



Control Number: 51044



Item Number: 23

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**PUC DOCKET NO. 51044**

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**PETITION OF FCS LANCASTER, LTD.  
TO AMEND ROCKETT SPECIAL  
UTILITY DISTRICT'S CERTIFICATE  
OF CONVENIENCE AND NECESSITY  
IN DALLAS COUNTY BY EXPEDITED  
RELEASE**

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**PUBLIC UTILITY COMMISSION**

**OF TEXAS**

**ROCKETT SPECIAL UTILITY DISTRICT'S REPLY TO PETITIONER'S  
SUPPLEMENTAL RESPONSE TO COMMISSION STAFF'S MOTION TO ABATE  
AND MOTION TO RECONSIDER STAFF'S MOTION TO ABATE**

COMES NOW, Rockett Special Utility District ("Rockett") and files this Reply to Petitioner's Response to Commission Staff's Motion to Abate filed on November 4, 2020 and Motion to Reconsider Staff's Motion to Abate. In accordance with 16 Texas Administrative Code (TAC) § 22.78, this Response is timely filed.

**I. BACKGROUND**

1. FCS Lancaster, Ltd., a Texas limited partnership ("Petitioner") filed a petition for streamlined expedited release, pursuant to Texas Water Code (TWC) § 13.2541 and 16 TAC § 24.245(h), from Rockett's water Certificate of Convenience and Necessity (CCN) No. 10099, where the properties subject to the Petition are approximately 35 acres and approximately 121 acres located south of the City of Lancaster at the southwestern corner of the intersection of Bear Creek Road and Interstate 35 in Dallas County (collectively, the "Property") on July 13, 2020 (the "Petition").

2. Order No. 1 issued on July 16, 2020 established the procedural schedule requiring Commission Staff's comments on the administrative completeness of the Petition and notice by August 13, 2020 and requiring Rockett to submit a response to the Petition by August 21, 2020.

3. Commission Staff filed its Motion to Abate on August 13, 2020, identifying two other Commission proceedings whereby parties seek to decertify areas within Rockett's CCN, one by City of Red Oak Industrial Development Corporation (CROIDC)<sup>1</sup> and one by Alamo Mission,

<sup>1</sup> *Petition of the City of Red Oak Industrial Development Corporation to amend Rockett's Water CCN in Dallas and Ellis Counties by Expedited Release*, Docket No. 49871 (pending).

LLC,<sup>2</sup> both of which are pending and currently abated due to ongoing litigation concerning issues relating to 7 U.S.C. § 1926(b) protection.<sup>3</sup>

In relation to the “ongoing litigation” Staff has referenced two cases: (1) *Green Valley Spec. Util. Dist. v. City of Schertz*, No. 18-51092 (5th Cir. filed Dec. 31, 2018) and (2) *Rockett Special Util. Dist. v. Shelly Botkin, et. al.*, Case No. 19-cv-1007-RP (W.D. Tex., Austin Div.) (the “Rockett Federal Case”). *Id.*

However, Staff overlooked the other “ongoing litigation” included in the CROIDC and Alamo proceedings filed with the Commission, where Staff recommended abatement and on which the Commission relied to abate the CROIDC and Alamo proceedings, specifically *City of Red Oak v. United States Department of Agriculture, et al.* in the U.S. District Court, N.D. Tex., Dallas Division, Case No. 19-2761 and later amended to add Red Oak Industrial Development Corporation (ROIDC) as an additional Plaintiff (hereafter the “Red Oak Federal Case”),<sup>4</sup> in which the Red Oak Federal Case was later transferred to the U.S. District Court, W.D. Texas, and was assigned Case No. 20-cv-483; *Crystal Clear Spec. Util. Dist. v. Marquez*, 316 F.Supp.3d 965 (W.D. Tex. March 29, 2018) and *Crystal Clear Spec. Util. Dist. v. Walker*, 2019 WL 2453777, U.S. District Court, W.D. Tex., Austin Division (March 27, 2019), holding that TWC § 13.254(a-5) and (a-6) are preempted and void, and both of which remain pending in the Fifth Circuit.<sup>5</sup>

4. Staff was required to provide additional comments if abatement was warranted in light of the recent decision of *Green Valley*, No. 18-51092, 2020 WL 44557844 (5th Cir. Aug. 7,

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<sup>2</sup> *Petition of Alamo Mission LLC to amend Rockett’s Water CCN in Ellis County by Expedited Release*, Docket No. 49863 (pending).

