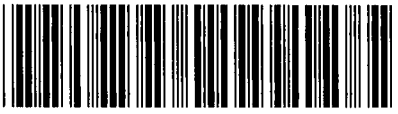

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DOCKET NO. 49863

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

ALAMO MISSION'S
MOTION TO LIFT ABATEMENT

Alamo Mission LLC ("Petitioner") moves to lift the abatement of these proceedings and requests an order granting its Petition for Streamlined Expedited Release (the Petition") from Rockett Special Utility District's ("Rockett") CCN, consistent with Commission Staff's prior recommendation to grant that relief. In support of its motion, Petitioner provides the following information.

I. INTRODUCTION

Petitioner's desired property-development project offers to create substantial economic benefits to the local economy. The plan will require a significant and reliable water source. Before seeking to decertify its property from Rockett's CCN, Petitioner discussed its needs with Rockett, with the initial intention of working with Rockett as the project's water supplier. After Rockett advised Petitioner that it could not provide the water necessary to meet Petitioner's property development needs, Petitioner filed this Petition for Streamlined Expedited Release.

The Petition has now been pending for over one year. Despite the legislature's intent that such petitions should be granted within 60 days after the date the landowner files a petition, and despite Commission Staff's prompt consideration and timely recommendation to grant the Petition, Commission Staff ultimately recommended, and the Administrative Law Judge ("ALJ") ordered, that this proceeding be abated for a federal court to address Rockett's last-minute assertion

that the Commission's proceedings were "preempted." Specifically, Rockett asserted before the Commission and in its federal lawsuit that it had incurred "federally guaranteed" debt through the United States Department of Agriculture ("USDA"), and that under 7 U.S.C. § 1926(b), its CCN was protected from encroachment and any Commission action that might limit its CCN was preempted by federal law—meaning that, according to Rockett, the Commission had no authority even *to consider* the Petition.

Rockett's federal preemption claim has now been fully vetted and thoroughly debunked by Federal Magistrate Judge Mark Lane. Judge Lane has recommended that Petitioner's (and other Defendants') motion to dismiss be granted because Rockett does not, in fact, have "federally guaranteed" debt. Rather, Rockett's false claims that it has such debt are—in Judge Lane's words—"absurd[]," "wholly insubstantial," "frivolous," and "completely devoid of merit."[1] Accordingly, § 1926(b) is inapplicable to these proceedings, and Rockett's preemption claim (in addition to being wrong on the merits) is foreclosed.[2]

But even if Rockett *did have* federally guaranteed debt, it would still not be entitled to play a literal "King's X" on these proceedings. The Fifth Circuit has recently clarified that a water utility's service area is not protected from encroachment by § 1926(b) merely because the utility holds a CCN and has a federally guaranteed loan. Rather, in addition to holding a CCN and having qualifying debt, the utility must actually "provide or make service available" to the property at issue before § 1926(b) is implicated. As the Fifth Circuit's decision in *Green Valley v. City of Schertz* makes clear, whether a utility is "providing or making service available" is a fact question that asks whether the utility "has adequate facilities to provide service to the relevant area within

[1] *Rockett Spec Util. Dist v. Shelly Botkin, et al*, No. 1:19-cv-01007, in the United States District Court for the Western District of Texas, Austin Division, at 5, 10, 11 (attached as Ex. 1).

[2] Judge Lane's recommendation is pending before Federal District Court Judge Robert Pittman.

a reasonable time after a request for service is made."[3] The Commission is uniquely suited and obligated to address that fact question—it is the Texas state agency charged with the authority to do so. Thus the existence of a CCN and qualifying debt does not "preempt" the Commission from doing its job. It only sets the stage for the Commission to determine whether the water utility resisting decertification under § 1926(b) can meet the standard set by *Green Valley*.

Here, the evidence submitted with the Petition conclusively demonstrates that when the Petition was filed, Rockett did not have adequate facilities to meet Petitioner's property-development needs. And Rockett did not demonstrate—or even attempt to demonstrate—in its prior responses to the Petition that it would have adequate facilities to serve the project within a reasonable time. Based on the record already before the Commission, Rockett is not entitled to § 1926(b) protection.

The Commission should—indeed, it must—address Petitioner's Petition for Streamlined Expedited Release pursuant to Texas Water Code § 13.2541[4] and 16 Texas Administrative Code § 24.245(h)[5] on the record before it. To do otherwise would allow Rockett's patently false preemption claim to continue to delay proceedings that, under the clear terms of Texas law, are intended to be *expedited*.

Additionally, Petitioner has learned that the USDA is now moving forward with its process to issue a federal guarantee to Rockett's loan. The Commission should act now to avoid further unnecessary complication and delay.

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

[4] Texas Water Code § 13.2541 was previously designated as § 13.254(a-5). The substance of the provision remains the same. For consistency, Petitioner will refer to § 13.2541.

[5] Effective July 2, 2020, the former 16 Texas Administrative Code § 24.245(l) is 16 Texas Administrative Code § 24.245(h). For consistency, Petitioner will refer to the new provision.

The Commission should lift the abatement and adopt Commission Staff's prior recommendation in this Docket to grant the Petition.

