

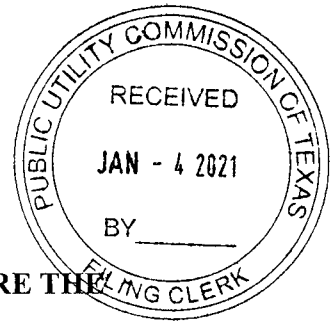


Control Number: 51044



Item Number: 37

Addendum StartPage: 0



PUC DOCKET NO. 51044

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

§
§
§
§
§
§

BEFORE THE

PUBLIC UTILITY COMMISSION

OF TEXAS

**FCS LANCASTER'S RESPONSE TO ROCKETT SPECIAL UTILITY DISTRICT'S
RESPONSE TO ADMINISTRATIVELY COMPLETE PETITION
PURSUANT TO ORDER NO. 6 AND RENEWED MOTION TO DISMISS AND
COMMISSION STAFF'S RECOMMENDATION ON FINAL DISPOSITION**

Now comes FCS Lancaster, Ltd (FCS Lancaster or Petitioner) and files this Response to Rockett Special Utility District's (Rockett) Response to Order No. 6 and Renewed Motion to Dismiss filed December 28, 2020 and Commission Staff's Recommendation on Final Disposition filed on December 31, 2020.¹ Order No. 6 directs Petitioner to respond to Rockett and Commission Staff's filings on or before January 11, 2020; therefore, this Response is timely filed.

I. INTRODUCTION AND BACKGROUND

FCS Lancaster filed a petition to amend Rockett's water certificate of convenience and necessity (CCN) in Dallas County by streamlined expedited release pursuant to Texas Water Code (TWC) § 13.2541 and 16 Texas Administrative Code (TAC) § 24.254(h) on July 13, 2020. Rockett intervened, and moved the Commission to dismiss the petition on the grounds that its service area is protected by 7 U.S.C. § 1926(b) and that the property is, in fact, receiving water service as the term is defined under the Texas Water Code.²

Because Rockett represented it could serve the property to the Commission, FCS Lancaster submitted a Non-Standard Application for Water Service with Rockett on September 30, 2020, along with a fee in the amount of \$3,000 to cover "costs associated with *an investigation of the District's ability to provide service* to the applicant's project," including the cost of a hydraulic analysis

¹ Rockett Special Utility District's Response to Order No. 6 and Renewed Motion to Dismiss (Dec. 28, 2020).

² Rockett Special Utility District's Response to the Petition and Motion to Dismiss at 10 (August 21, 2020).

performed by Rockett's Engineer.³ On October 12, 2020, Rockett's engineer reported Rockett could not commit to serving the project based on the information before it.⁴ And according to Rockett's Response, there are currently no direct water meters or pipes providing water service to FCS Lancaster's property.⁵

After over a year of continuing to file and pursue legal action in various venues based on a conditional commitment to guarantee loan, Rockett was issued an executed loan note guarantee on December 8, 2020, and now has a guaranteed loan as defined by 7 U.S.C. § 1926. Rockett's dilatory tactics resulted in a change of status 14 months after it first (falsely) represented it had a qualifying guaranteed loan. Rockett filed its original Motion to Dismiss on August 21, 2020, a renewed Motion to Dismiss on December 11, 2020, and yet another renewed Motion to Dismiss on December 28, 2020.⁶ The administrative law judge (ALJ) denied Rockett's first Motion to Dismiss on December 30, 2020.⁷

However, while Rockett finally has a guaranteed loan, the obligation of the Commission to carry out its requirements pursuant to TWC § 13.2541 has not changed. The renewed motions to dismiss rely on facts and arguments already rejected by the ALJ. Rockett's Supplement to its Motion to Dismiss fails for lack of factual and legal support, and the Motion to Dismiss should be denied accordingly. Further, as recommended by Commission Staff, the Petition should be granted.⁸

³ Rockett Special Utility District's Supplemental Motion to Dismiss at 11 (emphasis added).

⁴ FCS Lancaster, Ltd's Response to Rockett Special Utility District's Supplemental Motion to Dismiss at Exhibit B, October 12, 2020 Letter from Childress Engineers (Oct. 15, 2020).

