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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 §

BEFORE THE  
PUBLIC UTILITY COMMISSION  
OF TEXAS

**REPLY TO ROCKETT SPECIAL UTILITY DISTRICT'S  
RESPONSE AND OBJECTION TO PETITIONER'S MOTION  
TO LIFT ABATEMENT AND MOTION TO DISMISS THE PETITION**

The Red Oak Industrial Development Corporation (Red Oak)<sup>1</sup> replies to Rockett Special Utility District's (Rockett) Response and Objection to Petitioner's Third Motion to Lift Abatement and Motion to Dismiss the Petition (Response), filed herein on October 5, 2020.

**A. The USDA confirmed, and the federal magistrate judge determined, that Rockett does not have a loan note guarantee.**

This proceeding has been abated for almost a year because Rockett filed a lawsuit "devoid of merit"<sup>2</sup> in federal court claiming to have federal protections based on a qualifying guaranteed loan.<sup>3</sup> A lawsuit is not evidence of a guaranteed loan—a loan note guarantee is.<sup>4</sup> Rockett has submitted volumes of pages to the Commission, declaring that it has a qualifying federally guaranteed loan. Not a single page in all of its filings, however, is a loan note guarantee.

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<sup>1</sup> Rockett's Response to the Third Motion to Lift Abatement purports to respond to background regarding Red Oak's clarification of the petitioner as Red Oak Industrial Development Corporation and discussion not actually raised in Red Oak's Third Motion to Lift Abatement. Rather, that issue was raised in Red Oak's Amendment of Petition and Request to Restyle (Sep. 21, 2020), which has been fully briefed and responded to at this time. Because that discussion is not responsive to the Motion at issue, it should be ignored.

<sup>2</sup> Red Oak Industrial Development Corporation's Third Motion to Lift Abatement, Attachment C at 11 (Oct. 5, 2020) (emphasis added).

<sup>3</sup> Order No. 4, Abating Proceeding (Nov. 15, 2019).

<sup>4</sup> See 7 C.F.R. § 1779.4. Title 7, Part 1779 of the federal regulations was moved and redesignated as part of the consolidated Part 5001 regarding the USDA's guaranteed loan program, effective October 1, 2020. The agency decision Rockett uses to support its claim for federal protection was initiated prior to that date. Because the rules do not have retroactive effect, reference will generally be made to Part 1779.

Page 7 of the magistrate judge's Report & Recommendation in the Red Oak Suit<sup>5</sup> explains that Rockett does not currently have a guaranteed loan:

Various regulations are in place to facilitate section 1926. "*A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will also execute a Lender's Agreement.*" 7 C.F.R. § 1779.4. "If the Agency determines that the borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment ability, [and other conditions are met], the Agency will provide the lender and the borrower with the Conditional Commitment for Guarantee, listing all conditions for the guarantee." 7 C.F.R. § 1779.53. The actual Loan Note Guarantee will not be issued until certain conditions precedent are met. 7 C.F.R. § 1779.63 (listing the conditions precedent). "Upon receipt of the executed Lender's Agreement and after all requirements have been met, the Agency will execute the Loan Note Guarantee. . . ." 7 C.F.R. § 1779.64(b). "If the Agency determines that it cannot execute the Loan Note Guarantee because all requirements have not been met, the lender will have a reasonable period within which to satisfy the objections. If the lender satisfies the objections within the time allowed, the guarantee will be issued." 7 C.F.R. § 1779.64(d).

*By issuing the Conditional Commitment for Guarantee, the USDA has determined that the CoBank loan satisfies the necessary requirements. See 7 C.F.R. § 1779.53. Although CoBank and Rockett must satisfy certain conditions precedent to receive the Loan Note Guarantee, the USDA has no discretion about providing a Loan Note Guarantee if those conditions are satisfied.*<sup>6</sup>

The federal district court judge entered an order adopting this Report and Recommendation.<sup>7</sup> In the Rockett Suit,<sup>8</sup> the same magistrate judge issued a Report and

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<sup>5</sup> *City of Red Oak v. United States Department of Agriculture, Rural Utilities Service, Rockett Special Utility District, and CoBank*, Civil Action No. 1:20-CV-00483-RP, filed Nov. 19, 2019 ("Red Oak Suit"). This case was originally filed in the Northern District of Texas (Civil Action No. 19-2761) and was subsequently transferred to the United States District Court for the Western District of Texas, Austin Division, and issued a new case number.

<sup>6</sup> Red Oak Industrial Development Corporation's Third Motion to Lift Abatement, Attachment A at 7 (Oct. 5, 2020) (emphasis added).

<sup>7</sup> Red Oak Industrial Development Corporation's Third Motion to Lift Abatement, Attachment B (Oct. 5, 2020).

<sup>8</sup> *Rockett Special Utility District v. Botkin, et al, Alamo Mission, LLC, and City of Red Oak Industrial Development Corporation*, Civil Action No. 19-CV-1007, filed Oct. 16, 2019.

