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DOCKET NO. 49863

2020 DEC -8 PM 12:38

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

§ PUBLIC UTILITY COMMISSION
§
§ FILING CLERK
§ OF TEXAS
§

**ALAMO MISSION'S
RESPONSE TO ORDER NUMBER 12**

Alamo Mission LLC ("Petitioner") respectfully files this Response to Order Number 12. Order Number 12 directed Petitioner to file this Response by December 11, 2020; it is timely filed.

I. EXECUTIVE SUMMARY

Order Number 12 directed the parties and Commission Staff to file briefing explaining the effect of the dismissal of Rockett Special Utility District's ("Rockett") federal lawsuit on Rockett's Motion to Dismiss the Petition for Streamlined Expedited Release that is the subject of this Docket ("the Petition"). Pursuant to Order Number 12, Rockett filed its response on December 4, 2020.¹ Continuing its strategy of delay, Rockett (1) asserts the same preemption arguments that the federal district court flatly rejected in dismissing Rockett's lawsuit; (2) urges still additional delay based on an appeal that is no longer pending and its own appeal of its dismissed federal lawsuit, despite not taking any action to supersede the final judgment; and (3) reurges the same arguments concerning its alleged "service" to the property that Commission Staff rejected over a year ago, or that have otherwise been resolved by Petitioner's evidence.²

The dismissal of Rockett's federal lawsuit conclusively resolves all issues raised by Rockett's Motion to Dismiss and cited by Commission Staff to abate the Petition. No further delay is warranted. Indeed, additional delay will serve only to reward Rockett's tactics and could

¹ Rockett's Response to Order No. 12 (December 4, 2020).

² See *Id.*

potentially result in additional complications and impediments to decertification in the event that the United States Department of Agriculture (“USDA”) proceeds to act on issuance of a loan note guarantee.³

II. ARGUMENT

A. The Dismissal of Rockett’s Federal Lawsuit Conclusively Resolves the Sole Argument Advanced in Its Motion to Dismiss the Petition.

Rockett’s Motion to Dismiss this Petition and its federal lawsuit seeking injunctive relief against the Commission made the identical substantive argument: federal preemption. Rockett asserted in its Motion to Dismiss, and in its federal lawsuit, that it had federally guaranteed debt, entitling its service area to protection from encroachment under 7 U.S.C. § 1926(b). Before the Commission, Rockett contended its alleged federally guaranteed debt required the Commission to dismiss the Petition. Similarly, in its federal lawsuit, Rockett argued its alleged federally guaranteed debt entitled it to injunctive relief against the Commission prohibiting it from acting on the Petition. Simply put, Rockett’s Motion to Dismiss and its federal lawsuit are two sides of the same coin—both dependent on the same preemption argument.

The federal district court rejected Rockett’s preemption argument as “absurd[],” “wholly insubstantial,” “frivolous,” and “completely devoid of merit.”⁴ As Federal Magistrate Judge Mark Lane explained, a “federally guaranteed loan,” as required to invoke the protection of § 1926(b), is “a loan made and serviced by a lender for which the Agency and lender have entered into a Lender’s Agreement and *for which the Agency has issued a Loan Note Guarantee.*”⁵ Rockett’s own documentation demonstrates that the USDA has issued only a “*Conditional* Commitment for

³ See Alamo Mission LLC’s Expedited Motion for Correction and Clarification of Order Number 12 (November 18, 2020) at 2, 7-8.

⁴ *Rockett Spec. Util. Dist. v. Shelly Botkin, et al.*, No. 1:19-cv-01007, in the United States District Court for the Western District of Texas, Austin Division, Report and Recommendation at 5, 10, 11, adopted by Final Judgment.

⁵ *Id.* at 9 (citing 7 C.F.R. § 1779.2) (emphasis added).

Guarantee.”⁶ Judge Lane concluded that, because the USDA has not yet issued its loan note guarantee, Rockett does not have federally guaranteed debt and may not invoke the protection of § 1926(b).⁷ Agreeing with Judge Lane, and adopting his Report and Recommendation in its entirety, Federal District Judge Robert Pitman dismissed Rockett’s lawsuit.⁸ That decision and its rationale are not up for debate in this forum.⁹

Notably, Rockett does not advance a single argument that its Motion to Dismiss the Petition independently survives the federal district court’s dismissal of its lawsuit. Instead, Rockett reurges the very same arguments that the federal court *rejected*—that it is entitled to § 1926(b) protection because the conditional commitment is a binding contract against the USDA and because it constitutes a final agency action.¹⁰ As Judge Lane concluded, however, § 1926(b) and its implementing regulations are clear that only a *loan note guarantee* and not a *conditional commitment* for a guarantee falls within the protection of § 1926(b). Neither argument advanced by Rockett overcomes the binding statutory and regulatory language.

First, the *conditional commitment* for a guarantee is a separate, prior step in the process for a utility to receive a “loan note guarantee.” As explained by Judge Lane, “[t]he regulations clearly

⁶ *Id* (emphasis added).

