



Control Number: 49863



Item Number: 28

Addendum StartPage: 0

PUC DOCKET NO. 49863

RECEIVED

PETITION OF ALAMO MISSION LLC
TO AMEND ROCKETT SPECIAL
UTILITY DISTRICT'S WATER
CERTIFICATE OF CONVENIENCE
AND NECESSITY IN ELLIS COUNTY
BY EXPEDITED RELEASE

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PUBLIC UTILITY COMMISSION

PUBLIC UTILITY COMMISSION
OF TEXAS
FILED CLERK

ROCKETT SPECIAL UTILITY DISTRICT'S
OBJECTION AND REPLY TO ALAMO MISSION LLC'S
RESPONSE FILED OCTOBER 29, 2019

COMES NOW, ROCKETT SPECIAL UTILITY DISTRICT ("Rockett") and files this Objection and Reply to the Response filed by Alamo Mission LLC ("Petitioner") with the Public Utility Commission of Texas (the "PUC") on October 29, 2019. This Objection and Reply is timely filed.

Summary of Petitioner's Response and Arguments

Petitioner contends that the Judgment entered against the Commissioners of the PUC on March 27, 2019 by U.S. District Judge Lee Yeakel in *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777, at *2 (W.D. Tex. Mar. 27, 2019)¹ ("*Crystal Clear*") (1) applies only to that case, and (2) the judgment should be disregarded. Petitioner is directly encouraging, if not demanding, that the PUC and its Commissioners, violate 7 U.S.C. § 1926(b) ("1926(b)") and 42 U.S.C. § 1983 ("1983").

¹ "(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." *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.)

Petitioner urges the Commissioners to disregard 5th Circuit law regarding the standards to be applied to 1926(b), suggesting that non-applicable state court decisions and the decisions from other federal courts of appeal should be followed instead.

I. Petitioner Misstates the Law.

Petitioner misstates the law by falsely suggesting to the PUC that under 1926(b), which is enforced under 1983, Rockett must make water service immediately available from existing infrastructure. (Petitioner states at p. 4 of its Response: "...the utility must prove both a legal right or duty to serve a particular area and the "present" physical ability to do so.") The law of the 5th Circuit which is controlling here, mandates that Rockett is entitled to 1926(b) protection if Rockett shows only that (1) Rockett holds a CCN relative to the land at issue here, and (2) Rockett is indebted to the United States Department of Agriculture ("USDA") or on a loan guaranteed by the USDA. There is no genuine issue here that Rockett satisfies both elements.

"The Fifth Circuit recently held that "[w]here a certificate of convenience and necessity imposes a duty on a utility to provide a service, that utility has 'provided or made available' that service under § 1926." *Green Valley Special Utility Dist. v. City of Cibolo*, 866 F.3d 339, 341 (5th Cir. 2017) (citing *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915–16 (5th Cir. 1996) (per curiam)); see also *Green Valley Special Utility Dist. v. Walker*, 324 F.R.D. 176, 187 (W.D. Tex. 2018) ("The Court finds Fifth Circuit precedent conclusively precludes interpreting § 1926(b) to require a 'pipe in the ground' requirement.")"

Crystal Clear Special Util. Dist. v. Marquez, 316 F. Supp. 3d 965, 971 (W.D. Tex. 2018) (Emphasis added.)

Petitioner's arguments are premised on an erroneous description of the "pipes in the ground" or "physical ability" test adopted by certain other federal circuits and in *Creedmoor–Maha Water Supply Corp. v. Texas Commission on Environmental Quality*, 307 S.W.3d 505 (Tex. App.—Austin 2010, pet. denied). See Section V below which explains that the "pipes in the

ground” test, does not require a water district to have the immediate or existing capability to provide water service, but rather the Courts that have adopted that test, allow the water district to provide water service within a reasonable period of time (an objective standard).

Remarkably, Petitioner is presenting the same arguments that the PUC Commissioners presented to U.S. District Judge Lee Yeakel in *Crystal Clear* which were expressly rejected by Judge Yeakel.² The rulings made by Judge Yeakel are binding on the PUC Commissioners and the Commissioners are precluded from re-litigating issues decided by Judge Yeakel under the doctrine of non-mutual collateral estoppel, as discussed farther below.