Recommendation that further stated: “Rockett does not have a loan entitled to section 1926(b) protections.”<sup>9</sup>

Red Oak provided not only the recommendation of the federal magistrate judge, but the responsive pleading of the USDA in the Red Oak Suit.<sup>10</sup> The USDA, the entity charged with the enforcement, regulation, and administration of the loan program has represented in federal court that it has not executed a loan note guarantee.

- “USDA admits only that it has not closed on the Loan Note Guarantee with Rockett.”<sup>11</sup>
- “USDA admits only that all conditions precedent have not occurred.”<sup>12</sup>
- “USDA admits only that a loan note guarantee has not been executed.”<sup>13</sup>

USDA’s regulations also require that “[a] loan guarantee under this part will be evidenced by a Loan Note Guarantee Issued by the Agency.”<sup>14</sup> USDA makes plain what constitutes evidence of a guaranteed loan. In over a year, and despite various proceedings, Rockett has *never* produced a loan note guarantee, and *USDA says it does not exist*.

The magistrate judge has explained there is no loan note guarantee. The USDA, the very entity that would issue the loan guarantee, has stated that no guarantee has been issued. Rockett continually filing lawsuits to delay the Commission’s statutorily mandated action doesn’t change that fact. And allowing Rockett to continue its methodical practice of misrepresentation sets a

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<sup>9</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment C at 11 (Oct. 5, 2020).

<sup>10</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment D (Oct. 5, 2020).

<sup>11</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment D at ¶ 42 (Oct. 5, 2020).

<sup>12</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment D at ¶ 44 (Oct. 5, 2020).

<sup>13</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment D at ¶ 45 (Oct. 5, 2020).

<sup>14</sup> 7 C.F.R. § 1779.4.

dangerous precedent. If the existence of a lawsuit, rather than the document identified by the USDA as evidence of a qualifying loan, prevents the Commission from carrying out its duties under Texas law, does this not incentivize other CCN holders from making similar misrepresentations?

Red Oak petitioned the Commission 14 months ago today for *streamlined expedited* release for tracts that were not receiving water service. Red Oak followed the statutes. Red Oak followed the Commission's rules. Continuing to abate this proceeding, rather than lifting the abatement and granting the petition, is a statement that rules and the law don't matter.

**B. There is no preemption issue, as there is no conflict between federal and state law—Rockett does not have Section 1926(b) protections.**

Section 1926(b) is not at play here. Rockett cites *Crystal Clear Special Utility District v. Walker* to say that the Commission cannot grant decertification because the authorizing statute is void.<sup>15</sup> *Crystal Clear* in fact states:

(1) PUC Officials' Final Order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, Petition of Las Colinas San Marcos Phase I LLC, Docket No. 46148 was entered in violation of 7 U.S.C. § 1926(b) and is void.

(2) *Tex. Water Code § 13.254(a-6) is preempted by 7 U.S.C. § 1926 and is void.*

(3) *To the extent* that 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>16</sup>

Red Oak petitioned the Commission for *streamlined expedited* release in August 2019 under Section 13.254(a-5) of the Texas Water Code ("TWC"). *Crystal Clear* expressly declared

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<sup>15</sup> Rockett Special Utility District's Response And Objection to Red Oak Industrial Development Corporation's Third Motion to Lift Abatement at 12 (Oct. 12, 2020).

<sup>16</sup> *Crystal Clear Special Util. Dist v Walker*, 1:17-CV-254-LY, 2019 WL 2453777, at \*1 (W.D. Tex. Mar. 27, 2019) (emphasis added).

Section 13.254(a-6) void, only finding Section 13.254(a-5) void to the extent it asked the Commission to ignore whether an entity is federally indebted and entitled to protection under § 1926(b) when granting release. *Crystal Clear* did not find Section 13.254(a-5) void in its entirety, only to the extent it would create a conflict with federal law. There is a concern of preemption *only* where the CCN holder is “federally indebted and otherwise entitled to the protection of 7 U.S.C. § 1926(b).” Here, *Rockett is not federally indebted*. The statute was not robbed of all meaning and effect, even in *Crystal Clear*. Thus, the issue of preemption as it relates to Section 13.254(a-5) is not relevant to this matter.<sup>17</sup>

Additionally, the magistrate judge’s Report and Recommendation in the Rockett Suit does address the preemption issue, despite Rockett’s claim to the contrary.<sup>18</sup>

For all these reasons, Rockett’s policy arguments that a determination that its CoBank loan is not protected by section 1926(b) would frustrate the goals of section 1926(b) are also unpersuasive. Rockett’s position would far expand the protections of 1926(b) to loans that are not—and may never be—federally funded or guaranteed.

