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DOCKET NO. 51044

**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**

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COMMISSION STAFF'S RESPONSE TO ORDER NOS. 5 AND 6

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest, and files this response. Staff recommends that Rockett Special Utility District's motion to dismiss be denied. In support thereof, Staff would show the following:

I. BACKGROUND

On July 13, 2020, FCS Lancaster, LTD (FCS Lancaster) filed a petition to amend Rockett Special Utility District's (Rockett SUD) water certificate of convenience and necessity (CCN) in Dallas County by streamlined expedited release under Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.254(h). FCS Lancaster seeks the release of two tracts of land, the first approximately 35 acres and the second approximately 121 acres, within the boundaries of Rockett SUD's water CCN No. 10099. Supplemental materials were filed by FCS Lancaster on November 12, 2020.

Both Order Nos. 5 and 6 required Staff to file briefing as to the effect of the Order filed on November 3, 2020, in *Rockett Special Utility District v. Botkin* on Rockett's motion to dismiss by December 18, 2020.¹ This pleading, therefore, is timely filed.

II. RESPONSE

In support of the motion to dismiss, Rockett asserts that it should be afforded protection under 7 U.S.C. § 1926(b) because it has a qualifying loan. The district court judge in *Rockett Special Utility District v. Botkin* held that Rockett does not have a federally guaranteed loan and the court dismissed the matter.² Without a federally guaranteed debt, Rockett does not have a

¹ *Rockett Special Util Dist v. Botkin et al*, Cause No. 1:19-CV-1007-RP (W.D. Tex.—Austin).

² *Id.*

qualifying loan and is not afforded protection under 7 U.S.C. § 1926(b). Rockett has appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit and filed its Notice of Appeal.³

Rockett also relies on the district court's holding in *Crystal Clear v. Marquez* to assert that its indebtedness qualifies it for federal protection under 7 U.S.C. § 1926, which pre-empts TWC § 13.2541.⁴ However, on November 6, 2020, the Fifth Circuit vacated the *Crystal Clear* decision and remanded the matter to the district court for further proceedings consistent with the Fifth Circuit's recent decision in *Green Valley Special Utility District v. City of Schertz*.⁵

Given these developments with pertinent litigation, Staff recommends that Rockett's motion to dismiss be denied. Originally, the court in *Crystal Clear* determined that 7 U.S.C. § 1926(b) preempted TWC § 13.2541 (previously, TWC § 13.254(a-5) and (a-6)). Further, the court in *Green Valley* specifically dismissed Green Valley's preemption claim under 13.254(a-5) and determined that it lacked jurisdiction to consider such a claim.⁶ With the *Crystal Clear* decision vacated, and the decision in *Green Valley* offering no opinion on preemption, Staff can find no other decision by a federal court that upholds the preemption claim asserted by Rockett.

Absent any federal court ruling on preemption, Staff can only rely upon the pertinent Texas state statutes to make its recommendation. TWC § 13.254(a-6) specifically stated, "[t]he 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." Similarly, as redesignated, TWC § 13.2541(d) states, "[t]he utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program." Given the plain language of these statutes, the consideration of whether Rockett possesses a federally guaranteed loan, and therefore, is afforded protection under 7 U.S.C. § 1926(b), is now immaterial to the

³ Rockett Special Utility District's Reply to FCS Lancaster's Response to Order No. 5 and Renewed Motion to Dismiss at Attachment I (Dec 11, 2020).

⁴ *Id.* at 4-5.

⁵ *Crystal Clear Special Util. Dist v Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam); see, Docket No. 49871, Red Oak Industrial Development Corporation's Response to Order No. 11 at Attachment D (Dec. 8, 2020); see also, *Green Valley Special Util Dist v City of Schertz*, 969 F.3d 460 (5th Cir. Aug. 7, 2020) (en banc).

⁶ *Green Valley*, 969 F.3d at 472, 478.

determination of the present matter. As such, Staff recommends that Rockett's motion to dismiss be denied.

III. CONCLUSION

Staff respectfully requests the issuance of an order consistent with the foregoing response.

Dated: December 18, 2020

Respectfully Submitted,

**PUBLIC UTILITY COMMISSION OF TEXAS
LEGAL DIVISION**

Rachelle Nicolette Robles
Division Director

Eleanor D'Ambrosio
Managing Attorney

/s/ Creighton R. McMurray
Creighton R. McMurray
State Bar No. 24109536
1701 N. Congress Avenue
P.O. Box 13326
Austin, Texas 78711-3326
(512) 936-7275
(512) 936-7268 (facsimile)
creighton.mcmurray@puc.texas.gov

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CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record on December 18, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ Creighton R. McMurray
Creighton R. McMurray