



Control Number: 51545



Item Number: 8

Addendum StartPage: 0

RECEIVED

DOCKET NO. 51545

2021 JAN -7 AM 10:52

PETITION BY COMPASS
DATACENTERS DFW III, LLC
FOR STREAMLINED
EXPEDITED RELEASE FROM
ROCKETT SPECIAL UTILITY
DISTRICT'S
CCN NO. 10099 PURSUANT TO
TEXAS WATER CODE § 13.2541
AND 16 TAC § 24.254(h)

§
§
§
§
§
§
§
§
§

BEFORE THE
FILING CLERK

PUBLIC UTILITY COMMISSION

OF TEXAS

**PETITIONER'S RESPONSE TO ROCKETT SPECIAL UTILITY DISTRICT'S
MOTION TO DISMISS**

Now comes Compass Datacenters DFW III, LLC (Compass or Petitioner) and files this Response to Rockett Special Utility District's (Rockett) Motion to Dismiss.¹ Rockett SUD's Motion to Dismiss was received December 29, 2020; therefore, this Response is timely filed.

I. INTRODUCTION AND BACKGROUND

On November 20, 2020, Compass filed a petition to amend Rockett's water certificate of convenience and necessity (CCN) in Ellis County by streamlined expedited release pursuant to Texas Water Code (TWC) § 13.2541 and 16 Tex. Admin. Code (TAC) § 24.254(h).² Rockett intervened on December 2, 2020 and moved the Public Utility Commission (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 TWC.³

Rockett moved for dismissal based on the existence of a loan note guarantee received December 8, 2020, and service to a tract of land owned by Compass. Each of these reasons fails and should be rejected. In a related docket, the ALJ has already determined that whether or not Rockett

¹ Rockett Special Utility District's Response to the Petition and Motion to Dismiss (Dec. 29, 2020) (Rockett SUD's Motion to Dismiss).

² Compass notes that the entirety of the property that is the subject of its Petition is included within the property that is the subject of Docket No. 49781. On October 11, 2019, Commission Staff recommended release of tracts that include all of the property in Compass's Petition.

³ *Id.* at 2.

8

has a qualifying federal loan is “immaterial” to approving a petition for streamlined expedited release pursuant to TWC 13.2541.⁴ Second, though Compass and Rockett entered into a Non-standard Service Contract effective March 17, 2020 for property owned by Rockett, but the property subject to that agreement is not included in the Petition.⁵ Neither of Rockett’s arguments rightly asserts a claim for dismissal.

II. ARGUMENT & AUTHORITIES

Rockett SUD’s Motion to Dismiss goes to great lengths to argue that the Commission is preempted from carrying out its requirements pursuant to TWC § 13.2541. However, the concept of preemption is only an issue when there is a conflict between federal and state law and there is no such conflict here. Further, Rockett has provided no evidence that the property at issue in Compass’s Petition is receiving water service under Texas law. Rockett SUD’s Motion to Dismiss fails for lack of factual and legal support, and the Motion to Dismiss should be denied accordingly.

A. Irrespective of Rockett’s USDA-guaranteed loan, Section 1926(b) does not impair the Commission’s mandate to release the Property from Rockett’s CCN.

Section 1926(b) does not expressly limit the action the Commission may take in regulating retail water service. In its entirety, Section 1926(b) provides:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.⁶

⁴ *Petition Of Compass Datacenters DFW III, LLC To Amend Rockett Special Utility District’s Certificate Of Convenience And Necessity In Ellis County By Expedited Release*, Docket No. 51044, Order No. 7 Denying Rockett’s First Motion to Dismiss (Dec. 31, 2020),.

⁵ Rocket SUD’s Motion to Dismiss, Attachment G.

⁶ 7 U.S.C. § 1926(b).

Rockett contends that the Commission cannot amend the certificated area because it has a qualifying federally guaranteed loan under Section 1926.⁷ Even after Rockett’s recent acquisition of a loan note guarantee, Commission Staff recommended denial of Rockett’s motion to dismiss in related Docket No. 49871, and the Administrative Law Judge in related Docket No. 51044 has denied Rockett’s motion to dismiss concluding that Rockett’s federal indebtedness was “immaterial.”⁸

Rockett also argues that relying on the Texas Water Code violates the Supremacy Clause.⁹ However, the Supremacy Clause and the concept of preemption are only an issue when there is a conflict between federal and state law—there is no such conflict here. 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.¹⁰

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 protection.”¹¹ 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.

⁷ Rockett SUD’s Motion to Dismiss at 2.

⁸ See *Petition of the City of Red Oak Industrial Development Corporation to Amend Rockett Special Utility District’s Water Certificate of Convenience and Necessity in Dallas and Ellis Counties by Expedited Release*, Docket 49871, Commission Staff’s Response to Order No. 11 at 3 (Dec. 18, 2020); and Docket 51044, Order No. 7 Denying Rockett’s First Motion to Dismiss (Dec. 30, 2020).

