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Received - 2022-07-11 12:12:25 PM

Control Number - 53450

ItemNumber - 11

DOCKET NO. 53450

PETITION OF VPTM CROSS CREEK LB, LLC TO AMEND MARILEE SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY STREAMLINED EXPEDITED RELEASE	§ § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS
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COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION

On April 4, 2022, VPTM Cross Creek LB, LLC (VPTM) filed a petition for streamlined expedited release from Marilee Special Utility District's (Marilee SUD) water Certificate of Convenience and Necessity (CCN) No. 10150 under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(h). VPTM 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.

On June 13, 2022, the administrative law judge (ALJ) filed Order No. 3, establishing a deadline of July 11, 2022 for the Staff (Staff) of the Public Utility Commission of Texas (Commission) to file a recommendation on final disposition. Therefore, this pleading is timely filed.

I. RECOMMENDATION ON FINAL DISPOSITION

Staff has reviewed the petition, Marilee SUD's response to the petition, VPTM's reply to Marilee SUD's response, and, as detailed in the attached memorandum from James Harville, Infrastructure Division, recommends that the petition satisfies the requirements of TWC § 13.2541 and 16 TAC § 24.245(h). In its response to the petition, Marilee SUD stated that the petition should be denied.

Marilee SUD first argued that VPTM cannot meet its burden of proof because the requested area is receiving service.¹ 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

¹ Marilee Special Utility District's Verified Response to Petition of VPTM Cross Creek LB, LLC at 3-5 and Exhibits A and B (Jun. 20, 2022) (Marilee SUD Response).

anything to the particular tract . . .”² To support its argument, Marilee SUD submitted the sworn affidavits of Michael Garrison and Eddy Daniel, who attested that there are three waterlines within and close proximity to the requested area.³ Additionally, Marilee SUD provided an accompanying exhibit showing the waterlines on and adjacent to the requested area.⁴ Marilee SUD essentially argued that it has sufficient facilities in place to provide water service to VPTM’s property through these waterlines that are either located within or running adjacent to the requested area. Marilee SUD’s argument is flawed though. Specifically, the waterlines located within or running adjacent to the requested area have not been shown to be committed to providing water to the requested area. In *Crystal Clear*, the court looked to whether existing lines and facilities, located on or near property, were constructed for the purpose of providing water to the property in question.⁵ 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.⁶ Marilee SUD’s response on this issue is conclusory and does not demonstrate that any of its waterlines are committed in any way separate from supplying water to the greater area.

Additionally, Marilee SUD argued that VPTM has not met its burden of proof to decertify the property under TWC § 13.2541 and 16 TAC § 24.245(h)(3)(D).⁷ Specifically, Marilee SUD stated that VPTM only provided a conclusory one-page affidavit and did not provide any information regarding an investigation of the requested area.⁸ In turn, Marilee SUD argued that VPTM did not provide a sufficient statement of facts, as required by 16 TAC § 24.245(h)(3)(D), to establish the property is not receiving water service.⁹ However, the Commission has previously granted, in Docket No. 50404, the release of a tract of land from Marilee SUD’s CCN area, partly

² *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d.130, 140 (Tex. App.—Austin 2014, pet. denied); *see also* TWC § 13.002(21), 16 TAC § 24.33, and Docket No. 50404, Order at Findings of Fact Nos. 38-48.

³ Marilee SUD Response at 5 and Exhibits A and B.

⁴ *Id.* at Exhibit B-1.

⁵ *Crystal Clear*, 449 S.W.3d at 140.

⁶ *Id.*

⁷ Marilee SUD Response at 5-8.

⁸ *Id.*

⁹ *Id.*

on the basis of an affidavit that is, in relevant part, identical to the affidavit filed in this docket.¹⁰ As such, Staff recommends that VPTM has met its burden of proof under TWC § 13.2541 and 16 TAC § 24.245(h)(3)(D).