<sup>3</sup> Commission Staff’s Motion to Abate at 1-2 (Aug. 3, 2020).

<sup>4</sup> See *Commission Staff’s Response to Motion to Lift Abatement*, Docket No. 49871, Item 17 at 2-3 (Dec. 5, 2019) (alerting the Commission of the Red Oak Federal Case in which the Commission issued Order No. 5 to continue the abatement on December 9, 2019); see also *Commission Staff’s Response to Second Motion to Lift Abatement*, Docket No. 49871, Item 22 at 2 (Feb. 11, 2020) (noting the Red Oak Federal Case again to support continuance of the abatement and the Commission continued the abatement in reliance thereof by issuing Order No. 6 on March 31, 2020).

<sup>5</sup> See *Commission Staff’s Recommendation on Final Disposition*, Docket No. 49871, Item 10 at 4 (Oct. 11, 2019) (referring to *Crystal Clear v. Marquez* and where the Commission subsequently issued Order No. 4 abating the proceeding on November 15, 2019); see also *Commission Staff’s Response to Order No. 4*, Docket No. 49863, Item 20 at 2 (Oct. 11, 2019) (citing *Crystal Clear* similarly as support for abatement and in which the Commission ordered the abatement of the Alamo proceeding by issuing Order No. 7 on November 15, 2019).

2020),<sup>6</sup> and Staff filed its Response to Order No. 3 on August 27, 2020 recommending the continuance of abatement due to the pending Rockett Federal Case.<sup>7</sup>

5. On November 3, 2020, the U.S. District Court Judge in the Rockett Federal Case, adopted the Magistrate Judge's Report and Recommendation and entered an Order<sup>8</sup> that the case would be dismissed without prejudice by a separate order, and Petitioner requested the Commission not abate this proceeding in reliance of such Order.<sup>9</sup>

## II. ARGUMENTS AND AUTHORITY

The abatements in the CROIDC and Alamo proceedings were not based on the Rockett Federal Case alone, and other issues of relevance are pending; therefore, abatement would be consistent with such pending matters.

### A. THIS PROCEEDING SHOULD BE ABATED CONSISTENT WITH OTHER PROCEEDINGS INVOLVING AMENDMENT OF ROCKETT'S CCN BY STREAMLINED EXPEDITED RELEASE

The CROIDC and Alamo proceedings were not abated solely based upon the Rockett Federal Case. As discussed above, those orders of abatement were entered in reliance (at least in part) on Staff's recommendations that abatement could or should be made based on the Rockett Federal Case, as well as the appeals before the Fifth Circuit in the *Crystal Clear v. Marquez* and *Crystal Clear v. Walker* cases cited above, and as seen in the PUCT Defendants' Notice of Appeal, attached hereto as Attachment A. Abatement in this case should be consistent with the abatements entered in the CROIDC and Alamo proceedings, which were premised on the pendency of multiple cases involving 7 U.S.C. § 1926(b) in the Federal District Court and the Fifth Circuit.

### B. THE ROCKETT FEDERAL CASE RULING DOES NOT RESOLVE THE ISSUES AND THE CASE IS STILL PENDING

The issues in *Crystal Clear v. Marquez* and *Crystal Clear v. Walker* remain pending in the Fifth Circuit and thus remain unresolved. See Argument A above. This alone remains sufficient reason to abate this case as the resolution of the *Crystal Clear* appeals have been cited by Staff and the Commission as one basis for abatement in the CROIDC and Alamo proceedings.

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<sup>6</sup> Order No. 3 at 1 (Aug. 17, 2020).

<sup>7</sup> Commission Staff's Response to Order No. 3 at 1-2 (Aug. 27, 2020).

<sup>8</sup> Petitioner's Supplemental Response to Staff's Motion to Abate at Attachment A (Nov. 4, 2020).

<sup>9</sup> *Id.* at 1, 4 (Nov. 4, 2020).

In addition to the issues in *Crystal Clear v. Marquez* and *Crystal Clear v. Walker*, the Red Oak Federal Case and the Rockett Federal Case are still pending. Further, Rockett has appeal the District Court's adoption of the Magistrate's Report and Recommendation to the Fifth Circuit, and a true and correct copy of Rockett's Notice of Appeal is submitted herewith as Attachment B.

