



Control Number: 51044



Item Number: 29

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DOCKET NO. 51044

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

**ROCKETT SPECIAL UTILITY DISTRICT'S REPLY TO FCS LANCASTER'S  
RESPONSE TO ORDER NO. 5 AND RENEWED MOTION TO DISMISS**

COMES NOW Rockett Special Utility District ("Rockett") and hereby replies to FCS Lancaster, Ltd.'s Response to Order No. 5 filed on December 4, 2020 and re-urges its Motion to Dismiss. Thus, pursuant to 16 TAC § 22.78, this Reply is timely filed.

**I. Reply to Petitioner's Background.**

FCS Lancaster, Ltd. ("Petitioner") states that the federal district court dismissed the *Rockett Special Util. Dist. v. Botkin, et al.*, No. 19-cv-1007-RP (W.D. Tex. 2019), *appeal docketed*, No. 20-50938 (5th Cir. Nov. 20, 2020) (the "Rockett Federal Case").<sup>1</sup> However, omitted from Petitioner's Response—and of equal importance, as explained further herein—is the fact that Rockett filed an England Reservation in this case,<sup>2</sup> the federal district court dismissed the Rockett Federal Case without prejudice, and Rockett's appeal to the Fifth Circuit<sup>3</sup> is pending (the appeal now has been docketed, as provided in the notice dated November 20, 2020 attached hereto as Attachment 1).

Perhaps even more important is that Rockett has refiled its suit against the PUC Commissioners, because the United States Department of Agriculture ("USDA") has issued a "Loan Note Guarantee" to Rockett's lender CoBank, which Petitioner has previously conceded, grants Rockett protection under 7 U.S.C. § 1926(b). See *Rockett Special Util. Dist. v. Botkin, et al.*, No. 1:20-cv-01207-RP (W.D. Tex. filed Dec. 10, 2020), to be discussed further below.

<sup>1</sup> Petitioner's Response to Order No. 5, at 2 (Dec. 4, 2020).

<sup>2</sup> Rockett's Response to the Petition and Motion to Dismiss, at 12 (Aug. 21, 2020).

<sup>3</sup> See Rockett's Reply to Petitioner's Supplemental Response to Staff's Motion to Abate, at 4 and Attachment C (providing a copy of Rockett's Notice of Appeal and Amended Notice of Appeal in Attachment C, which was referenced incorrectly as Attachment B in the Reply).

## II. Reply to Petitioner's Arguments and Authorities

Petitioner is correct that Rockett moved for dismissal claiming federal preemption under *Crystal Clear* and that Rockett was providing service consistent with the new standard announced in *Green Valley*. However, the federal district court's dismissal of the Rocket Federal Case does not resolve those arguments to finality and, as further explained below, Petitioner's argument that such dismissal resolves any preemption claim is now mooted by the existence of a Loan Note Guarantee issued on December 8, 2020.

Regarding Petitioner's comment on water service, Petitioner attempts to mislead the Commission when it states "[T]his property *is not receiving water* as defined by Texas law." (emphasis added).<sup>4</sup> As explained further below, the issue here is whether the property is receiving water service as defined by Texas law.

### A. Rockett is federally indebted and enjoys protections under 7 U.S.C. § 1926(b)

Rockett maintains that Rockett has a loan qualifying it for protections under 7 U.S.C. § 1926(b) ("§ 1926(b)"). Petitioner argues that dismissal of the Rockett Federal Case moots any preemption claim; however, this argument fails to recognize that the entire preemption issue (now pending before the Fifth Circuit) remains a claim exclusively reserved to the federal courts once Rockett filed its England Reservation. Petitioner attempts to short-circuit the legal effect of Rockett's England Reservation in this proceeding, by asking the Commission to step in and decide a federal question *before* the federal courts have completed the appellate process. Granting the Petition, while the federal issue related thereto remains pending in the federal appellate court, would violate the purpose of an England Reservation. Moreover, the now issued Loan Note Guarantee (and the pending suit filed by Rockett on December 10, 2020 cited above) defeats all of Petitioner's arguments which were premised on the non-existence of the Loan Note Guarantee.

#### 1. The federal issues are to be decided exclusively by federal courts to its finality

It is true that Rockett's preemption arguments are premised on Rockett qualifying for 7 U.S.C. § 1926(b) protection. That federal law issue is reserved not only to the federal district court but also the federal courts of appeal, to decide that issue with finality. The issue before the Fifth Circuit is whether a "conditional commitment" is the type of "insurance" or "guarantee" contemplated by 7 U.S.C. § 1926(a)(1) which triggers § 1926(b) protection. The issue whether a

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<sup>4</sup> FCS Lancaster's Response to Order No. 5, at 2 (Dec. 4, 2020).



Loan Note Guarantee is required before § 1926(b) protections attach (as Petitioner argues), or whether a loan that has closed, proceeds are distributed and the loan is “insured” under a Conditional Commitment issued by the USDA, remains the issue reserved *exclusively* for federal court determination.

Further, Petitioner references the pending suit filed by City of Red Oak (“Red Oak”) and the Red Oak Industrial Development Corporation (“ROIDC”) against Rockett, CoBank and the USDA, seeking federal judicial review of the USDA’s decision to issue Rockett and CoBank a “Conditional Commitment.”<sup>5</sup> Remarkably, Petitioner points out that the Conditional Commitment is the subject of *federal* litigation directly involving the USDA as a defendant, yet at the same time argues that *the Commission* should find the Conditional Commitment has no legal significance as to Rockett’s § 1926(b) protections and must be disregarded.<sup>6</sup> If the Conditional Commitment has no legal significance and does nothing to support Rockett’s claim to § 1926(b) protections, then there would have been no need for Red Oak and ROIDC to have filed their suit against the USDA challenging the Conditional Commitment. Regardless, it is up to the federal courts to decide, as Rockett provided the Conditional Commitment, among other information, in this proceeding to show there are indeed federal issues to be resolved first.

Rockett has reserved its right to have its § 1926(b) protections decided in federal court by virtue of its England Reservation submitted in this docket, which remains effective. Petitioner argues that “[t]he recent federal court’s ruling, however, has disposed of the Rockett [Federal Case] . . . .”<sup>7</sup> The dismissal relied on by Petitioner was “without prejudice.” Since that dismissal, Rockett has re-filed its federal suit following the USDA’s issuance of a Loan Note Guarantee. Moreover, Petitioner offers no authority to suggest that an England Reservation disappears or becomes ineffective once the federal district court rules *and* while the case is pending on appeal. The England Reservation persists until all federal actions have been fully exhausted, as “The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.”<sup>8</sup> Petitioner is urging the Commission to deny Rockett’s choice and rights under its England

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<sup>5</sup> See FCS Lancaster’s Response to Order No. 5, at 5 (Dec. 4, 2020) (providing the case *City of Red Oak v. United States Dep’t. of Agric., et al.*, No. 1:20-CV-00483-RP (W.D. Tex, filed Nov. 19, 2019).