In addition to the first two arguments, Marilee SUD also asserted that releasing the requested area would curtail or limit its ability to service its federal debt, in violation of federal law.¹¹ Specifically, Marilee SUD stated that it is federally indebted through a Water and Wastewater Guaranteed loan that received approval from the United States Department of Agriculture (USDA) on July 12, 2021, as well as the USDA loans that it assumed from the Mustang Special Utility District when the two districts consolidated on November 2, 2021.¹² Marilee SUD argued 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.¹³ Marilee SUD claimed that, because it can show federal indebtedness, the protections of § 1926(b) prohibit the Commission from granting the release of the requested area.¹⁴

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."¹⁵ 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.¹⁶ Further, the Fifth Circuit decision in *Green Valley Special Utility District v. City of Schertz* specifically dismissed the preemption claim and determined that the court lacked jurisdiction to consider it.¹⁷ Absent any federal court ruling on preemption, Staff's recommendation must comply with state

¹⁰ *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); *Id.*, Order on Rehearing (Jan. 14, 2022).

¹¹ Marilee SUD Response at 8-11.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ TWC § 13.2541(d).

¹⁶ *Crystal Clear Special Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

¹⁷ *Green Valley Special Util Dist. v. City of Schertz*, 969 F.3d 460, 472 and 478 (5th Cir. 2020) (en banc).

law. As such, Staff's recommendation does not take Marilee SUD's federally indebted status into consideration.

Accordingly, Staff recommends that the petition for streamlined expedited release be approved. Further, the final water CCN map and certificate are attached to this filing. Staff recommends that the final map and certificate be provided to Marilee SUD and for Marilee SUD to file a certified copy of the CCN map and a boundary description of the CCN service area in the Collin County Clerk's office, as required under TWC § 13.257(r)-(s).

II. CONCLUSION

For the reasons detailed above, Staff recommends that the petition be approved and respectfully requests the entry of an order consistent with this recommendation.

Dated: July 11, 2022

Respectfully submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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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 July 11, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Scott Miles
Scott Miles

Public Utility Commission of Texas

Memorandum

TO: Scott Miles and Mildred Anaele, Attorneys
Legal Division

FROM: James Harville, Infrastructure Analyst
Infrastructure Division

DATE: July 11, 2022

RE: Docket No. 53450 – *Petition of VPTM Cross Creek LB, LLC to Amend Marilee Special Utility District’s Certificate of Convenience and Necessity in Collin County by Streamlined Expedited Release*

On April 4, 2022, VPTM Cross Creek LB, LLC (VPTM Cross Creek LB) 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). VPTM Cross Creek LB 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.

