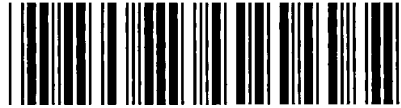




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DOCKET NO. 49871

**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

**PROPOSED FINAL ORDER
GRANTING STREAMLINED EXPEDITED RELEASE**

This Order grants to Petitioner, Red Oak Industrial Development Corporation,¹ streamlined expedited release of approximately 384 acres of land and removes the tracts from Rockett Special Utility District's water certificate of convenience and necessity (CCN) number 10099 in Ellis and Dallas Counties.

I. BACKGROUND

On August 19, 2019, Red Oak Industrial Development Corporation (Petitioner) filed its petition pursuant to Texas Water Code (TWC) § 13.254(a-5) and 16 Texas Administrative Code (TAC) § 24.245(l)² to remove from Rocket Special Utility District's water CCN number 10099 the five tracts of land, constituting approximately 384 acres, that Petitioner owned in Ellis and Dallas Counties. The petition includes an affidavit from Ben Goodwyn, President of the Red Oak Industrial Development Corporation.³ In the affidavit, Mr. Goodwyn attests, among other things, that Red Oak Industrial Development Corporation owns the tracts listed in the petition, the tracts are not receiving water service from Rocket Special Utility District or any other water provider,

¹ Originally identified as City of Red Oak Industrial Development Corporation; however this is a misnomer.

² Petitions for expedited release that commenced prior to September 1, 2019 are governed by former TWC § 13.254(a-5) and (a-6). Act of May 25, 2019, 86th Leg., R.S., ch. 688 (SB 2272), § 6, 2019 Tex. Sess. Law Serv. 1976, 1977; *see also* Act of Sep. 1, 2013, 83rd Leg., R.S., ch. 171 (SB 567), 2013 Tex. Gen. Laws 772, *amended by* Act of Sep. 1, 2019, 86th Leg., R.S., ch. 688 (SB 2272), §§ 1-6, 2019 Tex. Sess. Law Serv. 1976.

³ Mr. Goodwyn is also President of the City of Red Oak Industrial Development Corporation.

and there are no billing records or other documents indicating an existing account related to the provision of water service for the tracts. The petition includes Warranty Deeds confirming ownership of the tracts is vested in the Red Oak Industrial Development Corporation.

On September 3, 2019, Petitioner filed a supplemental filing to more accurately identify the five tracts of property as Tracts 1, 2, 3, 4A, and 4B. On September 13, 2019, Rockett Special Utility District moved to intervene and filed initial comments. The motion to intervene was granted in Order No. 2 filed on September 25, 2019. Rockett Special Utility District is opposed to the petition.

On October 10, 2019, Order No. 3 set a procedural schedule that concluded with the sixty-day administrative approval deadline of November 25, 2019.

Rockett Special Utility District's Pleadings

On October 2, 2019, Rockett Special Utility District filed a response and objection to the Petition for Expedited Release, in which it asserted that it received "federal funding" and was eligible for federal protection pursuant to 7 U.S.C. § 1926(b) (Section 1926(b)) due to a conditional commitment for guarantee by USDA and funding provided by CoBank, ACB as the lender, and argued that Section 1926(b) preempts the TWC. Rockett also asserted that it had previously installed a water line and a water connection tap directly on the west side of Tract 4B and that it currently utilizes and transmits water to its customers through said water line and on the west portion of Tract 3, which connects another waterline to provide service to the tract and surrounding land. It additionally provided a map showing the location of the lines and water tap on the property. Finally, Rockett asserted it had planned with the City of Red Oak to install a larger waterline allowing Rockett's McKenna Pump Station to serve future development on the property.

In various additional pleadings, including its December 2, 2019 Response and Objection to Petitioner's Motion to Lift Abatement and Motion to Dismiss the Petition, Rockett asserted that it qualified for protection of its service area pursuant to Section 1926(b), that the TWC is preempted by federal law, and that the petition must be dismissed. None of the pleadings filed by

Rockett Special Utility District showed any actual water service received by the property during the term of petitioner's ownership.

On September 28, 2020, in response to Petitioner's request to restyle the docket to correct a misnomer, Rockett asserted the petition should be dismissed because the misnomer was, in fact, a fatal misidentification of the parties leading to a lack of jurisdiction.

Petitioner's Pleadings

On September 3, 2019, Petitioner filed a supplemental filing to more accurately identify the five tracts of property as Tracts 1, 2, 3, 4A, and 4B.