<sup>6</sup> *Id.*, at 4.

<sup>7</sup> FCS Lancaster’s Response to Order No. 5, at 3 (Dec. 4, 2020).

<sup>8</sup> *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964).

Reservation and to grant the Petition, instead of abating this proceeding until the federal issues have been fully resolved, whether that be by the Fifth Circuit or by the Federal District Court in the re-filed federal case (*Rockett Special Util. Dist. v. Botkin, et al.*, No. 1:20-cv-01207-RP (W.D. Tex. filed Dec. 10, 2020)).

Although the federal district court dismissed the Rockett Federal Case, that dismissal is now on appeal to the Fifth Circuit, to which Rockett's England Reservation remains alive and well. Therefore, the Commissioners are deprived of any jurisdiction to decide the federal issues, until such time as the appeal (and any subsequent appeal to the United States Supreme Court) is fully concluded and/or the Federal District Court rules in *Rockett Special Util. Dist. v. Botkin, et al.*, No. 1:20-cv-01207-RP (W.D. Tex. Dec. 10, 2020).

## **2. Loan Note Guarantee issued; Petition must be dismissed under *Crystal Clear***

The dismissal of the Rockett Federal Case was premised entirely on the non-existence of a Loan Note Guarantee, such that Petitioner's arguments were centered *not only* on the dismissal of the Rockett Federal Case itself, *but also* on the non-existence of a Loan Note Guarantee.<sup>9</sup> However, these issues and arguments are swept aside with the issuance of the Loan Note Guarantee and the re-filing of Rockett's federal suit.

Petitioner correctly states that "...a conditional commitment is final agency action."<sup>10</sup> It is also true that the issuance of the Loan Note Guarantee is a final agency action. On December 8, 2020, the USDA issued its Loan Note Guarantee to CoBank, a copy of which is attached hereto as Attachment 2.

Petitioner has persistently maintained that if the USDA has not issued a Loan Note Guarantee to Rockett's lender CoBank, then Rockett does not qualify for the protections of 7 U.S.C. § 1926(b).<sup>11</sup> Petitioner argues that "[w]ithout a Loan Note Guarantee, Rockett does not have a federally guaranteed loan .... '[A] water district must have a continuing indebtedness to the

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<sup>9</sup> See FCS Lancaster's Response to Order No. 5, at 6 (Dec. 4, 2020) (providing USDA's admission, in the federal lawsuit filed by the City of Red Oak, et al., that a Loan Note Guarantee had not been issued to CoBank as of September 14, 2020).

<sup>10</sup> FCS Lancaster's Response to Order No. 5, at 4 (Dec. 4, 2020).

<sup>11</sup> Petitioner's Response to Motion to Dismiss of Rockett, at 1-2, 8 (Aug. 28, 2020).



USDA' to receive Section 1926(b) protection .... [E]xisting federal indebtedness is a requirement for Section 1926(b) protection.”<sup>12</sup>

Following Petitioner's argument to its logical conclusion, if the USDA issues a Loan Note Guarantee (Rockett is federally indebted), then indeed Rockett enjoys § 1926(b) protections and the Petition must be dismissed under *Crystal Clear*.<sup>13</sup> Rockett in no way concedes that it did not have a loan qualifying it for § 1926(b) protection prior to the USDA executing the Loan Note Guarantee. However, premised on Petitioner's own argument, Petitioner must now concede that Rockett's § 1926(b) protections have been triggered by the issuance of the Loan Note Guarantee.

### 3. Rockett has re-filed its federal suit; at minimum, this proceeding should be abated

Rockett maintains (without discarding its reliance on the issuance of the Conditional Commitment) and following Petitioner's argument, the existence of a Loan Note Guarantee equates to § 1926(b) protection. Thus, immediately following the USDA's issuance of the Loan Note Guarantee, Rockett refiled its federal suit on December 10, 2020.<sup>14</sup> A copy of the complaint is attached hereto as Attachment 3.

There is no genuine issue questioning whether the USDA's Loan Note Guarantee is in full force and effect, nor any genuine issue that Rockett enjoys § 1926(b) protections. If the Petition is not dismissed pursuant to the judgment in *Crystal Clear Special Util. Distr. V. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at \*2 (W.D. Tex. Mar. 27, 2019), then this proceeding should at least be abated until all of the pending litigation surrounding Rockett's § 1926(b) protections are resolved.<sup>15</sup>

Petitioner must concede that (1) Rockett's rights under its “England Reservation” remain undisturbed, (2) the Fifth Circuit has not “disposed” of Rockett's suit, and (3) issuance of the Loan Note Guarantee has definitively resolved the issue, triggering § 1926(b) protections. The issue of § 1926(b) protection does not revert to the Commissioners or even to Texas state courts, because

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<sup>12</sup> *Id.*, at 8-9.

<sup>13</sup> See FCS Lancaster's Response to Order No. 5, at 6-7 (arguing the order in *Crystal Clear* finding Tex. Water Code § 13.254(a-5) is preempted and void is only applicable if Rockett is federally indebted).

<sup>14</sup> *Rockett Special Util. Dist. v. Botkin, et al.*, No. 1:20-cv-01207-RP (W.D. Tex. Dec. 10, 2020).

<sup>15</sup> See Rockett's Reply to Petitioner's Supplemental Response (Nov. 12, 2020) (providing all pending litigation at the time of that filing in which Commission Staff's recommendations, and subsequently the Commission's orders, were relied on for abatement of various proceedings).

the § 1926(b) issue remains one to be resolved solely in federal court under the principles announced in *England*.

#### **B. The Property Is Receiving Water Service**

The existence of the Loan Note Guarantee preempts further consideration of this action. Even if it didn't, Rockett has water facilities or lines "committed to serving" the particular property or " 'used' to provide water to that tract" or had performed any act or supplied anything to the particular property *related to* providing water to the property.<sup>16</sup>

By submitting an application for water service to Rockett, Petitioner concedes that Rockett has facilities and lines *committed to the Property*, which Petitioner desires *to connect to*. Petitioner's legal argument is premised on the erroneous contention that water must be physically flowing "on the property." This contention disregards Texas law, that the existence of facilities or lines "committed to serving" the property is sufficient to constitute providing water service.

