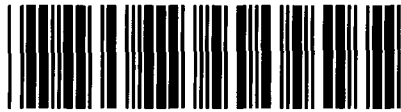




Control Number: 49871



Item Number: 20

Addendum StartPage: 0

DOCKET NO. 49871

RECEIVED

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 §

BEFORE THE PUBLIC UTILITY COMMISSION
2020 FEB -4 PM 1:15

PUBLIC UTILITY COMMISSION
FILING CLERK

OF TEXAS

SECOND MOTION TO LIFT ABATEMENT

The City of Red Oak Industrial Development Corporation (Red Oak) moves to lift the abatement of these proceedings and requests an Order granting its Petition. In support of its motion, Red Oak provides the following information.

I. BACKGROUND

On August 19, 2019, Red Oak filed its petition for expedited release of certain lands from the water Certificate of Convenience and Necessity (CCN) held by Rocket Special Utility District (Rockett) under the provisions of Texas Water Code (TWC) § 13.254(a-5) and 16 Texas Administrative Code (TAC) § 24.245(l) (Application). Rockett objected to the Application, and on October 19, 2019, filed suit against the Public Utility Commission (Commission), Red Oak, and Alamo Mission (LLC) (an entity that had also filed an application to remove properties from Rockett).

On November 15, 2019, an administrative law judge (ALJ) for the Commission issued Order No. 4, abating the processing of Red Oak's Application "due to the pendency of the federal litigation."¹ Order No. 4 also directed the Staff of the Public Utility Commission (Commission Staff) to file a status report concerning the status of the litigation on or before May 15, 2020.

On November 25, 2019, Red Oak filed its first motion to lift the abatement, providing information from the U.S. Attorney that the federal loan referenced by Rockett, which was the

¹ Order No. 4 Abating Proceeding (Nov. 15, 2019).

basis for the Commission's abatement, has not been approved.² Rockett opposed the Motion, arguing yet again that it actually possessed a federal loan protected under 16 U.S.C. § 1926(b). Commission Staff also opposed the Motion, citing its unfamiliarity with the underlying federal lawsuit, and asserting that the evidence provided by Red Oak in its Motion was hearsay.³ Commission Staff also claimed that Red Oak was positing a new theory regarding the effective date of a federal loan vis-à-vis the Loan Note Guarantee.⁴ Order No. 5 denied the request to lift the abatement, without stating the grounds therefor.⁵

II. FEDERAL LITIGATION OVERVIEW

There are currently two lawsuits pending in federal district courts: (1) *Rockett Special Utility District v. Botkin, et al, Alamo Mission, LLC, and City of Red Oak Industrial Development Corporation*, U.S. District Court for the Western District of Texas, Austin Division (Rockett Suit);⁶ and (2) *City of Red Oak v. United States Department of Agriculture, Rural Utilities Service, Rockett Special Utility District, and CoBank*, U.S. District Court for the Northern District of Texas, Dallas Division (Red Oak Suit).⁷

The Rockett Suit challenges the authority of the Commission to act on petitions filed under Tex. Water Code § 13.254(a-5) when the certificate holder is indebted to the federal government. Specifically, Rockett claims that "Rockett is indebted on a loan guaranteed by the United States Department of Agriculture ('USDA')." ⁸

² Red Oak's Motion to Lift Abatement at 1 (Nov. 25, 2019).

³ The evidence provided by Red Oak was an email from the U.S. Attorney representing the United States Department of Agriculture in a federal lawsuit brought by Red Oak, as explained further, *infra*.

⁴ Red Oak does not agree that a debt exists without loan documentation being issued, and believes that Staff itself is proposing a new standard to govern when a person or entity becomes indebted to someone else, without offering support for same.

⁵ Order No. 5 Denying Request to Lift Abatement (Dec. 9, 2019).

⁶ Civil Action No. 19-CV-1007, filed October 16, 2019.

⁷ Civil Action No. 19-2761, filed November 19, 2019.

⁸ Rockett Suit, Plaintiff's Original Complaint at 2 (Oct. 16, 2019).

The Red Oak Suit challenges the validity and the very existence of the federal guarantee claimed by Rockett before this Commission and in the Rockett Suit. In its suit, Red Oak claims that Rockett is ineligible to receive any loans under 16 U.S.C. § 1926, and seeks an injunction against Rockett, CoBank, and the United States Department of Agriculture (USDA) from consummating the loan note guarantee in violation of the statute and the regulations under the statute. Red Oak also seeks a declaratory judgment that the loan note guarantee that has been *conditionally* approved by the USDA is invalid.

Neither suit has progressed past the filing of answers or motions to dismiss.