II. FACTUAL BACKGROUND

Over one year ago, on August 16, 2019, Petitioner filed a Petition for Streamlined Expedited Release pursuant to Texas Water Code § 13.2541 and 16 Texas Administrative Code § 24.245(h), seeking to decertify approximately 167 acres of real property in Ellis County (the "Property") from Rockett's CCN No. 10099.[6] Rockett opposed the Petition, contending that it was providing water service to the Property.[7] As demonstrated in Petitioner's Reply to Rockett SUD's Responses to Petition for Expedited Release and Motion to Strike ("Petitioner's Reply"), however, Rockett's representation was false. The single active meter referenced by Rockett is in fact an old, empty meter box, which is locked off, has no water meter in it, and has been unused for a long time.[8] Moreover, Rockett informed Petitioner before the Petition was filed that Rockett did not have, and was unable to secure, sufficient water to service Petitioner's proposed Project on the Property.[9]

After initial briefing, Staff recommended that the Commission should approve the Petition, concluding that Petitioner had demonstrated that the property at issue "is located in a qualifying county (Ellis County), is not receiving water service, and that the aggregated, contiguous tracts of land make up a single property that is at least 25 acres."[10]

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[6] *Petition of Alamo Mission LLC to Amend Rockett Special Utility District's Water Certificate of Convenience and Necessity in Ellis County by Expedited Release*, Commission Dkt. No. 49863. As explained, the Petition was filed when the prior Texas Water Code and Texas Administrative Code designations were still in place. *See supra* notes 4, 5.

[7] Rockett's Special Utility District's Response and Objection to Petition for Expedited Relief ("Rockett's Response"), p. 2.

[8] Affidavit of Travis J. Snook, attached as Exhibit 1 to Petitioner's Reply.

[9] Supplemental Affidavit of David Thomas, attached as Exhibit 2 to Petitioner's Reply.

[10] Commission Staff's Recommendation on Final Disposition, September 26, 2019, at 2.

Four days later, Rockett submitted a supplemental filing asserting that it had recently incurred federally guaranteed debt and, pursuant to 7 U.S.C. § 1926(b), the Commission was preempted from considering the Petition or decertifying the Property from Rockett's CCN.[11] After additional briefing from the parties, Staff continued to recommend that the Commission grant the Petition.[12] Alternatively, however, Staff recommended that the Commission abate this proceeding "until the courts resolve [the federal preemption] issue."[13]

On October 29, 2019, Rockett filed suit in federal district court against Commissioners Botkin, Walker, and D'Andrea; Commission Executive Director, John Urban; the City of Red Oak Industrial Development Corporation ("the City of Red Oak"); and Petitioner seeking (among other things) to enjoin the Commission from acting on the Petition.[14] Rockett challenged the Commission's authority to act on petitions filed under Texas Water Code § 13.2541 when the certificate holder is indebted to the federal government or holds federally guaranteed debt, asserting that 7 U.S.C. § 1926(b) preempts any such action. Shortly thereafter, the ALJ ordered this Docket abated.[15]

Ten months later, the magistrate judge assigned to hear the parties' motions to dismiss concluded that, contrary to Rockett's representations to the Commission and the federal district court, *it has no federally guaranteed debt.* Petitioner now respectfully requests that the

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[11] Rockett Special Utility District's Supplemental Filing, filed September 30, 2019, at 1-5; *see also* Rockett Special Utility District's Response and Objection to Petition for Expedited Release, filed October 1, 2019, at 1-5.

[12] Commission Staff's Response to Order No. 4 at 2.

[13] *Id.*

[14] *Supra* note 1. In a separate, but related suit, the City of Red Oak challenged the validity and existence of Rockett's claimed federal guarantee. *City of Red Oak v. United States Department of Agriculture, Rural Utilities Service, Rockett Special Utility District and CoBank*, No. 1:19-2761, in the United States District Court for the Northern District of Texas, Dallas Division.

[15] Order No. 4 Abating Proceeding.

Commission lift the abatement and promptly resolve the Petition for Streamlined Expedited Release.

III. THE COMMISSION SHOULD LIFT THE ABATEMENT.

A. Texas Law Requires Expedited Release of Property Under Texas Water Code § 13.2541 and § 1926(b) Does Not Bind the Commission.

As an initial matter, the Commission should lift the abatement regardless of Rockett's federal lawsuit because these proceedings are governed by Texas Water Code § 13.2541, which requires the Commission to "grant the petition not later than the 60th day after the date the landowner files the petition."[16] The Commission "may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program."[17] The abatement of these proceedings is and continues to be contrary to Texas law.

Moreover, as the Commission argued before the Fifth Circuit in *Green Valley Special Utility District v. City of Schertz*, the abatement is not required by federal law.[18] The stated basis for the abatement—7 U.S.C. § 1926(b)—does not apply to the Commission. 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

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[16] TEX. WATER CODE § 13.2541(c).

[17] *Id.* § 13.2541(d). Petitioner expects that Rockett will respond to this point by arguing that the federal district court's decision in *Crystal Clear Special Utility District v Walker*, No. 1:17-cv-254-LY, 2019 WL 2453777, at *1 (W.D. Tex. Mar. 27, 2019), concluding that § 13.2541 is preempted to the extent it would require the Commission to grant a petition for decertification without regard to the protection afforded by § 1926(b), binds the Commission and prohibits it from taking any action here. For the reasons explained herein, the Fifth Circuit's recent decision in *Green Valley* fatally undermines the district court's holding in *Crystal Clear* The appeal in *Crystal Clear*, which was abated pending the decision in *Green Valley*, is still pending at the Fifth Circuit.

[18] Br. for Appellants at 30, *Green Valley Spec. Util. Dist v City of Schertz*, 2019 WL 2250158 (5th Cir. May 17, 2019).