Additionally, Petitioner assumes that "[a] customer does not submit an application for non-standard service to a water provider when it is already receiving water."<sup>17</sup> This is not true, as Rockett requires all new customers to submit an application for water service, or in the case of residential properties, an application/service agreement or occupant change/service agreement. Moreover, the diligent practice of a utility provider requiring an application and agreement prior to receiving service does not mean the property isn't receiving water "service" as defined by Texas statutes.

The Commission may use all facts provided in this proceeding to determine whether the Property is receiving water "service" from Rockett, including any acts performed by Rockett to fulfill a request (Petitioner's application for water service submitted *after* filing its Petition in this proceeding) for a specific quantity and water usage of a proposed future development.

The determination of whether a tract of land is "receiving water service" is a "fact-based inquiry requiring the Commission to consider whether the Rockett has facilities or lines *committed to providing water* to the particular tract in furtherance of its obligation to provide water to that

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<sup>16</sup> *Johnson Cty. Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-17-00160-CV, 2018 WL 2170259, at \*8 (Tex. App. May 11, 2018), review denied (Aug. 30, 2019).

<sup>17</sup> FCS Lancaster's Response to Order No. 5, at 7 (Dec. 4, 2020).



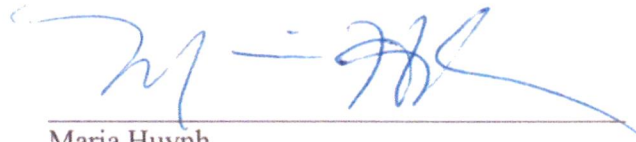
tract pursuant to its CCN.<sup>18</sup> Rockett has documented that it has committed facilities and lines to serve the Property.<sup>19</sup> Regardless, the fact-based inquiry has been mooted by the issuance of the Loan Note Guarantee.

### III. CONCLUSION

In addition to its appeal to the Fifth Circuit, the federal suit filed by Rockett on December 10, 2020 would certainly justify abatement of this case. However, the issuance of the Loan Note Guarantee compels a stronger result—specifically, denial of the Petition and dismissal of this action. Therefore, Rockett requests that the Petition be denied and this case be dismissed, or, in the alternative, abated until resolution of the Rockett Federal Case appealed to the Fifth Circuit and the federal district court ruling in *Rockett v. Botkin, et al.*, No. 1:20-cv-01207-RP (W.D. Tex. Dec. 10, 2020).

Respectfully submitted,

**JAMES W. WILSON & ASSOCIATES, PLLC**



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**ATTORNEYS FOR ROCKETT SPECIAL UTILITY  
DISTRICT**

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<sup>18</sup> *Mountain Peak Special Util. Dist. v. Pub. Util. Comm'n of Texas*, No. 03-16-00796-CV, 2017 WL 5078034, at \*5 (Tex. App. Nov. 2, 2017).

<sup>19</sup> Rockett's Response to the Petition and Motion to Dismiss, at 10-11 (Aug. 21, 2020).



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this document was served on the following parties of record on December 11, 2020, by e-mail in accordance with the Commission's Order.<sup>20</sup>

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

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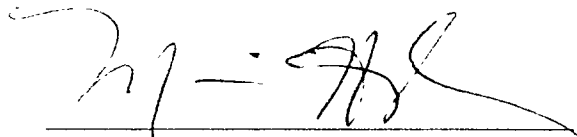
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*Attorneys for Petitioner*

  
Maria Huynh

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<sup>20</sup> *Issues Related to the State of Disaster for Coronavirus Disease 2019*, Docket No. 50664, Second Order Suspending Rules (Jul. 16, 2020).

## **ATTACHMENT 1**

***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. & 5<sup>TH</sup> CIR. R. 28, 30, and 31**. See also **5<sup>TH</sup> CIR. R. 30.1.2 and 5<sup>TH</sup> 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: **5<sup>TH</sup> 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 **5<sup>TH</sup> CIR. R. 31.4**. If you request an extension, you must contact opposing counsel and tell us if the extension is opposed or not. **5<sup>TH</sup> 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 **5<sup>TH</sup> 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 **5<sup>TH</sup> CIR. R. 12**. The form is available from the Fifth Circuit's website, [www.ca5.uscourts.gov](http://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.**

**5<sup>TH</sup> 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



## **ATTACHMENT 2**

USDA  
Form RD 449-34  
(Rev. 10-95)

LOAN NOTE GUARANTEE

Type of Loan: Water  
Applicable 7 C.F.R. part 1980  
subpart 1779

|                                       |                  |
|---------------------------------------|------------------|
| State                                 | Texas            |
| County                                | Ellis            |
| Date of Note                          |                  |
| Government Loan Identification Number | 49-070-776150909 |
| Lender's IRS ID Tax Number            | 8412686705       |
| Principal Amount of Loan              | \$1,720,000.00   |

Borrower  
Rockett Special Utility Distri

Lender  
CoBank ACB

Lender's Address  
6340 S Fid. G.C., GV, CO 80111

The guaranteed portion of the loan is \$1,548,000.00 which is ninety ( 90 %)

percent of loan principal. The principal amount of loan is evidenced by One note(s) (includes bonds as appropriate) described below. The guaranteed portion of each note is indicated below. This instrument is attached to note

one in the face amount of \$1,720,000.00 and is number one of one.

| LENDER'S<br>IDENTIFYING NUMBER | FACE AMOUNT     | PERCENT OF TOTAL<br>FACE AMOUNT | AMOUNT GUARANTEED |
|--------------------------------|-----------------|---------------------------------|-------------------|
|                                | \$ 1,720,000.00 | 90 %                            | \$ 1,548,000.00   |

|       |                 |      |                 |
|-------|-----------------|------|-----------------|
| TOTAL | \$ 1,720,000.00 | 100% | \$ 1,548,000.00 |
|-------|-----------------|------|-----------------|

In consideration of the making of the subject loan by the above named Lender. The United States of America, acting through the Consolidated Farm Service Agency, Rural Business and Cooperative Development Service, Rural Utilities Service, or Rural Housing and Community Development Service (herein called "Government"), pursuant to the Consolidated Farm and Rural Development Act (7 U.S.C. 1921 et seq), the Emergency Livestock Credit Act of 1974 (7 U.S.C. note preceding 1961 Pub. L. 93-357 as amended), the Emergency Agricultural Credit Adjustment Act of 1978 (7 U.S.C note preceding 1921 Pub. L. 95-334), or Title V of the Housing Act of 1949 (42 U.S.C. 1471 et seq) does hereby agree that in accordance with and subject to the conditions and requirements herein, it will pay to:

A. Any Holder 100 percent of any loss sustained by such Holder on the guaranteed portion and on interest due (including any loan subsidy) on such portion and any capitalized interest on such portion resulting from the restructuring of a Guaranteed Farm Credit Program loans but not exceeding statutory loan limits.

