



Control Number: 51044



Item Number: 19

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**PUC DOCKET NO. 51044**

<b>PETITION OF FCS LANCASTER, LTD.</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>TO AMEND ROCKETT SPECIAL UTILITY</b>	<b>§</b>	
<b>DISTRICT'S CERTIFICATE OF</b>	<b>§</b>	<b>OF TEXAS</b>
<b>CONVENIENCE AND NECESSITY IN</b>	<b>§</b>	
<b>DALLAS COUNTY BY EXPEDITED</b>	<b>§</b>	
<b>RELEASE</b>	<b>§</b>	

**ROCKETT SPECIAL UTILITY DISTRICT'S REPLY TO PETITIONER'S RESPONSE  
TO ROCKETT'S SUPPLEMENTAL MOTION TO DISMISS**

COMES NOW Rockett Special Utility District (Rockett) and files its Reply to Petitioner's Response to Rockett's Supplemental Motion for Dismiss and would show the following:

**I. BACKGROUND**

On July 13, 2020, Petitioner, FCS Lancaster, Ltd. (Petitioner) filed its Petition seeking to have certain lands (the "Property") released/decertified from Rockett's CCN.

Rockett intervened and on August 12, 2020, Rockett filed its combined Response to the Petition and Motion to Dismiss.

On August 28, 2020, Petitioner filed its Response to Rockett's Motion to Dismiss.

On September 4, 2020, Rockett filed its Reply.

On or about September 29, 2020, Petitioner submitted an Application for Non-Standard Water Utility Service ("Application For Service") to Rockett, paid the fee for processing the Application For Service, which includes pre-payment of a Hydraulic Analysis and Evaluation ("Hydraulic Analysis") by Rockett's consulting engineer ("Rockett's Engineer"). Rockett's Supplemental Motion to Dismiss, Item 16, at 1 and Attach 1 (Oct. 7, 2020). On October 2, 2020, Rockett, acting through Rockett's Development Coordinator Morgan Massey, advised Petitioner through Petitioner's engineers that Rockett was in receipt of Petitioner's Application For Service and the required payment and would forward the Application For Service to Rockett's Engineer,

and that not all of the information necessary to perform the Hydraulic Analysis had been provided. The e-mail from Ms. Massey to Petitioner's Engineer is attached hereto as Attachment 1.

On October 7, 2020, the parties exchanged various emails, attached hereto as Attachment 2, by which Petitioner's engineers provided *some* additional information, but qualified the information it provided by stating "...we are in the preliminary stage of design and have no final layout for the project."

Thus, on October 7, 2020, Rockett filed its Supplemental Motion to Dismiss advising the Commission that during the pendency of this case, Petitioner had requested water service from Rockett, evidencing that Rockett is providing service to the Property under the Texas Water Code and that the Petition is now moot.

Rockett's Engineer sent a request/letter dated October 12, 2020 to Rockett, indicating additional information from Petitioner was needed before the Hydraulic Analysis could be completed. *See* Petitioner's Response to Rockett's Supplement Motion To Dismiss, Item 18 at Ex. B (Oct. 15, 2020) (providing a copy of the October 12, 2020 letter from Rockett's Engineer).

On October 14, 2020, after review Rockett forwarded the October 12, 2020 letter of Rockett's Engineer requesting additional information from Petitioner. The email reflecting Rockett's transmission of the October 12, 2020 letter is attached hereto as Attachment 3.

On October 15, 2020, Petitioner filed its response to Rockett's Supplemental Motion to Dismiss, including a copy of the October 12, 2020 letter as Ex. B. Thus, in accordance with 16 Texas Administrative Code (TAC) § 22.78(a), this Reply is timely filed.

## **II. REPLY TO PETITIONER'S INTRODUCTION**

Contrary to Petitioner's statement, Rockett can provide water service to the property; the Hydraulic Analysis is to determine *how best to provide such service* and the *actual* water demand

genuinely needed by Petitioner (as opposed to *speculation* of water demand by Petitioner) and conducting a Hydraulic Analysis is standard policy of Rockett.