II. Petitioner’s Petition for Decertification is Premised on a Void Statute.

Petitioner argues that its Petition for Decertification filed pursuant to Texas Water Code § 13.254(a-5) (“(a-5)”) is fully compliant. However (a-5) was held preempted and void in *Crystal Clear* and cannot be used as the authority to support decertification here, which renders Petitioner’s Petition a nullity. The Commissioners must recognize and obey federal law to the exclusion of conflicting state law under the U.S. Constitution’s “Supremacy Clause.”

² “Las Colinas also argues that *Green Valley* was wrongly decided. Las Colinas supports its argument with decisions from the Fourth and Sixth Circuits and as well as a Texas court of appeals case. See *Chesapeake Ranch Water Co. v. Board of Commissioners of Calvert County*, 401 F.3d 274 (4th Cir. 2005); *Le-Ax Water District v. City of Athens*, 346 F.3d 701 (6th Cir. 2003); *Creedmoor–Maha Water Supply Corp. v. Texas Commission on Environmental Quality*, 307 S.W.3d 505 (Tex. App.—Austin 2010, pet. denied). Each of these cases applied some variation of the interpretation of “provided or made available” to require “pipes in the ground.” However, **this court is bound to apply the precedents of the Fifth Circuit and that precedent is clear here.** See *Green Valley Special Utility Dist. v. Walker*, 324 F.R.D. at 187 (“Though other courts of appeals have questioned the wisdom of this interpretation, this court is bound by the holdings of the circuit in which it sits.”). **Applying the Fifth Circuit’s holdings on the issue, *Crystal Clear* meets the requirement of having “provided or made available” service under Section 1926(b).**” *Crystal Clear Special Util. Dist. v. Marquez*, 316 F. Supp. 3d 965, 972 (W.D. Tex. 2018) (Emphasis added.)

Petitioner urges the PUC Commissioners to disregard federal statutory law, and controlling 5th Circuit law. The Court in *Crystal Clear* found such arguments “troubling.”

“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.”

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) (Emphasis added.)

III. The PUC Commissioners Are Bound By *Crystal Clear* In This Proceeding.

Petitioner’s argument that the PUC Commissioners are not bound by the *Crystal Clear* judgment, and may disregard the *Crystal Clear* judicial determinations in this proceeding, is a false statement of federal law. Rockett has the right to use offensive collateral estoppel (offensive issue preclusion) as explained in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331, 99 S. Ct. 645, 652, 58 L. Ed. 2d 552 (1979).

“Offensive collateral estoppel occurs when “a litigant who was not a party to the prior judgment may nevertheless use that judgment ‘offensively’ to prevent a defendant from relitigating issues resolved in the earlier proceeding.” *Parklane Hosiery Co., Inc.*, 439 U.S. at 326.”

OJSC Ukrnafta v. Carpaty Petroleum Corp., No. CV H-09-891, 2018 WL 5921228, at *3 (S.D. Tex. Nov. 13, 2018) (Emphasis added.) See also *Taylor v. Vaughn*, No. A-15-CV-648-LY-ML, 2016 WL 11588707, at *5 (W.D. Tex. July 25, 2016).

In the Federal Complaint filed by Rockett, attached hereto as Exhibit A, Rockett is specifically seeking to enforce the judgment entered in *Crystal Clear*, relative to the Petition for Decertification filed by Petitioner here. See attached Federal Complaint at ¶ 21.

Petitioner’s argument that “Rockett continues to rely on non-binding federal district court authority,” is both wrong and “troubling” (using the words of U.S. Magistrate Judge Andrew

Austin in the *Crystal Clear* case). Petitioner's contention that *Crystal Clear* is non-binding, is meritless and frivolous.

IV. This Proceeding Must Be Dismissed, Not Abated.

Rockett enjoys 1926(b) protection by virtue of the undisputed fact that Rockett holds a CCN for the property described in the Petition, and is indebted on a loan guaranteed by the USDA. As a result, this action must not be "abated," but rather must be dismissed without delay. Abatement would allow a Petition premised on a void statute, and in contravention of a final judgment entered in *Crystal Clear* to linger, in the hopes that at some future date, the law might change. The pendency of an appeal from the *Crystal Clear* judgment does not diminish the finality of that judgment, and the collateral estoppel effect of that judgment. Any delay in dismissal of the Petition, suggests that the PUC Commissioners are refusing to recognize Judge Yeakel's findings and judgment.