Accordingly, *because Rockett does not have a loan entitled to section 1926(b) protections, its claims based on section 1926 are so “completely devoid of merit as not to involve a federal controversy.” See Steel Co., 523 U.S. at 89.*<sup>19</sup>

The magistrate judge is right, and because of that, any question of preemption related to this matter is resolved based on Rockett’s lack of federal indebtedness. Further delay of this matter will not lead to clarity, but only further contravention of the law. Because Rockett is not federally

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<sup>17</sup> Commission Staff submitted a response and recommendation regarding the Third Motion to Lift Abatement. Commission Staff’s Status Report and Response (Oct. 15, 2020). Commission Staff noted that *Crystal Clear* is still pending appeal and the Rockett Suit has not been formally disposed of. Because of that, the Commission Staff recommended continued abatement. This further highlights the issue of continued abatement of this expedited matter. Litigation and appellate matters can last years. The process under TWC § 13.254(a-5) should last 60 days. Allowing potential litigation or appeals to impact present action creates an additional element that violates the plain text and spirit of the statute.

<sup>18</sup> Rockett Special Utility District’s Response And Objection to Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement at 11 (Oct. 12, 2020).

<sup>19</sup> Red Oak Industrial Development Corporation’s Third Motion to Lift Abatement, Attachment C at 11 (Oct. 5, 2020) (emphasis added).

indebted and is not entitled to Section 1926(b) protection, there is no issue with the Commission granting Red Oak's petition in harmony with the rest of TWC § 13.254(a-5).

**C. Red Oak is not asking the Commission to make any new findings as to provision or receipt of water service; Red Oak is asking the Commission to act consistent with findings that were made a year ago.**

It is not just "ROIDC's position" that the property was not receiving water—it is the finding of the Commission Staff.<sup>20</sup>

As part of the administrative procedural schedule set out by the ALJ, both parties were allowed to submit evidence proving or challenging the existence of the elements required by § 13.254(a-5) for streamlined expedited release.<sup>21</sup> Rockett in fact cites the evidence previously provided to the Commission in its prior filings.<sup>22</sup> Commission Staff explained that Rockett's submission and evidence were considered, yet still found that four tracts<sup>23</sup> were not receiving water.<sup>24</sup>

Rockett, not presenting any new facts from those the Commission Staff considered over a year ago, tries to adapt its argument that it met service requirements to various standards under federal law.<sup>25</sup> The matter before this body, however, is not a matter of federal law, but a matter of

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<sup>20</sup> Rockett Special Utility District's Response And Objection to Red Oak Industrial Development Corporation's Third Motion to Lift Abatement at 9 (Oct. 12, 2020); Commission Staff Recommendation on Final Disposition at 4 (Oct. 11, 2019).

<sup>21</sup> Order No. 2 Granting Motion to Intervene and Finding Petition Administratively Complete (Sep. 25, 2019).

<sup>22</sup> Rockett Special Utility District's Response And Objection to Red Oak Industrial Development Corporation's Third Motion to Lift Abatement at 9 (Oct. 12, 2020).

<sup>23</sup> In its Response, Rockett notes that Compass Datacenters currently owns a portion of the land. Although not relevant to any finding regarding receipt of water service or Rockett's claims of federal indebtedness, Red Oak recognizes that this logistical matter can be properly addressed by the Commission once the abatement has been lifted. Further, this underscores the issue with creating a lengthy delay in the streamlined expedited process. The transfer of property occurred after the application was deemed administratively complete and after Staff recommended granting the petition, with the expectation the Commission would accordingly grant the petition within the requisite timeline under state law.

<sup>24</sup> Commission Staff Recommendation on Final Disposition at 4 (Oct. 11, 2019).

<sup>25</sup> Rockett Special Utility District's Response And Objection to Red Oak Industrial Development Corporation's Third Motion to Lift Abatement at 9–10 (Oct. 12, 2020).

state law. And Red Oak has satisfied every requirement under the laws of this state. Under Texas law and the Commission's procedures for streamlined expedited release, the relevant question and standard is whether the property is receiving water service.<sup>26</sup> Commission Staff answered that question a year ago—"no." Thus, per the plain language of the relevant statutes and the Commission's Regulations, the Commission should lift the abatement and grant Red Oak's Petition.

The Commission should not allow Rockett to muddy the waters and raise procedural issues while the case is abated. The only question for the Commission now is whether the abatement should be lifted. Rockett's federal suit raising a claim of protection under § 1926(b) is the reason cited by the Commission for abating this docket; that misrepresentation has been exposed and debunked. The only basis on which the Commission abated this docket does not exist—the loan is not federally guaranteed. Accordingly, 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 and Rockett's Motion to Dismiss be denied.

Respectfully submitted,

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

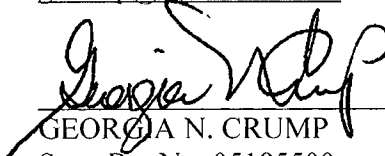
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ATTORNEYS FOR PETITIONER

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<sup>26</sup> TWC § 13.254(a-5); 16 TAC § 24.245.



### CERTIFICATE OF SERVICE

I hereby certify that on October 19, 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.

  
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GEORGIA N. CRUMP