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The Carlton Law Firm, P.L.L.C.

4301 Westbank Drive, Suite B-130
Austin, Texas 78746

Phone: (512) 614-0901
Facsimile: (512) 900-2855

John J. Carlton
john@carltonlawaustin.com

August 6, 2022

Public Utilities Commission
P.O. Box 13326
Austin, Texas 78711-3326

Re: PUD Docket No. 53559; *Petition by VPTM Cross Creek LB, LLC For Expedited Release from Water CCN No. 10150 Held by Marilee Special Utility District in Collin County*

Dear Administrative Law Judge Marx:

As a result of a clerical error, Marilee Special Utility District's Corrections and Exceptions to the Proposed Order were not timely filed. Marilee respectfully requests permission to late file the attached Corrections and Exceptions.

Sincerely,

THE CARLTON LAW FIRM, P.L.L.C.



John J. Carlton
Attorney for Marilee Special Utility District

DOCKET NO. 53559

PETITION BY VPTM CROSS CREEK LB, LLC FOR EXPEDITED RELEASE FROM WATER CCN NO. 10150 HELD BY MARILEE SPECIAL UTILITY DISTRICT IN COLLIN COUNTY §
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PUBLIC UTILITY COMMISSION

OF TEXAS

MARILEE SPECIAL UTILITY DISTRICT'S CORRECTIONS AND EXCEPTIONS TO THE PROPOSED ORDER

COMES NOW, MARILEE SPECIAL UTILITY DISTRICT (the “District”) and files these Corrections and Exceptions (“Corrections and Exceptions”) to the Proposed Order (“Proposed Order”) entered by Honorable Administrative Law Judge (“ALJ”) Marx on July 22, 2022, proposing that the Public Utility Commission of Texas (the “Commission”) amend the District’s Certificate of Convenience and Necessity (“CCN”) No. 10150 to release approximately 111.8 acres of land (“Subject Property”) in Collin County, Texas.¹ The Proposed Order requires the parties of this proceeding to file corrections or exceptions by August 5, 2022. In support thereof, the District respectfully shows as follows:

I.

CORRECTIONS AND EXCEPTIONS

1. The ALJ’s Proposed Order, which recommends that the Commission grant VPTM Cross Creek LB, LLC.’s (“Petitioner”) Petition (“Petition”),² is in error. The Proposed Order is based on factual, procedural, and legal errors that require correction in order to prevent the unlawful and inequitable decertification of the Subject Property from the District and to prevent the District from being materially prejudiced. Accordingly, the District respectfully requests that its Exceptions and Corrections to the Proposed Order be granted, and that the Commission deny the Petition and dismiss this proceeding.

¹ Proposed Order and Memorandum (Jul. 22, 2022).

² Petition by VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541 (May 3, 2022).

A. The ALJ Erred in Holding that the Property Is Not Receiving Water Service from the District (FOF Nos. 18, 25, and 26; COL Nos. 7, 12, and 13, and Ordering Paragraph 1).

2. The Proposed Order reflects a lack of understanding of the meaning of “service” under the Texas Water Code (“TWC”), the Texas Administrative Code (“TAC”), and caselaw interpreting the same when it concludes, “The tract of land is not receiving water service under TWC §§ 13.002(21) and 13.2541(b) and 16 TAC § 24.245(h), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).”³ In fact, the Findings of Fact in the Proposed Order reflect that the Subject Property is receiving and is capable of receiving service from the District as that term is defined in the TWC and *Crystal Clear*. Accordingly, the Commission should revise the Proposed Order to conclude that, based on Findings of Fact 22 and 23, the Subject Property is receiving water service from the District and is thus not eligible for streamlined expedited release under TWC § 13.2541 and 16 TAC § 24.245(h).
3. 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[.]”⁴ Whether or not a tract is “receiving water or sewer service” under TWC § 13.2541 is a fact question. The inquiry into whether a tract is “receiving service” requires the Commission to consider any facilities committed to providing water to the tract. 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.”
4. In *Crystal Clear*,⁵ 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

³ Proposed Order at Conclusion of Law (“COL”) 12.

⁴ TWC § 13.002(21); *see also* 16 TAC § 24.3(33) (same definition).