III. USDA AGREES THERE IS NO FEDERAL GUARANTEE

In a recent filing in the Red Oak Suit, the USDA has agreed with Red Oak that Rockett does not hold a debt for which there is there a federal guarantee, stating: “[t]he conditional loan approval [by the USDA] remains subject to several conditions precedent and therefore does not constitute ‘final agency action’...”⁹

The very agency that issues and guarantees loans under 16 U.S.C. § 1926(b) has denied that such a guarantee exists in favor of Rockett. Therefore, Rockett does not have a loan guaranteed by the federal government; its erroneous claim that it does was the only reason the Commission abated this proceeding. Indeed, there is no guarantee that Rockett will eventually obtain the federal guarantee, as suggested by Staff in its earlier reply. Conditions precedent must be satisfied; unless and until they are, no action will be taken by the USDA to extend such guarantee.¹⁰

Because the only condition upon which the Commission abated this docket does not, in fact, exist, Red Oak respectfully requests that the Commission lift the abatement imposed by Order No. 4. Red Oak also respectfully requests that its Petition be granted.

⁹ Red Oak Suit, Defendant United States Department of Agriculture’s Motion to Dismiss Plaintiffs’ First Amended Complaint at 1 (Jan. 30, 2020). A copy is attached as Attachment A for the Commission’s convenience. Red Oak requests that the Commission take judicial notice of the fact of the filing cited (along with their contents). See Tex. R. Evid. 201; *Freedom Comms. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012).

¹⁰ See Attachment A.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.**

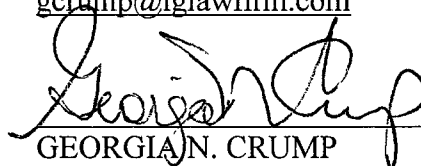
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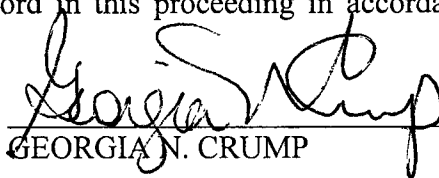
GEORGIA N. CRUMP

State Bar No. 05185500

ATTORNEYS FOR CITY OF RED OAK
INDUSTRIAL DEVELOPMENT CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2020, a true and correct copy of the foregoing document was served on all parties of record in this proceeding in accordance with 16 Tex. Admin Code § 22.74.



GEORGIA N. CRUMP

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF RED OAK, TEXAS, and the
RED OAK INDUSTRIAL
DEVELOPMENT CORPORATION,

Plaintiffs,

Civ. No. 3:19-CV-02761-S

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, acting by and through
George Ervin “Sonny” Perdue, III,
Secretary of Agriculture; RURAL
UTILITIES SERVICE, acting by and
through Edd Hargett, State Director;
ROCKETT SPECIAL UTILITY
DISTRICT; and COBANK, ACB

Defendants.

**DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE’S
MOTION TO DISMISS PLAINTIFFS’ FIRST AMENDED COMPLAINT**

Defendant United States Department of Agriculture (USDA) moves under Federal Rule of Civil Procedure 12(b) to dismiss Plaintiffs City of Red Oak, Texas and Red Oak Industrial Development Corporation (together, Red Oak)’s First Amended Complaint. The Court lacks subject matter jurisdiction because the United States and the USDA have not waived sovereign immunity for conditional approval of a rural water services loan under 7 U.S.C. § 1926. The government has waived sovereign immunity under the Administrative Procedure Act (APA) only for challenges to “final agency action.” 5 U.S.C. § 704. The conditional loan approval remains subject to several conditions precedent and therefore does not constitute “final agency action,” and the First Amended

Complaint should be dismissed. The USDA may provide further support for dismissal of Red Oak's First Amended Complaint in a brief in support it will file later.

Red Oak has agreed that the USDA may file a separate brief in support of its motion to dismiss under Local Civil Rule 7.1(d) by February 14, 2020. The USDA's brief in support may contain additional grounds for dismissal than those stated in this Motion.

Dated: January 30, 2020

Respectfully Submitted,

ERIN NEALY COX
UNITED STATES ATTORNEY

/s/ George M. Padis
George M. Padis
Assistant United States Attorney
Texas Bar No. 24088173
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214-659-8600
Fax: 214-695-8811
E-mail: george.padis@usdoj.gov

CERTIFICATE OF SERVICE

I certify that on January 30, 2020, a copy of the above was electronically filed with the Court's CM/ECF system and served on Plaintiffs and Defendant Rockett Special Utility District by email in accordance with the agreement among USDA, Plaintiffs, and Defendant Rockett Special Utility District.

/s/ George M. Padis
George M. Padis