⁵ Rockett Special Utility District's Supplemental Motion to Dismiss at Exs. D-E (Oct. 7, 2020).

⁶ Rockett Special Utility District's Reply to FCS Lancaster's Response to Order No. 5 and Renewed Motion to Dismiss (Dec. 11, 2020); Rockett Special Utility District's Response to Order No. 6 and Renewed Motion to Dismiss (Dec. 28, 2020).

⁷ Order No. 7 Denying Rockett's First Motion to Dismiss (Dec. 30, 2020). In Order No. 5, the ALJ dismissed two other supplemental motions to dismiss filed by Rockett. Order No. 5 Requiring a Recommendation on Administrative Completeness and Adequacy of Notice, Addressing Pending Motions, and Requiring Briefing from the Parties (Nov. 5, 2020).

⁸ Commission Staff's Recommendation on Final Disposition (Dec. 31, 2020).

II. ARGUMENT & AUTHORITIES

A. **The Supremacy Clause and the concept of preemption are only an issue where there is a conflict between federal and state law—there is no such conflict here.**

Rockett's renewed motion to dismiss presents no new facts or arguments from its December 11, 2020 Reply to Petitioner's Response to Order No. 5 and Renewed Motion to Dismiss.⁹ Rockett contends that the Commission cannot amend the certificated area because it has a qualifying federally guaranteed loan under Section 1926.¹⁰ Even after Rockett's recent acquisition of a loan note guarantee, Commission Staff has already recommended denial of Rockett's motion to dismiss.¹¹ Rockett argues that the Commission Staff's recommendation, which is to follow the black letter of the law, violates the Supremacy Clause.¹² However, Rockett's argument ignores the presumption against preemption and the lack of "clear and manifest purpose of Congress" in the text of Section 1926(b) to preempt state regulatory authority over its water-service scheme.¹³

The Commission argued before the Fifth Circuit in *Green Valley* that Section 1926 does not apply to the CCN process and decertification. The Commission's argument is correct. As the Commission rightly explained in its briefing, Section 1926(b) prevents encroachment by local governments—"to hold that § 1926(b) also prevents alteration by the State of a utility's legal duty to serve confuses what is necessary to trigger § 1926(b)'s protection with what is covered by that

⁹ Rockett Special Utility District's Reply to FCS Lancaster's Response to Order No. 5 and Renewed Motion to Dismiss (Dec. 11, 2020). No order has been issued in response to that "renewed motion to dismiss." Petitioner filed a response to Rockett's December 11, 2020 filing on December 18, 2020.

¹⁰ Rockett Special Utility District's Reply to FCS Lancaster's Response to Order No. 5 and Renewed Motion to Dismiss (Dec. 11, 2020).

¹¹ Commission Staff's Response to Order Nos. 5 and 6 at 4 (Dec. 18, 2020).

¹² Rockett Special Utility District's Response to Order No. 6 and Renewed Motion to Dismiss at 4–6 (Dec. 28, 2020).

¹³ See *Jones v. Rath Packing Co.*, 430 U.S. 519, 545 (1977), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also Br. for Appellants at 43, *Green Valley Spec Util Dist v City of Schertz*, 2019 WL 2250158 (5th Cir. May 17, 2019).

protection.”¹⁴ Section 1926(b) does not apply to Texas’s decertification process under Chapter 13 of the TWC, which is regulated by the Commission under the laws of this State.

Further, Rockett’s previous reliance on the decision in *Crystal Clear* to support the contention that a portion of TWC § 13.2541 is void, is misplaced. The Fifth Circuit vacated the district court’s judgment in *Crystal Clear*, and thus, that ruling as to preemption is no longer good law.¹⁵ Commission Staff is correct that with the decision in *Crystal Clear* vacated, and absent any other federal court ruling to the contrary, Section 13.2541 is not preempted and must be followed by the Commission.¹⁶

Rockett refers to case law outside of this state and this circuit, or rationale that has since been vacated, in an attempt to craft support for its preemption argument.¹⁷ However, per the Tenth Circuit decision cited by Rockett, “where the federal § 1926 protections have attached, § 1926 preempts local or state law that can be used to justify *a municipality’s* encroachment. . . .”¹⁸ The Tenth Circuit’s decision is directly in line with the Commission’s position that Section 1926 applies to local governments—not the regulatory authority of the Commission (which is an arm of the State). The Fifth Circuit, considering a prior version of *this* statute, vacated the district court’s ruling that the statutory provisions relating to streamlined expedited release were preempted by Section 1926.