The Commission and Staff have given credence to the concept of continuing to abate other cases when a federal district court case involving relevant federal issues are on appeal to the Fifth Circuit as discussed above in Argument A.

This is expressed very well by Commission's Reply in Support of Motion to Dismiss, filed in the Rockett Federal Case at Doc. 30, attached hereto as Attachment C without exhibits, wherein the Commission Defendants argue:

The Commission has not, and will not, take any action inconsistent with Judge Yeakel's injunction.

Indeed, to the contrary, the PUCT's decision to abate all water-utility service-area release dockets pending the federal courts' clarification of the relevant law reflects the Commission's desire to respect federal law – including Judge Yeakel and Judge Spark's recent decisions in the related § 1926(b) expedited release cases involving the Commission. In both the *Green Valley*, and the *Crystal Clear* cases now pending before the Fifth Circuit, the District Court applied the Fifth Circuit's 1996 panel decision in the *North Alamo Water Supply Corp. v. City of San Juan* involving § 1926(b) protection of federally indebted rural utilities, Mot. 3. As the PUCT Defendants explained in their Motion – and Rockett completely ignores in its Response – the Commission itself will make no decision whatsoever regarding the petitions now before it seeking the release of property in Rockett's service area until after the federal courts resolve the disputed and uncertain issues regarding the scope of § 1926(b) protection of the service areas of federally indebted rural utilities' service areas.

PUCT Defendants' Reply In Support of Motion to Dismiss, Rockett Federal Case Doc. 30, Attachment C at 6-7 (emphasis added).

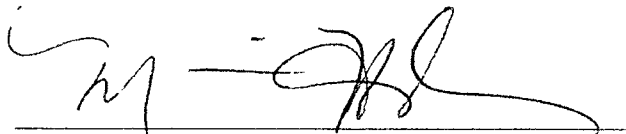
The Magistrate's Report and Recommendation in the Rockett Federal Case and the Court's adoption of same does not end the issue of whether Rockett has debt qualifying it for § 1926(b) protection. Not only has Rockett appealed that decision to the Fifth Circuit, but the *Crystal Clear* cases, the issues of which affect this proceeding, are still pending.

### CONCLUSION

Based upon the issues and pending cases affecting Rockett's CCN and its § 1926 protection, the Commission should reconsider and abate this proceeding.

Rockett reserves the right and shall respond to Order No. 5 by filing a briefing to the effect on Rockett's first motion to dismiss this case on or before November 20, 2020.<sup>10</sup>

Respectfully Submitted,

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ATTORNEYS FOR ROCKETT SPECIAL  
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<sup>10</sup> Order No. 5 at 1 (Nov. 5, 2020).

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on the following parties of record on November 11, 2020, by e-mail in accordance with the Commission's Order.<sup>11</sup>

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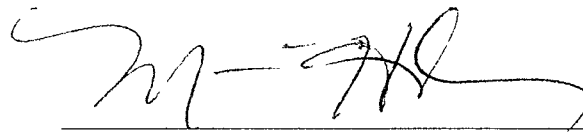
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A handwritten signature in black ink, appearing to read 'Maria Huynh', written over a horizontal line.

Maria Huynh

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<sup>11</sup> *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Suspending Rules (Mar. 16, 2020).

**ATTACHMENT A**



**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

CRYSTAL CLEAR SPECIAL  
UTILITY DISTRICT,  
*Plaintiff,*

V.

DEANN T. WALKER, ARTHUR C.  
D'ANDREA, and SHELLY BOTKIN, in  
their official capacities as  
COMMISSIONERS of the PUBLIC  
UTILITY COMMISSION OF TEXAS;  
and LAS COLINAS SAN MARCOS  
PHASE I, LLC,  
*Defendants.*

Civil Action No. 1:17-cv-00254

## PUCT DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that Defendants DeAnn T. Walker, Arthur C. D’Andrea, Shelly Botkin, and Brandy Marty Marquez, in their official capacities as Commissioners of the Public Utility Commission of Texas, hereby appeal Judge Yeakel’s Order Adopting Report and Recommendation of the United States Magistrate Judge (Dkt. No. 113), Report and Recommendation of the United States Magistrate Judge (Dkt. No. 110), regarding Plaintiff’s Motion for Attorneys’ Fees and Costs (Dkt. No. 85) entered on December 18, 2019, and all adverse rulings that merge into that order.

This order is related to a pending appeal from this same cause, *Crystal Clear Special Utility District v. Walker*, No. 19-50556 (5th Cir. filed June 17, 2019).

