



Control Number: 49871



Item Number: 53

Addendum StartPage: 0



DOCKET NO. 49871

PETITION OF THE CITY OF RED OAK	§	PUBLIC UTILITY COMMISSION
INDUSTRIAL DEVELOPMENT	§	
CORPORATION TO AMEND	§	OF TEXAS
ROCKETT SPECIAL UTILITY	§	
DISTRICT'S WATER CERTIFICATE	§	
OF CONVENIENCE AND NECESSITY	§	
IN DALLAS AND ELLIS COUNTIES BY	§	
EXPEDITED RELEASE	§	

ROCKETT SPECIAL UTILITY DISTRICT'S RESPONSE TO ORDER NO. 11

COMES NOW Rockett Special Utility District ("Rockett") and hereby responds to Commission's Order No. 11 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"). Thus, this Response is timely filed.

Rockett's first Request for Dismissal was filed on October 2, 2019 with its initial Response to the Petition included, among other things, that decertification must be denied and the Petition must be dismissed premised on preemption by 7 U.S.C. § 1926(b) and the provisions of 16 Texas Administrative Code (TAC) § 24.245(h) and Water Code (TWC) § 13.254(a-5), now § 13.2541,¹ 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 the Property is receiving water service from Rockett.² Rockett renewed its request for dismissal on February 11, 2020, and added the argument that the case must be dismissed because City of Red Oak Industrial Development Corporation ("CROIDC" or "Petitioner") is not the owner of the Property; rather, the Property is owned by Red Oak Industrial Development Corporation ("ROIDC"), a separate legal entity from Petitioner.³ Rockett's Motion to Dismiss was renewed again in Rockett's Response to Petitioner's

¹ The Petition was filed pursuant to 16 TAC § 24.245(l), now § 24.245(h), as the current § 24.245 was adopted to be effective July 2, 2020, 45 TexReg 4321.

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

² See Rockett Special Utility District's Response and Objection to the Petition, at 6-7 (Oct. 2, 2019) (providing details of Rockett's water service to the Property as defined by the cited statutes).

³ Rockett Special Utility District's Response to Second Motion to Lift Abatement and Rockett's Motion to Dismiss, at 1-2 (Feb. 11, 2020).

Amendment to Petition and Request to Restyle the Docket, and Renewed Motion to Dismiss the Petition, filed on September 28, 2020.

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)") is related to Rockett's first Motion to Dismiss. Rockett contends upon its previous arguments, 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.⁴ 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."⁵ The USDA has issued a Conditional Commitment in connection with the Rockett loan made by CoBank.⁶

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.⁷ 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).⁸ 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

⁴ *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").

⁵ *Id.*, at 1019.

⁶ Rockett's Response, at 3, Ex. C (Oct. 2, 2019).

⁷ *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).

⁸ See Rockett's Response, at 1-3, Exs. A, B and C (Oct. 2, 2019) (providing true and correct copies of Rockett's receipt of the funded loan and the Conditional Commitment related thereto executed by the USDA).

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).⁹ In addition to the pending Rockett Federal Case, Commission Staff recommended on October 15, 2020 to continue abatement based on *Crystal Clear*.¹⁰

The issues in *Crystal Clear v. Marquez* and subsequently *Crystal Clear v. Walker, et. al.*, remain pending and unresolved,¹¹ where the Commission has filed its notice of appeal accordingly.¹² 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 Order issued on November 3, 2020 in the Rockett Federal Case does not finally resolve the issues related thereto and in this proceeding, as Rockett has appealed such decision to the Fifth Circuit and filed its Notice of Appeal.¹³ 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

⁹ See *id.*, at 2-5 (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)).

¹⁰ Commission Staff's Status Report and Response, at 2-3 (Oct. 15, 2020).

¹¹ Rockett's Response and Objection to Petitioner's Supplement, at 6-8 (Nov. 10, 2020).

¹² See *id.*, at 6-7 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).

¹³ *Id.*, at Attachment C.

England Reservation submitted in this docket.¹⁴ Because the appeal of the Rockett Federal Case is pending, this case should at least be abated consistent with the previous abatements issued by Order Nos. 4, 5, 6, 7, and 8 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 November 3, 2020 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 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.¹⁵

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.

III. No Effect On Rockett's Motion To Dismiss Due To Lack Of Ownership

The November 3, 2020 ruling in the Rockett Federal Case has no effect on Rockett's Response where Rockett contends that the Petition should be dismissed, since Petitioner is not the landowner of any tracts of the Property.¹⁶ In accordance with 16 TAC § 24.245(h)(1) and TWC § 13.2541(b), only the owner of a tract of land may file a petition for streamlined expedited release from a CCN holder's certificated service area. The Petition was filed by City of Red Oak Industrial Development Corporation, who is not the landowner of any of the tracts of the Property and who is a separate entity from Red Oak Industrial Development Corporation (ROIDC).¹⁷ ROIDC now claims to be the owner of a portion of the Property (ROIDC has conveyed tracts 3 and 4A of the

¹⁴ Rockett's Response, at 8 (Oct. 2, 2019).