The Commission’s authority under Section 13.2541 is not preempted by 7 U.S.C. § 1926(b). As explained in Oder No. 7, “the question of whether Rockett possesses a federal loan is immaterial

¹⁴ Br. for Appellant Pub. Util. Comm’n *et al.*, at 30–31, *Green Valley Spec. Util. Dist. v. City of Schertz*, 2019 WL 2250158 (5th Cir. May 17, 2019).

¹⁵ FCS Lancaster’s Response to Rockett’s Renewed Motion to Dismiss at Attachment A (Dec. 18, 2020).

¹⁶ Commission Staff’s Response to Order Nos. 5 and 6 (Dec. 18, 2020); *see also* FCS Lancaster’s Response to Rockett’s Renewed Motion to Dismiss at Attachment A (Dec. 18, 2020).

¹⁷ *See generally* Rockett Special Utility District’s Response to Order No. 6 and Renewed Motion to Dismiss at 4–6 (Dec. 28, 2020).

¹⁸ *Rural Water Sewer & Solid Waste Mgmt v City of Guthrie*, 344 Fed. Appx. 462, 465 (10th Cir. 2009), *certified question answered sub nom Rural Water Sewer & Solid Waste Mgmt , Dist No 1, Logan County, Oklahoma v City of Guthrie*, 2010 OK 51, 253 P.3d 38, quoting *Pittsburg County Rural Water Dist No 7 v City of McAlester*, 358 F.3d 694, 715 (10th Cir.2004) (emphasis added); *see also* Rockett’s Response to Order No. 6 and Renewed Motion to Dismiss at 4–5 (Dec. 28, 2020).

to the determination to be made in this case.”¹⁹ Thus, the authority that must be followed to process FCS Lancaster’s position for expedited release of the property from Rockett’s CCN are the Texas Water Code and the Commission’s own Regulations. Dismissal based on Rockett’s federal indebtedness would violate the requirements of the TWC, and Rockett’s motion to dismiss should be denied.

B. Rockett has not shown that the property has received water service as required by relevant authority under the laws of this state.

Rockett’s argument that FCS Lancaster’s application indicates the property is receiving water service is not new—and that argument has already been rejected.²⁰ The applicable standard here is the Texas standard that a property can be released from a certificated area when it is not “receiving water service.”²¹ Rockett continues to blur the two standards between provision of service as contemplated by Section 1926, and receipt of water service as that term is used in Section 13.2541. The Commission is required to grant expedited release regardless of the status of Rockett’s indebtedness or the pending federal suit. State law is clear and the Commission’s responsibility here is not discretionary. Under TWC § 13.2541, when a landowner petitions the Commission for expedited release from a CCN, “the utility commission *shall* grant the petition not later than the 60th day after the date the landowner files the petition.”²² The *only* permissible reason for not granting expedited release of the property is if the landowner failed to satisfy statutory or regulatory requirements.²³

Pursuant to the TWC and the Commission’s Regulations, in approving a petition for streamlined expedited release, the Commission must make a finding as to whether a property that is

¹⁹ Order No. 7 Denying Rockett’s First Motion to Dismiss at 2 (Dec. 30, 2020).

²⁰ Order No. 5 Requiring A Recommendation On Administrative Completeness and Adequacy of Notice, Addressing Pending Motions, And Requiring Briefing From The Parties at 2–3 (Nov. 5, 2020) Further, Petitioner previously addressed these same arguments in its December 18, 2020 Response to Renewed Motion to Dismiss.

²¹ Rockett cites to federal opinions regarding provision of water service under Section 1926, not case law regarding providing water service under TWC 13.2541.

²² TWC § 13.2541.

