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PETITION OF ALAMO MISSION LLC	§	PUBLIC UTILITY COMMISSION
TO AMEND ROCKETT SPECIAL	§	FILING CLERK
UTILITY DISTRICT'S WATER	§	OF TEXAS
CERTIFICATE OF CONVENIENCE	§	
AND NECESSITY IN ELLIS COUNTY	§	
BY EXPEDITED RELEASE	§	

### ROCKETT SPECIAL UTILITY DISTRICT'S RESPONSE TO ORDER NO. 12

COMES NOW Rockett Special Utility District (Rockett) and hereby responds to Commission's Order No. 12 requesting Rockett to file a brief as to the effect of the Order entered on November 3, 2020 in *Rockett Special Utility District v. Botkin, et al.*, Case No. 19-cv-1007-RP (W.D. Tex.) (the "Rockett Federal Case").

Rockett's initial response to Alamo's Petition included, among other things, that decertification could not be granted because the Property is receiving service from Rockett based on the provisions of 16 Texas Administrative Code (TAC) § 24.245(l) and Texas Water Code (TWC) § 13.254(a-5), now 13.2541,<sup>1</sup> requiring that "the tract of land is not receiving service of the type the current CCN holder is authorized to provide under the applicable CCN . . . ." and because Alamo was not the true owner of the Property at the time the Petition was filed.<sup>2</sup>

Rockett submitted a Supplemental Filing raising the additional issue of federal preemption under 7 U.S.C. § 1926(b).<sup>3</sup> Rockett filed a Motion to Dismiss based upon federal preemption.<sup>4</sup>

### I. No Effect Of Order On Preemption Claims

#### A. The Order does not negate Rockett's indebtedness on a loan which qualifies Rockett for 7 U.S.C. § 1926(b) protections.

Rockett recognizes that the issues involved in the Rockett Federal Case concerning whether Rockett has a loan qualifying it for the protections provided by 7 U.S.C. § 1926(b) ("§ 1926(b)")

<sup>1</sup> TWC § 13.254(a-5), amended by Acts 2019, 86th Leg., ch. 688 (S.B. 2272), § 4.

<sup>2</sup> See Rockett's Response to the Petition, at 2-4 (Sept. 24, 2019) (providing details of Rockett's water service to the Property as defined by the related statutes); see also *id.*, at 7 (pointing out that the Sale Agreement alone submitted with the Petition did not reflect Petitioner's ownership of the Property).

<sup>3</sup> Rockett's Supplemental Filing, Item 12 (Sept. 30, 2019).

<sup>4</sup> Rockett's Motion to Dismiss, Item 30 (Nov. 12, 2019).

is related to Rockett's Supplemental Filing and Rockett's Motion to Dismiss. Rockett contends it is indebted on a loan which qualifies it for § 1926(b) protection.

The Court in *Wells Fargo* found that a "Conditional Commitment for Guarantee" (also, "Conditional Commitment") issued by the United States Department of Agriculture (USDA) is a binding contract enforceable against the USDA, and that the USDA is not free to withdraw or refuse its guarantee—even while determining whether the conditions were in fact satisfied.<sup>5</sup> The USDA's promise to issue the Loan Note Guarantee to Rockett provided in the Conditional Commitment, while contingent on numerous conditions, "does not make the [USDA's] promise any less binding."<sup>6</sup> The USDA has issued a Conditional Commitment in connection with the Rockett loan made by CoBank.<sup>7</sup>

Further, it has been found that the USDA's *approval* of a loan *application*—even when the loan had *not yet* been funded—was a final agency action.<sup>8</sup> Here, the USDA issued its Conditional Commitment for Rockett's loan on July 25, 2019, the loan has closed, and Rockett received the loan proceeds (the loan was funded).<sup>9</sup> As confirmed by the court in *Wells Fargo*, the USDA has taken final agency action and bound itself to issue the Loan Note Guarantee to Rockett by executing the Conditional Commitment. Therefore, in accordance with the Fifth Circuit and the facts in this case, Rockett is indebted on a loan approved and guaranteed by the USDA, providing Rockett protection under § 1926(b).

#### **B. The issues affecting Rockett in the *Crystal Clear* case remain pending**

Rockett relies on *Crystal Clear* to establish that Rockett is indebted to the government and has federal protection under § 1926(b).<sup>10</sup> In addition to the pending Rockett Federal Case,

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<sup>5</sup> *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1018 (Fed.Cir. 1996) ("The Court of Federal Claims correctly ruled that the Conditional Commitment constituted a unilateral contract by which the government agreed to guarantee the loan upon Wells Fargo's performance of the conditions specified, and that Wells Fargo accepted the contract through beginning performance by making the loan").

<sup>6</sup> *Id.*, at 1019.

<sup>7</sup> Rockett's Supplemental Filing, at Ex. C (Sept. 30, 2019).

<sup>8</sup> *City of Schertz v. United States Dept. of Agric. by & through Perdue*, No. 18-CV-1112-RP, 2019 WL 5579541, at \*3 (W.D. Tex., Oct. 29, 2019) (emphasis added).