"In any event, though, in the more pertinent context of determining the finality of a judgment for purposes of according it preclusive effect, courts, including the Fifth Circuit, have uniformly held that the finality of a judgment is not affected by the pendency of an appeal. See *Fid. Standard Life Ins. Co. v. First Nat'l Bank & Trust Co. of Vidalia, Ga.*, 510 F.2d 272 (5th Cir.1975) (per curiam) ("A case pending appeal is res judicata ... unless and until reversed on appeal."), cert. denied, 423 U.S. 864, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975); see also *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc.*, 170 F.3d 1373, 1380–81 (Fed.Cir.1999) ("[t]he vast weight of case law" supports according a judgment collateral estoppel effect while pending on appeal); *Williams v. Commissioner*, 1 F.3d 502, 504 (7th Cir.1993) ("[A] judgment final in the trial court may have collateral estoppel effect even though the loser has not exhausted his appellate remedies.")"

Welch v. All Am. Check Cashing, Inc., No. 3:13CV271TSL-JCG, 2015 WL 4066495, at *5 (S.D. Miss. July 2, 2015) (Emphasis added.)

V. 1926(b) Does Not Require Immediate or Existing Water Service.

Petitioner cites to an email sent by Kay Phillips, the general manager of Rockett which states in pertinent part that “the District does not have any *existing* water service or water pipelines that can provide service to the Project site as requested.” (Emphasis added.)

5th Circuit precedent (cited above) and the *Crystal Clear* judgment and findings of Judge Yeakel, show that Rockett is not required to have “existing” water service or “existing” water pipelines in order to qualify for 1926(b) protection. Other federal circuits that have adopted a different analysis from that described in the 5th Circuit decisions referenced above, have never required a water district to have a “present” or “existing” ability to provide water service. The other federal circuits that have addressed 1926(b) have adopted a “reasonable time” period in which the water district can provide water service. See for example *Ross Cty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 399 (6th Cir. 2011) (“The association seeking § 1926(b) protection must also be capable of providing service to the disputed area within a reasonable time after a request for service occurs.” (Emphasis added.) See also *Pub. Water Supply Dist. No. 3 of Laclede Cty., Mo. v. City of Lebanon, Mo.*, 605 F.3d 511, 523 (8th Cir. 2010)) “Under the “pipes in the ground” test used in water service cases, courts examine “whether a water association ‘has adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made.’ ” *Sequoyah County*, 191 F.3d at 1202 (quoting *Bell Arthur*, 173 F.3d at 526).” (Emphasis added.))

Crystal Clear pointed out that the law of other circuits regarding 1926(b) is not applicable here. If such law did apply (which it does not) none of the decisions from other circuits support Petitioner’s argument that water service must be presently or immediately provided.

VI. Petitioner Provided No Information Regarding Its Water Needs.

Contrary to Petitioners contention that it provided sufficient information for Rockett to perform an hydraulic study (that Rocket performs for all such similar requests for water service), Petitioner provided “no information” to support its speculative prediction of future water needs. Petitioner also specified an unreasonably short time period in its demand for water service. Petitioner’s motivation in doing so was to create the false illusion that Rockett could not provide adequate water service. If such information had been provided to Rockett, Petitioner would have attached the information to Petitioner’s Response.

Petitioner admits that its application for water service submitted to Rocket was “incomplete” (Response at 11) because the information was “confidential.” Petitioner fails to explain what is secret regarding the volume of water that is “genuinely” needed and for what purpose. Rockett was precluded from performing an hydraulic analysis for the project, for the reason that Petitioner withheld vital information.

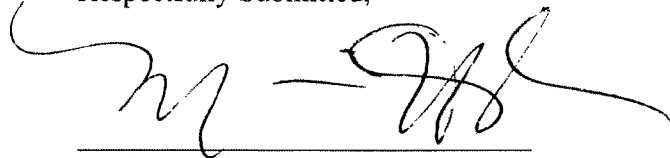
Conclusion

The issue here is not whether Rockett is providing water service to the land described in the Petition, but rather whether Petitioner can proceed with a Petition premised on Tex. Water Code § 13.254(a-5) that has been declared unconstitutional and void, relative to water districts that enjoy 1926(b) protection.

