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PUC DOCKET NO. 51044

PETITION OF FCS LANCASTER, LTD TO AMEND ROCKETT SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE & NECESSITY IN DALLAS COUNTY BY EXPEDITED RELEASE	§ § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

PETITIONER'S RESPONSE TO MOTION TO ABATE OF COMMISSION STAFF

Now comes FCS Lancaster, Ltd (FCS Lancaster or Petitioner) and, as set forth in Order No. 3, responds to the Motion to Abate (Motion) and supplemental briefing submitted by Public Utility Commission Staff (Staff). Order No. 3 required a response to Staff's Motion to abate by September 11, 2020, therefore this response is timely filed.

I. INTRODUCTION

Staff is correct in pointing out that United States Magistrate Judge Mark Lane concluded that "Rockett does not yet have a loan entitled to section 1926 protections."[1] But Staff's Response to Order No. 3 does not answer the question presented in the Order—i.e., whether abatement is still warranted in light of the decision of the United States Court of Appeals for the Fifth Circuit in *Green Valley Special Utility District v. City of Schertz*.[2]

Staff's response unnecessarily punts on the question presented. The answer is that in light of *Green Valley*, Staff's Motion should be denied irrespective of whether Rockett has Section 1926(b) protection. The Commission's consistent position, including in briefing to the *Green Valley* Court, is that Section 1926(b) does not apply to restrict its obligations under the Texas

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[1] Staff's Resp. to Ord. No. 3 at 2 (quoting Report & Recomm. of U.S. Magistrate Judge at 10–13, *Rockett Spec Util. Dist. v. Botkin*, Civil Action No. 1-19-cv-1007-RP (W.D. Tex. July 29, 2020), Electronic Case Filing (ECF) No. 43 (the "Report and Recomm." in the "Rockett" suit)).

[2] --- F.3d ---, 2020 WL 4557844 (5th Cir. Aug. 7, 2020).

Water Code and the Commission should not move from that position. The Fifth Circuit declined to consider the issue in *Green Valley*, and accordingly, the ALJ should follow the Commission's previously stated position. Moreover, the *Green Valley* Court did observe that Commission decisions cannot be retroactively reversed due to the State's sovereign immunity. Accordingly, should the Commission deny Staff's motion to abate and move forward with decertification, such a decision cannot be retroactively reversed.

The Commission's position in *Green Valley* as to the applicability of Section 1926(b) restrictions is well-reasoned and correct. The ALJ should follow the position that the Commission has argued to the Fifth Circuit (and presumably still holds), conclude that Section 1926(b) does not bar the Commission from releasing FCS Lancaster's property from Rockett's CCN, and reject Staff's argument that this proceeding be abated. Finally, as Judge Lane notes, Rockett does not even have protection under Section 1926(b), so there is no reason for the Commission to abate this proceeding.

II. THE FIFTH CIRCUIT'S *GREEN VALLEY* DECISION

Even if Rockett did have Section 1926(b) protection (which it does not), *Green Valley* has obviated the hardline prohibition against decertification for properties inside a federal borrower's CCN in favor of a new "physical-ability" test. *Green Valley*, 2020 WL 4557844, at *12. Therefore, to answer the Commission's question to Staff—under *Green Valley*, the Commission should move forward with the decertification proceeding. Should the Commission determine that Rockett is entitled to Section 1926(b) protection, *Green Valley* prescribes that the physical-ability test should be applied to determine whether decertification is proper. *Id.*

However, the Commission has taken the position before the Fifth Circuit that it is not constrained by Section 1926(b), and it should keep to this position here. The Commission's position is based on the text of Section 1926(b), which includes a "congressional mandate that

local governments not encroach upon the services provided by" federally indebted utilities; this prohibition does not limit the activities of the State.[3] The alternative reading, as argued by the Commission, would violate the Constitution's system of dual sovereignty by dragooning State officials into administering federal law.[4]

The federal court for the Western District of Texas rejected the Commission's similar arguments in *Crystal Clear Special Utility District v. Marquez*.[5] In that case, the court concluded that Section 1926(b) applies to prohibit decertification of a property under TWC § 13.254(a-5).[6] Accordingly, the court concluded that it could reverse the Commission's decision releasing the disputed property from Crystal Clear's CCN.[7] That case remains on appeal to the Fifth Circuit and has been abated pending resolution of *Green Valley*.