B. The Lender the lesser of 1. or 2. below:

1. Any loss sustained by such Lender on the guaranteed portion including:
  - a. Principal and interest indebtedness as evidenced by said note(s) or by, assumption agreement(s), and
  - b. Any loan subsidy due and owing, and
  - c. Principal and interest indebtedness on secured protective advances for protection and preservation of collateral made with Government's authorization, including but not limited to, advances for taxes, annual assessments, any ground rents, and hazard or flood insurance premiums affecting the collateral, or
  - d. and, Capitalized interest on such portion resulting from the restructuring of a Guaranteed Farm Credit Programs loans and not exceeding statutory loan limits, or
2. The guaranteed principal advanced to or assumed by the Borrower under said note(s) or assumption agreement(s) and any interest due (including any loan subsidy) thereon and any capitalized interest resulting from the restructuring of a Guaranteed Farm Credit Programs loans and not exceeding statutory loan limits.

If Government conducts the liquidation of the loan, loss occasioned to a Lender by accruing interest (including any loan subsidy) after the date Government accepts responsibility for liquidation will not be covered by this Loan Note Guarantee. If Lender conducts the liquidation of the loan accruing interest (including any loan subsidy) shall be covered by this Loan Note Guarantee to date of final settlement when the lender conducts the liquidation expeditiously in accordance with the liquidation plan approved by Government.

#### Definition of Holder.

The Holder is the person or organization other than the Lender who holds all or part of the guaranteed portion of the loan with no servicing responsibilities. Holders are prohibited from obtaining any part(s) of the Guaranteed portion of the loan with proceeds from any obligation, the interest on which is excludable from income, under Section 103 of the Internal Revenue Code of 1954, as amended (IRC). When the Lender assigns a part(s) of the guaranteed loan to an assignee, the assignee become a Holder only when Form RD 449-36, "Assignment Guarantee Agreement," is used.

#### Definition of Lender.

The Lender is the person or organization making and servicing the loan which is guaranteed under the provisions of the applicable subpart of 7 C.F.R. part 1980. The Lender is also the party requesting a loan guarantee.

### CONDITIONS OF GUARANTEE

#### 1. Loan Servicing.

Lender will be responsible for servicing the entire loan, and Lender will remain mortgagee and/or secured party of record notwithstanding the fact that another party may hold a portion of the loan. When multiple notes are used to evidence a loan, Lender will structure repayments as provided in the loan agreement. In the case of Farm Ownership, Soil and Water, or Operating Loans, the Lender agrees that if liquidation of the account becomes imminent, the Lender will consider the Borrower for an Interest Rate Buydown under Exhibit C of subpart B of 7 C.F.R. part 1980, and request a determination of the Borrower's eligibility by Government. The Lender may not initiate foreclosure action on the loan until 60 days after a determination has been made with respect to the eligibility, of the Borrower to participate in the Interest Rate Buydown Program.

#### 2. Priorities.

The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will not be paid first nor given any preference or priority over the guaranteed portion.

#### 3. Full Faith and Credit.

The Loan Note Guarantee constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which Lender or any Holder has actual knowledge at the time it became such Lender or Holder or which Lender or any Holder participates in or condones. If the note to which this is attached or relates provides for the payment of interest on interest, then this Loan Note Guarantee is void. However, in the case of the Farm Credit Programs loans, the capitalization of interest when restructuring loans will not void this Loan Note Guarantee. In addition, the Loan Note Guarantee will be unenforceable by Lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which Government acquires knowledge of the foregoing. Any losses occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by Government in its Conditional Commitment for Guarantee. Negligent servicing is defined as the failure to perform those services which a reasonably prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The term includes not only the concept of a failure to act but also not acting in a timely manner or acting in a manner contrary to the manner in which a reasonably prudent lender would act up to the time of loan maturity or until a final loss is paid.

#### 4. Rights and Liabilities.

The guarantee and right to require purchase will be directly enforceable by Holder notwithstanding any fraud or misrepresentation by Lender or any unenforceability of this Loan Note Guarantee by Lender. Nothing contained herein will constitute any waiver by Government of any rights it possesses against the Lender will be liable for and will promptly pay to Government any payment made by Government to Holder which if such Lender had held the guaranteed portion of the loan, Government would not be required to make.

#### 5. Payments.

Lender will receive all payments of principal, or interest, and any loan subsidy on account of the entire loan and will promptly remit to Holder(s) its pro rata share thereof determined according to its respective interest in the loan, less only Lender's servicing fee.

#### 6. Protective Advances.

Protective advances made by Lender pursuant to the regulations will be guaranteed against a percentage of loss to the same extent as provided in this Loan Note Guarantee notwithstanding the guaranteed portion of the loan that is held by another.

#### 7. Repurchase by Lender.

The Lender has the option to repurchase the unpaid guaranteed portion of the loan from the Holder(s) within 30 days of written demand by the Holder(s) when: (a) the borrower is in default not less than 60 days on principal or interest due on the loan or (b) the Lender has failed to remit to the Holder(s) its pro rata share of any payment made by the borrower or any loan subsidy within 30 days of its receipt thereof. The repurchase by the Lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest (including any loan subsidy) less the Lender's servicing fee. The Loan Note Guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accruing after 90 days from the date of the demand letter to the Lender requesting the repurchase. Holder(s) will concurrently send a copy of demand to Government. The Lender will accept an assignment without recourse from the Holder(s) upon repurchase. The Lender is encouraged to repurchase the loan to facilitate the accounting for funds, resolve the problem, and to permit the borrower to cure the default, where reasonable. The Lender will notify the Holder(s) and Government of its decision.



8. Government Purchase.

If Lender does not repurchase as provided by paragraph 7 hereof, Government will purchase from Holder the unpaid principal balance of the guaranteed portion together with accrued interest (including any loan subsidy) to date of repurchase less Lender's servicing fee, within thirty (30) days after written demand to Government from Holder. The Loan Note Guarantee will not cover the note interest to the Holder on the guaranteed loan(s) accruing after 90 days from the date of the original demand letter of the Holder to the Lender requesting the repurchase. Such demand will include a copy of the written demand made upon the Lender. The Holder(s) or its duly authorized agent will also include evidence of its right to require payment from Government. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to Government or the original of the Assignment Guarantee Agreement properly assigned to Government without recourse including all rights, title, and interest in the loan. Government will be subrogated to all rights of Holder(s). The Holder(s) will include in its demand the amount due including unpaid principal, unpaid interest (including any loan subsidy) to date of demand and interest (including any loan subsidy) subsequently accruing from date of demand to proposed payment date. Unless otherwise agreed to by Government, such proposed payment will not be later than 30 days from the date of demand.

