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DOCKET NO. 53559

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 ADMINISTRATIVE
COMPLETENESS AND NOTICE**

On May 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) 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 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. On June 27, 2022, Marilee filed a response to the petition.

On June 30, 2022, the administrative law judge (ALJ) filed Order No. 4 establishing a deadline of July 19, 2022, for Staff (Staff) of the Public Utility Commission (Commission) to file a recommendation on final disposition. Therefore, this pleading is timely filed.

I. RECOMMENDATION ON FINAL DISPOSITION

A. STAFF'S RECOMMENDATION

Staff has reviewed the petition, Marilee's response to the petition, 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).

B. MARILEE'S RESPONSE

In its response, Marilee stated that the petition should be denied for three reasons: (1) the tract of land is receiving water service, (2) VPTM Cross Creek LB did not provide sufficient evidence to establish that the tract is receiving water service, and (3) it is federally indebted.

C. STAFF’S REPLY TO MARILEE’S RESPONSE AND ANALYSIS

1. The Tract of Land is not receiving service

Marilee argued that VPTM Cross Creek LB 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 anything to the particular tract”² To support its argument, Marilee submitted the sworn affidavits of Michael Garrison and Eddy Daniel, who attested that there are three waterlines within close proximity to the requested area.³ Additionally, Marilee provided an accompanying exhibit showing the waterlines on, and adjacent to, the requested area.⁴ Marilee essentially argued that it has sufficient facilities in place to provide water service to VPTM Cross Creek LB’s property through these waterlines and that the tract of land is receiving service on this basis.

Marilee’s argument is flawed. 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 In accordance with this standard, Marilee’s response is dispositive: Marilee fails to demonstrate that any of its waterlines are committed to providing service to the tract of land in any way apart from supplying water to the greater area.

¹ Marilee Special Utility District's Verified Response to Petition of VPTM Cross Creek LB, LLC at 3-5 (Jun. 27, 2022) (Marilee Response).

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 Response at 4 and Exhibits A and B.

⁴ *Id.* at Exhibit B-1.

⁵ *Crystal Clear*, 449 S.W.3d at 140.

⁶ *Id.*

2. VPTM Cross Creek LB's affidavit is sufficient

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

3. Federal Indebtedness does not preclude streamlined expedited release

Marilee 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 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 it assumed from the Mustang Special Utility District when the two districts consolidated on November 2, 2021.¹² Marilee 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 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

⁷ Marilee Response at 5-8.

⁸ *Id.*

⁹ *Id.*

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 Response at 8-11.

¹² *Id.*

¹³ *Id.*

Marilee’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 since 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 law. Thus, Marilee’s federally indebted status is irrelevant.

In accordance with the foregoing analysis, 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 and that Marilee 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).

D. COMPENSATION PHASE

Due to ongoing procedural issues with the compensation phase in other pending expedited and streamlined expedited release dockets,¹⁸ Staff respectfully recommends that, if streamline expedited release is granted and parties cannot agree on an appraiser, the petitioner and CCN

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).

¹⁸ *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, Order No. 19 (Jul. 15, 2022); *Petition Of CCD-North Sky, LLC to Amend Marilee Special Utility District's Certificate of Convenience and Necessity in Collin County by Expedited Release*, Docket No. 52101, Order No. 13 (Jul. 18, 2022).

holder be ordered to compensate or provide a firm commitment to pay their respective halves of the costs of the Commission-appointed appraiser's report. Furthermore, Commission-ordered appraisers should be ordered not to begin any work on an appraiser's report until both the petitioner and CCN holder provide them these payments or firm commitments to pay directly.

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 19, 2022

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

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Division Director

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/s/ Mildred Anaele
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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 19, 2022, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Mildred Anaele
Mildred Anaele

Public Utility Commission of Texas

Memorandum

TO: Phillip Lehmann and Mildred Anaele, Attorney
Legal Division

FROM: James Harville, Infrastructure Analyst
Infrastructure Division

DATE: July 19, 2022

RE: Docket No. 53559 – *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 May 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) 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’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 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 Dave Babicki, Infrastructure Division, it was determined the landowner’s total property is approximately 111.8 acres. The tract of land in the petition for streamlined expedited release is approximately 111.8 acres, of which approximately 111.8 acres overlap Marilee (CCN No. 10150) and would be decertified from CCN No. 10150.