Notice of appeal is hereby given on January 15, 2020.

Respectfully submitted,

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ATTORNEYS FOR THE DEFENDANT  
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document has been served on January 15, 2020, by electronic service and email to counsel listed below:

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JOHN R. HULME

## **ATTACHMENT B**

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

ROCKETT SPECIAL UTILITY DISTRICT, a political subdivision of the State of Texas,

Plaintiff,

VS.

SHELLY BOTKIN, DEANN T. WALKER, and ARTHUR C. D'ANDREA, in their official capacities as Commissioners 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 LLC, a Delaware limited liability Company; and CITY OF RED OAK INDUSTRIAL DEVELOPMENT CORPORATION, a Texas non-profit corporation,

Defendants.

[illegible]

Civil Action No.:  
1:19-CV-1007-RP

**PUCT DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS**

The defendant officials of the Public Utility Commission of Texas (collectively, “PUCT Defendants”) file this reply in support of their motion to dismiss the complaint of Plaintiff Rockett Special Utility District (“Rockett”).

## I. Introduction and Summary

As the PUCT Defendants explained in their Motion to Dismiss (“Motion”), Plaintiff’s complaint should be dismissed for several reasons.

First, Rockett has not stated a claim under 42 U.S.C. § 1983. Under binding Fifth Circuit precedent, governmental entities are not “persons” entitled to sue under § 1983. As explained below, Rockett has failed to rebut that *City of Safety Harbor v. Birchfield*<sup>1</sup> is the controlling Fifth Circuit authority on this issue.

Second, even if Rockett had stated a § 1983 claim, its complaint also fails for lack of jurisdiction (standing and ripeness) because no PUCT decision regarding the release petitions at issue is imminent. Because these water-utility service-area release proceedings are now abated, there is no possibility of the PUCT’s release of any of Rockett’s service area in the near future. The PUCT abated the proceedings at issue in this case to allow the federal courts to address the uncertainty regarding the scope of 7 U.S.C. § 1926(b)’s protection of water utility service areas in related cases. And now, in an extraordinary measure discussed further below, the Fifth Circuit has decided to hear the first of these cases in initial en banc review.

## **II. Rockett may not assert any claim against the PUCT Defendants under § 1983.**

The Fifth Circuit has long held that political subdivisions are not proper plaintiffs under 42 U.S.C. § 1983. *See Birchfield*, 529 F.2d at 1253-54. Rockett asks the Court to ignore this binding precedent, pressing for the application of irrelevant precedent and the precedent of other federal circuits. But the Court cannot pick and choose which precedent to apply. Nothing Rockett argues undermines the PUCT Defendants’ showing that

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<sup>1</sup> 529 F.2d 1251 (5th Cir. 1976)

straightforward application of Fifth Circuit precedent requires dismissal of Rockett's § 1983 claim.

Rockett points to *Monell v. Department of Social Services*, 436 U.S. 658 (1978)—which “overrul[ed] [precedent] insofar as it holds that local governments are not ‘persons’ who may be defendants in § 1983 suits,” *id.* at 700 (emphasis added). It imagines that *Monell*'s holding about § 1983 defendants also overruled *Birchfield*'s holding as to who may be § 1983 plaintiffs. It is true that *Birchfield* relied in part on Supreme Court precedent overruled by *Monell*. But *Birchfield* “also relied heavily . . . upon the legal distinctions between private persons and public entities and on the legislative history of § 1983. Thus, *Monell* did not necessarily undermine the result in [*Birchfield*].” 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 1:13, at 1-17 (4th ed. 2017). Only “unequivocal” Supreme Court holdings knock out the Fifth Circuit's binding precedent. *United States v. Alcantar*, 733 F.3d 143, 146 (5th Cir. 2013). *Monell* did not unequivocally overrule *Birchfield*'s holding. Indeed, multiple courts have concluded that *Birchfield*'s holding remains sound after *Monell*. Mot. 8 (citing cases). So *Birchfield* remains binding precedent of the Fifth Circuit.