> to serve the area served by the association at the time of the occurrence of such event.

7.U.S.C. § 1926(b). As the Commission has observed, it is not a "municipal corporation or other public" body that can expand its boundaries. Accordingly, § 1926(b) does not limit the Commission's authority to "examin[e] whether the loan-recipient continues to deserve or has the ability to fulfill its legal duty to serve."

Although the Fifth Circuit's decision in *Green Valley* did not address the Commission's argument in this precise regard, the Commission's argument there was well-reasoned and should guide the Commission's actions in this Docket.[19] The Commission should lift the abatement and proceed with the expedited streamlined release of the Property as mandated by Texas Water Code § 13.2541.

B. The Federal Magistrate Judge Correctly Concluded That *Rockett Does Not Have* Federally Guaranteed Debt and Has Recommended Dismissal of Rockett's Complaint.

Even if the Commission diverges from the position it took in *Green Valley* and concludes that it must wait to receive "clearance" from the federal court to proceed on this Docket, it essentially has that now. Resolution of the issue for which Commission Staff recommended abatement has substantially concluded. Federal Magistrate Judge Lane determined that Rockett *does not have* federally guaranteed debt, is not entitled to § 1926(b) protection, and has recommended that Federal District Judge Pittman dismiss Rockett's complaint. This Docket may now proceed.

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[19] Moreover, as explained below, *infra* at III.C., the Fifth Circuit's resolution of the main issue in *Green Valley*, establishing the proper test to determine whether a water utility has "provided or made service available," *supports* the Commission's view that it is the established fact finder under Texas law to "examine whether the loan-recipient continues to deserve or has the ability to fulfill its legal duty to serve."

In its lawsuit, Rockett claimed (as it did before the Commission) to be indebted on a loan guaranteed by the USDA under 7 U.S.C. § 1926(b). Rockett argued that because (1) it holds the CCN for the Property at issue and (2) it has "federally guaranteed" debt, § 1926(b) prohibits any encroachment on its service area, and any action by the Commission under Texas Water Code § 13.2541 is preempted.[20]

Petitioner disputed Rockett's entitlement to § 1926(b) protection, arguing that Rockett's debt was *not* federally guaranteed—rather, Rockett's loan has only a "*Conditional* Commitment for Guarantee." Accordingly, Petitioner moved to dismiss Rockett's lawsuit for lack of a federal question because without a federally guaranteed loan, Rockett was not entitled to assert the protection of § 1926(b).[21]

Federal Magistrate Judge Lane agreed. As he explained, a federally "guaranteed loan" is "a loan made and serviced by a lender for which the Agency and lender have entered into a Lender's Agreement and for which the Agency has issued a Loan Note Guarantee."[22] The loan documentation provided by Rockett unequivocally demonstrates that the USDA has issued only a "Conditional Commitment for Guarantee" of Rockett's loan.[23] Judge Lane therefore concluded that, contrary to Rockett's contentions, Rockett's loan *is not* guaranteed by any federal agency and Rockett is not entitled to invoke § 1926(b).[24]

Therefore, § 1926(b) is no barrier to the Commission's authority to consider the Petition.

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[20] As explained below, *infra* III.C, Rockett's argument in this regard is foreclosed by *Green Valley*

[21] The City of Red Oak submitted a similar motion, making similar arguments.

[22] Ex. 1 at 9 (citing 7 C.F.R. § 1779.2).

[23] *Id*

[24] *Id* at 11.

C. Even if Rockett Had Federally Guaranteed Debt, the Commission Would Not Be Preempted from Considering the Petition and Rockett Is Still Not Entitled to § 1926(b) Protection.

Finally, *Green Valley* provides the Commission an independent basis to lift the abatement and move forward on this Docket. Under *Green Valley*, even if Rockett had federally guaranteed debt, which it does not, the Commission would not be "preempted" from considering the Petition, and Rockett would not be entitled to § 1926(b)'s protection. Because the Commission is fully authorized to proceed on this Docket, regardless of the status of Rockett's debt, the Commission should reinstitute the proceedings and resolve the Petition.[25]

It is well established that § 1926(b) protects a water utility's service area from encroachment only if three elements are met: the utility must (1) be an "association" within the meaning of § 1926(b); (2) have qualifying federal or federally guaranteed debt; and (3) have provided or made service available in the disputed area.[26] Prior Fifth Circuit precedent, *North Alamo Water Supply Corp. v. City of San Juan*, held that the third element—"provided or made service available"—was satisfied with evidence that the utility asserting § 1926(b) protection had a duty to provide service by virtue of the fact that it held the CCN covering the property at issue.[27] Thus, under *North Alamo*, a utility such as Rockett seeking to establish the § 1926(b) bar to encroachment of its service area had to show only that it held the CCN covering the property sought for decertification and that it had qualifying federal or federally guaranteed debt.[28] Rockett made that very argument to the Commission in this Docket and in its federal lawsuit. With that

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[25] For this reason, as well, the Commission need not wait for Judge Pittman to adopt Magistrate Judge Lane's recommendation.

[26] *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 705 (6th Cir. 2003).

[27] *N Alamo Water Supply Corp v City of San Juan*, 90 F.3d 910, 917 (5th Cir. 1996) (holding that a utility's "state law duty to provide service is the legal equivalent to . . . "making service available"), *rev'd*, 969 F.3d 460, 477 ("*North Alamo* must be overruled").

[28] *Id*

prior precedent in place at the initial phase of this Docket—and based on Rockett's erroneous claim to have federally guaranteed debt—the ALJ abated the proceedings.