⁵ 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied) (interpreting TWC § 13.2541’s predecessor statute, § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the Water Code. *See* Tex. S.B. 2272, 86th Leg., R.S. (2019)).

the statutory and regulatory definition. But where water lines are actually present within a tract and committed to the property, as is the case in this proceeding, the tract is unquestionably “receiving service” and the Commission has determined that a streamlined expedited release petition may not be granted under TWC § 13.2541, as interpreted by *Crystal Clear*, when such facts are present.

5. The District’s verified response and motion to dismiss in this proceeding was supported by the affidavits and accompanying exhibits of Assistant General Manager, Michael Garrison, and Eddy Daniel, the District’s engineer. Both swore that the Subject Property, and the tract of land upon which the Subject Property is located, is served by the District’s meters and facilities. As described therein, the District maintains the following facilities that currently provide water service to the tract of land, including the Subject Property:
 - A 4” waterline, that runs along the western and northern boundaries of the Subject Property;
 - A 6” waterline, to the north and west of the Subject Property; and
 - An 8” waterline to the north of the Subject Property.⁶
6. Based on the District’s service to the Subject Property, and meters, waterlines, and other facilities the District maintains within and near the Subject Property, the District’s engineer has stated that in his “professional opinion, the District has the ability and facilities dedicated to presently provide and continue to provide water service to the Property.”⁷
7. The Proposed Order erroneously omits all of these material facts. Further, the ALJ does not explain why the Subject Property is not receiving “service” when, as the Proposed Order states, the following facts are present:

⁶ See Marilee Special Utility District’s Verified Response at ¶¶ 14-15 (Jun. 27, 2022) (describing the District’s facilities that provide service to the Tract of Land); *see also id.* at Exhibit A (Affidavit of Michael Garrison) at ¶ 4-5; Exhibit B (affidavit of Eddy Daniel) at ¶ 4-5; Ex. B-1 (detailed map showing meters and waterlines inside and near the boundaries of the Tract of Land).

⁷ *Id.* at Exhibit B (Affidavit of Eddy Daniel) at ¶ 6.

- “The CCN holder owns and operated a four-inch, six-inch, and eight-inch waterline in direct or close proximity to the boundaries of the tract of land.”⁸
- “The CCN holder has four water meters in close proximity to the western boundary of the tract of land, but does not have any water meters on the tract of land.”⁹

8. Because the Proposed Order and the sworn affidavits and exhibits provided by the District reflect that the District has facilities, water lines, and meters on and near the Subject Property and is capable of receiving service if requested, Petitioner has failed to show that the Subject Property is not receiving “service” under TWC § 13.2541, 16 TAC § 16.245(h), and *Crystal Clear*. The Proposed Order’s recommended conclusion that the Subject Property is not receiving “service” is error. Specifically, the following proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs are incorrect and should be corrected:

- “The tract of land is not receiving actual water service from the CCN holder.”¹⁰
- “The CCN holder has not committed or dedicated any facilities or lines to the tract of land for water service.”¹¹
- “The CCN holder has no facilities or lines that provide water service to the tract of land.”¹²
- “The CCN holder has not performed any acts for or supplied anything to the tract of land.”¹³
- “The tract of land is not receiving water service under TWC §§ 13.002(21) and 13.2541(b) and 16 TAC § 24.245(h), as interpreted in *Texas General Land Office v.*

⁸ Proposed Order at Finding of Fact (“FOF”) 22.

⁹ *Id.* at FOF 22.

¹⁰ *Id.* at FOF 18.

¹¹ *Id.* at FOF 24.

¹² *Id.* at FOF 25.

¹³ *Id.* at FOF 26.

Crystal Clear Water Supply Corporation, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).”¹⁴

- “The petitioner is entitled under TWC § 13.2541(b) to the release of the tract of land from the CCN holder’s certificated service area.”¹⁵
- “The Commission releases the tract of land identified in the amended and supplemented petition from the CCN holder’s certificated service area under CCN number 10150.”¹⁶

9. Additionally, for the aforementioned reasons, the ALJ should enter a Proposed Order that proposes denying the Petition on the grounds that the Subject Property is receiving service from the District and is not eligible for streamlined expedited release under TWC § 13.2541, 16 TAC § 24.245(h), and *Crystal Clear*.