⁷ *Id* at 5, 10, 11

⁸ *Id*, Final Judgment.

⁹ Rockett cited the Proposal for Decision (“PFD”) in the separate petition for expedited release in *The Petition of T.J. Bradshaw Construction Ltd for Expedited Release* Docket No. 48801, as authority for its Motion to Dismiss. The Bradshaw PFD is no help to Rockett. The documentation submitted by the water utility in that docket unequivocally demonstrated that the utility *had a federal loan* issued by the United States Department of Agriculture Rural Development Division. That distinction is controlling. A utility with a federal loan, or other qualifying debt, might, depending on other factors, be protected from encroachment of its service area § 1926(b). But a utility without such a loan, like Rockett, is—as a matter of law—not entitled to the protection of § 1926(b). Because—as Judge Lane’s Recommendation makes plain—Rockett has no federally guaranteed debt, 7 U.S.C. § 1926(b) has no preemptive effective here, and the Bradshaw PFD is entirely inapplicable.

Moreover, the Bradshaw PFD relied heavily on the district court’s decision in *Crystal Clear Special Utility District v Marquez*, 316 F. Supp. 3d 965 (W.D. 2018), which discussed the preemptive effect of 7 U.S.C. § 1926(b). The Fifth Circuit vacated that decision on appeal and remanded for reconsideration in light of the Court’s decision in *Green Valley Special Utility District v City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc). The vacated *Crystal Clear* decision has no force and is not binding on the Commission any longer.

¹⁰ Rockett’s Response to Order No. 12 at 2

contemplate [first, the issuance] of a Conditional Commitment for Guarantee and then, if all conditions are satisfied, a Loan Note Guarantee.”¹¹ To conclude that Rockett may invoke the protection of § 1926(b) while its loan note guarantee is still pending “would render the conditions in the Conditional Commitment for Guarantee a nullity—Rockett would be entitled to the guarantee and the ensuing section 1926(b) protections without actually satisfying the USDA’s required conditions.”¹²

Second, the fact that the USDA’s approval of its loan application may be a “final agency action” means only that the decision would be subject to judicial review.¹³ Rockett still must comply with the conditions of the commitment before the loan note guarantee will issue. As expressly stated in the regulations: “The Loan Note Guarantee will not be issued until [t]he lender certifies that . . . [n]o changes have been made in the lender’s loan conditions and requirements since the issuance of the Conditional Commitment for Guarantee except those approved in the interim by the Agency in writing.”¹⁴

Rockett would have the Commission *disregard* the federal court’s judgment by issuing a contrary conclusion that Rockett actually *does have* federally guaranteed debt within the meaning of § 1926(b) despite the fact that it admittedly has only a conditional commitment for guarantee, and not a loan note guarantee. But, as Rockett itself has repeatedly argued, the Commission has no authority to disregard a federal district court’s judgment regarding the very question before it.

For the reasons explained by Judge Lane, and adopted by Judge Pitman in his final judgment of dismissal, § 1926(b) does not shield Rockett from the Commission’s state-mandated action on the Petition. Rockett’s Motion to Dismiss should be denied.

¹¹ *Rockett Spec Util Dist v Shelly Botkin*, Report and Recommendation at 9 (citing 7 C.F.R. § 1779.2).

¹² *Id.* at 10 (rejecting Rockett’s argument that under *Wells Fargo Bank, N.A. v United States*, 88 F.3d 1012, 1020 (Fed. Cir. 1996), that its conditional commitment for guarantee constituted a loan note guarantee).

¹³ *Id.* at 10-11.

¹⁴ 7 C.F.R. § 1779.63.

B. The Appeals Cited by Rockett Do Not Support Additional Delay.

Still intent on forestalling action on the Petition, Rockett urges the Commission to continue its abatement of this Docket on the basis of two appeals. Specifically, Rockett contends that the “pending” appeal of the district court’s decision in *Crystal Clear Special Utility District v. Marquez*, 316 F. Supp. 3d 965 (W.D. Tex. 2018), and Rockett’s own appeal of the district court’s dismissal of its federal lawsuit, require continued abatement. Rockett is wrong on both counts.

First, the appeal in *Crystal Clear* is no longer pending. On November 6, 2020, the Fifth Circuit vacated the district court’s judgment in *Crystal Clear* (on which Rockett had relied to support its now-rejected federal preemption claim) and remanded the case to the district court.¹⁵ Thus the very authority that Rockett has persistently relied upon to support its preemption argument is no longer good law, and there is no pending appeal to even arguably support continued abatement.

Second, Rockett’s own appeal affords no basis to continue the abatement of this Docket. Federal Rule of Civil Procedure 62 permits an appealing party to stay the effect of a district court’s order pending appeal.¹⁶ Rockett has not availed itself of those procedures. Therefore, the district court’s order is fully effective and the Commission has no basis to disregard it.

C. Rockett’s State-Law Based Arguments in Opposition to Decertification Regarding “Service” Have Either Already Been Rejected by Commission Staff or Have Otherwise Been Disproved by Petitioner’s Evidence.