The en banc Fifth Circuit's decision in *Green Valley* overruled *North Alamo*.[29] Under *Green Valley*, the third inquiry—whether a utility has "provided or made service available"—not only asks whether the utility has a duty to serve because it holds the relevant CCN, it also examines whether the utility has "adequate facilities to provide service to the area within a reasonable time after a request for service is made."[30]

That holding has two important implications: *First*, *Green Valley* expressly notes that whether facilities are "adequate" or whether a time lag in providing service is "reasonable" "will likely depend on the facts and circumstances surrounding the particular request for service."[31] In other words, whether a utility has "provided or made service available" involves fact questions that must be resolved by a fact finder under state law. *The Commission* is the Texas state agency established to make such fact findings in the context of a decertification petition. Consequently, the Commission cannot be "preempted" from conducting decertification proceedings and making the "adequate" and "reasonable" determinations. Under *Green Valley*, if a Texas water utility resists decertification proceedings under the alleged protection of § 1926(b), it must demonstrate *to the Commission* that it has "adequate facilities to provide service to the area within a reasonable time after a request for service is made."[32] Accordingly, the Commission is not and cannot be "preempted" from considering the Petition.

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[29] *Green Valley*, 969 F.3d at 477.

[30] Commission Staff's Recommendation on Final Disposition, September 26, 2019, at 2.

[31] *Id* at 477 n.35 ("As in many other legal contexts, what makes facilities 'adequate' or a time lag 'reasonable' will likely depend on the facts and circumstances surrounding the particular request for service.").

[32] *Id.* at 477.

Second, under the test established by *Green Valley*, Rockett cannot demonstrate its entitlement to § 1926(b) protection because it has not "provided or made service available" to the Property. Commission Staff long ago concluded that the property was not "receiving water service" under Texas Water Code § 13.2541.[33] For similar reasons, and based on the record already before it, the Commission should conclude that Rockett also is not "providing or making service available" to the Property.

Specifically, there is currently no water service to the Property. Contrary to Rockett's prior claims to have provided water service to the Property through a 5/8" x ¾" water meter,[34] Petitioner has demonstrated that there is no active meter on the Property. Rather, there is an old, empty meter box, which is locked off, has no water meter in it, that has been unused for a long time.[35]

Rockett even admitted, in writing, in early discussions with Petitioner—before Petitioner sought decertification—that it lacked available water supply and was unable to secure the water needed for Petitioner's planned project.[36] Thus, at the time the Petition was filed, Rockett did not have "adequate facilities to provide service to the area"[37] and it made no assertion that it could do so "within a reasonable time after the request for service was made."[38]

Petitioner is aware that in a different docket pending before the Commission, Docket No. 51044, Rockett claims to be in the process of installing new water lines that may provide additional capacity to its service area by the *fall of 2021*.[39] That information should have no impact here.

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[33] Commission Staff's Recommendation on Final Disposition, September 26, 2019, at 2.
[34] Rockett's Special Utility District's Response and Objection to Petition for Expedited Relief, p. 2.
[35] Affidavit of Travis J. Snook, attached as Exhibit 1 to Petitioner's Reply.
[36] Supplemental Affidavit of David Thomas, attached as Exhibit 2 to Petitioner's Reply.
[37] *Green Valley*, 969 F.3d at 477.
[38] *Id.*
[39] Rockett's Response to the Petition and Motion to Dismiss in *Petition of FCS Lancaster, Ltd to Amend Rockett Special Utility District's Certificate of Convenience and Necessity in Dallas County by Expedited Release*, Commission Dkt. No. 51044.

There is no evidence to suggest that Rockett's planned development will benefit the Property at issue nor provide the quantity of water required for Petitioner's project. And even if it did, and if Rockett's new construction proceeds according to its proposed schedule, the proposed new water supply will not be available for at least a year from now—which is *two years* after Petitioner initially filed its Petition for Streamlined Expedited Release. It is not reasonable to require a decertification petitioner, seeking *streamlined expedited* release, which by statute must be granted within 60 days of filing, to wait for two years (at a minimum) to begin its project.

Moreover, allowing Rockett to supplement its response to the Petition now—a full year after the fact—with new evidence of a potential new water source that indisputably was not in existence at the time the Petition was filed would make a mockery of the *expedited* proceedings the Legislature intended to be in effect here. The Commission should not permit Rockett to retroactively achieve § 1926(b) protected status under the cover of the delay secured by its deception on both the Commission and the federal district court.

The Commission has authority and more than sufficient evidence to act on this Petition. It should do so now, and it should grant the Petition.

IV. CONCLUSION

As Commission Staff long ago concluded, the Petition meets the requirements for streamlined expedited release and should be approved because the Property "is located in a qualifying county (Ellis County), is not receiving water service, and the aggregated, contiguous tracts of land make up a single property that is at least 25 acres."[40] Petitioner agrees with the statements and conclusions reached by Commission Staff in its Recommendation.

[40] Commission Staff's Recommendation on Final Disposition, September 26, 2019, at 2.