As it happens, the courts continuing to follow *Birchfield*'s rule are correct—*Monell*'s reasoning about who may be sued does not undermine *Birchfield*'s conclusion about who may sue. *Monell* observed that plaintiffs “routinely” sued municipalities in federal court before Congress enacted what is now § 1983, so there was no reason to think (as the Supreme Court previously concluded) that Congress would have presumed municipalities could not be sued. 436 U.S. at 688. But Rockett offers no historical evidence,

and the PUCT Defendants are aware of none, suggesting that Congress believed political subdivisions could be civil rights claimants against their parent states. To the contrary, as the Court observed in *Birchfield*, “public entities are not right-holders in the same sense as private parties,” which “has particular relevance in determining whether a municipality is a ‘person’ entitled to bring suit under the 1871 Civil Rights Act.” 529 F.2d at 1255. It confirms that Congress wrote that statute “to provide *private* parties a cause of action.” *Moor v. County of Alameda*, 411 U.S. 693, 699 (1973) (Marshall, J.) (emphasis added).

Section 1983 uses “person” twice, first describing who may be sued and then who may sue. While courts presume consistent usage, “this canon is particularly de-feasible by context.” Antonin Scalia & Bryan A. Garner, *Reading Law* 171 (2012); *accord Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (concluding that the Government was a “person” under one part of a statute, but not another). The context of the Civil Rights Act of 1871 was Congress’s expressed desire to aid enforcement of the Fourteenth Amendment in federal courts. *See* Act of April 20, 1871, 17 Stat. 13; *Moor*, 411 U.S. at 699; *Magana v. Commonwealth of the N. Mariana Islands*, 107 F.3d 1436, 1442 (9th Cir. 1997). “Being but creatures of the State,” however, “municipal corporations have no standing to invoke . . . the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator.” *Coleman v. Miller*, 307 U.S. 433, 441 (1939). It would have made little sense for Congress to include political subdivisions as “persons” who may sue when political subdivisions could not bring the claim foremost in Congress’s mind in the forum Congress preferred. *See Will v. Mich. Dep’t of State Police*, 491 U.S.



58, 67 (1989) (using similar reasoning to conclude that States are not persons who may be sued under § 1983).

The Fifth Circuit has held that political subdivisions generally lack standing to sue their parent States for violating federal law, and in *Rogers v. Brockette*, the Court created an exception for suits, like this one, brought under the Supremacy Clause. 588 F.2d 1057, 1062 (5th Cir. 1979); 1 Nahmod, *supra* § 1:13, at 1-18 n.7. But “[d]etermining whether a party is a ‘citizen’ or ‘other person,’” as used in the relevant portion of § 1983, “is distinct from the issue of standing.” *City of New Rochelle v. Town of Mamaroneck*, 111 F. Supp. 2d 353, 368 (S.D.N.Y. 2000). But the PUCT Defendants are not questioning whether Rockett “may sue its state” at all. The question is whether Rockett has a cause of action under § 1983. *See* Mot. 6-8. *Rogers* is an “anomalous” decision in its own right. *Donelon v. La. Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 567 (5th Cir. 2008). And it did not address the question at issue here. It thus cannot undermine *Birchfield*. *Cf. Donelon*, 522 F.3d at 567-68 & n.6 (refusing to extend *Rogers*). Rockett’s response, based almost entirely on a distinction between a “statutory” versus a “constitutional” right that is of no consequence here, does not rebut *Birchfield*’s holding that the governmental entities are not “persons” entitled to sue under § 1983.

Rockett relies on contrary Tenth Circuit precedent allowing a political subdivision to sue under § 1983 to enforce § 1926(b). Resp. 10 (citing *Rural Water Dist. No. 1 v. City of Wilson, Kan.*, 243 F.3d 1263, 1274 (10th Cir. 2001)). This is one of two Tenth Circuit decisions Rockett cites in which that court goes far out of its way (and far from statutory

text and Supreme Court precedent) to protect water utilities. But this Court must apply Fifth, not Tenth, Circuit precedent.

**III. Plaintiff's complaint should be dismissed due to lack of standing and ripeness.**

Instead of actually responding to the PUCT Defendants' argument here, much of Rockett's response to the Motion is devoted to claiming that the PUCT's request to dismiss this premature case somehow reflects an intent to evade federal law. But nothing in the PUCT's motion even suggests that it will not abide by the *Crystal Clear* injunction or afford proper respect to Judge Yeakel's decision in that case. The PUCT Defendants' request to dismiss this suit because the release proceedings before it are now abated does not evidence any such intent. The Commission has not, and will not, take any action inconsistent with Judge Yeakel's injunction.