⁹ Rockett SUD’s Motion to Dismiss at 6.

¹⁰ 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).

¹¹ 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).

Further, Rockett's 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.¹²

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.¹³ 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. . . ."¹⁴ 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). Thus, the authority that must be followed to process Compass'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 SUD's Motion to Dismiss should be denied.

B. The property is not receiving water service and must be released from the CCN.

Rockett's loan is not enough to establish federal protection under Section 1926(b). A utility asserting protection under Section 1926(b) must demonstrate both: (1) qualifying federal indebtedness; and (2) that service has been provided or made available.¹⁵ For years, Fifth Circuit

¹² See Order, *Crystal Clear Spec. Util. Dist. v. Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam) (provided as Attachment A).

¹³ See generally Rockett Special Utility District's Response to Petition and Motion to Dismiss at 5–6 (Dec. 29, 2020).

¹⁴ *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).

¹⁵ 7 U.S.C. § 1926(b).

precedent in *North Alamo Water Supply Corp. v. City of San Juan* held that a utility could satisfy that second element simply by providing evidence that it had an obligation to serve by virtue of holding a CCN.¹⁶ On August 7, 2020, the United States Fifth Circuit Court of Appeals overruled *North Alamo*, holding that the mere existence of a CCN and the statutory obligation to serve is *not* sufficient to meet Section 1926(b)’s requirement that service be made available.¹⁷ “[A] state-law duty to provide service is not the same as being physically able to provide it.”¹⁸ Instead, the Fifth Circuit adopted the “physical ability” test, a standard more akin to other federal jurisdictions and more in line with the standard already applied within Texas by the Commission.¹⁹

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.”²⁰ The *only* permissible reason for not granting expedited release of the property is if the landowner failed to satisfy statutory or regulatory requirements.²¹ That is not the case with Compass’s application.

A requisite finding the Commission must make in approving a petition for streamlined expedited release is that the property is not receiving water service from the CCN holder.²² The existence of the Loan Note Guarantee does not moot the fact-finding delegated to this body under Texas law to determine whether a property is receiving water service. Consistent with Commission precedent, statutory authority, and Texas case law, the mere existence of water lines

¹⁶ *N. Alamo Water Supply Corp. v. City of San Juan*, Tex., 90 F.3d 910, 916 (5th Cir. 1996), overruled by *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460 (5th Cir. 2020).

¹⁷ *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 475–76 (5th Cir. 2020).

¹⁸ *Green Valley Special Util. Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 477 (5th Cir. 2020).

¹⁹ *See id.* at 477.

²⁰ TWC § 13.2541.

²¹ 16 TAC § 24.245(h)(10).

²² TWC § 13.2541.

or facilities on or near a tract does not necessarily mean that the tract is receiving service, as contemplated by TWC § 13.2541.²³

There is no doubt that Rockett is not *actively* supplying water to the property Compass requests for decertification.²⁴ All of the alleged proof of water service that Rockett cites to refers to property that is not the subject of Compass's Petition. Compass's Petition solely seeks release of Tracts A and B, defined in the Petition and its attachments. Compass submitted the Affidavit of Jared Day with its Petition indicating that the property is not currently receiving service.²⁵ That is consistent with the finding made by Commission Staff in a related docket that included this exact same property—this property is not receiving water service.²⁶ That Rockett has existing waterlines and facilities that *could* be committed to the property at some point in the indeterminate future is not enough for a finding by the Commission that the property is receiving service. The relevant test is whether Rockett has “performed any act, furnished or supplied anything, or committed or used any facilities or lines *to the properties themselves*.”²⁷ All of the infrastructure referenced is designed and used to serve property that is not a part of the portion of the service area that is the subject of this petition. Rockett's own evidence establishes that it has not.²⁸

Rockett misleadingly claims that it is providing service to Compass's property and attaches evidence of water bills for service from Rockett.²⁹ What Rockett fails to state or clarify, is that

²³ *Texas Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 140 (Tex. App.—Austin 2014).

²⁴ A related pending matter, Docket No. 49871, includes all of the area that is the subject of Compass's Petition. Commission Staff has already made a finding that the property in question is not receiving water service; *see* Docket No. 49871, Commission Staff's Recommendation on Final Disposition (Oct. 11, 2019). To the extent that petition is approved, it would completely resolve this petition.

²⁵ Petition of Compass Datacenters DFW III, LLC for Streamlined Expedited Release from Rockett Special Utility District's CCN No. 10099, Exhibit B at 4 (Nov. 20, 2020).

²⁶ *See* Docket No. 49871, Commission Staff's Recommendation on Final Disposition (Oct. 11, 2019).

²⁷ *Tex. Gen. Land Office v. Crystal Clear Water Supply Corp.*, 449 S.W.3d 130, 142 (Tex. App.—Austin 2014, pet. denied) (emphasis added).

