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**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 §**

**PUBLIC UTILITY COMMISSION  
OF TEXAS**

### **COMMISSION STAFF'S STATUS REPORT AND RESPONSE**

**COMES NOW** the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this report and response. In support thereof, Staff 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 of approximately 384 acres from Rockett Special Utility District's (Rockett) water certificate of convenience and necessity No. 10099, in Ellis County, under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.245(l).<sup>1</sup>

Order No. 4, issued on November 15, 2019, abated this proceeding due to pendency of federal litigation. On July 21, 2020, Order No. 8 was issued, continuing that abatement. On October 12, 2020, Order No. 9 was issued, requiring Staff to file a status report and response to Red Oak's motion to lift abatement by October 15, 2020. This pleading, therefore, is timely filed.

#### **II. STATUS REPORT AND RESPONSE**

On October 5, 2020, Red Oak filed a motion to lift the present abatement in this matter. Red Oak's motion is based upon three arguments: first, that a Federal Magistrate Judge has concluded that Rockett does not have a federally guaranteed debt, and therefore, cannot be afforded protection under 7 U.S.C. 1926(b); second, even if Rockett had a federally guaranteed

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<sup>1</sup> Effective July 2, 2020, the former 16 TAC § 24.245(l) is now § 24.245(h).

debt, it does not provide or make water service available, and therefore, is not entitled to section 1926(b) protection; and third, that TWC § 13.2541 requires the Commission to act on petitions for expedited release and is not preempted by section 1926(b).

On October 12, 2020, Rockett filed a response to that motion, asserting that the abatement should be maintained. The response addresses Red Oak's three arguments thusly: first, that the Magistrate Judge's report still awaits final judgment and is not yet binding; second, that the requested area is receiving water service and that the Commission lacks the jurisdiction to resolve the question of whether service has been made available under section 1926(b); and third, that section 1926(b) was found to preempt former TWC § 13.254(a-6) in *Crystal Clear Special Utility District v. Walker, et al.*<sup>2</sup>

The three points of contention are grounded in three separate federal matters. First, as Red Oak noted in its motion, the Magistrate's Report in *Rockett Special Utility District v. Shelly Botkin, et. al.*, Cause No. 1:19-cv-1007-RP stated that Rockett does not have a federally guaranteed debt.<sup>3</sup> As such, Rockett would not be afforded protection under 7 U.S.C. § 1926(b). However, as Rockett indicated in its response, the matter is still awaiting final ruling from the District Court judge, and therefore, is not finalized.<sup>4</sup>

Second, the question of whether service has been made available under section 1926(b) is one that need not be addressed at this juncture. The Fifth Circuit Court's opinion in *Green Valley Special Utility District v. City of Schertz, Texas* has announced a new standard for evaluating whether a utility is entitled to protection under section 1926(b) because it is "providing service."<sup>5</sup> However, the Commission will not need to apply that new standard unless and until: (1) it is determined that Rockett has a federally guaranteed debt in *Rockett Special*

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<sup>2</sup> *Crystal Clear Spec. Util. Dist v Walker, et al*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).

<sup>3</sup> Red Oak Industrial Development Corporation's Third Motion to Lift Abatement at 5-6 (Oct. 5, 2020). Staff understands Red Oak's frustration that this docket has been abated solely because of Rockett's claim of federal indebtedness, which is now in doubt. However, that does not change the fact that Red Oak had to engage in litigation in order to obtain confirmation that a conditional commitment and a loan guarantee are not interchangeable.

<sup>4</sup> Rockett Special Utility District's Response and Objections to Red Oak IDC's Third Motion to Lift Abatement at 5-6 (Oct. 8, 2020).

<sup>5</sup> *Green Valley Spec. Util. Dist. v. City of Schertz, Tex*, 969 F.3d 460, 477 n. 36 (5th Cir. 2020), "Though the en banc court need not tease out exactly *what* facilities are necessary or precisely *how nearby* they must be located, the utility must have *something* in place to merit § 1926(b)'s protection."

*Utility District v. Shelly Botkin, et. al.*; and (2) the appeal of the district court's decision in *Crystal Clear* is resolved such that it is clear whether the bar on denying a petition for streamlined expedited release based on the fact that the CCN holder has a federally guaranteed loan<sup>6</sup> is pre-empted by federal law.

Finally, as to the question of federal preemption, the district court in *Crystal Clear* held: “[t]o the extent the Tex. Water Code § 13.254(a-5) directs PUC Officials to grant a petition for decertification that meets the requirements of that provision without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 U.S.C. § 1926(b), the statute is preempted and is void.”<sup>7</sup> However, an appeal of that ruling is currently pending before the Fifth Circuit Court of Appeals.<sup>8</sup> At present, the parties appear to be engaged in briefing on various motions, with oral argument, if forthcoming, not yet scheduled.

As such, given that *Rockett Special Utility District v. Shelly Botkin, et. al.* and *Crystal Clear Special Utility District v. Walker, et al.* directly pertain the instant matter and remain unresolved, Staff recommends that this matter remain abated.

### III. CONCLUSION

Staff respectfully requests an order consistent with the foregoing.

Dated: October 15, 2020

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<sup>6</sup> TWC § 13.2541(d).

<sup>7</sup> *Crystal Clear Spec. Util. Dist. v. Walker, et al.* at \*2.

<sup>8</sup> Red Oak argues that lifting the abatement would be consistent with the Commission's argument in *Green Valley Special Utility District v. City of Schertz, Texas* regarding why 7 U.S.C. § 1926(b) cannot limit the state. However, the Fifth Circuit declined to address this argument in *Green Valley*, which leaves *Crystal Clear Special Utility District v. Walker, et al.* as the vehicle for answering the question of whether section 1926(b) or TWC § 13.2541(d) controls in what the Commission may consider in this proceeding.

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS  
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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 on October 15, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Creighton R. McMurray  
Creighton R. McMurray