¹⁵ Rockett's Response, at 6-7 (Oct. 2, 2019).

¹⁶ Rockett's Response to Second Motion, at 1-2 (Feb. 11, 2020); Rockett's Response and Objection to Petitioner's Amendment of Petition and Request to Restyle Docket, at 1-6 (Sept. 28, 2020).

¹⁷ Rockett's Response, at 2 (Feb. 11, 2020); Rockett's Response and Objection, at 2 (Sept. 28, 2020).

Property identified in the Petition to Compass Datacenters DFW III, LLC)¹⁸ and attempts to substitute CROIDC as the Petitioner.¹⁹

However, at the time Petitioner CROIDC filed the Petition in this proceeding, ROIDC was an involuntarily dissolved corporation and cannot be deemed to have filed the Petition retroactively, as ROIDC was not in existence legally and had forfeited its right to conduct business at such time the Petition was filed.²⁰

More importantly, because CROIDC never owned the Property, the Petition cannot be amended to confer subject matter jurisdiction since CROIDC has no standing in this proceeding, as only the landowner may file a petition for streamlined expedited release (decertification).²¹

Petitioner CROIDC does not own any tracts of the Property identified in its Petition and ROIDC cannot be merely substituted as the petitioner in this proceeding due to misidentification.²² Accordingly, the Petition must be dismissed, as the Commission cannot release property from a CCN holder's certificated service area where the petition is not filed by the landowner. Further, the Order issued on November 3, 2020 in the Rockett Federal Case does not affect dismissal of the Petition based on lack of jurisdiction.

CONCLUSION

Rockett requests that the Petition be denied and this case be dismissed for the reasons herein, 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*.

¹⁸ Rockett's Response, at 2 (Feb. 11, 2020); see also, *id.* at Ex. B (providing a copy of the deed conveying tracts 3 and 4A of the Property to Compass on November 1, 2019, after the Petition was filed by CROIDC).

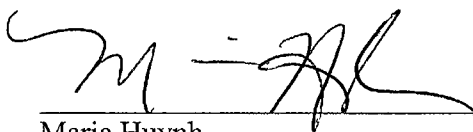
¹⁹ Petitioner's Amendment of Petition and Request to Restyle Docket, at 1 (Sept. 21, 2020).

²⁰ Rockett's Response to Petitioner's Amendment of Petition, at 2, 4-5 (Sept. 28, 2020).

²¹ *Id.*, at 3-4.

²² See Rockett's Response, at 3-4 (providing that misidentification of the proper petitioner in this proceeding cannot be cured by amendment of the petition, citing *Gonzalez v. Greyhound Lines, Inc.*, 181 S.W.3d 386 (Tex. App. 2005)).

Respectfully submitted,



Maria Huynh
State Bar No. 24086968
James W. Wilson
State Bar No. 00791944
JAMES W. WILSON & ASSOCIATES, PLLC
103 W. Main Street
Allen, Texas 75013
Tel: (972) 727-9904
Fax: (972) 755-0904
Email: mhuynh@jww-law.com
jwilson@jww-law.com

ATTORNEYS FOR ROCKETT SPECIAL
UTILITY DISTRICT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following parties of record on December 7, 2020, via e-mail in accordance with the Commission's Order.²³

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

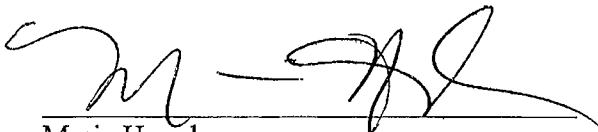
Creighton R. McMurray
Attorney-Legal Division
Public Utility Commission
1701 N. Congress
P.O. Box 13326
Austin, Texas 78711-3326

Attorney for the Commission

via e-mail: gcrump@lglawfirm.com

Georgia N. Crump
Lloyd Gosselink
Rochelle & Townsend, P.C.
816 Congress Avenue
Suite 1900
Austin, Texas 78701

Attorney for Petitioner


Maria Huynh

²³ *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. & 5TH CIR. R. 28, 30, and 31**. See also **5TH CIR. R. 30.1.2 and 5TH 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: **5TH 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 **5TH CIR. R. 31.4**. If you request an extension, you must contact opposing counsel and tell us if the extension is opposed or not. **5TH 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 **5TH 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 **5TH CIR. R. 12**. The form is available from the Fifth Circuit's website, 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.

5TH 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