Petitioner argues that because it had to apply for service, the necessity to file the Application For Service in and of itself demonstrates the property is not considered receiving service. However, this argument purposefully ignores the definition of “service” as provided by the Texas Water Code (TWC) and 16 TAC § 24.254(h). *See* Argument A below. *See also* Rockett’s Response to the Petitioner and Motion to Dismiss, Item 8 at 2-8, 10-12 (Aug. 21, 2020) Petitioner’s position also ignores the issue of whether Rockett has “made service available” for purpose of establishing 7 U.S.C. § 1926(b) [§ 1926(b)] protection which precludes decertification. *See* Rockett’s Response to the Petition and Motion To Dismiss, at 2-10.

As demonstrated by the pleadings submitted herein, this case should be dismissed or abated until such time as Petitioner has submitted all information requested by Rockett’s Engineer, and Rockett’s Engineer has had the opportunity to finalize the hydraulic analysis.

### **III. RESPONSE TO PETITIONER’S BACKGROUND FACTS**

As primarily discussed in Rockett’s Response to the Petition and Motion To Dismiss, the Petitioner is premised on TWC § 13.2541 and TAC § 24.254(h), contain the same language that was contained in the previous statute, TWC § 13.254, which has been declared preempted by 7 U.S.C. § 1926(b) and void.<sup>1</sup> *See* Rockett’s Response, Item 8 at 6-8.

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<sup>1</sup> The Petition is premised on 16 TAC § 24.245(h) and TWC § 13.2541, and must be dismissed as Rockett has “provided or made service available and enjoys protection” under 7 U.S.C. § 1926(b). *See Green Valley Special Util. Dist. v. City of Schertz, Texas*, No. 18-51092, 2020 WL 4557844, at \*12 (5th Cir. Aug. 7, 2020).<sup>1</sup> *See also Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at \*1 (W.D. Tex. Mar. 27, 2019) (“To the extent that Tex. Water Code § 13.254(a-5) directs PUC Officials to grant a petition for decertification that meets the requirements of that provision *without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 U.S.C. § 1926(b)*, the statute is preempted and is void.” (Emphasis added.) In light of the similarity of language between TWC § 13.2541 and TWC § 13.254(a-5), and their direction to disregard federal law (§ 1926(b)) it is a near certainty that TWC § 13.2541 will be preempted by § 1926(b)

Regardless of the reason Petitioner claims it submitted a request of water service from Rockett, Petitioner filed such Application For Service and Rockett is in the process of responding to same, once Petitioner provides all necessary and verifiable (not speculative) information. Rockett's Engineer has not completed the Hydraulic Analysis because Petitioner provided insufficient information, and Rockett has requested further information concerning the intended use of the property and its water needs. *See* Petitioner's Response to Rockett's Supplemental Motion to Dismiss, Item 18 at Exhibit B (Oct. 15, 2020) (providing the letter from Rockett's Engineer requesting additional information from Petitioner not provided as required along with the Application For Service in order to conduct a Hydraulic Analysis).

Petitioner misleads the Commission in its statement that "Rockett's [E]ngineer reported Rockett could not commit to serving the project based on the information before it" as the letter from Rockett's Engineer contains no such statement, and Petitioner's interpretation of such letter is to purposefully misconstrue the contents therein. *See id.* (providing the outstanding documents and information to be submitted or verified by Petitioner to Rockett to conduct the Hydraulic Analysis). Further, Rockett has provided and demonstrated that the Property is receiving water service under applicable Texas state law (TWC and TAC) and Rockett has made service available to the Property under federal law (7 U.S.C. § 1926(b)), in Rockett's Response to the Petitioner and Motion to Dismiss, Item 8 (Aug. 21, 2020). *See also* Arguments below.

Petitioner continues to muddy the water, as Rockett has provided water "service" to the property under the TWC and TAC, and has met the "made service available" test for purposes of § 1926(b), the latter of which cannot be decided in this proceeding due to lack of jurisdiction over federal questions, as well as Rockett's England Reservation found in Rockett's Response to Petition and Motion To Dismiss, at 12.

#### IV. ARGUMENT AND AUTHORITIES

Rockett's Motion to Dismiss should be granted.

##### A. The Property Is Currently Receiving Service For Purposes Of The TWC and TAC

Petitioner argues that because it submitted the Application For Service, that fact alone proves the Property is not currently receiving service.

