the PUC rules governing SERs.³

Black’s Law Dictionary defines “own” as “to have legal title to” or the right to “have or possess as property.” BLACK’S LAW DICTIONARY 1280 (10th ed. 2014). The term “owner” is defined as someone who has the right “to possess, use, and convey something.” *Id.*

Texas courts, including the state supreme court, have routinely considered ownership in an expansive rather than restrictive context—in other words, ownership can include control or possession. *AHF-Arbors at Huntsville I, LLC v. Walker County Appraisal Dist.*, 410 S.W.3d 831, 83 (Tex. 2012) (concluding that “owns” in the

³ Chapter 13 does provide that the terms “landowner,” “owner of a tract of land,” and “owners of each of tract of land” can include multiple owners of a single deeded tract of land as shown in appraisal records. Tex. Water Code § 13.002(1-a). Chapter 13 also defined the term “person” to include “natural persons, partnerships of two or more people having a joint or common interest...” *Id.* § 13.002(15). Neither of the Chapter 13 definitions are exclusive, nor do they directly describe or apply to the situation presented here. Further, neither section 13.254 (expedited release) nor section 13.2541 (streamlined expedited release) requires or refers to “common ownership,” instead using multiple terms such as “owner of a tract of land” or “landowner.” *See e.g., id.* § 13.254(a-1), (a-2). Section 13.501 defines the term “owner” in the apartment or manufactured home context to include “any individual ... expressly identified in a lease agreement as the landlord ...” *Id.* § 13.501(5).

context of a statute allowing a tax exemption for commercial housing entities is not limited to strict legal title, but also includes equitable title); *See, e.g., Janaki v. C.H. Wilkinson Physician Network*, 624 S.W.3d 623, 630 (Tex. App.—Corpus Christi 2021, no pet.) (discussing common ownership in the same breath as common or exclusive control, interrelation of operations, common management, and common financial control).

Likewise, other Texas statutes have also taken a more expansive view of what common ownership means. *See* Tex. Prop Code § 221.013(a) (“Any timeshare interest may be jointly or commonly owned by more than one person.”); *See* Tex. Est. Code § 1151.153 (“The guardian of the estate is entitled to possession of a ward’s property held or owned in common with a part owner in the same manner as another owner in common or joint owner is entitled.”); *See* Tex. Labor Code § 91.001(6) (common ownership includes ownership through subsidiaries or affiliates).

Dry’s property is comprised of four contiguous tracts that are exclusively used, possessed, managed, and controlled by Dry. All four tracts are in uninterrupted physical contact and there is no separation of management, control, or financial responsibility. As evidenced in the attached affidavit of Dry’s estate planning attorney, Dry either owns the tracts individually or serves as the sole manager or trustee of the entities that do. *Exhibit 1*. That is to say, Dry exercises total and exclusive managerial and financial control over the entire four-tract property to a degree that is indistinguishable from, and functionally equivalent to, ownership and control of one single larger tract.

Moreover, Dry’s role as trustee to two of the properties is significant because it means he holds legal title and possession of the property under a fiduciary duty for the benefit of the beneficiaries. *See Sarah v. Primarily Primates, Inc.*, 255 S.W.3d 132, 145 (Tex. App.—San Antonio 2008, pet. denied); *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995) (a trustee fits

entirely within the definition of “own” because a trustee is vested with legal title and has the right to possession of the trust property). And Dry’s inclusion of and payment of taxes associated with the four tracts on his personal tax return is further evidence that the land is held under Dry’s common ownership. *See* Tex. Tax Code § 32.07(a) (providing that property taxes are the personal obligation of the person who owns the property); *Willacy County Appraisal District v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 42 (Tex. 2018) (wherein the Texas Supreme Court recognized that “[a] person who owns property is generally liable for property taxes assessed on that property”).

The Commission’s interpretation of common ownership should mirror that of Texas courts and other Texas statutes—an expansive view which includes control or lawful possession, such as exists in this proceeding. There is no basis in the PUC’s rules or applicable statutes to justify a narrow definition of common ownership as that employed by the presiding officer.

B. Good cause exception is a question of discretion and the clarification of its use in this proceeding is an appropriate question for the Commission.

The Third Court of Appeals has held that the broad authority of the Commission includes the power to grant exceptions and extensions. *Pub. Util. Comm’n of Tex. v. Sw. Bell Tel. Co.*, 960 S.W.2d 116 (Tex. App.—Austin 1997, no pet.). In addressing the Public Utility Regulatory Act (PURA), the court concluded:

A delegation of power to an administrative agency, in such broad and general terms, implies a legislative judgment that the agency should have the widest discretion in conducting its adjudicative proceedings, including a discretion to make ad hoc rulings in specific instances, within the bounds of relevant statutes and the fundamentals of *fair play*. Within those limits and without express statutory authority, it has been held that an agency’s power to conduct adjudicative proceedings necessarily includes an attendant power to consolidate proceedings,

allow intervention by strangers to the litigation, and grant continuances. An agency must have the flexibility necessary to adjust to the variety of incidents encountered in particular contested cases.

