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DOCKET NO. 49871

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PETITION OF THE CITY OF RED §
OAK INDUSTRIAL DEVELOPMENT §
CORPORATION TO AMEND §
ROCKETT SPECIAL UTILITY §
DISTRICT'S WATER CERTIFICATE §
OF CONVENIENCE AND NECESSITY §
IN DALLAS AND ELLIS COUNTIES §
BY EXPEDITED RELEASE §

PUBLIC UTILITY COMMISSION
OF TEXAS
FILING CLERK

COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this Final Recommendation and would show the following:

I. BACKGROUND

On August 19, 2019, the City of Red Oak Industrial Development Corporation (Red Oak) filed a petition for streamlined expedited release from Rockett Special Utility District's (Rockett SUD) water Certificate of Convenience and Necessity (CCN) No. 10099 in Dallas and Ellis Counties, under Texas Water Code (TWC) § 13.254(a-5)¹ and 16 Texas Administrative Code (TAC) § 24.245(l). Red Oak asserts that the land is at least 25 contiguous acres, is not receiving water service, and is located in Dallas and Ellis Counties, which are both qualifying counties. On September 13, 2019, Rockett SUD filed a motion to intervene in this proceeding.

Order No. 2, issued September 25, 2019, granted Rockett SUD's motion to intervene and established October 2, 2019, as the date for Rockett SUD to file a response to the administratively complete petition. Rockett SUD timely filed its response asserting that (1) Rockett SUD is the recipient of a federal loan, and therefore, is entitled to protection under 7 U.S.C. § 1926; and (2) the property for which Red Oak seeks streamlined expedited release is receiving water service. Order No. 3, issued October 10, 2019, extended the deadline for Staff to file its recommendation on final disposition to October 11, 2019. Therefore, this pleading is timely filed.

¹ Staff notes SB 2272 passed during the 86th Regular Legislative Session amended TWC § 13.254(a-5) effective September 1, 2019. Red Oak's petition was filed in August 2019; therefore, the current version of TWC § 13.254 and the new TWC § 13.2541 do not apply to this proceeding.

II. RECOMMENDATION ON FINAL DISPOSITION

Texas law requires the Commission to grant a petition for the streamlined expedited release of a tract of land that is at least 25 acres, is not *receiving* water or sewer service, and is located in a qualifying county.² Furthermore, Texas law prohibits the Commission from denying a petition for streamlined expedited release based on the fact that the utility from which decertification is sought is a borrower under a federal loan program.³ The Commission rules provide further specificity regarding the contents of a petition for a streamlined expedited release. The landowner must provide the Commission with a verified petition that includes:

1. a statement that the petition is being submitted under TWC § 13.254(1-5) and 16 TAC § 24.245(l);
2. proof that the tract of land is at least 25 acres in size;
3. 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;
4. a statement of facts that demonstrate that the tract of land is not currently receiving service;
5. copies of all deeds demonstrating ownership of the tract of land by the landowner;
6. proof that a copy of the petition has been mailed to the current CCN holder via certified mail on the day that the landowner submits the petition with the Commission; and
7. mapping information as required by the rule.⁴

Staff has reviewed the petition and, as supported by the attached memorandum of Patricia Garcia of the Commission's Infrastructure Division, Staff recommends that the maps and digital data filed by Red Oak provide adequate information demonstrating that the petition satisfies the requirements of TWC § 13.254(a-5) and 16 TAC § 24.245(1). Specifically, the maps and digital data provided by Red Oak enable Staff to determine that the property to be released: (1) is at least

² Act of June 17, 2011, 82nd Leg., R.S., ch. 1325, § 6, 2011 Gen. and Special Laws of Tex. 3839, 3842-43 (amended 2019) (current version at TWC § 13.2541(b)) (emphasis added).

³ Act of June 17, 2011, 82nd Leg., R.S., ch. 1325, § 6, 2011 Gen. and Special Laws of Tex. 3839, 3843 (amended 2013 and 2019) (current version at TWC § 13.2541(d)).