But while the Fifth Circuit has not decided the *Crystal Clear* appeal, the court's decision in *Green Valley* fatally undermines the holding of *Crystal Clear*. The *Green Valley* Court concluded that the district court's order invalidating the Commission's final orders decertifying the disputed property from Green Valley's CCN and recertifying it to the City was in error as the Commission enjoys sovereign immunity to a suit for such relief.[8] While a federal court can grant prospective relief, it cannot grant retrospective relief voiding the final order of a state agency.[9]

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[3] Br. for Appellants, *Green Valley Spec. Util Dist v. City of Schertz*, 2019 WL 2250158, at *30 (5th Cir. May 17, 2019) (quoting *City of Madison v Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1987)).

[4] *Id.* at *33–34 (relying on *Printz v. US.*, 521 U.S. 898, 928 (1997)).

[5] 316 F. Supp. 3d 965 (W.D. Tex. 2018).

[6] *Id.* at 974–75.

[7] *See id.* at 975.

[8] *See Green Valley*, 2020 WL 4557844, at *8.

[9] *See id.*

In other words, under *Green Valley*, once the Commission takes action to decertify a CCN, under the principles of sovereign immunity its decision may not be reversed.[10] There is no basis in either state or federal law, therefore, for the Commission to refuse to take action.

IV. ARGUMENT & AUTHORITIES

A. The Commission must proceed with decertification without regard to Section 1926(b).

Texas law sets forth a clear mandate for proceeding with FCS Lancaster's Petition. The Commission "shall grant the petition not later than the 60th day after the date the landowner files the petition."[11] The Commission "may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program."[12] Staff's request to abate the processing of FCS Lancaster's Petition is therefore contrary to Texas law.

B. Section 1926(b) does not impair the Commission's mandate to release the Property from Rockett's CCN.

Staff's request to abate is not only contrary to Texas law, it is contrary to the Commission's stated position that Section 1926(b) does not restrict its processing of decertification petitions. Section 1926(b) does not expressly limit the action the Commission may take in regulating retail water service. In its entirety, Section 1926(b) provides:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.[13]

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[10] *See id.*

[11] Tex. Water Code § 13.2541(c).

[12] *Id.* at § 13.2541(d).

[13] 7 U.S.C. § 1926(b).

As the Commission has observed, it is not a "municipal corporation or other public" body that can expand its boundaries.

Accordingly, the Commission argued in its Brief to the United States Court of Appeals for the Fifth Circuit that because Section 1926(b) only restricts local governments, it "cannot limit the State's activities."[14] The Commission concluded that nothing in Section 1926(b) limits the Commission's authority to "examin[e] whether the loan-recipient continues to deserve or has the ability to fulfill its legal duty to serve."[15]

The Fifth Circuit declined to address the Commission's argument.[16]

The *Green Valley* Court did conclude, however, that a federal court could not invalidate the Commission's previous orders decertifying a portion of Green Valley's CCN and recertifying that area to the City of Schertz.[17] Such "quintessentially retrospective" relief is "out of bounds" under the Eleventh Amendment.[18]

The Commission presumably still holds the position that it briefed to the Fifth Circuit—that Section 1926(b) does not apply to restrict its actions under the Texas Water Code. FCS Lancaster agrees with the Commission's position for the reasons the Commission thoughtfully laid out in its Fifth Circuit briefing. And as set forth in *Green Valley*, a federal court cannot retrospectively invalidate an order of the Commission.

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[14] Br. for Appellants at 30, *Green Valley Spec Util Dist v City of Schertz*, 2019 WL 2250158 (5th Cir. May 17, 2019).

[15] *Id*

[16] *See Green Valley Spec Util. Dist. v City of Schertz*, --- F.3d ---, 2020 WL 4557844, at *13, n.39 (5th Cir. Aug. 7, 2020).

[17] *See id.* at *8.

[18] *See id.*

Because Section 1926(b) does not apply to restrict the Commission's actions that it must take under the Texas Water Code, and because a federal court cannot retrospectively invalidate an order of the Commission even if Section 1926(b) did apply, the Commission should proceed with the streamlined release of FCS Lancaster's property as mandated by Section 13.2541 of the Texas Water Code. In the event it does so, its decision cannot be reviewed by a federal court under the Fifth Circuit's *Green Valley* precedent.

C. Rockett does not have a USDA-guaranteed loan and is not entitled to Section 1926(b) protection against decertification.

Rockett does not have a federally guaranteed loan. In the absence of a federal guarantee, Rockett's CCN does not have federal protection under Section 1926(b) and the Commission should deny the motion to abate and move forward with decertification.