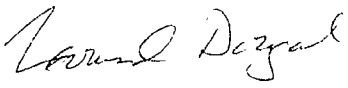
Rockett's basis to bring these "expedited" proceedings to a halt—Rockett's purported federal debt and alleged § 1926(b) protection—*does not exist.* First, as the Commission has observed, § 1926(b) does not bind the Commission. Second, § 1926(b) is inapplicable here. Rockett has no federally guaranteed debt and, as a matter of law, cannot invoke § 1926(b). Third, even if Rockett did have qualifying debt, which it does not, it would still have to show that it had "provided or made service available" to the Property to invoke § 1926(b). The Commission is the designated agency in Texas to make that determination. The Commission is, therefore, fully authorized to consider the Petition and resolve this Docket based on the record before it. And because Rockett has not provided water service to the Property and cannot do so within a reasonable time from the filing of the petition, Rockett is not entitled to § 1926(b) protection.

And the time to act is now. Rockett's loan may soon receive the federal guarantee that Rockett falsely claimed to have a year ago. While that federal guarantee will not divest the Commission of authority to consider this Docket, it will at least potentially raise new complications that could delay this Docket even more. The Commission should not reward Rockett's offensive and erroneous use of § 1926(b) by continuing to defer its state mandated responsibility to grant the Petition.

Petitioner is entitled to have its Petition addressed and resolved by the Commission. There is no federal barrier to the Commission fulfilling its state-mandated obligations. Commission Staff's Recommendation should be adopted, and the Petition should be approved.

Respectfully submitted,

JACKSON WALKER L.L.P.



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ATTORNEYS FOR ALAMO MISSION LLC

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 October 1, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

Leonard H. Dougal

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ROCKET SPECIAL UTILITY DISTRICT, a political subdivision of the State of Texas,	§	
Plaintiff,	§	
V.	§	
	§	**A-19-CV-1007-RP**
SHELLY BOTKIN, DEANN T. WALKER, and ARTHUR C. D'ANDREA, in their official capacities as Commissioners of the Public Utility Commission of Texas; and JOHN PAUL URBAN, in his official capacity of Executive Director of the Public Utility Commission of Texas; ALAMO MISSION LLC, a Delaware limited liability company; and CITY OF RED OAK INDUSTRIAL DEVELOPMENT CORPORATION, a Texas non-profit corporation,	§	
Defendants.	§	

REPORT AND RECCOMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE:

Before the court are Defendant Red Oak Industrial Development Corporation's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Opposed Motion to Expedite Ruling (Dkt. #21), Defendant Alamo Mission LLC's Motion to Dismiss (Dkt. #24), PUCT Defendants' Motion to Dismiss and Brief in Support (Dkt. #25), Defendant City of Red Oak Industrial Development Corporation's Expedited Request for Oral Argument on its Motion to Dismiss for Lack of Subject

Matter Jurisdiction [Dkt. #21] (Dkt. #35), and all related briefing.[1] Having considered the motions, pleadings, and applicable law, and finding a hearing is not necessary, the court **DENIES** Red Oak's request for a hearing (Dkt. #35) and will recommend that the remaining motions be **GRANTED**.

I. BACKGROUND[2]

Plaintiff Rockett Special Utility District brings this suit against Shelly Botkin, Deann T. Walker and Arthur C. D'Andrea, in their official capacities as Commissioners of the Public Utility Commission of Texas ("PUC") and John Paul Urban in his official capacity as PUC's Executive Director (collectively, "the PUC Defendants"); Alamo Mission LLC ("Alamo"); and City of Red Oak Industrial Development Corporation ("Red Oak"). Dkt. #1 (Compl.). Rockett is a retail public utility operating under Chapter 65 of the Texas Water Code furnishing water to areas in Ellis and Dallas Counties under a Certificate of Convenience and Necessity ("CCN"). *Id.* at ¶ 3. Rockett is indebted on a loan it claims is guaranteed by the United States Department of Agriculture ("USDA") under 7 U.S.C. § 1926 ("section 1926"). As such, Rockett contends it is federally protected from having its service areas encroached upon. *See* 7 U.S.C. § 1926(b). Alamo and Red Oak have both applied to the PUC to decertify some areas of Rockett's CCN. Compl. at ¶¶ 10-11. Rockett contends any decertification would violate section 1926.

Rockett brings suit against the PUC Defendants under 42 U.S.C. § 1983 alleging they are acting under the authority of state law to deprive Rockett of its rights under section 1926(b). *Id.*

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[1] The motions were referred by United States District Judge Robert Pitman to the undersigned for a Report and Recommendation as to the merits pursuant to 28 U.S.C. § 636(b), Rule 72 of the Federal Rules of Civil Procedure, and Rule 1 of Appendix C of the Local Rules of the United States District Court for the Western District of Texas.

[2] This case is related to *City of Red Oak, Texas and Red Oak Industrial Development Corporation v United States Department of Agriculture, Rural Utilities Service, Rockett Special Utility District, and CoBank, ACB*, 1:20-CV-483-RP, which was recently transferred to this District from the Northern District of Texas. In that suit, the City of Red Oak, Texas and the Red Oak Industrial Development Corporation seek to prevent the USDA from issuing a Loan Note Guarantee to Rockett for the CoBank loan.

at ¶¶ 22-27. Rockett only seeks prospective injunctive relief against the PUC Defendants to prevent them from decertifying Rockett's CCN. *Id.* at ¶¶ 4-5, 36-37, Prayer at ¶ 2. Rockett seeks a declaratory judgment against all Defendants of the rights and other legal relations of the parties under section 1926(b). *Id.* at ¶¶ 28-35. Rockett also seeks injunctive relief against all Defendants for their respective violations of sections 1983 and 1926(b). *Id.* at ¶ 36-37.