Petitioner’s prayer for relief here, is premised on asking the PUC Commissioners to disregard federal law, and in particular disregard a federal judgment entered against the Commissioners in *Crystal Clear*.

The Commissioners must swiftly reject Petitioner’s arguments and immediately dismiss the Petition for Decertification.

Respectfully Submitted,



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Certificate of Service

I hereby certify that on the 30th day of October, 2019, a true and correct copy of the foregoing was served on the individuals listed below by hand delivery, email, facsimile or First Class Mail, postage prepaid.

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

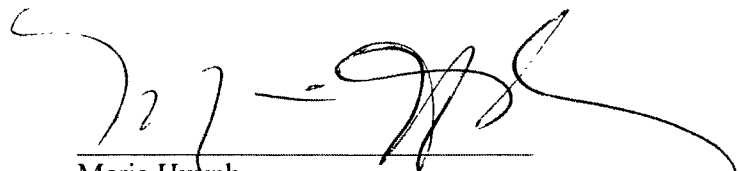
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Maria Huynh

EXHIBIT A

1

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 continues to occur, in this judicial district.

PARTIES

3. Rockett Special Utility District (“Rockett”) is a political subdivision of the State of Texas and is a retail public utility operating under Chapter 65 of the Texas Water Code furnishing water 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 United States Department of Agriculture (“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 has provided or made service available (can provide water service within a reasonable period of time),

which includes the land described in the “Petitions” referenced in paragraphs 10 and 11 below (“Land at Issue”). (Rockett moves the District Court to take judicial notice of said Petitions pursuant to Fed. R. Evid. 201.)¹

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 regulating, and implementing the state’s laws concerning, electric, telecommunication, and water and sewer utilities. The Commissioners may be served with process by serving each at the William B. Travis Building, 1701 North Congress Avenue, 7th 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.”

Frew v. Hawkins, 540 U.S. 431, 437 (2004). *See also 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); *Nelson v. Univ. of Tex. At Dallas*, 535 F.3d 318, 322 (5th Cir. 2008).

¹ The Public Utilities Commission filings are public records available online here: <http://interchange.puc.texas.gov>. Rockett asks the Court to take judicial notice of the following filings: Control Number 49871, Item Number 1 (Petition by City of Red Oak for Expedited Release); Control Number 49871, Item Number 10 (Commission’s Staff Recommendation on Final Disposition of Red Oak Petition); Control Number 49863, Item Number 1 (Petition by Alamo for Expedited Release); Control Number 49863, Item Number 2 (Commission’s Staff Response to Order No. 4 in Alamo Petition). Copies of these orders are attached to this motion as Exhibits A through D respectively.

5. Defendant John Paul Urban (“Urban”), in his official capacity as Executive Director of the Texas Public Utility Commission, 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 North Congress Avenue, 7th 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 by serving its registered service agent: Corporation Service Company dba CSC – Lawyers Incorporating Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

7. Defendant City of Red Oak Industrial Development Corporation (“Red Oak”) is a Texas nonprofit corporation incorporated under the Development Corporation Act of 1979 (Chapter 504, Texas Local Government Code). Red Oak may be served with process on its registered service agent: Todd Fuller, 200 Lakeview Parkway, Red Oak, Texas 75154.

DEFENDANTS’ VIOLATIONS OF 7 U.S.C. § 1926(b)

8. On March 27, 2019 this Court entered the following judgment against the Commissioners and ordered:

“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.)

9. Prior to this Court entering judgment against the Commissioners and declaring Tex. Water Code §§ 13.254(a-5) and (a-6) 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 directly contradictory to federal law. U.S. Magistrate Judge Andrew Austin (Western District) stated in his recommendation to this 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).**⁴ 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 Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019). (Emphasis added.)