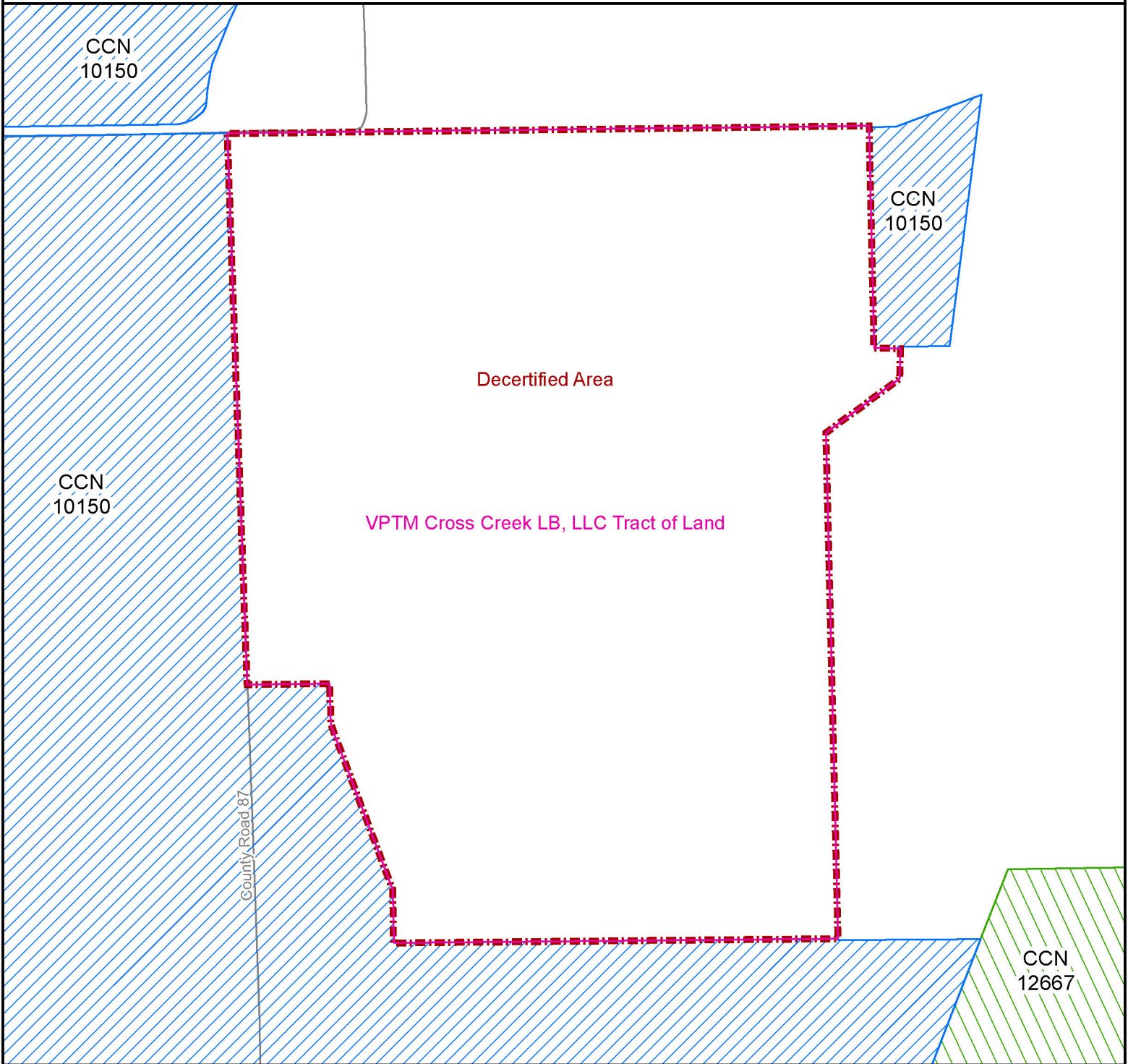
Marilee provided documentation stating it has 4-inch, 6-inch, and 8-inch waterlines within or in direct proximity to the boundaries of the tract of land, however, based on provided mapping data all meters and associated waterlines are showing outside or surrounding the tract of land. Marilee has documented other planning efforts to ensure its water systems continue to meet the needs of its service area.

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’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. 53559
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
-  12667 - City of Celina

-  Decertified Area
-  Tract of Land





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. 53559 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.