Red Oak has moved to dismiss Rockett's Complaint for lack of subject matter jurisdiction. Dkt. #21. Alamo has similarly moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Rule 12(b)(6). Dkt. #24. Finally, the PUC Defendants have moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Dkt. #25. As Red Oak's and Alamo's subject matter jurisdiction arguments overlap, the undersigned will address those first and then turn to the PUC Defendants' motion.

II. APPLICABLE LAW

A. Jurisdictional Motions

Federal Rule of Procedure 12(b)(1) governs motions to dismiss for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). When the court lacks the statutory or constitutional power to adjudicate a case, the case is properly dismissed for lack of subject-matter jurisdiction. *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 312 (5th Cir. 2015). "The objection that a federal court lacks subject-matter jurisdiction, *see* FED. R. CIV. P. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506 (2006). Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. FED. R. CIV. P. 12(h)(3). "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any

attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). While the burden of proof falls on the plaintiff to show that jurisdiction does exist, "[u]ltimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle [the] plaintiff to relief." *Ramming*, 281 F.3d at 161. A district court may base its determination on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Spotts v. United States*, 613 F.3d 559, 565 (5th Cir. 2010) (citations and quotations omitted).

B. Federal Question Jurisdiction

Federal question jurisdiction exists if a case "arises under the Constitution, treaties or laws of the United States." 28 U.S.C. § 1331. Federal question jurisdiction is proper if the complaint establishes (1) federal law creates the cause of action, or (2) federal law is a necessary element of one of the well-pleaded claims. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988). "A district court's federal-question jurisdiction . . . extends over 'only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law,'" in that 'federal law is a necessary element of one of the well-pleaded . . . claims." *Id.* (quoting *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13, 27–28 (1983)).

"[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Rather, the district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one

construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* (internal quotations and citations omitted). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Id.*; *Fermin v. Priest of Saint Mary - Marfa, Texas*, 775 F. App'x 162, 163 (5th Cir.), cert. denied sub nom. *Fermin v. Priest of Saint Mary-Marfa, Texas*, 140 S. Ct. 674 (2019) ("[A First Amendment] claim arises under federal law, so it survives a challenge to subject matter jurisdiction unless it is so 'completely devoid of merit as not to involve a federal controversy.'") (quoting *Steel Co.*, 523 U.S. at 89).

C. Standing

To establish standing, a plaintiff must prove three elements: (1) "the plaintiff must have suffered an injury in fact ... which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992) (internal quotation marks and citations omitted). The first standing element is often referred to as "ripeness." "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Choice Inc. of Tex. v. Greenstein*, 691 F.3d 710, 715 (5th Cir. 2012) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586 (5th Cir. 1987)). "The . . . doctrine is necessary to prevent courts from becoming entangled in abstract disputes by

adjudicating an issue prematurely." *Am. Med. Ass'n v. Bowen*, 857 F.2d 267, 272 (5th Cir. 1988) (citing *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 580 (1985)). Moreover, "[t]he doctrine discourages the litigation of contingent events that either may not occur at all or, at least, may not occur as anticipated." *Id.* To determine whether an issue is ripe for consideration, the court must balance "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Planned Parenthood of Gulf Coast, Inc., v. Gee*, 862 F.3d 445, 456 (5th Cir. 2017) (quoting *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007)).

III. ANALYSIS

A. Red Oak's and Alamo's Subject Matter Jurisdiction Arguments

Red Oak and Alamo contend the loan Rockett relies on for section 1926(b) protection has not yet been guaranteed by the Government. Accordingly, with no federal protection under section 1926(b) they contend this case presents no federal question.[3] Their arguments could also be couched in terms of standing and ripeness—because Rockett has not yet been issued a guarantee under section 1926, its claim under that statute is not yet ripe.

Rockett argues it closed on a loan from CoBank and received the loan proceeds on September 26, 2019. Prior to that, on November 21, 2018, Rockett and CoBank submitted their "Application for Loan and Guarantee" to the United State Department of Agriculture ("USDA"). Dkt. #21-2 at 12-13, ¶ 6; Dkt. #21-2 at 143-50. The USDA issued a "Conditional Commitment for Guarantee" on July 25, 2019. Dkt. #21-1 at 71-72. On August 7, 2019, the state director for the USDA issued a "Certification Approval" stating the "loan guarantee is approved subject to the conditions on the Conditional Commitment." Dkt. #21-1 at 74, ¶ 38. Rockett contends the

[3] Alamo also moves to dismiss Rockett's section 1983 claim under Rule 12(b)(6), but Rockett only asserts its section 1983 claim against the PUC Defendants. Compl. at ¶¶ 22-27. Additionally, Rockett disclaims the assertion of its section 1983 claim against Alamo. Dkt. #26 at 4-5.

Conditional Commitment for Guarantee is binding on the USDA, and its loan from CoBank is a "such loan" protected by section 1726. Rockett argues section 1726 is to be liberally construed and Red Oak and Alamo impermissibly narrow the protections of section 1726.

Section 1926 is the statute governing the U.S. Department of Agriculture's water and sewer utility loan program. *Green Valley Special Util. Dist. v. City of Cibolo, Tex.*, 866 F.3d 339, 341 (5th Cir. 2017). It authorizes the USDA to make loan guarantees for rural water development. 7 U.S.C. § 1926(a)(24). Section 1926(b) prohibits municipalities from encroaching on services provided by utilities with outstanding loans:

> 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.