<sup>9</sup> See Rockett's Supplemental Filing, at 1-3, Exs. A, B and C (Sept. 30, 2019) (providing true and correct copies of Rockett's receipt of the funded loan and the Conditional Commitment related thereto executed by the USDA).

<sup>10</sup> See *id.*, at 2-4 (providing that the documents verifying Rockett's outstanding loan establishes Rockett's indebtedness and protections under § 1926(b), pursuant to the findings in *Crystal Clear Special Util. Dist. v. Marquez, et.al.*, 316 F.Supp.3d 965 (5th Cir. 2018)).

Commission Staff recommended on October 15, 2020 to continue abatement based on *Crystal Clear*.<sup>11</sup>

The issues in *Crystal Clear v. Marquez* and subsequently *Crystal Clear v. Walker, et. al.*, remain pending and unresolved,<sup>12</sup> where the Commission has filed its notice of appeal accordingly.<sup>13</sup> As previously stated, Rockett relies on *Crystal Clear*, among other arguments and authorities, as a basis for denial of the Petition and dismissal of the Petition; therefore, as the related issues of *Crystal Clear* remain pending, this proceeding should be abated at minimum until such issues are resolved.

### **C. Pending Appeal of the Rockett Federal Case to the Fifth Circuit**

The November 3, 2020 Order does not finally resolve the Rockett Federal Case, as Rockett has filed a Notice of Appeal,<sup>14</sup> appealing the decision to the Fifth Circuit. Further, the Fifth Circuit has docketed Rockett's appeal and assigned a case number, as provided in the notice dated November 20, 2020 attached hereto as Attachment 1.

Rockett in no way concedes that it does not have a loan qualifying it for § 1926(b) protection, and Rockett has reserved its right to have that issue decided in federal court by its England Reservation submitted in this docket.<sup>15</sup> Because the appeal of the Rockett Federal Case is pending, this case should at least be abated and consistent with the previous abatements issued by Order Nos. 7, 8, and 9 in this proceeding.

## **II. No Effect Of The Order On Rockett's Service To The Property Under State Law; Denial Of The Petition Is Appropriate**

The ruling in the Rockett Federal Case has no effect on the portion of Rockett's Response where Rockett contends that the Property is receiving "service" as defined by 16 TAC § 24.3(33) and TWC § 13.002(21) and provides details of Rockett's service to the Property including but not

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<sup>11</sup> Commission Staff's Status Report, at 3 (Oct. 15, 2020).

<sup>12</sup> Rockett's Response and Objection to Petitioner's Supplement, at 4-6 (Nov. 10, 2020).

<sup>13</sup> See *id.*, at 5 and Attachment A (providing a copy of the Notice of Appeal filed by PUCT Defendants in *Crystal Clear v. Walker, et. al.*, U.S. District Court, W.D. Tex., Austin Division, Civil Action No. 1:17-cv-00254).

<sup>14</sup> *Id.*, at Attachment C.

<sup>15</sup> Rockett's Supplemental Filing, at 5 (Sept. 30, 2019).

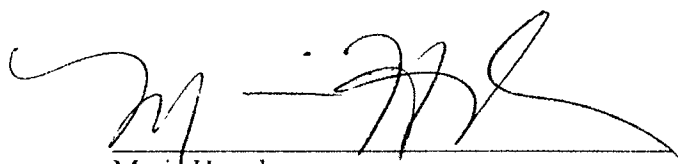
limited to acts performed by Rockett and facilities and lines committed or used by Rockett in the performance of its duties as a retail public utility.<sup>16</sup>

The Order in Rockett's Federal Case does not affect Rockett's contention in its initial Response to the Petition, as the Petition is premised on 16 TAC § 24.245(h) and TWC § 13.2541 and Rockett provides water service to the Property under state law. Therefore, the Property cannot be decertified or released from Rockett's CCN, and not all conditions have been met to authorize the streamlined expedited release thereof.

### CONCLUSION

In the interest of judicial economy and resources, Rockett requests that the Petition be denied and this case be dismissed, or, in the alternative, abated until resolution by the Fifth Circuit of the pending appeals regarding the Rockett Federal Case and by the Commission regarding *Crystal Clear*.

Respectfully submitted,



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State Bar No. 00791944  
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ATTORNEYS FOR ROCKETT SPECIAL  
UTILITY DISTRICT

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<sup>16</sup> Rockett's Response to the Petition, at 2-4 (Sept. 24, 2019).

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on the following parties of record on December 4, 2020, via e-mail in accordance with the Commission's Order.<sup>17</sup>

via e-mail: creighton.mcmurray@puc.texas.gov

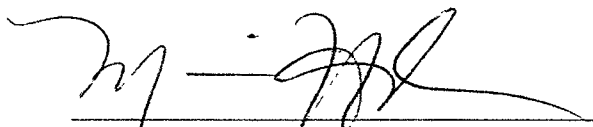
Creighton R. McMurray  
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Austin, Texas 78701

*Attorney for Petitioner*

*Attorney for the Commission*



Maria Huynh

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<sup>17</sup> *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Second Order Suspending Rules (Jul. 16, 2020).