Following Order No. 4 abating the proceeding, Petitioner moved on November 25, 2019, February 4, 2020, and on October 5, 2020 to lift the abatement. The November 25 and February 4 motions were denied in Order Nos. 5 and 6, respectively. On November 3, 2020, Petitioner filed a Supplement to its Third Motion to Lift Abatement wherein it confirmed that federal district judge, Robert Pitman, had dismissed Rockett's lawsuit in its entirety, confirmed that Rockett had no federally guaranteed debt, and that Section 1926(b) was not an obstacle to proceeding with this docket.

On September 21, 2020, Petitioner filed an Amendment of Petition and Request to Restyle Docket to address the inadvertent misnomer of City of Red Oak Industrial Development Corporation as Petitioner by amending the style to indicate Red Oak Industrial Development Corporation is the Petitioner.

Commission Staff's Pleadings

On October 11, 2019, Commission Staff filed a recommendation on final disposition that the petition be approved. Included was a staff memorandum confirming Petitioner's ownership of the property, that Tracts 1, 2, 3, and 4A were not receiving water service,⁴ the sufficiency of the mapping, and that the property is located in Ellis and Dallas Counties, qualifying counties. Staff additionally recommended that there is no useless or valueless property of the CCN holder and

⁴ Staff found that Rockett had provided evidence showing Tract 4B is receiving service.

that a compensation proceeding is not necessary. Accordingly, Commission Staff recommended that the petition be granted or in the alternative, the docket be abated due to unresolved issues at the federal court level.

On October 22, 2020, Commission Staff filed a recommendation that Rockett's motion to dismiss on the basis that the petition should have been filed under the name Red Oak Industrial Development Corporation rather than City of Red Oak Industrial Development Corporation be denied as the difference in names is attributed to a misnomer and dismissal would not serve the interests of efficiency and fairness.

Abatement and Reinstatement of the Docket

On November 15, 2019, in Order No. 4, the administrative law judge (ALJ) abated the processing of this proceeding due to the pendency of federal litigation involving the federal preemption issue raised in this docket. Petitioner moved on November 25, 2019, February 4, 2020, and on October 5, 2020 to lift the abatement. The November 25 and February 4 motions were denied in Order Nos. 5 and 6, respectively.

The Third Motion to Lift Abatement, filed on October 5, 2020, after the magistrate's Report and Recommendation dated July 29, 2020 in *Rockett Special Utility District v. Shelly Botkin, et al*, No. 1:19-cv-01007, in the United States District Court for the Western District of Texas, Austin Division, found that 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."

On October 12, 2020, Rockett Special Utility District filed a Response and Objection to Petitioner's Third Motion to Lift Abatement, stating the federal issue had not yet been resolved by the federal court.

On November 3, 2020, Petitioner filed a Supplement to its Motion to Lift Abatement wherein it confirmed that federal district judge Robert Pitman had dismissed Rockett's lawsuit in

its entirety, confirmed that Rockett had no federally guaranteed debt, and that Section 1926(b) was not an obstacle to proceeding with this docket.

The proceeding remained abated until the issuance of Order No. 10, filed November 10, 2020, which lifted the abatement in light of the Commission's discussion of the abatement issue at its open meeting on November 5, 2020, and in light of the current status of the federal litigation. Order No. 10 also directed Petitioner to clarify the ownership of the five tracts of land for which decertification is sought.

On November 20, 2020, Petitioner filed additional briefing clarifying that during the abatement, Tracts 3 and 4A were conveyed to Compass Datacenters DFW III, LLC (Compass). As a result, Petitioner owns Tracts 1, 2, and 4B, and Compass owns Tracts 3 and 4A. However, Petitioner asserted that TWC § 13.254(a-5) directs the Commission to consider the facts as they exist at the time the petition is filed, and therefore the Commission will address each of the five tracts in this Final Order.

On November 16, 2020, Order No. 11 was issued requiring the parties to file briefing as to the effect of *Rockett Spec. Util. Dis. v. Shelly Botkin, et al*, No. 1:19-cv-01007 (W.D. Texas) on Rockett's motion to dismiss in this case, setting a briefing schedule, and setting January 15, 2021 as the 60-day approval deadline.

Based on the facts summarized above, the Commission finds Petitioner has established that it is entitled to have its petition granted, including proving that Tracts 1, 2, 3, and 4A are not receiving water service under the standards of TWC §§ 13.002(21) and 13.254(a-5), and 16 TAC § 24.245(l), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*.⁵ Further, Section 1926 does not preclude the Commission from acting on the petition.

