



Control Number: 51044



Item Number: 27

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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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OF TEXAS  
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### ROCKETT SPECIAL UTILITY DISTRICT'S RESPONSE TO ORDER NO. 5

COMES NOW Rockett Special Utility District (Rockett) and hereby responds to Commission's Order No. 5 requesting Rockett to file a brief as to the effect of the November 3, 2020 Order entered in *Rockett Special Utility Dist. v. Botkin, et al.*, Case No. 19-cv-1007-RP (W.D. Tex., Austin Div.) (the "Rockett Federal Case"). Thus, this Response is timely filed.

Rockett's First Motion to Dismiss was filed with its Response to the Petition and was 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) § 13.2541, 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...."<sup>1</sup>

#### I. Effect Of Order On Preemption Claims

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 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" issued by the USDA is a binding contract enforceable against the USDA, and the USDA is not free to withdraw or refuse its guarantee—even while determining whether the conditions were in fact satisfied.<sup>2</sup> The USDA's promise to issue the Loan Note Guarantee to Rockett while contingent on

<sup>1</sup> Rockett Special Utility District's Response to the Petition and Motion to Dismiss, at 10 (Aug. 21, 2020).

<sup>2</sup> *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").

numerous conditions “does not make the [USDA’s] promise any less binding.”<sup>3</sup> The USDA has issued a Conditional Commitment in connection with the Rockett loan made by CoBank.<sup>4</sup> Further, the *Wells Fargo* court found that the USDA’s *approval* of a loan *application*—even when the loan had not yet been *funded*—was a final agency action.<sup>5</sup>

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).<sup>6</sup> 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).

In addition, Rockett has filed a Notice of Appeal, as provided in this docket,<sup>7</sup> appealing the decision in the Rockett Federal Case to the Fifth Circuit. 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 England Reservation submitted in this docket.<sup>8</sup> Thus, as the appeal of the Rockett Federal Case is pending, this case should at least be abated.

## II. No Effect Of The Order Regarding Rockett’s Service To The Property Under State Law

The ruling in the Rockett Federal Case has no effect on the portion of Rockett’s first Motion to Dismiss, in which 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.<sup>9</sup>

Additionally, when Rockett received an application for service from Petitioner FCS Lancaster, Ltd., Rockett *continued* to perform its duties in providing water service to the Property

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<sup>3</sup> *Id.* at 1019.

<sup>4</sup> Rockett’s Response, at Ex. A ¶ 3-4, Ex. C (Aug. 21, 2020).

<sup>5</sup> *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).

<sup>6</sup> Rockett’s Response, at 4-5, Ex. A ¶ 3-4, and Ex. C (Aug. 21, 2020).

<sup>7</sup> Rockett’s Reply to Petitioner’s Supplemental Response, at 4, Attachments B-C (Nov. 12, 2020).

<sup>8</sup> Rockett’s Response to the Petition and Motion to Dismiss, at 12 (Aug. 21, 2020).

<sup>9</sup> *Id.*, at 10-11.

as a retail public utility by processing the service application and evaluating a *specific* water service request submitted to Rockett by Petitioner for a proposed development.<sup>10</sup> Contrary to Petitioner's claim, the submission of Petitioner's service application to Rockett does not indicate that the Property was not currently receiving "service" as defined by 16 TAC § 24.3(33) and TWC § 13.002(21).

Rather, Petitioner was requesting whether Rockett could now provide a specific capacity, quantity of water, etc., for the *proposed* development *on* the Property and its estimated future water usage. Rockett, as the CCN holder with the legal right to provide water service to the Property, has a reasonable amount of time to provide the requested water service for the proposed development on the Property *after* such service has been requested, in accordance with the most recent decision in *Green Valley*.<sup>11</sup> Further, the Fifth Circuit stated:

**"Service may be 'available' even if it cannot be immediately used .... No water or sewer utility can make service immediately available to rural, undeveloped land; providing such service involves building or installing facilities, which necessarily takes time to accomplish."**<sup>12</sup>

Here, Petitioner attempts to have the Property released from Rockett's CCN while at the same time apply for service from Rockett (after filing the Petition in this case), which has not given Rockett the reasonable opportunity or time to provide such service to the Property.

The Order in Rockett's Federal Case does not affect Rockett's contention in its first Motion to Dismiss, 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, as not all conditions have been met to authorize the streamlined expedited release thereof.<sup>13</sup>

### CONCLUSION

Rockett requests that the Petition be denied and this case be dismissed as the Property is receiving water service from Rockett under state law, or, in the alternative, abated until resolution of the Rockett Federal Case appeal by the Fifth Circuit.

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<sup>10</sup> Rockett's Supplemental Motion to Dismiss, at 1-2 (Oct. 7, 2020).

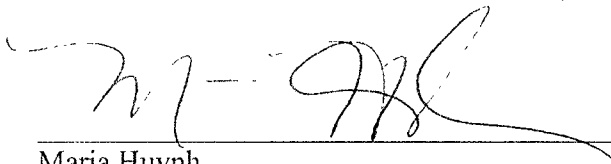
<sup>11</sup> *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 465 (5th Cir. 2020).

<sup>12</sup> *Id.*, at fn. 38.

<sup>13</sup> Rockett's Response to the Petition and Motion to Dismiss, at 10-11 (Aug. 21, 2020).

Respectfully submitted,

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**ATTORNEYS FOR ROCKETT SPECIAL UTILITY  
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on the following parties of record on November 20, 2020, by e-mail in accordance with the Commission's Order.<sup>14</sup>

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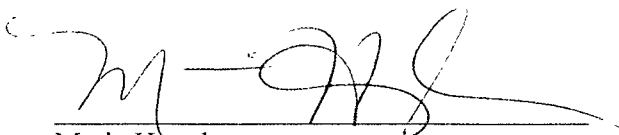
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<sup>14</sup> *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Order Suspending Rules (Mar. 16, 2020)