The Government will promptly notify the Lender of its receipt of the Holder(s)'s demand for payment. The Lender will promptly provide the Government with the information necessary for Government determination of the appropriate amount due the Holder(s). Any discrepancy between the amount claimed by the Holder(s) and the information submitted by the Lender must be resolved before payment will be approved. Government will notify both parties who must resolve the conflict before payment by Government will be approved. Such conflict will suspend the running of the 30 day payment requirement. Upon receipt of the appropriate information, Government will review the demand and submit it to the State Director for verification. After reviewing the demand the State Director will transmit the request to the Government Finance Office for issuance of the appropriate check. Upon issuance, the Finance Office will notify the office servicing the borrower and State Director and remit the check(s) to the Holder(s).

9. Lender's Obligations.

Lender consents to the purchase by Government and agrees to furnish on request by Government a current statement certified by an appropriate authorized officer of the Lender of the unpaid principal and interest then owed by Borrowers on the loan and the amount including any loan subsidy then owed to any Holder(s). Lender agrees that any purchase by Government does not change, alter or modify any of the Lender's obligations to Government arising from said loan or guarantee nor does it waive any of Government's rights against Lender, and that Government will have the right to set-off against Lender all rights inuring to Government as the Holder of this instrument against Government's obligation to Lender under the Loan Note Guarantee.

10. Repurchase by Lender for Servicing.

If, in the opinion of the Lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the Holder will sell the portion of the loan to the Lender for an amount equal to the unpaid principal and interest (including any loan subsidy) on such portion less Lender's servicing fee. The Loan Note Guarantee will not cover the note interest to the Holder on the guaranteed loans accruing after 90 days from the date of the demand letter of the Lender or Government to the Holder(s) requesting the Holder(s) to tender their guaranteed portion(s).

- a. The Lender will not repurchase from the Holder(s) for arbitrage purposes or other purposes to further its own financial gain.
- b. Any repurchase will only be made after the Lender obtains Government written approval.
- c. If the Lender does not repurchase the portion from the Holder(s), Government at its option may purchase such guaranteed portions for servicing purposes.

11. Custody of Unguaranteed Portion.

The Lender may retain, or sell the unguaranteed portion of the loan only through participation. Participation, as used in this instrument, means the sale of an interest in the loan wherein the Lender retains the note, collateral securing the note, and all responsibility for loan servicing and liquidation.

12. When Guarantee Terminates.

This Loan Note Guarantee will terminate automatically (a) upon full payment of the guaranteed loan; or (b) upon full payment of any loss obligation hereunder; or (c) upon written notice from the Lender to Government that the guarantee will terminate 30 days after the date of notice, provided the Lender holds all of the guaranteed portion and the Loan Note Guarantee(s) are returned to be cancelled by Government.

13. Settlement.

The amount due under this instrument will be determined and paid as provided in the applicable subpart of 7 C.F.R. part 1980 in effect on the date of this instrument.

14. Loan Subsidy.

\*In addition to the interest rate of the note attached hereto, Government will pay a loan subsidy of N/A percent per year. Payments will be made annually.

15. Interest Capitalization.

In the case of Farm Credit Programs loans, the Lender/Holder(s) may capitalize interest only when the note is restructured. When delinquent interest is so treated as principal, the new principal amount may exceed the principal amount of the loan listed herein, but may not exceed statutory loan limits. The new principal amount and new guaranteed portion will be identified at restructuring in an addendum to this Loan Note Guarantee. Such capitalized interest will be covered by this loan Note Guarantee. References to "principal and interest" and "principal advanced" herein, therefore, shall include any capitalized interest on the guaranteed portion of the loan resulting from the restructuring of a Guaranteed Farm Credit Programs loans and not exceeding statutory loan limits.

16. Notices.

All notices will be initiated through the Government

for Texas (State) with mailing address at the day of this instrument:

1502 Highway 77 North

Hillsboro, TX 76645

*\*If not applicable delete paragraph prior to execution of this instrument.*

UNITED STATES OF AMERICA

RURAL DEVELOPMENT

*(insert applicable agency)*

By:

Edd Hargett

Title:

State Director

**DEC 08 2020**

(Date)

Assumption Agreement by \_\_\_\_\_ dated \_\_\_\_\_, \_\_\_\_\_

Assumption Agreement by \_\_\_\_\_ dated \_\_\_\_\_, \_\_\_\_\_

### **ATTACHMENT 3**





Utility Commission of Texas; Alamo Mission LLC; City of Red Oak Industrial Development Corporation; Red Oak Industrial Development Corporation; FCS Lancaster, Ltd.; and Compass Datacenters DFW III, LLC, respectfully states and alleges as follows:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction under 28 U.S.C. § 1331, as this case is based on a federal question claim brought under 7 U.S.C. § 1926(b) (“§ 1926(b)”), 42 U.S.C. § 1983 (“§ 1983”), and U.S. Const. art. VI, cl. 2, otherwise known as the Supremacy Clause. This Court has jurisdiction over Plaintiff’s claims for declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

2. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(1) and (2) because at least one Defendant resides in this judicial district, and a substantial part of the events giving rise to Plaintiff’s claims occurred, and continue to occur, in this judicial district.

### **PARTIES**

3. Rockett is a political subdivision and an agent and instrumentality of the State of Texas created under the authority of Article XVI, Section 59 of the Texas Constitution, and operating pursuant to, among others, Chapters 13, 49 and 65 of the Texas Water Code, furnishing water service to areas in Ellis and Dallas Counties.

Rockett is an “association” as that term is used in 7 U.S.C. § 1926(a). Rockett is indebted on a loan guaranteed by the USDA. Rockett holds the federal right to be the exclusive water service provider within any area for which Rockett has the legal right to provide water service and provided or has made service available (can provide water service within a reasonable period of time), which includes the land described in the Decertification Petitions referenced below. Rockett moves the District Court to take judicial notice of the Decertification Petitions and all other matters filed in said actions pending before the Public Utility Commission of Texas.

4. Defendants Shelly Botkin, Deann T. Walker and Arthur C. D’Andrea, (collectively referred to as the “Commissioners”) are commissioners for the Public Utility Commission of Texas, a state agency (“PUC”). The Commissioners are named as Defendants solely in their official capacities as commissioners of the PUC. The Commissioners are charged with the primary responsibility for implementing state laws relating to the use and conservation of natural resources, environmental protection and water service. The Commissioners may be served with process by serving each at the William B. Travis Building, 1701 N. Congress Ave., 7<sup>th</sup> Floor, Austin, TX 78701.

**Rockett seeks only prospective injunctive relief against the Commissioners.**

To ensure the enforcement of federal law ... the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law.