1. Section 1926 loans and loan guarantees afford Section 1926(b) protection.

Section 1926 was enacted as part of a program to facilitate federal funding for rural utilities, which would otherwise be unable to fund infrastructure improvements.[19] The program is designed to serve entities that cannot qualify for comparable credit in the private sector, and are thus loans and loan guarantees of last resort.[20]

Because the borrower has limited financial resources, its utility system acts as collateral for the federal loan. Section 1926(b) secures that collateral. Thus, Section 1926(b) protects the borrower's service areas from being taken over by other retail water or wastewater service providers. That protection remains in effect for the term of the loan.[21]

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19 *Note, Water Associations & Federal Protection under 7 U.S.C § 1926(b) A Proposal to Repeal Monopoly Status*, 80 Tex. L. Rev. 155, 157-60 (2001) (outlining the history of 7 U.S.C. § 1926(b)).

20 *See* 7 C.F.R. §§ 1779.2(2), 1780.7(d).

21 7 U.S.C. § 1926(b).

Because the purpose of Section 1926(b) is to protect the government's collateral, it is a defensive mechanism. Although it was not intended to be an offensive tool to be used by retail service providers (e.g., Rockett) to create a federally protected long-term monopoly, it is often used as such.[22]

2. Rockett does not have a federally guaranteed loan.

All of the above presumes that the lender and the government have actually closed on a federal loan or a federally guaranteed loan.

That is not true in this case.

Rockett has closed on a loan funded by CoBank, ACB.[23] But that loan is not currently guaranteed by the federal government. Rather, the USDA has issued a Conditional Commitment, which has the effect of approving the issuance of a guarantee once certain conditions precedent occur.[24]

The conditions precedent to the federal guarantee are listed in 7 C.F.R. § 1779.63, and include the conditions that: "all planned property acquisition has been completed and all development has been substantially completed in accordance with plans, specifications, and applicable building codes."[25] Those conditions precedent have not occurred the USDA has in fact confirmed that the guarantee has not yet closed.[26] Moreover, it is possible that the conditions will *never* be satisfied—in which case Rockett would *never* obtain a federal guarantee.

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22 *See e.g*, *Rural Water Dist No 4 v City of Eudora*, 659 F.3d 969, 980 (10th Cir. 2011).

23 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. B at 18–19.

24 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. C at 21–22.

25 7 C.F.R. § 1779.63(a)(2).

26 Def.'s Br. in Support of its Mot. to Dism. at 6, *City of Red Oak v USDA*, Civil Action No. 19-2761 (W.D. Tex. Feb. 14, 2020), ECF No. 38 (Attached as Ex. E to FCS Lancaster's Resp. to Rockett SUD's Mot. to Dism.).

3. With no federal loan guarantee, Section 1926(b) does not protect the Property.

Without a guarantee, there is no Section 1926(b) protection. Rockett's Conditional Commitment is not a guarantee. Today, Rockett has nothing more than a loan from a private lender.[27] A loan and a guarantee can be related, but they are not one and the same.[28] A loan from CoBank (or any other private lender) may be obtained with or without a USDA guarantee.[29]

The USDA's Regulations contemplate the agency first issuing a Conditional Commitment and then, if all conditions are satisfied, a Loan Note Guarantee.[30] A loan on which a Conditional Commitment has been extended, however, is not a "guaranteed loan." The Regulations define a "guaranteed loan" as "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.*"[31]

A Section 1926 guarantee can be made only after the conditions precedent listed in 7 C.F.R. §§ 1779.53 and 1779.63 are met. This requirement is reiterated on the face of the Conditional Commitment.[32] Those conditions have not yet occurred; Rockett does not claim otherwise.

Without a Loan Note Guarantee, Rockett does not have a federally guaranteed loan even though Rockett has received loan funds from CoBank. If Rockett were to default on the loan, CoBank would have no recourse against the USDA. With no federal guarantee to collateralize there is no need for Section 1926(b) protection over Rockett's certificated area.

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27 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. B at 18–19.

28 *Rural Water Dist No. 4*, 659 F.3d at 977 (stating that the guarantee should be considered the trigger for federal indebtedness, not the loan.).

29 *Id.*

30 *See* 7 C.F.R. § 1779.2.

31 *Id.* (emphasis added).

32 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. C at 21; see also 7 C.F.R. § 1779.64 (listing procedure for issuance of Lender's Agreement and Guarantee).

Federal courts have consistently held that "a water district must have a continuing indebtedness to the USDA" to receive Section 1926(b) protection.[33] Accordingly, "when an issuer buys back its own bond and cancels the debt, it no longer qualifies as a debtor for Section 1926(b) protection."[34]

Scioto, *Sequoyah*, and *Bell Arthur* all deal with the end of Section 1926(b) protection on the back-end of a loan. This case deals with the beginning of Section 1926(b) on the front-end—before a Loan Note Guarantee is issued. But the different scenarios all point to the same fundamental rule: existing federal indebtedness is a requirement for Section 1926(b) protection.

And in this case, there is no federal indebtedness.