B. The ALJ Erred by Failing to Hold Petitioner to Its Burden of Proof Under TWC § 13.2541 and 16 TAC § 24.245(h) (FOF Nos. 5 and 6, COL Nos. 5, 7, 13, and Ordering Paragraph 1.).

12. The Proposed Order does not accurately state Petitioner’s burden of proof under TWC § 13.2541, 16 TAC § 24.245(h), or caselaw that interprets these provisions. 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 via a “statement of facts that *demonstrates* that the tract of land is not currently receiving service.”¹⁷ That burden has not been met here, where Petitioner has only claimed, without factual support, that the Subject Property is not and has not received water service from the District, and provided no facts regarding water-service facilities or meters on or near the Subject

¹⁴ *Id.* at COL 12.

¹⁵ *Id.* at COL 13.

¹⁶ *Id.* at Ordering Paragraph 1.

¹⁷ 16 TAC § 24.245(h)(3)(D) (emphasis added).

Property, and failed to rebut the District’s evidence that it is capable of providing water service to the Subject Property.¹⁸

13. The proper analysis of a Petitioner’s burden is reflected in *Johnson County Special Utility District v. Public Utility Comm’n of Texas*.¹⁹ 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.”²⁰ The Commission, based on these facts, properly decertified the property as having not water service from at least 2005.²¹
14. The “statement of facts” that Petitioner must show in its verified petition to meet its burden under 16 TAC § 24.245(h) is also reflected in *Crystal Clear*. Petitioner in that case, the Texas General Land Office, supported the contention that the area requested to be decertified was not receiving water service by explaining that there were “no active water meters or water connections on and no facilities providing current service” and that there was “one abandoned, empty meter box on the eastern portion of the property, which Crystal Clear itself classifies as inoperative.”²²
15. Petitioner here has not met its burden of proof to decertify the Tract of Land under TWC § 13.2541 and 16 TAC § 24.245(h). The Proposed Order improperly recommends decertifying the Subject Property that the District is capable of providing service to, as evidenced by the District’s existing meters and waterlines. The ALJ’s approval eviscerates

¹⁸ See Petition by VPTM Cross Creek LB, LLC for Expedited Release Pursuant to Texas Water Code Section 13.2541(Exhibit A, Affidavit of Brendan Bosman) at ¶ 3 (“The Property is not receiving water or sewer service from Marilee SUD or any other service area.”) (May 3, 2022).

¹⁹ No. 03-17-00160-CV, 2018 WL 2170259 (Tex. App—Austin (May 11, 2018, pet. denied) (mem. op.) (interpreting TWC § 13.2541’s predecessor statute, TWC § 13.254(a-5); in 2019, the Legislature transferred § 13.245(a-5) to § 13.2451, its current place in the TWC. See Tex. S.B. 2272, 86th Leg., R.S. (2019)).

²⁰ *Id.* at **6-7.

²¹ *Id.* at **9-10 (citing the Commission’s Finding of Fact No. 24).

²² *Crystal Clear*, 449 S.W.3d at 134.

Petitioners' burden of proof, and improperly puts all the burden on the District to prove that the Subject Property is receiving, has received, and is capable of receiving water from the District's dedicated facilities, water lines, and meters.

16. The District takes exception to the Proposed Order as written because it fails to hold Petitioner to its burden of proof. For the above reasons, the Proposed Order's recommendation that Petitioner has established that the Subject Property is eligible to be decertified is deficient and must be corrected.

C. The ALJ Erred by Proposing the Curtailment or Limitation of the District's Service Area Because the District is Entitled to Protection Under 7 U.S. Code § 1926 (COL 13, Ordering Paragraph 1).

17. 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. In order to protect a USDA debtor's ability to service its debt, Congress enacted 7 U.S.C. § 1926(b) to prohibit "curtail[ing] or limit[ing]" 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 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.²³

18. A federal law, such as 7 U.S.C. § 1926(b), is supreme and binding authority over a state law, such as TWC § 13.2541.²⁴ A federally indebted CCN holder has an equitable cause of action for prospective injunctive relief, preventing ongoing or future limitation or

²³ 7 U.S.C § 1926(b).