*Pzifer, Inc. v. Texas Health & Human Servs. Comm'n*, No. 1:16-CV-1228-LY, 2017 WL 11068849, at \*2 (W.D. Tex. Sept. 29, 2017) (quoting *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 322 (5th Cir. 2008)).

5. Defendant John Paul Urban (“Urban”), in his official capacity as Executive Director of the PUC, is named as a Defendant solely with respect to his official capacity as Executive Director of the PUC. Urban may be served with process at the William B. Travis Building, 1701 N. Congress Ave., 7<sup>th</sup> Floor, Austin, TX 78701.

**Rockett seeks only prospective injunctive relief against Urban.**

6. Defendant Alamo Mission LLC (“Alamo”) is a Delaware limited liability company, authorized to conduct business in the State of Texas. Alamo may be served with process on its registered service agent: Corporation Service Company dba CSC – Lawyers Incorporating Company, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701-3218.

7. Defendant City of Red Oak Industrial Development Corporation (“CROIDC”) is a Texas nonprofit corporation incorporated under the Development Corporation Act of 1979 (Chapter 501, Texas Local Government Code). CROIDC may be served with process on its registered service agent: Todd Fuller, 200 Lakeview Parkway, Red Oak, TX 75154.

8. Defendant Red Oak Industrial Development Corporation (“ROIDC”) is a Texas nonprofit corporation incorporated under the Development Corporation Act of 1979 (Chapter 501, Texas Local Government Code). ROIDC may be served with process on its registered service agent: Todd Fuller, 200 Lakeview Parkway, Red Oak, TX 75154.

9. FCS Lancaster Ltd. (“FCS”) is a Texas limited partnership. FCS may be served with process on its registered service agent: Koons Real Estate Law, P.C., 1410 Robinson Road, Unit 100, Corinth, TX 76210.

10. Compass Datacenters DFW III, LLC, (“Compass”) is a Delaware limited liability company. Compass may be served with process on its registered service agent: Corporation Service Company, 211 E. 7th Street, Suite 620, Austin, TX 78701-3218.

#### **DEFENDANTS’ VIOLATIONS OF § 1926(b)**

11. On March 27, 2019 judgment was entered against the Commissioners in *Crystal Clear*:

The court **ORDERS AND DECLARES:**

(1) PUC Officials' Final Order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, *Petition of Las Colinas San Marcos Phase I LLC*, Docket No. 46148 **was entered in violation of 7 U.S.C. § 1926(b)** and is void.

(2) **7 U.S.C. § 1926 preempts and voids** the following section of Tex. Water Code § 13.254(a-6): “The utility commission may not deny a



petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program.”

(3) 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.**

**IT IS FURTHER ORDERED** that the PUC, its officers, employees, and agents **are permanently enjoined** from enforcing in any manner the order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, Petition of Las Colinas San Marcos Phase I LLC, Docket No. 46148 (Final Order).

*Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at \*2 (W.D. Tex. Mar. 27, 2019) (Emphasis added).

12. Prior to the District Court entering judgment against the Commissioners and declaring that Tex. Water Code §§ 13.254(a-5) and (a-6) are void (relative to entities that enjoy the protection of § 1926(b)) the Commissioners suggested that they had no choice but to follow state law despite that law being contrary to federal law. U.S. Magistrate Judge Andrew W. Austin (Western District) stated in his report and recommendation to the District Court:

Thus, regardless of whether § 13.254(a-5) explicitly directs the PUC to consider the provisions of 7 U.S.C. § 1926(b), the PUC has no choice in the matter, as the Constitution compels it to consider that applicable federal law. The fact that the PUC suggests otherwise is troubling. Generally, a court should be as circumscribed as possible when it determines the scope of a ruling invalidating a statute, and this is particularly true when there are both separation of powers and federalism issues implicated, as there are here. **But the PUC Officials'**

**suggestion that they have no choice but to follow state law even in the face of a directly contrary federal law—despite the fact that the agency has a general counsel and a staff full of attorneys—supports Crystal Clear’s argument that the Court should go further than simply enjoining enforcement of § 13.254(a-6).<sup>4</sup> Accordingly, the Court has added in its recommended relief, a declaration regarding § 13.254(a-5) as well.**

*Crystal Clear Spec. Util. Dist. v. Walker*, No. A-17-CV-00254-LY, 2018 WL 6242370, at \*4 (W.D. Tex. Nov. 29, 2018), *report and recommendation adopted as modified sub nom. Crystal Clear Spec. Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).

The Commissioners persistently disregard the judgment of the District Court and continue ignoring the protections afforded by § 1926(b) to qualifying associations including Rockett. The Commissioners persistently consider actions such as the Decertification Petitions that are preempted by § 1926(b) and therefore void.

13. On August 16, 2019, Defendant Alamo filed its petition with the PUC (case number 49863) seeking a decertification of property situated within Rockett’s Certificate of Convenience and Necessity (“CCN”) purportedly owned by Defendant Alamo, pursuant to Tex. Water Code § 13.254(a-5). Alamo’s petition to decertify or remove a part of Rockett’s CCN is a form of interference prohibited by Rockett’s federal rights under § 1926(b) and is a violation of § 1926(b) because Alamo is

seeking to reduce the customer pool for Rockett within Rockett's protected service area.

Indeed, the type of encroachment contemplated by § 1926(b) is not limited to the traditional guise of an annexation followed by the city's initiation of water service. **It also encompasses other forms of direct action that effectively reduce a water district's customer pool within its protected area.** *See id.* at 716 (“[T]he question becomes whether McAlester's sales to customers ... purport to take away from Pitt 7's § 1926 protected sales territory.”).

*Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 985 (10th Cir. 2011) (Emphasis added).

All land Alamo seeks to decertify is situated within Rockett's CCN No.10099.

14. On August 19, 2019, Defendant CROIDC filed its Petition with the PUC (case number 49871) seeking a decertification of property situated within Rockett's CCN and purportedly owned by Defendant CROIDC (and for which CROIDC later conceded it does not own), pursuant to Tex. Water Code § 13.254(a-5). CROIDC's petition to decertify or remove a part of Rockett's CCN is a form of interference prohibited by Rockett's federal rights under § 1926(b) and is a violation of § 1926(b) because CROIDC is seeking to reduce the customer pool for Rockett within Rockett's protected service area. All land CROIDC seeks to decertify is situated within Rockett's CCN No. 10099.