The Commissioners have willfully and intentionally disregarded (if not repudiated) the judgment of this Court and have persisted in ignoring the protections afforded by 1926(b) to qualifying associations such as Rockett. The Commissioners have persisted in considering actions such as those filed by Defendants Alamo and Red Oak, to enforce Tex. Water Code § 13.254(a-5) (“(a-5)”) and Tex. Water Code § 13.254(a-6) (“(a-6)”) despite the fact that (a-5) and (a-6) have been adjudicated void by this Court, under the circumstances and subject to the limitations described above by U.S. District Judge Lee Yeakel (when the object of the enforcement is an entity which qualifies for 1926(b) protections) and despite the fact that Rockett is entitled to the protections of 1926(b).

10. On August 16, 2019, more than 4 months after judgment was entered in *Crystal Clear*, 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). After Alamo was notified that Rockett was indebted on a loan guaranteed by the USDA and qualified for the protections of 1926(b), Alamo ignored this notice and intensified its efforts to diminish and alter the territory for which Rockett holds the legal right to provide water service under Rockett's CCN. This form of interference with Rockett's federal rights under 1926(b) is a violation of 1926(b), as 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 that Alamo seeks to decertify is situated within Rockett's CCN 10099.

11. On August 19, 2019, more than 4 months after judgment was entered in *Crystal Clear*, Defendant Red Oak filed its Petition with the PUC (case number 49871) seeking a decertification of Rockett's CCN regarding property purportedly

owned by Defendant Red Oak, pursuant to Tex. Water Code § 13.254(a-5). After Red Oak was notified that Rockett was indebted on a loan guaranteed by the USDA and qualified for the protections of 1926(b), Red Oak ignored this notice and continued its efforts to diminish and alter the territory for which Rockett holds the legal right to provide water service. This form of interference with Rockett's federal rights under 1926(b) is a violation of 1926(b) as Red Oak is seeking to reduce the customer pool for Rockett within Rockett's protected service area. All land Red Oak seeks to decertify is situated within Rockett's CCN 10099.

12. Defendants Alamo and Red Oak have been placed on formal written notice that the Texas statutes on which their Petitions for Decertification depend, namely (a-5) and (a-6), have been adjudged unconstitutional and void under circumstances identical to those present here. Despite notice provided to Alamo and Red Oak, that Rockett qualifies for 1926(b) protection, and the judgment entered in *Crystal Clear*, Alamo and Red Oak have persisted in pursuing their Petitions to Decertify the Land at Issue.

13. Defendant Commissioners knew, after judgment was entered in *Crystal Clear*, that any new Petition filed with the PUC pursuant to (a-5), against an entity such as Rockett, that was and is entitled to the protections of 1926(b), was premised on a statute that was void and unenforceable.

14. Despite Rockett notifying the PUC and documenting for the PUC Rockett's federally guaranteed loan that remains outstanding and requesting that the PUC dismiss the Alamo and Red Oak Petitions for Decertification which sought relief under (a-5), the PUC has failed and refused to dismiss the Alamo and Red Oak Petitions for Decertification.

15. Staff for the Commissioners has warned the Commissioners in writing regarding this matter, namely that the Commissioners should "alternatively" consider abating any consideration of the Alamo Petition for Decertification of portions of Rockett's territory "until the courts resolve this issue", but as of the date of the filing of this Complaint, the Commissioners have not respected nor observed the prior rulings of this Court in *Crystal Clear* or warnings from the Commissioners' staff.²

16. Rockett is indebted on a loan guaranteed by the USDA ("Guaranteed Loan"). A USDA guaranteed loan qualifies 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 [a] 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). (Emphasis added.)

² PUC staff made the same suggestion—for abatement of the two proceedings—pending resolution by "the courts". *See* Exhibit B at p. 4; Exhibit D at p. 2.

17. The Petitions for Decertification filed by Alamo and Red Oak with the PUC, specifically allege that the property for which decertification is sought is within the CCN granted to Rockett by the State of Texas.

18. Rockett is entitled to 1926(b) protection because (1) Rockett is indebted on a loan guaranteed by the USDA, and (2) Rockett has “made service available” because of its legal obligation to provide water service pursuant to its CCN.