Because this proceeding commenced before September 1, 2019, by the physical filing of the petition and the assignment of a docket number, the petition is governed by the law in effect

⁵ 449 S.W.3d 130 (Tex App.—Austin 2014, pet. denied).

prior to that date, and all cites herein to the TWC and Commission rules are to the version of the statutes and rules in effect prior to September 1, 2019.⁶

II. FINDINGS OF FACT

The Commission makes the following findings of fact.

Petitioner

1. Petitioner is a nonprofit corporation registered with the Texas secretary of state.
2. The petition initially purported to be filed by the City of Red Oak Industrial Development Corporation, which was a misnomer. The correct petitioner and landowner is Red Oak Industrial Development Corporation.
3. At the time of the petition, Petitioner owned five tracts of land (Tracts 1, 2, 3, 4A, and 4B) in Ellis and Dallas Counties totaling approximately 384 acres, which are located within the boundaries of Rockett Special Utility District's water CCN number 10099.

Petition

4. On August 19, 2019, Petitioner filed its petition for streamlined expedited release of the five tracts from Rockett Special Utility District's water CCN number 10099.
5. Petitioner provided warranty deeds confirming its ownership of the tracts at the time the petition was filed and maps confirming the tracts' location.
6. Tracts 1, 2, 3, and 4A are not receiving water service from Rockett Special Utility District, were owned by Petitioner at the time of filing, are more than 25 acres, are located within the boundaries of CCN number 10099 held by Rockett Special Utility District, and are located in Ellis and Dallas Counties.
7. The petition includes an affidavit from Ben Goodwyn, President of the Red Oak Industrial Development Corporation, stating among other things, that the tracts are not receiving water service from Rockett Special Utility District.

⁶ Act of May 26, 2019, 86th Leg., R S 2272, §§6, 7

8. In Order No. 2 filed on September 25, 2019, the ALJ found the petition administratively complete.

Notice

9. Petitioner sent a true and correct copy of the petition, via certified mail, return receipt requested, to Rockett Special Utility District on August 19, 2019.
10. In Order No. 2 filed on September 25, 2019, the ALJ found the notice sufficient.

Intervention and Response to Petition

11. On September 13, 2019, Rockett Special Utility District filed a motion to intervene.
12. In Order No. 2 filed on September 25, 2019, the ALJ granted the motion to intervene.
13. In a response filed on October 2, 2019, and in various other pleadings, Rockett Special Utility District asserted that it was providing service to the tract because it had previously installed a water line and water connection tap on the west side of Tract 4B and a water line connection on the west side of Tract 3, and that it had been contemplating additional construction for future developments on the tracts with the City of Red Oak.

Water Service

14. Tracts 1, 2, 3, and 4A were not receiving water service at the time the petition was filed and have not received water service at any time during Petitioner's ownership.
15. The existence of a water line that "connects to another Rockett 12 water line to provide service to the Property and surrounding lands" does not constitute receipt of water service to Tract 3.
16. Tract 4B was receiving water service at the time the petition was filed.
17. Rockett Special Utility District's website states that "The corporation [sic] was formed for the purpose of furnishing a water supply for general farm use and domestic purposes to individuals residing in the rural community of Rockett, Texas and the surrounding rural areas."

18. Consistent with the Commission's other recent decisions, the fact that a utility has waterlines on or near a tract does not mean the facilities are committed and dedicated to serving the subject tract.
19. Rockett Special Utility District has not committed or dedicated facilities or lines providing water service to Tracts 1, 2, 3, or 4A.
20. Rockett Special Utility District has not performed acts or supplied anything to Tracts 1, 2, 3, or 4A.
21. Tracts 1, 2, 3, or 4A are not receiving water service from Rockett Special Utility District.

Determination of Useless or Valueless Property

22. No property of Rockett Special Utility District is rendered useless or valueless by the decertification.

III. CONCLUSIONS OF LAW

The Commission makes the following conclusions of law.

1. The Commission has authority over this petition under TWC §§ 13.254(a-5).
2. Because this proceeding commenced before September 1, 2019, by the physical filing of the petition and the assignment of a docket number, the petition is governed by the law in effect prior to that date, and all cites to the TWC are to the version of the statutes in effect prior to September 1, 2019. Act of May 25, 2019, 86th Leg., R.S., ch. 688 (SB 2272), § 6, 2019 Tex. Sess. Law Serv. 1976, 1977; *see also* Act of Sep. 1, 2013, 83rd Leg., R.S., ch. 171 (SB 567), 2013 Tex. Gen. Laws 772, *amended by* Act of Sep. 1, 2019, 86th Leg., R.S., ch. 688 (SB 2272), §§ 1-6, 2019 Tex. Sess. Law Serv. 1976.
3. Notice of the petition was provided in compliance with 16 TAC §§ 22.55 and 24.245(l).
4. No opportunity for a hearing on a petition for expedited release is provided under TWC § 13.254(a-5) or 16 TAC § 24.245(l).
5. Petitions for expedited release filed under TWC § 13.254(a-5) or 16 TAC § 24.245(l) are not contested cases.