4. Rockett's assertion has been rejected by United States Magistrate Lane.

The facts underlying Staff's concern that Rockett's service area may be protected by federal law have been thoroughly litigated, and need only brief review. Rather than provide its own narrative, FCS Lancaster will allow Rockett to provide the narrative of its quest for Section 1926(b) protection. "On November 21, 2018, Rockett and CoBank submitted their Application for Loan and Guarantee" to the USDA.[35] On July 25, 2019, the USDA issued its Conditional Commitment for Guarantee," which states "The United States of America . . . will execute the Loan Note Guarantee, subject to the conditions and requirements specified in said regulations and below."[36] The conditions precedent to the issuance of the Loan Note Guarantee are set forth in 7 C.F.R. § 1779.63, which

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33 *Rural Water Dist. No. 4*, 659 F.3d at 977 (10th Cir. 2011) (cleaned up).

34 *Scioto Cnty Reg'l Water Dist. No. 1 v. Scioto Water Inc.*, 103 F.3d 38, 42 (6th Cir. 1996) (cleaned up); *accord Sequoyah Cty Rural Water Dist.* No. 7 v. Town of Muldrow, 191 F.3d 1192, 1199 (10th Cir. 1999); *Bell Arthur Water Corp v Greenville Utils. Comm'n*, 173 F.3d 517, 522 (4th Cir. 1999).

35 Pl.'s Obj. to U.S. Magistrate Judge's Rep. & Recomm. at 6, *Rockett Suit* (W.D. Tex. Aug. 10, 2020), ECF No. 45 (Ex. B to FCS Lancaster's Resp. to Rockett SUD's Resp. to Pet. and Mot. to Dism.).

36 *Id.* (emphasis extracted).

states that "The Loan Note Guarantee will not be issued until: (a) The lender certifies that [the conditions have occurred.]"[37]

The Conditions precedent have not occurred, and the USDA has not issued the Loan Note Guarantee.[38]

FCS Lancaster owns two properties in Dallas County that are together approximately 155 acres in size.[39] Rockett is not currently providing service to the property.[40] It has water pipes near the property.[41] However, in order to actually provide service to the property, Rockett will need to construct new waterlines that will not be completed before Autumn 2021—more than a year from now.[42]

As the Report and Recommendation issued by United States Magistrate Judge Lane concluded, the argument that Rockett currently has Section 1926(b) protection is "absurd[]," "wholly insubstantial," "frivolous," and "completely devoid of merit."[43] As Judge Lane rightly observed, under Rockett's theory, "an entity that earlier had its service areas limited during a loan term and later received a federal guarantee of the loan could absurdly argue that the earlier limitation violated section 1926(b) because it occurred 'during the term of such loan' even though there was no guarantee in place when the service area was limited."[44]

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37 *Id.* at 7 (quoting 7 C.F.R. § 1779.63(a)).

38 *See id.* at 5.

39 Rockett SUD's Resp. to Pet. and Mot. to Dism. at 1.

40 *Id.* at 8–9.

41 *Id.* at 9.

42 *Id.* at 9–10.

43 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. A at 5, 10, 13.

44 Rockett SUD's Resp. to Pet. and Mot. to Dism., Ex. A at 9–10.

To the extent Rockett claims that its service area is protected under federal law, it can seek redress from the federal courts. Of course, Rockett has not done so, nor will not do so, as its position is contrary to the decisions of the Fourth, Sixth, and Tenth Circuits and has specifically been rejected by Magistrate Judge Lane just weeks ago. With no federal issue properly before it, the Commission should apply state law, which requires that it proceed promptly with streamlined release of FCS Lancaster's property from Rockett's CCN.

V. CONCLUSION

The Commission was correct when it argued to the Fifth Circuit that Section 1926(b) does not apply to restrict its regulation of retail water utilities. But that position is academic to the current case because Rockett does not have Section 1926(b) protection. Accordingly, the Commission should deny Staff's Motion to Abate.

Respectfully submitted,

/s/ James F. Parker

Georgia N. Crump
Texas State Bar No. 05185500
gcrump@lglawfirm.com

James F. Parker
Texas State Bar No. 24027591
jparker@lglawfirm.com

Sarah T. Glaser
Texas State Bar No. 24079482
sglaser@lglawfirm.com

Gabrielle C. Smith
Texas State Bar No. 24093172
gsmith@lglawfirm.com

LLOYD GOSSELINK ROCHELLE & TOWNSEND, PC
816 Congress Ave., Suite 1900
Austin, Texas 78701
Telephone: 512-322-5800
Telecopier: 512-472-0532

ATTORNEYS FOR PETITIONER

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 September 11, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ James F. Parker

James F. Parker