15. During the pendency of CROIDC's petition referenced in paragraph 14 above, Defendant ROIDC sought to substitute itself as the petitioning landowner, in

place of CROIDC, and filed pleadings directly requesting that the PUC decertify or remove a part of Rockett's CCN. ROIDC's actions to decertify or remove part of Rockett's CCN is a form of interference prohibited by Rockett's federal rights under § 1926(b) and is a violation of § 1926(b) because ROIDC is seeking to reduce the customer pool for Rockett within Rockett's protected service area. All land ROIDC seeks to decertify is situated within Rockett's CCN No. 10099.

16. On July 13, 2020, Defendant FCS filed its Petition with the PUC (case number 51044) seeking a decertification of Rockett's CCN regarding property purportedly owned by Defendant FCS, pursuant to Tex. Water Code § 13.2541 and 16 Tex. Admin. Code § 24.245(h). FCS's petition to decertify or remove a part of Rockett's CCN is a form of interference prohibited by Rockett's federal rights under § 1926(b) and is a violation of § 1926(b) because FCS is seeking to reduce the customer pool for Rockett within Rockett's protected service area. All land FCS seeks to decertify is situated within Rockett's CCN 10099.

17. On November 20, 2020, Defendant Compass filed its petition with the PUC (case number 51545) seeking a decertification of property situated in Rockett's CCN and purportedly owned by Defendant Compass, pursuant to Tex. Water Code § 13.2541. Compass's petition to decertify or remove a part of Rockett's CCN is a form of interference prohibited by Rockett's federal rights under § 1926(b) and is a violation of § 1926(b) because Compass is seeking to reduce the customer pool for



Rockett within Rockett's protected service area. All land Compass seeks to decertify is situated within Rockett's CCN No. 10099.

18. Defendants Alamo, CROIDC, ROIDC, FCS and Compass, knew or should have known that the Texas statutes that their respective Decertification Petitions depend upon are unconstitutional and void because those statutes are preempted by § 1926(b).

19. Defendant Commissioners knew or should know that petitions for decertification filed with the PUC pursuant to Tex. Water Code § 13.254(a-5) or § 13.2451, against an entity such as Rockett, that is entitled to the protections of § 1926(b), are premised on statutes that are void and unenforceable.

20. The PUC Commissioners have failed to dismiss the petitions for decertification referenced in paragraphs 13–17 above and are actively considering those Decertification Petitions in violation of § 1926(b).

21. Rockett is indebted on a loan guaranteed by the United States Department of Agriculture ("USDA") ("Guaranteed Loan"). Specifically, the USDA issued both a Conditional Commitment (a method used by the USDA to insure a loan) and a Loan Note Guarantee, insuring and guaranteeing a loan made by lender CoBank ACB to Rockett. An insured or guaranteed loan qualifies the borrower (Rockett) for § 1926(b) protection.

Under Section 1926(a), "such loans" include loans the government makes or insures, *see id.* § 1926(a)(1), and loans the

government guarantees, *see id.* § 1926(a)(24). Therefore, under § 1926(b), **the federal guarantee of Douglas–4's private loan may be considered one “such loan” for purposes of meeting the requirements of § 1926(b).”**

*Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 976 (10th Cir. 2011).

22. The Decertification Petitions each admit that the property for which decertification is sought is within the CCN granted to Rockett by the State of Texas.

23. Rockett is entitled to § 1926(b) protection because (1) Rockett is indebted on a loan both insured and guaranteed by the USDA, and (2) Rockett has “made service available” because of its nearby facilities and infrastructure maintained by Rockett and Rockett’s physical ability to provide water service immediately or within a reasonable period of time. Specifically, Rockett has (1) adequate facilities to provide water service to the areas specified in the Decertification Petitions within a reasonable time after a request for service is made and (2) the legal right to provide service. *Green Valley Spec. Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 477 (5th Cir. 2020).

24. Rockett’s “territory” (i.e., area under Rockett’s CCN) for which it has the *legal right* to provide water service under Texas law, includes land identified in the Decertification Petitions. This legal right cannot be diminished or altered once Rockett becomes indebted on a loan insured or guaranteed by the USDA.

In addition to these principles defining the protection § 1926(b) affords rural water districts from competition, **state law cannot change the service area to which the protection applies, after that federal protection has attached.** See *Pittsburg County*, 358 F.3d at 715. For instance, “where the federal § 1926 protections have attached, § 1926 preempts local or state law that can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law.” *Pittsburg County*, 358 F.3d at 715 (quotation, alteration omitted).

*Rural Water Sewer & Solid Waste Mgmt. v. City of Guthrie*, 344 F. App'x 462, 465 (10th Cir. 2009), *certified question answered sub nom. Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cty., Oklahoma v. City of Guthrie*, 2010 OK 51, 253 P.3d 38 (Emphasis added).

Defendants Alamo, CROIDC, ROIDC, FCS and Compass are attempting to diminish or alter the territory of Rockett through their Decertification Petitions, all of which violate § 1926(b).

25. Any doubts regarding whether Rockett is entitled to the protections of § 1926(b) must be resolved in Rockett's favor. Rockett's territory is sacrosanct.

In order to achieve both of these stated purposes, “[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the F[M]HA-indebted party seeking protection for its territory.” *Sequoyah Cnty. Rural Water Dist. No. 7*, 191 F.3d at 1197 (citing *North Alamo Water Supply Corp.*, 90 F.3d at 913 and *Jennings Water, Inc.*, 895 F.2d at 315 (citing five federal courts which have held that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment)).

In addition to interpreting § 1926(b) broadly to “indicate a congressional mandate” that local governments not encroach upon the services provided by federally indebted water associations, regardless of the method of encroachment, **the Fifth Circuit has gone so far as to designate “the service area of a federally indebted water association” as “sacrosanct”, emphasizing the virtually unassailable right of an indebted association to protection from municipal encroachment.** *North Alamo Water Supply Corp.*, 90 F.3d at 915; *see also Bear Creek Water Ass'n, Inc.*, 816 F.2d at 1059 (affirming that one dollar of debt would be enough to afford the statute's protection because Congress “literally proscribed interference by competing facilities ... ‘during the term of said loan’”).

*El Oso Water Supply Corp. v. City of Karnes City, Tex.*, No. SA-10-CA-0819-OLG, 2011 WL 9155609, at \*6 (W.D. Tex. Aug. 30, 2011), *report and recommendation adopted*, No. CIV. SA-10-CA-819-OG, 2012 WL 4483877 (W.D. Tex. Mar. 19, 2012), *judgment entered*, No. SA10CA0819-OG, 2012 WL 4747680 (W.D. Tex. Apr. 11, 2012) (Emphasis added) (Note: *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 914 (5th Cir. 1996), was overruled on other grounds by *Green Valley Spec. Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460 (5th Cir. 2020)).