This argument by Petitioner ignores the definition of service provided by Texas state law.

6 TAC § 24.3(33) and TWC § 13.002(21) define "service" as follows:

Any act performed, anything furnished or supplied, and any facilities or lines committed or used by a retail public utility in the performance of its duties under TWC Chapter 13 to its patrons, employees, other retail public utilities and the public, as well as the interchange of facilities between two or more retail public utilities.

(Emphasis added.)

Rockett has performed many acts in the furtherance of its duties as a retail public utility to the Property, including but not limited to the installation, construction, maintenance, operation, and/or improvements of all Rockett waterlines and facilities that serve its certificated area, and specifically 1½" and 2" waterlines immediately north of the Property, 2" waterline near the southeast corner of the Property, 2½", 4" and 6" waterlines east of the Property, 6" and 1½" waterlines south of the Property, and other infrastructure that transmit water service to the Property and surrounding areas from Water Plant No. 4. Rockett's Response to the Petition and Motion to Dismiss, at Exhibit A, ¶ 9.

Rockett has committed or used its facilities and waterlines – including but not limited to improvements of Water Plant No. 4 to be completed by Fall of 2021 – in the performance of its duties as the retail public utility with the legal right to provide water service to the Property and by providing or making service available to the Property within a reasonable time, under *Green*

*Valley* and others. These additional facilities are being provided “within a reasonable time,” and constitute an act performed to provide “service.” *Id.*

Rockett has extensively shown herein that it is providing “service” to the Property, and has committed or used (and continues to commit and use) its facilities and waterlines to provide water service to the Property, under its duty as the retail public utility and CCN holder. Therefore, the Petition must be dismissed as the Property is receiving “service” as defined by the TWC and TAC.

In addition, Rockett has performed and is performing acts necessary to perform its duties under the TWC and TAC, by accepting and processing the Application for Service submitted by Petitioner, i.e., by processing Petitioner Application For Service, Rockett has met the “any act performed” requirement of the TWC and TAC.

**B. There Is An Absolute Inconsistency Between Applying For Service And Seeking Decertification**

Petitioner’s argument here appears to be a repeat of its argument that because it submitted an Application For Service, such fact is determinative of whether Rockett is providing service under the TWC. As discussed above in Argument A, Petitioner’s argument has no merit.

Petitioner has now filed an Application For Service and paid the fee for the required Hydraulic Analysis, which moots this case because it demonstrates Rockett is “serving” the property under the TWC and TAC, as supported by the definition of “service” contained within both the TWC and TAC. *See* Argument A above.

This is true because the definition of “service” within both the TAC and TWC (quoted above), does not require a physical connection providing water to the Property, but includes “any act performed, anything furnished or supplied....” The acts of Petitioner submitting its Application for Service, and Rockett’s efforts to conduct the Hydraulic Analysis to determine not whether it can provide service, but how best to provide service, in and of themselves constitute “service”

under the applicable TAC and TWC provisions, i.e., Rockett has performed an act in the performance of its duties specific to the Property. TAC § 24.3(33) and TWC § 13.002(21).

Petitioner's reliance on Rockett's Engineer's statement that "if the plans change [meaning, if Petitioner changes its design plans] then the analysis and approval for service may change" is not supportive of Petitioner's position. It should be obvious to anyone that if Petitioner changes its plans and anticipated water requirements, the Hydraulic Analysis (after conducted) and Rockett's agreement of service would need to be re-evaluated. To date, Petitioner has not provided Rockett with the information requested in the October 12, 2020 letter to conduct a Hydraulic Analysis.

**C. The Property Is Receiving Water Thus Precluding Decertification**

The issue of whether the Property has been provided service has already been briefed in this proceeding in Rockett's Response to the Petition and Motion to Dismiss. This issue is also addressed at Arguments A and B above, which are incorporated herein, as a further response to Petitioner's Argument C in its Response to Rockett's Supplemental Motion to Dismiss, Item 18 at 4 (Oct 15, 2020).