²⁴ See, e.g., *Murphy v. NCAA*, 138 S. Ct. 1461, 1479 (2018) ("[F]ederal law is supreme in case of a conflict with state law."); see also *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 492 (5th Cir. 2020) (en banc) (Jones, J., concurring) (noting, "the final PUC decision" in a case involving streamlined expedited release, "is reviewable de novo in state courts, which would have to enforce Section 1926(b) pursuant to the Supremacy Clause.").

curtailment of its service area by the Commissioners, in the event that the Commission enters an order curtailing or limiting the CCN holder's service area in violation of 7 U.S.C. § 1926(b).²⁵

19. To be eligible for protection under 7 U.S.C. § 1926(b), the District must show that it satisfies the “physical abilities” test, as adopted by the United States Court of Appeals for the Fifth Circuit, sitting *en banc* in *Green Valley Special Utility District v. City of Schertz*.²⁶ To satisfy the “physical capabilities,” the District must show that it has “adequate facilities to provide service to the area within a reasonable time” after service is requested, and that the District has “the legal right to provide service.”²⁷ The District need not show “pipes in the ground” at the specific tract, as long as it has some “nearby infrastructure.”²⁸ The District's ability to provide service to the Property satisfies the “physical capabilities” test.²⁹
20. 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.”³⁰ 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.”³¹ Additionally, upon remand of the case to the U.S. District Court for the Western District of Texas, Judge Yeakel, in granting *Green*

²⁵ See, e.g., *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)).

²⁶ 969 F.3d 460 (5th Cir. 2020) (*en banc*).

²⁷ *Id.* at 477; see also *Green Valley Special Utility District v. Marquez*, Cause No. 1:17-CV-819-LY, at 4-6 (W.D. Tex. Mar. 25, 2022) (granting a new trial to CCN holder to demonstrate that CCN holder satisfies “physical capabilities” test).

²⁸ *Id.* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

²⁹ See *infra* ¶ 5-8 & accompanying text (describing the District's meters and waterlines on and near the Property).

³⁰ *Green Valley Special Utility District v. City of Schertz* at 477 & n.36 (quoting *Lexington—S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 238 (6th Cir. 1996)).

³¹ *Id.* at n.38.

Valley’s motion for a new trial, held that “a request for service is a prerequisite for obtaining decertification rather than for resisting decertification.”³²

21. A recent report and recommendation by Magistrate Judge Lane, which was adopted in full by Judge Pitman in the U.S. District Court for the Western District of Texas, upheld plaintiff’s right to protection under § 1926(b) in a TWC § 13.2541 case, recommended that plaintiff had standing to receive protection in both final Commission cases and pending Commission cases.³³ The Magistrate Judge’s analysis of issues included the following:

- “As *Green Valley* makes clear, the court can enjoin enforcement of [the Commission’s] orders or entry of future orders or enjoin the certification of the land to another provider.”³⁴
- “*Green Valley* provided a different standard from the PUC’s determination for courts to use to analyze whether an entity was entitled to § 1926(b) protections. . . . [I]f [Plaintiff] is victorious on its claims, then the PUC’s Decertification Order is not entitled to enforcement.”³⁵

22. Based on the District’s facilities and waterlines near Subject Property, as reflected in Exhibit B-1 to the District’s Second Verified Response, the District satisfies the “physical abilities” test. Moreover, Petitioner cannot show that it has requested service from the District, which Judge Yeakel’s order of March 25, 2022, indicates is necessary for Petitioner to show that the District does not satisfy the “physical abilities” test.

23. In addition to satisfying the “physical capabilities” test, an entity must show federal indebtedness to qualify for protection under 7 U.S.C. § 1926(b). As described in the District’s verified response and motion to dismiss, the District has been consolidated with Mustang Special Utility District (“Mustang SUD”), pursuant to the provisions of TWC

³² *Green Valley Special Utility District v. Marquez*, Cause No. 1:17-CV-819-LY (W.D. Tex. Mar. 25, 2022) (order remanding for new trial).