6. Landowners seeking expedited release under TWC § 13.254(a-5) or 16 TAC § 24.245(l) are required to submit a verified petition through a notarized affidavit, and the CCN holder may submit a response to the petition.
7. To obtain release from a retail water CCN under TWC § 13.254(a-5), a landowner must demonstrate that the landowner owns a tract of land that is at least 25 acres, that the tract of land is located in a qualifying county, and that the tract of land is not receiving water service.
8. Ellis County and Dallas County are qualifying counties under TWC § 13.254(a-5) and 16 TAC § 24.245(l).
9. Tracts 1, 2, 3, and 4A are not receiving water service under the standards of TWC §§ 13.002(21) and 13.254(a-5) or 16 TAC § 24.245(l), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).
10. Tract 4B was receiving water service under the standards of TWC §§ 13.002(21) and 13.254(a-5) or 16 TAC § 24.245(l), as interpreted in *Texas General Land Office v. Crystal Clear Water Supply Corporation*, 449 S.W.3d 130 (Tex. App.—Austin 2014, pet. denied).
11. Petitioner has satisfied the requirements of 13.254(a-5) or 16 TAC § 24.245(l) by adequately demonstrating ownership of a tract that is at least 25 acres, is located in a qualifying county, and is not receiving water service.
12. The error in naming City of Red Oak Industrial Development Corporation and not Red Oak Industrial Development Corporation is a misnomer that does not prevent the petition from being validly amended.
13. Rockett Special Utility District failed to prove that any of its property will be rendered useless or valueless by the decertification under the standards of TWC §13.254(a-6) and (d), and 16 TAC § 24.245(l) and (n); therefore under TWC 13.254(d) through (g) and 16 TAC § 24.245(n)(3), no compensation is owed to Rockett Special Utility District.

14. As used in TWC § 13.254(d), *useless* means having or being of no use, and *valueless* means having no monetary worth.
15. Because no compensation is owed under TWC 13.254(d) through (g), a retail public utility may render retail water directly or indirectly to the public in the 166.594-acre tract of land without providing compensation to Rockett Special Utility District.
16. The Commission processed the petition in accordance with the TWC, the Administrative Procedure Act,⁷ and Commission rules.
17. Under TWC § 13.257(r) and (s), Rockett Special Utility District is required to record certified copies of the approved certificate and map, along with a boundary description of the service area, in the real property records of Ellis and Dallas Counties, and submit to the Commission evidence of the recording.
18. As concluded by the federal district court, because Rockett Special Utility District did not have a federally guaranteed loan, or any other qualifying loan under 7 U.S.C. §1926(b), it is not entitled to the protection of 7 U.S.C. §1926(b).

IV. ORDERING PARAGRAPHS

In accordance with these findings of fact and conclusions of law, the Commission issues the following orders, which are retrospective to November 25, 2019.

1. The Commission amends the style of the petition to Petition 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.
2. The Commission grants the petition and removes the requested 374 acres from the certificated area of Rockett Special Utility District's water CCN number 10099.
3. The Commission amends water CCN number 10099 in accordance with this Order.
4. The Commission's official service area boundary map for Rockett Special Utility District's water CCN number 10099 will reflect this change as shown on the attached map.

⁷ Tex. Gov't Code §§ 2001.001- 903

5. The Commission grants the certificate attached to this Order.
6. Rockett Special Utility District must comply with the recording requirements of TWC § 13.257(r) and (s) for the area in Ellis and Dallas Counties affected by the petition and submit to the Commission evidence of the recording no later than 45 days after receipt of this Order.
7. A copy of this Order will be provided to Rockett Special Utility District.
8. The Commission denies all other motions and any other requests for general or specific relief that have not been expressly granted.

Signed at Austin, Texas the _____ day of _____, 2020.

PUBLIC UTILITY COMMISSION OF TEXAS

DEANN T. WALKER, CHAIRMAN

ARTHUR C. D'ANDREA, COMMISSIONER

SHELLY BOTKIN, COMMISSIONER