Id. at 119. The same delegation of power, “expressed in the broadest possible terms,” appears in Section 13.041(a) of the Texas Water Code. Tex. Water Code § 13.041(a) (“The utility commission and the commission may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction...”). And the Commission is further afforded the discretion to make exceptions to the requirements of Chapter 24 of its rules for good cause, so long as the requirements are not proscribed by statute. 16 Tex. Admin. Code § 24.2(b).

As discussed, the term “common ownership” is not defined in Chapter 13 of the Water Code. Nor does Chapter 13 otherwise address what common ownership should mean in the context of SERs. Even if the Commission were to construe Section 24.3(38) of its rules so narrowly to conclude there is no common ownership of the tracts, good cause exists to permit the SER to proceed. And good cause is solely a question for the Commission to clarify its policy on a substantive issue of significance—a sole owner, manager or trustee of several tracts legally owned by different landowners—to this and future SERs.

MOTION FOR STAY

Dry further requests the presiding officer grant a motion for stay of the procedural schedule established in Order No. 3. Specifically, Dry is unable to file information to cure the deficiencies of the petition by the April 22, 2022 deadline.

Dry is currently working to resolve the mapping deficiencies cited in the March 25, 2022 memorandum of Patricia Garcia. However, Dry is unable to resolve the ownership issue until a ruling by the Commissioners at the next open meeting, which is April 21, 2022. Thus, Dry requests a stay of the procedural schedule pending a ruling by the Commissioners on this appeal.

CONCLUSION

For the reasons stated herein, Dry respectfully requests the Commission grant certification and consideration of the issues presented in this appeal.

Respectfully submitted.

/s/ John R. Clay Jr.

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TATUM CLAY PLLC

Counsel for Petitioner

Michael D. Dry

Dated: April 8, 2022

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 April 8, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ John R. Clay Jr.
John Reed Clay Jr.
Counsel for Petitioner
Michael D. Dry

EXHIBIT 1

AFFIDAVIT OF MARVIN E. BLUM

I, MARVIN E. BLUM, of Tarrant County, Texas, under penalty of perjury, declare that the following statements are true and correct to the best of my knowledge:

1. I am an attorney with The Blum Firm, PC ("Blum").
2. Blum has provided legal representation to MICHAEL D. DRY ("Dry") in various estate and business planning matters since 2016.
3. Based on the representations of Dry, it is my understanding that there are four contiguous parcels of land forming a single tract approximately 661 acres in size located in Tarrant County, Texas (the "Subject Property") owned by Dry and three entities subject to Dry's exclusive control: DRY RANCH, LLC, a Texas limited liability company ("Dry Ranch"), DRY & BUSBY, LLC, a Texas limited liability company ("Dry & Busby"), and DRY APR, LLC, a Texas limited liability company ("Dry APR").
4. Dry is the sole manager of Dry Ranch.
5. Dry Ranch is owned, in equal shares, by the SKYLAR BOYCE-DRY INVESTMENT TRUST, created by trust agreement executed December 31, 2012, the ALEXANDRA DRY INVESTMENT TRUST, created by trust agreement executed December 31, 2012, the DALTON DRY INVESTMENT TRUST, created by trust agreement executed December 31, 2012, and the ALYSSA DRY INVESTMENT TRUST, created by trust agreement executed December 31, 2012.
6. Dry is the sole trustee of each of the SKYLAR BOYCE-DRY INVESTMENT TRUST, the ALEXANDRA DRY INVESTMENT TRUST, the DALTON DRY INVESTMENT TRUST, and the ALYSSA DRY INVESTMENT TRUST.

7. Dry & Busby is owned 100% by DRY INVESTMENTS, LP, a Texas limited partnership (“Dry Investments”).

8. MDD 2017 FAMILY TRUST, created by trust agreement executed May 24, 2017, owns a 99% limited partnership interest in Dry Investments.

9. Dry is the sole trustee of MDD 2017 FAMILY TRUST.

10. DRY MANAGEMENT, LLC, a Texas limited liability company (“Dry Management”), owns a 1% general partnership interest in Dry Investments and serves as its sole general partner.

11. Dry is the sole manager of Dry Management.

12. Dry APR is owned 100% by Dry.

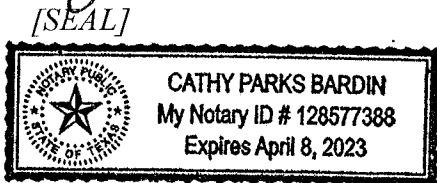
13. Dry is the sole manager of Dry APR.

Signed this the 2nd day of February, 2022.

Marvin E. Blum
MARVIN E. BLUM

THE STATE OF TEXAS §
 §
COUNTY OF TARRANT §

SUBSCRIBED AND SWORN TO BEFORE ME on this the 2nd day of February, 2022, by MARVIN E. BLUM, Affiant.



[Signature]
Notary Public in and for
The State of Texas