⁴ 16 TAC § 24.254(l).

25 acres; (2) is comprised of five⁵ separate tracts that are contiguous; (3) is located within the City's certificated area; and (4) is located within Dallas and Ellis Counties, which are qualifying counties. Further, Staff was able to confirm that Red Oak is the owner of all five tracts using the five separate warranty deeds provided with the petition.

Staff has also reviewed the information provided by Rockett SUD, which included a map depicting a portion of its existing water system that was prepared by Rockett SUD's engineer.⁶ The map shows a 12" water line that is installed directly on the western side of Tract 3 as well as a 6" water line and 5/8" x 3/4" meter installed directly on the western side of Tract 4B.⁷ In addition, Rockett SUD provided a bill for 56 gallons of water usage on Tract 4B during the period June 27, 2019 to July 10, 2019.⁸ The only information about the 12" water line on Tract 3 that was provided in addition to the map is a statement in Rockett SUD's pleading that this line "connects to another Rockett 12" water line to provide service to the Property and surrounding lands."⁹ The affidavit of Rockett SUD's General Manager is silent as to what this line is used for but specifically addresses the uses of the 6" water line on Tract 4B.¹⁰ Consequently, Rockett SUD has shown that Tract 4B is receiving service under TWC § 13.254(a-5), but has failed to provide information sufficient to show that the 12" water line on Tract 3 is dedicated to the provision of service to Tract 3. Accordingly, Staff recommends that Tracts 1, 2, 3, and 4A meet the requirements for streamlined expedited release.¹¹

⁵ The petition refers to only four tracts; however, Tract 4 is comprised of a 74.917-acre parcel (Tract 4A) and a 10.39-acre parcel (Tract 4B). Tract 4B is located in both Dallas and Ellis Counties. Tracts 1, 2, 3, and 4A are located wholly within Ellis County.

⁶ Rockett Special Utility District's Response and Objection to Petition for Expedited Release at 6, Ex. A and Ex. F (Oct. 2, 2019) (Rockett SUD's Response).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 6.

¹⁰ *Id.* at Ex. A.

¹¹ See *Tex. General Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 136 (Tex. App.-Austin 2014, pet. denied) (concluding that "section 13.254(a-4) does not contain an 'all or nothing' requirement" that would have required the GLO to seek decertification of all of its property located within Crystal Clear's CCN").

Staff is aware of the controversy between the Federal Fifth Circuit and the majority of the other Federal Circuit Courts and the Texas Third Court of Appeals regarding the test applied to determine whether a rural water association qualifies for protection under 7 U.S.C. § 1926(b).¹² Staff also understands that there is an appeal before the Fifth Circuit from a federal district court case that overruled the Commission's approval of petition for streamlined expedited release based upon the conclusion that Section 1926(b) pre-empts TWC § 13.254(a-6).¹³ While Staff believes that the Commission is required to follow state law,¹⁴ it is also reluctant to recommend to the Commission a position that could run afoul of orders from a federal court. Therefore, Staff suggests that, in the alternative, the Commission could abate this proceeding until the courts resolve this issue.

III. FINAL MAP

Typically, Staff would provide a final map along with its recommendation on final disposition. However, in addition to this docket, there is a second petition for streamlined expedited release from Rockett SUD's CCN pending in Docket No. 49863.¹⁵ Given that there is more than one possible outcome in both dockets, Staff respectfully requests that it be allowed to issue a final map within 10 days of the Commission issuing a final order in this docket or Docket No. 49863, whichever is later.