The bottom line of whether Rockett is "actively supplying water" to the Property is not the question to be resolved in determining whether the Property is "receiving service" under TAC or TWC, and certainly not the question in relation to Rockett's claim to § 1926(b) protection, the latter of which is not an issue within the Commissioner's jurisdiction, and for which Rockett has reserved its right to have the issues resolved in federal court by its England Reservation previously submitted in Rockett's Response to Petition and Motion To Dismiss, Item 8 at 12 (Aug. 21, 2020). The only case cited by Petitioner to support its argument that because Rockett is not "actively supplying water to the Property," the Property is not "currently receiving service"<sup>2</sup> simply does

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<sup>2</sup> Petitioner's Response to Rockett's Supplemental Motion to Dismiss, Item 18 at 4 (Oct. 15, 2020).



not support Petitioner's position. In *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130 (Tex.App.-Austin 2014), the Court held in pertinent part:

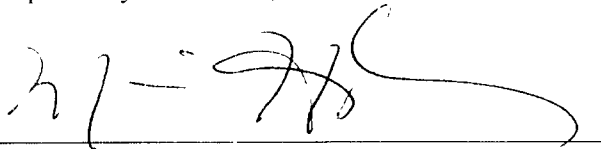
1. "necessary water service" does not mean "actual present delivery of water to the tract." *Id.*, at p. 140.
2. "The acts performed and things furnished or supplied must be in furtherance of performing those duties," i.e., the duties to provide water service under the TWC. *Id.*, at p. 140.

There can be no doubt that Rockett's efforts to provide water service to this area, including the Property, as well as Rockett's actions of accepting and processing Petitioner's Application For Service, constitute acts which are "committed" to provide water service to the Property.

### CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth herein, Rockett Special Utility District respectfully requests that the Petition be denied in its entirety, that Rockett's Motion to Dismiss be granted and that Rockett be provided such further and other relief to which Rockett may be entitled.

Respectfully Submitted,



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State Bar No. 00791944  
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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 October 22, 2020, by e-mail in accordance with the Commission's Order.<sup>3</sup>

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

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

*Attorney for the Commission*

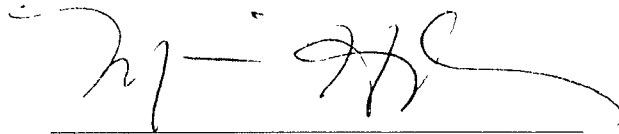
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*Attorneys for Petitioner*



Maria Huynh

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<sup>3</sup> *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Suspending Rules (Mar 16, 2020)

## **ATTACHMENT 1**

**From:** Morgan Massey <[mmassey@rockettwater.com](mailto:mmassey@rockettwater.com)>  
**Sent:** Friday, October 02, 2020 1:48 PM  
**To:** Austin McDaniel, EIT <[amcdaniel@landeengineers.com](mailto:amcdaniel@landeengineers.com)>  
**Cc:** Lawrence A. Cates, PE, RPLS <[lcates@landeengineers.com](mailto:lcates@landeengineers.com)>  
**Subject:** Non-Standard Application

**CAUTION:** This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Afternoon,

I have received your non-standard application and have attached the receipt for the application fee. I will submit your NSA to the District's Engineer, however, a full set of water plans is required in order to perform the hydraulic analysis. Please include fire lines, fire hydrants, meter locations, public streets, private streets, etc.

**Thank you,  
Morgan Massey**

**Development Coordinator**

Rockett SUD | 126 Alton Adams, Waxahachie, TX 75165

PO Box 40, Red Oak, TX 75154

office: (972) 617-3524 ext. 125 | direct: (469) 517-0986

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## **ATTACHMENT 2**

**From:** Austin McDaniel, EIT <[amcdaniel@landeengineers.com](mailto:amcdaniel@landeengineers.com)>  
**Sent:** Wednesday, October 07, 2020 11:03 AM  
**To:** Lawrence A. Cates, PE, RPLS <[lcates@landeengineers.com](mailto:lcates@landeengineers.com)>  
**Subject:** FW: Non-Standard Application

Larry,

Please see the attached revised water demand study exhibit for Bear Creek Industrial Development per Rockett SUD comments asking for hydrant locations, meter locations, and finish floor elevations. Let me know if you need anything else at this time and if you would like me to move forward with resubmitting this document to Rockett SUD.

Below is the email from Morgan Massey from Rockett SUD for your references.