Finally, Rockett continues to argue that the statutory requirements to decertification have not been met, contending that the property is receiving “service” as a result of “acts performed by Rockett and facilities and lines committed or used by Rockett in the performance of its duties as a

¹⁵ *Crystal Clear Spec Util Dist v Marquez, et al* , No 19-50556 in the United State Court of Appeals for the Fifth Circuit, per curiam order and mandate vacating the district court’s judgment and remanding case to the district court, attached as Exhibit 1.

¹⁶ FED. R. CIV. P. 62.

retail public utility.”¹⁷ Putting aside the fact that Rockett’s “service” arguments are outside the scope of Order Number 12 (which requested briefing only on the effect of the dismissal of Rockett’s federal lawsuit on Rockett’s Motion to Dismiss), Commission Staff determined over a year ago that the statutory elements requiring decertification have been satisfied, and that determination is fully supported by evidence submitted by Petitioner.¹⁸ As Commission Staff concluded, the Property “is located in a qualifying county (Ellis County), is not receiving water service, and the aggregated, contiguous tracts of land make up a single property that is at least 25 acres.”¹⁹ There is no statutory basis to retread this ground.

III. CONCLUSION

It is now conclusively established by the federal district court that Rockett’s sole basis to bring these “expedited” proceedings to a halt, and to continue its attempts to forestall the state-mandated decertification of Petitioner’s property from Rockett’s certificated area, is “absurd[,],” “wholly insubstantial,” “frivolous,” and “completely devoid of merit.”²⁰ Contrary to Rockett’s erroneous claims, it has no federally guaranteed debt and § 1926(b) preemption does not apply. There is no reason now—just like there was no reason over a year ago—for the Commission to further delay its action on the Petition.

¹⁷ Rockett’s Response to Order No. 12 at 3-4.

¹⁸ Rockett also notes that it has questioned Petitioner’s ownership of the subject property. *See id.* at 1 & n.2. Petitioner has addressed that concern. Alamo Mission LLC’s Reply to Rockett’s Responses to Petition for Expedited Release and Motion to Strike (October 4, 2019) at 11 & Exhibit 2 (affidavit of David Thomas, stating the property that is the subject of the Petition “is owned by Alamo Mission LLC in fee simple title, and there are no contingencies or conditions associated with the grant and conveyance of ownership”)

¹⁹ Commission Staff’s Recommendation on Final Disposition (September 26, 2019); *see also* Petition (September 16, 2019); Alamo Mission LLC’s Reply to Rockett SUD’s Responses to Petition for Expedited Release and Motion to Strike (October 4, 2019); Alamo Mission LLC’s Response to Rockett SUD’s Surreply and to Staff’s Response to Order No. 4 (October 29, 2019).


²⁰ *Rockett Spec Util Dist*, No. 1:19-cv-01007, Report and Recommendation at 5, 10, 11, adopted by Final Judgment.

Delay may cause additional complications. As Petitioner has explained in multiple prior filings,²¹ the federal loan note guarantee that Rockett claimed to have over a year ago may soon issue. The Commission should not reward Rockett's gamesmanship with any additional delay.

Petitioner agrees with Commission Staff's statements and conclusions that all the requirements for streamlined expedited release are met and the Petition should be approved. The Commission should deny Rockett's Motion to Dismiss and grant the Petition.

Respectfully submitted,

JACKSON WALKER L.L.P.



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ATTORNEYS FOR ALAMO MISSION LLC

²¹ *E.g.*, Alamo Mission LLC's Expedited Motion for Correction and Clarification of Order Number 12 (November 18, 2020) at 2, 7-8.

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 via electronic mail on December 8, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.



Leonard H. Dougal

EXHIBIT 1

United States Court of Appeals
for the Fifth Circuit

No. 19-50556

CRYSTAL CLEAR SPECIAL UTILITY DISTRICT,

Plaintiff—Appellee Cross-Appellant,

versus

BRANDY MARTY MARQUEZ, *in her official capacity as Commissioner of the Public Utility Commission of Texas*; LAS COLINAS SAN MARCOS PHASE I, L.L.C.; 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*; SHELLY BOTKIN,

Defendants—Appellants Cross-Appellees.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-254

Before WILLETT, HO, and DUNCAN, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that Appellants Cross-Appellees' opposed motion to vacate the district court judgment is GRANTED.

IT IS FURTHER ORDERED that Appellants Cross-Appellees' opposed motion to remand the case to the district court is GRANTED. The

case is remanded for reconsideration in light of *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc). We express no opinion how the issues in this case should be resolved on remand.

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 06, 2020

Ms. Jeannette Clack
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

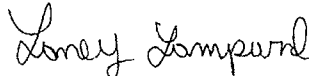
No. 19-50556 Crystal Clear Spec Util Dist v. DeAnn
Walker, et al
USDC No. 1:17-CV-254

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Laney L. Lampard, Deputy Clerk
504-310-7652