²⁸ Rockett SUD's Motion to Dismiss at Ex. G, identifying Phase 1 as the property receiving water service.

²⁹ Rockett's Response and Motion to Dismiss at 4, Attachments H-1, H-2, and H-3.

Rockett is serving *a portion* of Compass's property—a portion cut out of the service area to be decertified.³⁰ The Non-Standard Service Agreement entered into by Rockett and Compass is to serve approximately 20.752 acres that has been excluded from the application for decertification (Phase 1 of Project Cardinal).³¹ Attachment E to Rockett SUD's Motion to Dismiss shows the 8' domestic water meter, 2" irrigation meter, and a fire hydrant meter Rockett uses to serve a portion of Compass's property.³² A comparison of Attachment E and the map included in Compass's application shows that the area receiving service from Rockett is not included in the service area Compass requests for decertification. Further, the Agreement itself states that "[t]his Contract shall not be construed to include Developer's request for domestic, irrigation, or fire flow water demand related to Phases 2, 3 or 4 of Project Cardinal (as shown in Exhibit B) or related water facilities in connection thereto, or other phases or water facilities other than the Development."³³ Clearly, the contract and the infrastructure identified do not serve all property owned by Compass, but more importantly, the Agreement and supporting maps make clear that it does not cover the property that is the subject of Compass's Petition. That property is not receiving water service and should be released.

Additionally, contrary to Rockett's claim, a request for service is an indication that the Property is not receiving water service.³⁴ The fact that Compass was required to submit such a request supports the finding that the property is not receiving service. Moreover, with the application, Rockett required payment of \$3,000 to cover the cost of a hydraulic study *to determine whether Rockett could provide water service to the property*. If the property was receiving service,

³⁰ *Id.* at Attachment E.

³¹ *Id.* at Attachment G.

³² *Id.*

³³ Rockett's Response and Motion to Dismiss at Attachment G at 4.

³⁴ On this point, the ALJ in related Docket No. 51044 has already denied Rockett's Motion to Dismiss, finding that a service request was not dispositive of whether a property is receiving water service; *see* Docket No. 51044, 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). The execution of the Loan Note Guarantee does not change the analysis as to this point.

there would be no need for an application for service, nor for a hydraulic study. 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 Non-Standard Contract has been executed by all necessary parties.”³⁵ The application covers all four phases of Project Cardinal. Again, the Non-Standard Service Contract entered into by Rockett and Compass is for service to the portion of property owned by Compass, but that property is not subject to this petition, for Phase 1 of Project Cardinal. Additionally, the Easement to which Rockett refers for the installation of a 12” waterline across Tract B of the property is not proof of providing service to the requested property.³⁶ The easement was executed to serve the area excepted from the Petition.³⁷ In sum, Rockett does provide service to a portion of Compass’s property—just not to the property requested for decertification.

There is no inconsistency between applying for service from Rockett and for decertification of the CCN simultaneously. Submitting a request for service does not guarantee receipt of service and certainly is not an indicator that service is already being provided. And, in fact, service is not being provided or received on the property that is the subject of Compass’s Petition. As Commission Staff stated in related Docket No. 51044, in its Recommendation on Final Disposition:

the language of the application and the description of the fee imply that not only is [petitioner] not receiving service, but that Rockett SUD is not even sure it has the capacity to provide service to the requested service area. Given these two implications, Staff cannot find a cogent line of reasoning to suppose the line of reasoning to support the assertion that [petitioner]’s request for service means that the property is receiving service.³⁸

³⁵ Rocket SUD’s Motion to Dismiss, Attachment F.

³⁶ *Id.* at Attachment G, Exhibit D.

³⁷ *Id.*

³⁸ Docket No. 51044, Commission Staff’s Recommendation on Final Disposition at 2 (Dec. 31, 2020).

The property is not receiving water service. Compass has satisfied all of the requirements for streamlined expedited release under the controlling statutes and regulatory provisions. Rockett SUD's Motion to Dismiss fails and ultimately, this petition should be granted.

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. Accordingly, the Commission should deny Rockett SUD's Motion to Dismiss the Petition.

Respectfully submitted,

**LLOYD GOSSELINK ROCHELLE
& TOWNSEND, P.C.**

816 Congress Avenue, Suite 1900

Austin, Texas 78701

(512) 322-5800

(512) 472-0532 (Fax)

jmauldin@lglawfirm.com

jparker@lglawfirm.com



JAMIE L. MAULDIN

State Bar No. 24065694

JAMES F. PARKER

State Bar No. 24027591

**ATTORNEYS FOR COMPASS
DATACENTERS DFW III, LLC**

CERTIFICATE OF SERVICE

I certify that notice of the filing of this document was provided to all parties of record via electronic mail on January 7, 2021, in accordance with the Order Suspending Rules, issued in Project No. 50664.



JAMIE L. MAULDIN