³³ See *Rockett Special Util. Dist. v. McAdams*, Case No. A-20-CV-1207-RP (W.D. Tex. Jul. 30, 2021) (Report and Recommendation of the United States Magistrate Judge); *Rockett Special Util. Dist. v. McAdams*, Case No. A-20-CV-1207-RP, at 2 (W.D. Tex. Sept. 30, 2021) (ordering that “the report and recommendation of Magistrate Judge Mark Lane, (Dkt. 45), is adopted”).

³⁴ *Id.* at 14.

³⁵ *Id.* at 17.

Chapter 65, Subchapter H.³⁶ Mustang SUD is indebted to the USDA, Rural Utilities Service, which has twice 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”).³⁷ The District assumed Mustang SUD’s federal indebtedness under the Bonds when the District and Mustang SUD were consolidated.³⁸ In addition to its existing federal indebtedness, the District is also working diligently to close on a USDA loan that was approved in July 2021.³⁹

24. As the District is federally indebted and satisfies the “physical abilities” test, curtailing or limiting the District’s service area with regard to the Property is prohibited by 7 U.S.C. § 1926(b). The Proposed Order must be revised and corrected to propose the denial of the Petition on the grounds that the 7 U.S.C. § 1926(b) prohibits the Commission from curtailing or limiting the District’s service area.

D. The Proposed Order Omits Significant Actual and Legal Events.

25. The Proposed 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 Proposed Order be revised to include new Findings of Fact and Conclusions of Law substantially similar to the following and delete Conclusions of Law 13, 14, 17 and 18:
- **Proposed FOF 10A.** In Order No. 3, entered on June 13, 2022, the ALJ entered a procedural schedule reflecting that the 60-day administrative approval period for expedited release expired on July 30, 2022.

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 Marilee Special Utility District’s Verified Response, at Exhibit A (Affidavit of Michael Garrison) ¶¶ 8-9 & accompanying exhibits (affirming that the District has been consolidated with Mustang SUD) and Exhibit C (Affidavit of Chris Boyd) ¶¶ 3-4 & accompanying exhibits (affirming that Mustang SUD has been consolidated with the District) (Jun. 27, 2022).

³⁷ See *id.* at Exhibit C (Affidavit of Chris Boyd), at ¶ 5.

³⁸ See TWC § 65.726

³⁹ Marilee Special Utility District’s Verified Response, Exhibit A (Affidavit of Michael Garrison), at ¶¶ 7-9 (Jun. 27, 2022).

- **Proposed Revised FOF 18.** The Tract of land is Receiving actual water service from the CCN holder.
- **Proposed Revised FOF 23A.** The CCN holder owns and operates additional water system infrastructure located outside of, but in proximity to, the tract of land.
- **Proposed Revised FOF 24 .** The CCN holder has committed and dedicated facilities or lines to the tract of land for water service.
- **Proposed Revised FOF 25.** The CCN holder has facilities or lines that provide water service to the tract of land.
- **Proposed Revised FOF 26.** The CCN holder has performed acts for or supplied water service to the tract of land.
- **Proposed COL 8A.** Under 16 TAC § 24.245(h)(7), “[t]he commission will issue a decision on a petition filed under this subsection no later than 60 calendar days after the presiding officer by order determines that the petition is administratively complete.”
- **Proposed Revised COL 12.** The tract of land is receiving water service.
- **Proposed Revised COL 13.** The Petition is not entitled to release of the tract of land from the CCN holder’s certificated area.

II.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the District respectfully requests that its Exceptions and Corrections to the Proposed Order be granted, that the ALJ enter a corrected and revised Proposed Order that proposes denying the Petition and dismissing this proceeding on the independently sufficient grounds that the Property is receiving service from the District, and that 7 U.S.C. § 1926(b) prohibits the curtailment or limitation of the federally indebted District. The District also respectfully requests all other relief in law and equity to which it may be entitled.

Respectfully submitted,

By: 
 John J. Carlton
 State Bar No. 03817600
 Kelsey Daugherty

State Bar No. 24125054
The Carlton Law Firm P.L.L.C.
4301 Westbank Drive, Suite B-130
Austin, Texas 78746
(512) 614-0901
Fax (512) 900-2855
john@carltonlawaustin.com
kelsey@carltonlawaustin.com

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 6th day of August 2022.



John J. Carlton