26. The Commissioners are precluded from re-litigating the issues decided in *Crystal Clear*.

**Collateral estoppel, or issue preclusion, may be applied to bar relitigation of an issue previously decided by a court of competent jurisdiction** where: (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that would make it unfair to apply the doctrine. *Winters v. Diamond*



*Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998) (quoting *Copeland, et al. v. Merrill Lynch & Co., et al.*, 47 F.3d 1415, 1422 (5th Cir. 1995)). **“Complete identity of parties in the two suits is not required.”** *Robin Singh Educ. Servs. Inc. v. Excel Test Prep Inc.*, 274 F. App'x 399, 404 (5th Cir. 2008) (quoting *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the seminal Supreme Court case setting out the parameters of the *offensive* use of collateral estoppel—the type at issue here—the Court observed that “[t]he general rule should be that in cases ... [where] the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.” *Id.* at 330–31. **The Court emphasized, however, that the trial court has broad discretion to determine whether collateral estoppel is appropriately employed offensively to preclude issue relitigation.** *Id.* at 331; *see also Winters*, 149 F.3d at 392 (highlighting the Supreme Court's grant of broad discretion to trial court's determination of whether offensive collateral estoppel is appropriate).

*Taylor v. Vaughn*, No. A-15-CV-648-LY-ML, 2016 WL 11588707, at \*5 (W.D. Tex. July 25, 2016) (Emphasis added).

### Count 1

#### Violation of § 1983 – Commissioners and Urban

27. Rockett incorporates by reference all allegations above.
28. In order to state a cause of action under 42 U.S.C. § 1983, Rockett must allege only that some person has threatened to deprive or has deprived it of a federal right and that such person acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).
29. Rockett has a federal right under § 1926(b) to be protected from any curtailment or limitation of its right to sell water within Rockett's territory.

30. Actions of the Commissioners and Urban constitute an attempt to deprive Rockett of its § 1926(b) federal rights.

31. The actions of the Commissioners and Urban are conducted under color of state law by virtue of their statutory power to decertify land situated within the boundaries of Rockett's CCN after Rockett became indebted on a loan which qualified Rockett for § 1926(b) protection, and for which Rockett has made water service available, as the term "made water service available" has been interpreted by the Fifth Circuit and other Federal Circuit Courts of Appeal.

32. Rockett suffered or is in immediate jeopardy of suffering loss and damage as a result of the wrongful acts of the Commissioners and Urban in connection with the Decertification Petitions.

## **Count 2**

### **Declaratory Judgment – § 1926(b) – All Defendants**

33. Rockett incorporates by reference all allegations above.

34. This claim is brought pursuant to and in accordance with 28 U.S.C. §§ 2201 and 2202 seeking a declaration of the rights and other legal relations of the Parties under § 1926(b).

35. There exists an actual case or controversy between Rockett and all of the Defendants concerning the Commissioners or Urban's authority to decertify a portion of Rockett's CCN, namely to remove the land described in the

Decertification Petitions from Rockett's territory (its CCN) to allow Alamo, CROIDC, ROIDC, FCS and Compass to obtain water service from another competitive entity and/or whether such decertifications, if not directly prohibited, will negatively affect Rockett's rights under §1926(b) to be the exclusive water service provider to the land specified in the Decertification Petitions.

36. Section 1926(b) prohibits decertification of any portion of Rockett's CCN if the decertification would function to limit or curtail the water service provided or made available by Rockett or allow competition with Rockett within Rockett's CCN, or function to impair the collateral pledged to secure the federally guaranteed loan referenced above or deprive the lender (CoBank) and guarantor (USDA) of their rights in the collateral. Decertification of Rockett's territory/CCN is prohibited under the Fifth Circuit's "bright-line" rule. *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The threatened decertification violates Rockett's § 1926(b) rights and any order issued by the PUC or Commissioners, if issued, shall be a nullity and of no force or effect.

37. Texas Water Code Section 13.254(a-6) (re-designated as Section 13.2541(d)) originally stated in pertinent part: "The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program." Tex. Water Code § 13.254. Section 13.2541(d) now states: "The utility commission may not deny the petition based on

the fact that the certificate holder is a borrower under a federal loan program.” *Id.* This statutory language is void because it violates the Supremacy Clause. The Commissioners were parties to *Crystal Clear*, and are bound by the judgment entered in that case. *Crystal Clear*, 2019 WL 2453777. The Commissioners and Urban are prohibited from disregarding the judgment entered in *Crystal Clear* relative to the Decertification Petitions.

38. Regardless of whether the Texas Water Code explicitly directs the PUC to disregard the provisions of § 1926(b), the PUC has no choice in the matter, as the Constitution compels it to consider and comply with applicable federal law. *See Crystal Clear Spec. Util. Dist. v. Walker*, No. A-17-CV-00254-LY, 2018 WL 6242370, at \*4 (W.D. Tex. Nov. 29, 2018), report and recommendation adopted as modified sub nom. *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).

39. The Texas statutes upon which the Decertification Petitions depend are unconstitutional for the reason that they interfere with Rockett’s rights under § 1926(b). Any action by the Commissioners or Urban to decertify or remove portions of Rockett’s CCN would frustrate an important federal statutory scheme intended to promote rural development as codified in 7 U.S.C. § 1926.

40. The Texas statutes upon which the Decertification Petitions are premised must be declared preempted, void, and unconstitutional because the

statutes are in direct conflict with the purposes and objectives of § 1926(b). As a result, the Commissioners and Urban have no authority to act upon the Decertification Petitions relative to Rockett's territory or CCN, and Alamo, CROIDC, ROIDC, FCS and Compass, have no lawful right to pursue their Decertification Petitions.

### **Count 3**

#### **Injunctive Relief – All Defendants**

41. Rockett incorporates by reference all allegations above.

42. Rockett does not have a proper and adequate remedy at law and injunctive relief is a proper remedy for violation of § 1983 as well as for violations of § 1926(b).

**Jury Demand – Rockett demands a jury trial as to all issues triable by jury.**

#### **Prayer**

Rockett prays the Court grant the following relief:

1. The Court enter a declaration that Texas Water Code sections on which the Decertification Petitions are based are preempted to the same extent and in the same manner as that specified in *Crystal Clear*.

2. The Court enter a permanent injunction against all of the Defendants from the further presentation, prosecution, consideration, or granting relief of the pending Decertification Petitions.



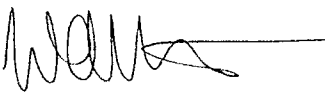
3. The Court award attorney fees and costs of this action in the form of a judgment in favor of Rockett and against Defendants Alamo, CROIDC, ROIDC, FCS and Compass.

4. The Court grant such other and additional relief as Rockett demonstrates it is entitled.

Respectfully submitted,

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