7 U.S.C. § 1926(b) (emphasis added). Section 1926(b) has two purposes: "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations . . . by protecting them from the expansion of nearby cities and towns." *Green Valley Special Util. Dist.*, 866 F.3d at 343 (quoting *N. Alamo Water Supply Corp. v. City of Suan Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996)); *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

Various regulations are in place to facilitate section 1926. "A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will also execute a Lender's Agreement." 7 C.F.R. § 1779.4. "If the Agency determines that the borrower is eligible, the proposed loan is for an eligible purpose, there is reasonable assurance of repayment

ability, [and other conditions are met], the Agency will provide the lender and the borrower with the Conditional Commitment for Guarantee, listing all conditions for the guarantee." 7 C.F.R. § 1779.53. The actual Loan Note Guarantee will not be issued until certain conditions precedent are met. 7 C.F.R. § 1779.63 (listing the conditions precedent). "Upon receipt of the executed Lender's Agreement and after all requirements have been met, the Agency will execute the Loan Note Guarantee. . . ." 7 C.F.R. § 1779.64(b). "If the Agency determines that it cannot execute the Loan Note Guarantee because all requirements have not been met, the lender will have a reasonable period within which to satisfy the objections. If the lender satisfies the objections within the time allowed, the guarantee will be issued." 7 C.F.R. § 1779.64(d). The regulations also define the relevant terms:

> *Conditional Commitment for Guarantee*. The Agency's written statement to the lender that the material submitted is approved subject to the completion of all conditions and requirements contained in the commitment (available in any Agency office).
> *Guaranteed loan*. A loan made and serviced by a lender for which the Agency and lender have entered into a Lender's Agreement and for which the Agency has issued a Loan Note Guarantee.
> *Lender's Agreement*. The signed agreement between the Agency and the lender containing the lender's responsibilities when the Loan Note Guarantee is issued (available in any Agency office).
> *Loan Note Guarantee*. The signed commitment issued by the Agency containing the terms and conditions of the guarantee of an identified loan (available in any Agency office).

7 C.F.R. § 1779.2.

"When interpreting statutes, we begin with the plain language used by the drafters." *Green Valley Special Util. Dist.*, 866 F.3d at 342. The plain language of section 1926(b) is dispositive. *Id.* "[E]ach part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole." *Id.* at 343. "Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted

rural water associations from municipal encroachment." *N. Alamo Water Supply Corp.*, 90 F.3d at 915.

Rockett does not dispute that at the time it filed suit, or even now, it did not have an issued Loan Note Guarantee from the USDA. Instead, Rockett argues that it is entitled to section 1926(b) protections because Red Oak's and Alamo's attempts to decertify Rockett's service areas occurred during the term of its loan from CoBank and its loan from CoBank is a "such loan" under section 1926(b) because the USDA has issued a Conditional Commitment for Guarantee for the loan. Notably, Rockett has cited no case that directly holds a "Conditional Commitment for Guarantee" entitles the borrower to section 1926(b) protections.

Rockett is correct that neither the statute nor the regulations define "such loan" as used in section 1926(b). However, under a plain reading of the statute the term must refer to federally funded or guaranteed loans, as other courts have referred. *Green Valley Special Util. Dist.*, 866 F.3d at 341 ("we have held that § 1926(b) 'should be liberally interpreted to protect [federally] indebted rural water associations from municipal encroachment'") (bracketed text in original); *N. Alamo Water Supply Corp.*, 90 F.3d at 915 ("The service area of a federally indebted water association is sacrosanct."), 919 ("As discussed above, § 1926(b) grants broad protection to federally indebted utilities."). The regulations clearly contemplate the first issue of a Conditional Commitment for Guarantee and then, if all conditions are satisfied, a Loan Note Guarantee. 7 C.F.R. § 1779.2. A "guaranteed loan" is "a loan made and serviced by a lender for which the Agency and lender have entered into a Lender's Agreement and for which the Agency has issued a *Loan Note Guarantee*." *Id.* (emphasis added). The statutory and regulatory scheme make clear that "such loan" is one for which a Loan Note Guarantee has been issued. Under Rockett's definition of "such loan" as a loan that will—or even might—be federally guaranteed, an entity

that earlier had its service areas limited during a loan term and later received a federal guarantee of the loan could absurdly argue that the earlier limitation violated section 1926(b) because it occurred "during the term of such loan" even though there was no federal guarantee in place when the service area was limited.

Rockett's reliance on *Wells Fargo Bank, N.A. v. U.S.*, 88 F.3d 1012, 1020 (Fed. Cir. 1996), is misplaced. That case held the United States breached a contract by issuing a commitment to guarantee a loan if certain conditions were met and then failing to issue the guarantee after the conditions were met. That case did not hold that the commitment to guarantee and the guarantee were interchangeable. Rather the case acknowledged the lender and the borrower had to satisfy certain conditions for the guarantee to issue, which they did. However, if they had not met those conditions, the United States would have been under no obligation to issue the guarantee. This case may stand for the proposition that the USDA is contractually obligated to issue a guarantee if Rockett satisfies the conditions included in the Conditional Commitment for Guarantee, but it does not go so far as to imply that section 1926(b) protections now apply to the loan from CoBank. To hold otherwise, would render the conditions in the Conditional Commitment for Guarantee a nullity—Rockett would be entitled to the guarantee and the ensuing section 1926(b) protections without actually satisfying the USDA's required conditions.