Indeed, to the contrary, the PUCT's decision to abate all water-utility service-area release dockets pending the federal courts' clarification of the relevant law reflects the Commission's desire to respect federal law—including Judge Yeakel and Judge Sparks' recent decisions in the related § 1926(b) expedited release cases involving the Commission. In both the *Green Valley*<sup>2</sup> and the *Crystal Clear*<sup>3</sup> cases now pending before the Fifth Circuit, the District Court applied the Fifth Circuit's 1996 panel decision in the *North Alamo Water Supply Corp. v. City of San Juan*<sup>4</sup> involving § 1926(b)'s protection of federally indebted rural utilities. Mot. 3. As the PUCT Defendants explained in their

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<sup>2</sup> *Green Valley Special Util. Dist. v. Schertz, Tex.*, No. 18-51092 (5th Cir. filed Dec. 31, 2018)

<sup>3</sup> *Crystal Clear Special Util. Dist. v. Walker*, No. 19-50556 (5th Cir. filed June 17, 2019)

<sup>4</sup> 90 F.3d 910 (5th Cir. 1996).

Motion—and Rockett completely ignores in its Response—the Commission itself will make no decision whatsoever regarding the petitions now before it seeking the release of property in Rockett’s service area until *after* the federal courts resolve the disputed and uncertain issues regarding the scope of § 1926(b)’s protection of the service areas of federally indebted rural utilities’ service areas.

The PUCT abated the proceedings to allow the federal courts to provide guidance on the law. And indeed, the Fifth Circuit is in the process of providing the needed clarification. In an extraordinary step, the Fifth Circuit has now decided to revisit the *North Alamo* panel decision en banc in the pending *Green Valley* appeal. The PUCT Defendants requested this initial en banc review to allow the full court to reconsider *North Alamo*. Exhibit A, Appellants Cross-Appellees DeAnn T. Walker, Arthur C. D’Andrea, Shelly Botkin and John Paul Urban’s Petition for Initial Hearing En Banc. *Green Valley Special Util. Dist. v. Schertz, Tex.*, No. 18-51092 (5th Cir. July 17, 2019).

Among the core issues that the Fifth Circuit will address en banc in *Green Valley* is whether a federally indebted rural water utility’s possession of a state regulatory certificate to provide service to a particular area is sufficient—in and of itself—to protect that tract from decertification under the standards provided under state law. *Id.* at 8. In this regard, the Fifth Circuit’s *North Alamo* panel decision is an outlier, and is contrary to the overwhelming weight of the federal case authority on § 1926(b). Almost all other courts have applied a “pipes-in-the-ground” or present-means-or-ability test in determining whether service has been made available within the meaning of 7 U.S.C. § 1926(b). *See id.* at 7-12 (*North Alamo* contrary to Section 1926(b) test employed by the Fourth, Sixth,

Eighth, and Tenth Circuits and Texas state courts, and also contrary to the position taken by the United States in an *amicus curiae* filing in the U.S. Supreme Court).

The *Green Valley* case has been fully briefed, but the Fifth Circuit has requested the submission of supplemental briefing in the coming months. The case is set for oral argument en banc the week of May 18, 2020. Exhibit B.

Rockett's response to the Commission's Motion largely misses the point of the PUCT's argument for dismissal on standing and ripeness. The PUCT does not argue that the case should be dismissed as moot based upon a statutory or regulatory change. Thus, *Amawi v. Pflugerville Indep. School Dist.*, No. 1:18-CV-1091-RP, 2019 WL 4980454, at \*1 (W.D. Tex. July 23, 2019), Rockett's primary authority on this point, has no relevance. Unlike this case, *Amawi* and other mootness cases Rockett cites involved the potential recurrence of allegedly wrongful behavior or its continuing effects. But here the PUCT has made no decision regarding the release of Rockett's property and will do so only after the Fifth Circuit issues its determination as to the appropriate § 1926(b) standard. For these same reasons, *Pro-Life Cougars v. University of Houston*, 259 F. Supp. 2d 575 (S.D. Tex. 2003), and the other cases Rockett cites here are inapplicable.