“Under § 1926(b), the service area of utility association may not be curtailed or limited so long as (1) the association has an outstanding loan under § 1926; and (2) the association has “made available” service. *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996) (per curiam); *see also Green Valley Special Util. Dist. v. City of Cibolo, Tex.*, 866 F.3d 339, 341 (5th Cir. 2017).”

Green Valley Special Util. Dist. v. Walker, 351 F. Supp. 3d 992, 1002 (W.D. Tex. 2018).

“On appeal, the **Fifth Circuit explicitly held “that the Utility’s state law duty to provide service is the legal equivalent” of making service available under § 1926(b).** *Id.* It then affirmed “on the strength of [the lower court’s] alternative legal and factual determinations.” *Id.*”

Id. at 1003 (citing *N. Alamo*, 90 F.3d at 916) (emphasis added).

Independent of the fact that Rockett has satisfied the “made service available” element of 1926(b) under 5th Circuit law, because Rockett holds a CCN with respect to the Land at Issue, Rockett has also satisfied the “made service available” element of 1926(b) as that phrase is interpreted by other Federal Circuit Courts of Appeals, by reason of the fact that Rockett has “pipes in the ground” within or adjacent to the

property Alamo and Red Oak seek to decertify, and Rockett has the physical ability to satisfy the *legitimate* domestic water needs for the Land at Issue or can provide water service within a reasonable period of time.

19. Rockett's "territory" for which it has the *legal right* to provide water service under Texas law, which includes land identified in the Petitions that Defendants Alamo and Red Oak have filed with the PUC (referenced above in numbered paragraphs 10 and 11), cannot be diminished or altered after Rockett became indebted on a loan 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 and Red Oak are engaged in an attempt to diminish or alter the territory of Rockett, through their Petitions filed with the PUC in violation of 1926(b).

20. 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.)

21. 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 42 U.S.C. § 1983 – Commissioners and Urban

22. Rockett incorporates all allegations above.

23. In order to state a cause of action under 42 U.S.C. § 1983, Rockett must allege only that some person 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).

24. 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.

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

26. 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 5th Circuit and other Federal Circuit Courts of Appeals.

27. Rockett has 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 Alamo and Red Oak Petitions for Decertification.

Count 2

Declaratory Judgment – 7 U.S.C. § 1926(b) – All Defendants

28. Rockett incorporates by reference all allegations above.

29. 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).

30. 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 at Issue, from Rockett's

territory (its CCN) to allow Alamo and Red Oak to obtain water service from another entity (presumably the City of Red Oak), 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 at Issue.

31. 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 would otherwise 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. 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.

32. (a-6) states 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." This portion of (a-6) has been expressly declared void because it violates the Supremacy Clause. The Commissioners were parties to *Crystal Clear*, and are bound by the judgment entered in that case. (See *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).) The Commissioners and Urban cannot

disregard the judgment entered in *Crystal Clear*, relative to the Petitions for Decertification filed by Alamo and Red Oak, once notified of Rockett's 1926(b) rights.

33. Regardless of whether (a-5) or (a-6) 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).)

34. (a-5) and (a-6) are unconstitutional for the reason that these statutes interfere with Rockett's rights under 1926(b). Any action by the Commissioners or Urban in reliance on or pursuant to (a-5) or (a-6) would frustrate an important federal statutory scheme intended to promote rural development as codified in 7 U.S.C. § 1926.

35. (a-5) and (a-6), which are applicable to the Petitions for Decertification filed by Alamo and Red Oak (because those Petitions were filed before September 1, 2019), must be declared preempted, void, and unconstitutional because such statutes are in direct conflict with the purposes and objective of 1926(b). As a result, the Commissioners and Urban have no authority to act upon the Petitions filed by

Alamo and Red Oak relative to Rockett's territory or CCN, and Alamo and Red Oak have no lawful right to pursue said Petitions.

Count 3

Injunctive Relief – All Defendants

36. Rockett incorporates by reference all allegations above.

37. 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 § 13.254(a-5) and (a-6) 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 precluding any further presentation, prosecution, consideration, or granting relief under the pending Petitions for Decertification filed by Alamo and Red Oak.

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 and Red Oak.

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

Respectfully submitted,

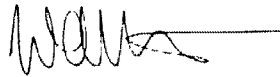
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EXHIBIT “A”