Thanks,

**Austin McDaniel, EIT** | *Design Engineer*  
Landev Engineers, Inc. | TxEng F-4387 | 972.385.2272 x 1456 p | 972.672.4262 c

**From:** Lawrence A. Cates, PE, RPLS <[lcates@landevenueers.com](mailto:lcates@landevenueers.com)>

**Sent:** Wednesday, October 7, 2020 2:41 PM

**To:** Morgan Massey <[mmassey@rocketwater.com](mailto:mmassey@rocketwater.com)>

**Cc:** Austin McDaniel, EIT <[amcdaniel@landevenueers.com](mailto:amcdaniel@landevenueers.com)>; Mike Anderson <[mike@blanderson.net](mailto:mike@blanderson.net)>; Lawrence A. Cates, PE, RPLS <[lcates@landevenueers.com](mailto:lcates@landevenueers.com)>

**Subject:** FW: Non-Standard Application

Based upon our conversation earlier in the week, we have updated our exhibit to help Childress with their analysis. As we discussed, we are in the preliminary stage of design and have no final layout for the project. We have updated the drawing to show three future lots with public streets as well as public (Rockett SUD) water lines. We are also showing some additional water lines on each tract, but we assume that these will be private. We also located domestic water meters off the proposed public mains (one for each of the 3 buildings).

Hopefully this is the information that is needed to complete the analysis. Call me if additional information is needed.

Thank you again for the assistance

Larry Cates







**Lawrence A. Cates, PE, RPLS**

*Sr. Vice President of Business Development*

**A** 1801 Gateway Boulevard, Suite 101, Richardson, Texas 75254

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**ATTACHMENT 3**



**From:** Morgan Massey  
**Sent:** Wednesday, October 14, 2020 10:58 AM  
**To:** Lawrence A. Cates, PE, RPLS <lcates@landeengineers.com>  
**Cc:** Austin McDaniel, EIT <amcdaniel@landeengineers.com>; Mike Anderson <mike@bjanderson.net>  
**Subject:** RE: Non-Standard Application

Good Morning,

Please see attached letter from the District's Engineer regarding the submitted non-standard application.

If you have any questions, please do not hesitate to contact me.

**Thank you,**  
**Morgan Massey**  
**Development Coordinator**

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TEXAS REGISTERED ENGINEERING FIRM F-702

ROBERT T. CHILDRESS, JR., P.E. • BENJAMIN S. SHANKLIN, P.E. • ROBERT T. CHILDRESS III, P.E.

October 12, 2020

Kay Phillips, Manager  
Rockett Special Utility District  
P.O. Box 40  
Red Oak, Texas 75154

Re: Hydraulic Analysis and Evaluation  
FCS Lancaster Limited  
Near Node 703, Map Sheet 9

Dear Ms. Phillips:

In response to your request, we have reviewed the Nonstandard Service Application and exhibits submitted on the above referenced development and we are requesting additional information. Per Rockett's Nonstandard Service Application requirements, documents are to be furnished that were not included. We did not receive a complete Preliminary Plat prepared by a licensed surveyor or Registered Engineer. The application did not note whether there would be any phases proposed in the development or if it is intended to be constructed all at once; the phases should be noted on the plat and/or a Concept Plan.

Regarding the three (3) 8" domestic meters and the three (3) 2" irrigation meters that were requested; are each of these meters to be centered on the three rectangular buildings denoted on the Water Service Plan or at some other locations? Also, the 111,200 GPD domestic flow breaks down to 77 GPM per day or 26 GPM per 8" meter per day while an 8" meter will pass more than 3,000 GPM. Furnish the projected flowrate breakdown per building or flowrate per unit.

The fireflow request is noted as 2000 gpm for a 2 hour duration and 58 fire hydrants are noted as proposed. Are the fire hydrants at a 300 foot spacing as normally required for most commercial areas or where are they to be located? Show the fire hydrants on the Water Service Plan.

Lastly, please note that if the plans change, then the analysis and approval for service may change. So, an accurate depiction of the project and demand is very important. If this information can be provided, we can complete our evaluation. Please let us know if you have any questions concerning this matter.

Very truly yours,

CHILDRESS ENGINEERS

Benjamin S. Shanklin, P.E.

Cc: Robert Woodall

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