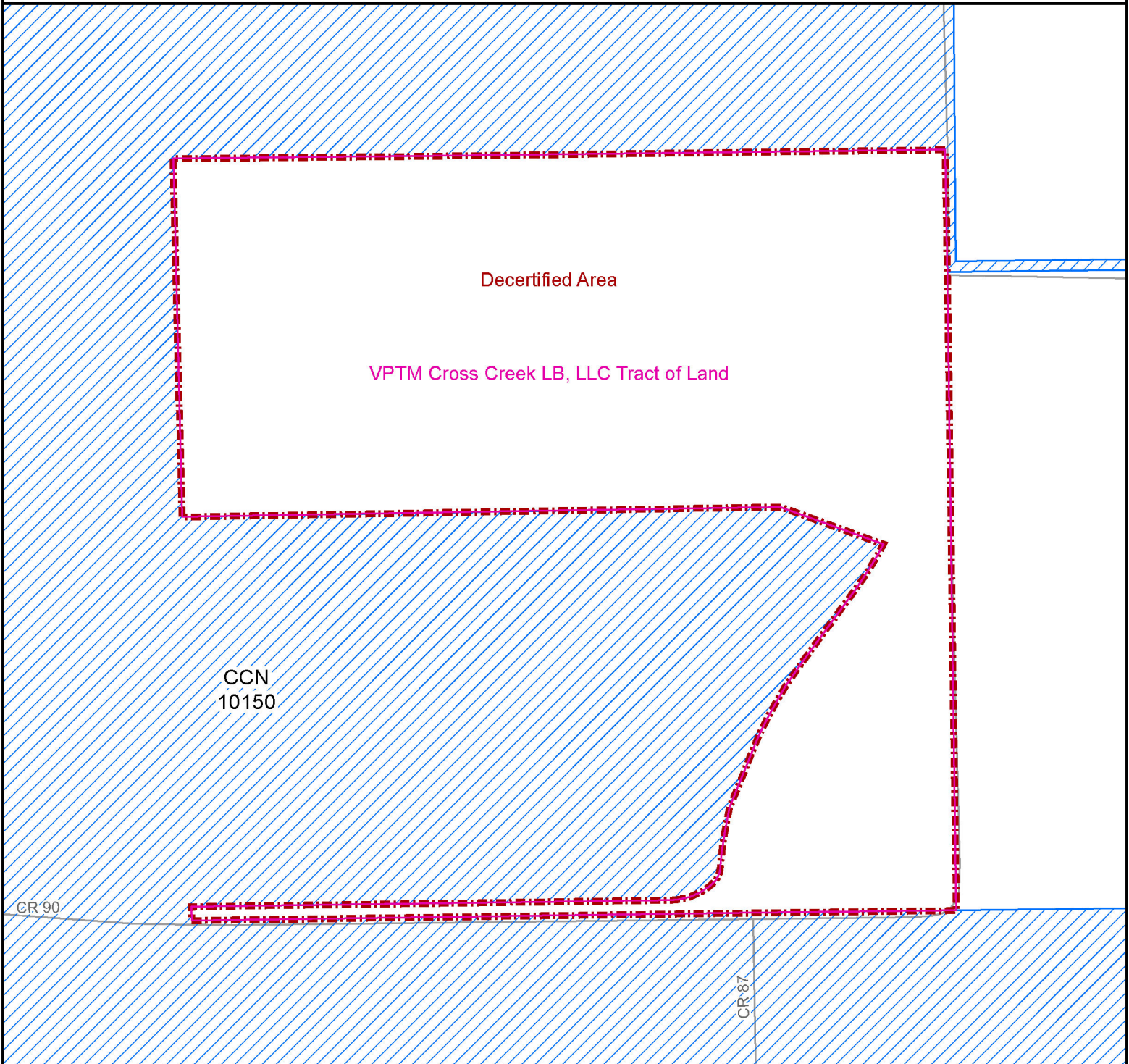
VPTM Cross Creek LB provided a warranty deed confirming ownership of the tract of land within Marilee SUD’s certificated service area. In addition, VPTM Cross Creek LB submitted a sworn affidavit attesting that the tract of land was not receiving water service from the CCN holder. Marilee SUD requested to intervene and filed a response indicating there are three waterlines that run through the tract of land, but no active meters.

Based on the mapping review by Tracy Montes, Infrastructure Division, it was determined the tract of land in the petition for streamlined expedited release is approximately 37.7 acres, of which approximately 37.7 acres overlap Marilee SUD (CCN No. 10150) and would be decertified from CCN No. 10150.



In accordance with TWC § 13.2541 and 16 TAC § 24.245(h), VPTM Cross Creek LB 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.

Marilee Special Utility District
Portion of Water CCN No. 10150
PUC Docket No. 53450
Petition by VPTM Cross Creek LB, LLC to Amend
Marilee Special Utility District's CCN by Streamlined Expedited Release in Collin County



Water CCN
 10150 - Marilee SUD

 Decertified Area
 Tract of Land

0 150 300
Feet





Public Utility Commission of Texas

By These Presents Be It Known To All That

Marilee Special Utility District

having obtained certification to provide water utility service for the convenience and necessity of the public, and it having been determined by this Commission that the public convenience and necessity would in fact be advanced by the provision of such service, Marilee Special Utility District is entitled to this

Certificate of Convenience and Necessity No. 10150

to provide continuous and adequate water utility service to that service area or those service areas in Collin and Grayson Counties as by final Order or Orders duly entered by this Commission, which Order or Orders resulting from Docket No. 53450 are on file at the Commission offices in Austin, Texas; and are matters of official record available for public inspection; and be it known further that these presents do evidence the authority and the duty of the Marilee Special Utility District to provide such utility service in accordance with the laws of this State and Rules of this Commission, subject only to any power and responsibility of this Commission to revoke or amend this Certificate in whole or in part upon a subsequent showing that the public convenience and necessity would be better served thereby.