²³ 16 TAC § 24.245(h)(10)

the subject of a petition is *receiving* water service from the CCN holder.²⁴ The affidavit of Rick Sheldon submitted with FCS Lancaster’s petition demonstrates that the property is not currently receiving service.²⁵ Although Rockett makes much of its *future* plans to build facilities that “*could*” be extended to the property, there is currently no actual water line or meter on the property.²⁶ Commission staff, consistent with statutory authority, and Texas case law, determined that the mere existence of water lines or facilities on or near a tract “does not constitute service,” as contemplated by TWC § 13.2541.²⁷ Accordingly, Commission Staff properly recommended that the Petition be approved.²⁸

Further, FCS Lancaster submitted an application for water service to Rockett.²⁹ The very fact that Petitioner applied for service indicates that *the property is not receiving water service*. Contrary to Rockett’s argument, a customer does not submit an application for non-standard service to a water provider when it is already receiving water service.

Rockett contends that it provided water service by “processing the service application” and “evaluating a specific water service request submitted to Rockett by Petitioner.”³⁰ However, Rockett’s own application for service makes it clear that submitting an application for service does not mean water service is being provided or received (or ever will be provided). The application itself states: “This is only an application for non-standard service. Rockett Special Utility District is not obligated to provide service until the application has been evaluated and a final

²⁴ TWC § 13.2541; 16 TAC 24.245(h)

²⁵ *Petition of FCS Lancaster, Ltd to Amend Rockett Special Utility District’s Certificate of Convenience and Necessity in Dallas County by Expedited Release* (July 13, 2020) at 9.

²⁶ Rockett’s Motion to Dismiss at Exs. D–E (Aug. 21, 2020) (emphasis added)

²⁷ Commission Staff’s Recommendation on Final Disposition at 2 (Dec. 31, 2020); *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014).

²⁸ Commission Staff’s Recommendation on Final Disposition (Dec. 31, 2020).

²⁹ The argument that an application for service indicated service was being provided or received was not a part of Rockett’s argument in its initial motion to dismiss, but is addressed here in response to Rockett’s filing of November 20, 2020. This argument was raised in Rockett’s Third Motion to Dismiss, which was fully briefed and responded to previously. That motion to dismiss was denied in Order No. 5 on November 5, 2020.

³⁰ Rockett Special Utility District’s Response to Order No. 5 at 2–3 (Nov. 20, 2020)

Non-Standard Contract has been executed by all necessary parties.”³¹ As the Commission Staff correctly explains in its recommendation that the Petition be granted, “Staff cannot find a cogent line of reasoning” to support Rockett’s contention that a service request indicates that a property is receiving water service.³²

Rockett raises the same arguments the ALJ already rejected in Order No. 5, with no new facts regarding receipt of water service. The existence of a loan note guarantee does not change the rationale supporting the rejection of those arguments. Thus, the ALJ should likewise deny Rockett’s August 21, 2020 Motion to Dismiss and its December 11 and December 28, 2020 Renewed Motions to Dismiss.

III. CONCLUSION

A petition for streamlined expedited release is a matter of Texas law, and the Commission is the administrative body charged with making that determination based on state-law standards. That is the position the Commission has taken in federal court and should take here. Under state law, a property that is not receiving water service and meets the other requirements set out in TWC § 13.2541, must be released from a certificated area. The property has not, and is not, receiving water service from Rockett. Accordingly, the Commission should deny Rockett’s Motion to Dismiss the Petition. Further, and as evidenced herein, the Commission should grant the Petition.

³¹ Rockett Special’s Supplemental Motion to Dismiss at 9 (Oct. 7, 2020).

³² Commission Staff’s Recommendation on Final Disposition (Dec. 31, 2020)

Respectfully submitted,



Jamie L. Mauldin
Texas State Bar No. 24065694
jmauldin@lglawfirm.com

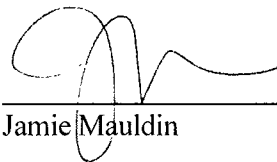
James F. Parker
Texas State Bar No. 24027591
jparker@lglawfirm.com

LLOYD GOSSELINK ROCHELLE & TOWNSEND, PC
816 Congress Ave., Suite 1900
Austin, Texas 78701
Telephone: 512-322-5800
Telecopier: 512-472-0532

ATTORNEYS FOR PETITIONER

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 via electronic mail on January 4, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.



Jamie Mauldin