Nor do any of Rockett's other arguments have merit. Rockett's claim that its injury is imminent is unfounded and misconstrues the facts supporting the abatement of decertification petitions at the PUCT. As the Motion explained, the orders abating the pending Rockett release petitions reference the November 14 PUCT open meeting and pending federal court litigation. Mot. 4. At this November 14 open meeting, the PUCT Commissioners discussed how to proceed with respect to the pending decertification

petitions involving utilities that may have federal indebtedness. The matter was discussed in connection with a petition for release of another utility's service area, not Rockett's. The Commissioners did not specifically mention either of the PUCT proceedings referenced in Rockett's complaint in this Court. But the November 14 discussion did include general deliberation as to how the Commission should proceed with all service-area release petitions that may involve a federally indebted water utility, and thus, a potential § 1926(b) issue. Thus, Rockett is wrong to state that the proceedings were only abated due to the pendency of the suit in this Court. And Rockett's claims that dismissal would somehow result in an "absurd, never-ending refiling of the present suit" based on this erroneous premise are groundless. After all, the very reason for the abatements of all those dockets potentially involving federal indebtedness is to allow the federal courts to resolve the uncertainty regarding the scope of § 1926(b) protection before the PUCT made any determination regarding these petitions. The suggestion that the PUCT would for some reason repeatedly abate the release petitions involving Rockett's service area in an attempt to evade review by this Court is itself simply "absurd."

Likewise, Rockett's suggestion that the PUCT Defendants will lift the abatement and grant the release petitions if the Court dismisses this suit is also groundless. Once again, this baseless assertion misses the entire point of the abatements: to allow the federal courts to resolve the uncertainty regarding the § 1926(b) standard so that the PUCT may comply appropriately with the applicable state and federal law. How the federal courts will finally resolve the uncertain issues, and what action the PUCT will take on the petitions thereafter

in light of these determinations, are now unknown. Once decided, the PUCT will act in accordance with state and federal law.

Finally, Rockett's references to the PUCT staff's recommendations in various filings in PUCT proceedings are extremely misleading. The statements and positions of PUCT staff do not, in any sense, reflect the position of the Commission itself or any preliminary or final determination of the Commissioners. In PUCT proceedings, PUCT staff acts like any other party—advancing positions on legal and factual issues that the Commission itself may or may not ultimately accept in making its decision. The Commission itself has not yet taken any position regarding the two pending release petitions involving Rockett's service area and the issues involved with them, including the particular issues that the parties have briefed in the Commission proceedings. Thus, there was no "procedural slight of hand" here. Resp. 8. It is simply wrong to suggest that the Commission "recommended" abatement in order to get this case dismissed.

#### **IV. Conclusion and prayer**

For the foregoing reasons, and for the reasons explained in the PUCT Defendants' Motion, Plaintiff's claims against the PUCT Defendants should be dismissed

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, John R. Hulme, hereby certify that on this the 9th day of January, 2020, a true and correct copy of the foregoing document was transmitted to the following counsel via electronic service:

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## ATTACHMENT C

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

ROCKETT SPECIAL UTILITY DISTRICT,	§	
a political subdivision of the State of Texas	§	
	§	
Plaintiff,	§	
	§	Civil Action No.:
	§	19-CV-1007-RP
v.	§	
	§	
SHELLY BOTKIN, DEANN T. WALKER,	§	
and ARTHUR C. D'ANDREA, in their	§	
official capacities as Commissioners 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 LLC,	§	
a Delaware limited liability Company;	§	
and CITY OF RED OAK	§	
INDUSTRIAL DEVELOPMENT	§	
CORPORATION, a Texas non-profit	§	
corporation,	§	
	§	
Defendants.	§	

**NOTICE OF APPEAL**

Notice is hereby given that Rockett Special Utility District, Plaintiff in the above-named case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from an Order adopting Dkt. 43 (the Report and Recommendation of United States Magistrate Judge) and granting Defendant Red Oak Industrial Development Corporation's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Dkt. 21), Defendant Alamo Mission LLC's Motion to Dismiss, (Dkt. 24), and PUCT Defendants' Motion to Dismiss and Brief in Support, (Dkt. 25) entered in this action on the 3rd

day of November, 2020 (Dkt. 61) and the Separate Judgment of Dismissal (without prejudice), entered on November 6, 2020 pursuant to Fed.R.Civ.P. 58 (Dkt. 62).

Respectfully submitted,

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AUSTIN DIVISION

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OF TEXAS; ALAMO MISSION LLC,	§	
a Delaware limited liability Company;	§	
and CITY OF RED OAK	§	
INDUSTRIAL DEVELOPMENT	§	
CORPORATION, a Texas non-profit	§	
corporation,	§	
	§	
Defendants.	§	

**AMENDED NOTICE OF APPEAL**

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