Rockett also cites *Melissa Indus. Dev. Corp. v. N. Collin Water Supply Corp.*, 256 F. Supp. 2d 557, 562 (E.D. Tex. 2003), and *City of Schertz v. United States Dep't of Agric. by & through Perdue,* No. 18-CV-1112-RP, 2019 WL 5579541 (W.D. Tex. Oct. 29, 2019), which also do not stretch as far as Rockett would have this court interpret them. Both cases held approving a loan was a final agency action that subjected the USDA to judicial review even though the loan had not yet closed and funded. Contrary to Rockett's position, the *Melissa* court stated that the loan would

not be subject to section 1926(b) protection until the loan was funded. *Melissa Indus. Dev. Corp.*, 256 F. Supp. 2d at 560 ("Once the loan/grant *is funded* and NCWSC goes forward with the contemplated improvements, a federal law *will be triggered* which will generally protect NCWSC's service area from encroachment by any competitors for up to 40 years.") (emphasis added), 565 ("*If* the USDA loan/grant is implemented, the statutory prohibition under 7 U.S.C. § 1926(b) becomes effective and the Facilities Agreement would be abrogated.") (emphasis added).

Finally, Rockett's reliance on *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987), to argue that entities should not be able to take advantage of statutory "loopholes" is unpersuasive. While "the service area of a federally indebted water association is sacrosanct," *see N. Alamo Water Supply Corp.*, 90 F.3d at 915, the service area must still be federally indebted. Requiring a service area to actually be federally indebted before affording it section 1926(b) protections is not applying a loophole but adhering to the statutory and regulatory structure of the protections.

For all these reasons, Rockett's policy arguments that a determination that its CoBank loan is not protected by section 1926(b) would frustrate the goals of section 1926(b) are also unpersuasive. Rockett's position would far expand the protections of 1926(b) to loans that are not—and may never be—federally funded or guaranteed.

Accordingly, because Rockett does not have a loan entitled to section 1926(b) protections, its claims based on section 1926 are so "completely devoid of merit as not to involve a federal controversy." *See Steel Co.*, 523 U.S. at 89. Alternatively, Rockett's section 1926(b) claim could also be construed as lacking "ripeness." Until Rockett actually receives a Loan Note Guarantee for the CoBank loan, it is premature to determine whether Red Oak or Alamo violate section 1926(b) by seeking to decertify some of Rockett's service areas. For these reasons, the

undersigned will recommend that Rockett's claims based on section 1926(b) be dismissed without prejudice. This disposes of all of Rockett's claims against Red Oak and Alamo, and the court does not need to reach Alamo's Rule 12(b)(6) arguments.

B. PUC Defendants' Subject Matter Jurisdiction Arguments

In addition to its claims for declaratory and injunctive relief based on section 1926(b), Rockett also asserts a section 1983 claim against the PUC Defendants. *See* Compl. at ¶¶ 22-27. Rockett's section 1983 claim is based on the PUC Defendants' "attempt to deprive Rockett of its 1926(b) federal rights." *Id.* at ¶ 25. For the reasons given above, this claim is not ripe and Rockett has failed to state a viable section 1983 claim against the PUC Defendants.

The PUC Defendants argue the claims against them should be dismissed because as a political subdivision Rockett cannot sue under section 1983. The PUC Defendants also argue Rockett's claims are not ripe because the PUC has abated the decertification proceedings involving Rockett's territory pending the Fifth Circuit's decisions in two cases involving section 1926(b) and decertification proceedings. *See Green Valley Special Util. Dist. v. Schertz, Tex.*, No. 18-51092 (5th Cir. filed Dec. 31, 2018); *Crystal Clear Special Util. Dist. v. Walker*, No. 19-50556 (5th Cir. filed June 17, 2019). The PUC Defendants contend the PUC has decided "to abate all water-utility service-area release dockets pending the federal courts' clarification of the relevant law" and the PUC "will make no decision whatsoever regarding the petitions now before it seeking the release of property in Rockett's service area until after the federal courts resolve the disputed and uncertain issues regarding the scope of § 1926(b)'s protection of the service areas of federally indebted rural utilities' service areas." Dkt. #30 at 6, 7.

Rockett disputes the PUC Defendants' assertion that it cannot bring a claim under section 1983. Rockett also disputes the reason the PUC abated the proceedings concerning the potential decertification of its service areas brought by Red Oak and Alamo.

The court does not need to wade into these issues. For the reasons described above, Rockett's section 1926 claim does not raise a federal question because Rocket does not yet have a loan entitled to section 1926 protections. Similarly, Rockett does not yet have a claim under 1983, as that claim was premised on a violation of section 1926. Until Rockett actually receives a Loan Note Guarantee for the CoBank loan, it is premature to determine whether the PUC Defendants violate section 1926(b) or section 1983 by decertifying some of Rockett's service areas. Accordingly, the undersigned will recommend this case be dismissed for lack of subject matter jurisdiction.

IV. ORDER AND RECOMMENDATIONS

Having determined that oral arguments are not necessary, the court **DENIES** Defendant City of Red Oak Industrial Development Corporation's Expedited Request for Oral Argument on its Motion to Dismiss for Lack of Subject Matter Jurisdiction [Dkt. #21] (Dkt. #35).

For the reasons stated above, the court **RECOMMENDS** Defendant Red Oak Industrial Development Corporation's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Opposed Motion to Expedite Ruling (Dkt. #21), Defendant Alamo Mission LLC's Motion to Dismiss (Dkt. #24), and the PUCT Defendants' Motion to Dismiss and Brief in Support (Dkt. #25) be **GRANTED** and this case be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

V. OBJECTIONS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battles v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED July 29, 2020

MARK LANE
UNITED STATES MAGISTRATE JUDGE