¹² See *Chesapeake Ranch Water v. Bd. of Com'rs of Calvert Cty*, 401 F.3d 274, 279-80 (4th Cir. 2005); *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 706-07 (6th Cir. 2003); *Rural Water Sys No 1 v City of Sioux Ctr*, 202 F.3d 1035, 1037 (8th Cir. 2000); *Sequoyah Cty. Rural Water Dist No. 7 v. Town of Muldrow*, 1914 F.3d 1192, 1207 (10th Cir. 1999); *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam); see also, *Creedmoor-Maha Water Supply Corp. v. Tex Comm'n on Env Quality*, 307 S.W.3d 505, 521-22 (Tex. App.—Austin 2010, no pet.) (adopting the majority view of the federal circuits regarding what it means to provide or make service available under Section 1926(b)).

¹³ See *Crystal Clear Special Util. Dist. v. Marquez*, 316 F.Supp.3d 965, 979 (W.D. Tex., March 29, 2018).

¹⁴ See *Creedmoor-Maha*, 307 S.W.3d at 521 (citing to *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1992) (per curiam)).

¹⁵ *Petition of Alamo Mission LLC to Amend Rockett Special Utility District's Water Certificate of Convenience of Necessity in Ellis County by Expedited Release*, Docket No. 49863 (pending).

IV. CONCLUSION

Staff respectfully recommends that the Commission grant Red Oak's petition in part and decertify Tracts 1, 2, 3, and 4A. Staff further recommends that the Commission deny Red Oak's petition as to Tract 4B because the record reflects that Tract 4B is currently receiving service. In the alternative, Staff recommends that the Commission abate this proceeding in light of the unresolved issues at the federal court level.


Dated: October 11, 2019

Respectfully submitted.

PUBLIC UTILITY COMMISSION OF TEXAS LEGAL DIVISION

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DOCKET NO. 49871
CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on October 11, 2019, in accordance with 16 TAC § 22.74.


Eleanor D'Ambrosio

PUC Interoffice Memorandum

To: Eleanor D'Ambrosio, Attorney
Legal Division

Thru: Heidi Graham, Manager
Infrastructure Division

From: Patricia Garcia, Engineering Specialist
Infrastructure Division

Date: October 11, 2019

Subject: **Docket No. 49871:** *Petition of the City of Red Oak Industrial Development Corporation to Amend Rockett Special Utility District's Water Certificate of Convenience and Necessity in Dallas and Ellis Counties by Expedited Release*

On August 19, 2019, the City of Red Oak Industrial Development Corporation (Petitioner) filed an application for expedited release from Rockett Special Utility District's (Rockett SUD) water Certificate of Convenience and Necessity (CCN) No. 10099 in Dallas and Ellis Counties, under Texas Water Code § 13.254(a-5) and 16 Texas Administrative Code § 24.245(l). The Petitioner asserts that the land is at least 25 contiguous acres, is not receiving water service, and is located in Dallas and Ellis Counties, which are both qualifying counties.

The Petitioner included a statement indicating a copy of the petition was sent via certified mail to Rockett SUD on the date the petition was filed with the Commission. On September 13, 2019, Rockett SUD filed a motion to intervene, which was granted by the Administrative Law Judge on September 25, 2019. A response and objection to the petition was submitted by Rockett SUD on October 2, 2019.

The response included a claim that Rockett SUD qualifies for protection under 7 U.S.C. § 1926(b) because it is the recipient of a federal loan. In addition, Rockett SUD demonstrated that there is a waterline installed on the west side of tract 3 and a water line and tap installed on the west side of tract 4b that serves the property. The pleading included a map showing the location of the water lines and meter and a bill for the period of June 27, 2019 through July 10, 2019 for an address that appears to be in one of the areas requested for release. Although Staff would prefer to have bills showing three consecutive months of service, Staff recommends that Rockett SUD has shown that tract 4b is receiving water service but has not made a similar showing for tracts 1, 2, 3, and 4a.

Rockett SUD's response did not address whether granting the petition would render any of its property useless and valueless. Therefore, Staff also recommends that there is no useless or valueless property, in accordance with 16 TAC § 24.245(n)(3). Staff further recommends that a compensation proceeding is not necessary, if the Commission determines that there is no useless or valueless property, pursuant to 16 TAC § 24.245(n)(7).