## ATTACHMENT A

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

November 20, 2020

Mr. Steven M. Harris  
Doyle Harris Davis & Haughey  
2419 E. Skelly Drive  
Tulsa, OK 74105

No. 20-50938 Rockett Special Utility Dist v. Shelly  
Botkin, et al  
USDC No. 1:19-CV-1007

Dear Mr. Harris,

We have docketed the appeal as shown above, and ask you to use the case number for future inquiries. You can obtain a copy of our briefing checklist on the Fifth Circuit's website "<http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/brchecklist>".

Briefing Notice: The record is complete for purposes of the appeal, see **FED. R. APP. P. 12**. Appellant's brief and record excerpts are due within 40 days of the date shown above, see **FED. R. APP. P. & 5<sup>TH</sup> CIR. R. 28, 30, and 31**. See also **5<sup>TH</sup> CIR. R. 30.1.2 and 5<sup>TH</sup> CIR. R. 31.1** to determine if you have to file electronic copies of the brief and record excerpts. [If required, electronic copies **MUST** be in Portable Document Format (PDF).]

Record Excerpts: **5<sup>TH</sup> CIR. R. 30.1.7(c)** provides that the electronic PDF version of the record excerpts should contain pages representing the "tabs" identified in the index of the document. However, we remind attorneys that the actual paper copies of record excerpts filed with the court must contain actual physical tabs that extend beyond the edge of the document, to facilitate easy identification and review of tabbed documents.

Brief Covers: THE CASE CAPTION(S) ON BRIEF COVERS MUST BE EXACTLY THE SAME AS THE CASE CAPTION(S) ON THE ENCLOSED TITLE CAPTION SHEET(S). YOU WILL HAVE TO CORRECT ANY MODIFICATIONS YOU MAKE TO THE CAPTION(S) BEFORE WE SUBMIT YOUR BRIEF TO THE COURT.

Policy on Extensions: The court grants extensions sparingly and under the criteria of **5<sup>TH</sup> CIR. R. 31.4**. If you request an extension, you must contact opposing counsel and tell us if the extension is opposed or not. **5<sup>TH</sup> CIR. R. 31.4** and the Internal Operating



Procedures following rules 27 and 31 state that except in the most extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

Reply Brief: We do not send cases to the court until all briefs are filed, except in criminal appeals. Reply briefs must be filed within the 21 day period of **FED. R. APP. P. 31(a)(1)**. See **5<sup>TH</sup> CIR. R. 31.1** to determine if you have to file electronic copies of the brief, and the format.

Dismissal of Appeals: The clerk may dismiss appeals without notice if you do not file a brief on time, or otherwise fail to comply with the rules.

Appearance Form: If you have not electronically filed a "Form for Appearance of Counsel," you must do so within 14 days of this date. You must name each party you represent, See **FED. R. APP. P.** and **5<sup>TH</sup> CIR. R. 12**. The form is available from the Fifth Circuit's website, [www.ca5.uscourts.gov](http://www.ca5.uscourts.gov).

Brief Template: The clerk's office offers brief templates and the ability to check the brief for potential deficiencies prior to docketing to assist in the preparation of the brief. To access these options, log in to CM/ECF and from the Utilities menu, select 'Brief Template' (Counsel Only) or 'PDF Check Document'.

ATTENTION ATTORNEYS: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website at <http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm>. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

VIDEO/AUDIO EXHIBITS: If this record contains exhibits (e.g. Dash cam or Body cam videos) that must be submitted to the court's attention, you must provide them to the District Court in MP4 format for submission to our court.

### **Guidance Regarding Citations in Pleadings.**

**5<sup>TH</sup> CIR. R. 28.2.2** grants the Clerk the authority to create a standard format for citation to the electronic record on appeal. You must use the proper citation format when citing to the electronic record on appeal.

- A. In single record cases, use the short citation form, "ROA" followed by a period, followed by the page number. For example, "ROA.123."
- B. For multiple record cases, cite "ROA" followed by a period, followed by the Fifth Circuit appellate case number of the record referenced, followed by a period, followed by the page of the record. For example, "ROA.13-12345.123."
- C. Please note each individual citation must end using a termination of a period (.) or semicolon (;).

**Reminder as to Sealing Documents on Appeal:** Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Monica R. Washington, Deputy Clerk  
504-310-7705

Enclosure(s)

cc w/encl:

Mr. John Richard Hulme  
Mr. James F. Parker III  
Mr. Joshua Abraham Romero

Case No. 20-50938

Rockett Special Utility District,

Plaintiff - Appellant

v.

Shelly Botkin, in her official capacity as Commissioner of the Public Utility Commission of Texas; DeAnn T. Walker, in her official capacity as Commissioner of the Public Utility Commission of Texas; Arthur C. D'Andrea, in his official capacity as Commissioner of the Public Utility Commission of Texas; John Paul Urban, in his official capacity as Executive Director of the Public Utility Commission of Texas; Alamo Mission, L.L.C.; City of Red Oak Industrial Development Corporation,

Defendants - Appellees