Control Number: 49871

Item Number: 32

Addendum StartPage: 0

PUC DOCKET NO. 49871

PETITION OF THE CITY OF RED OAK INDUSTRIAL DEVELOPMENT CORPORATION TO AMEND ROCKETT SPECIAL UTILITY DISTRICT'S WATER CERTIFICATE OF CONVENIENCE AND NECESSITY IN DALLAS AND ELLIS COUNTIES BY EXPEDITED RELEASE	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ROCKETT SPECIAL UTILITY DISTRICT'S RESPONSE AND OBJECTION TO PETITIONER'S AMENDMENT OF PETITION AND REQUEST TO RESTYLE DOCKET AND RENEWED MOTION TO DISMISS THE PETITION

Rockett Special Utility District ("Rockett") presents the following as its objection and response to the Petitioner City of Red Oak Industrial Development Corporation's ("CROIDC") "Amendment of Petition And Request To Restyle Docket" (the "Proposed Amendment") filed on September 21, 2020. This Response and Objection and Renewed Motion to Dismiss is timely filed per 16 Tex. Admin. Code § 22.78(a).

I. The Commission Lacks Jurisdiction Over the Original Petition and Proposed Amendment, as Petitioner is not the Landowner.

Petitioner CROIDC concedes that it was not the owner of the land described in its Petition when it filed this action pursuant to Texas Water Code § 13.254(a-5). Petitioner was created and filed its Articles of Incorporation with the Texas Secretary of State on February 7, 1994.[1] Red Oak Industrial Development Corporation ("ROIDC")—an entirely different entity than CROIDC—claims to be the owner of the land described in the Petition, both before and after CROIDC filed its Petition.

On February 11, 2020, Rockett filed its Response and Objection to Petitioner's Second Motion to Lift Abatement and Motion to Dismiss, and pointed out that Petitioner CROIDC was

[1] Petition by City of Red Oak Industrial Development Corporation, Item 1, at Ex. A (Aug. 19, 2019).

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not the landowner of the subject property in the Petition (the "Property") that ROIDC claimed to be the true landowner[2] and further provided a Special Warranty Deed where a portion of the Property was conveyed to Compass Datacenters DFW III, LLC after the Petition was filed; thus, Rockett moved the Commission to dismiss the Petition as Petitioner was not a landowner of the Property.[3] The next day, Petitioner CROIDC acknowledged the issues surrounding the identity and ownership of the property, stating "[t]hese issues cannot be resolved while the petition is abated."[4]

Between the filing of CROIDC's original petition and the filing of the Proposed Amendment there has been a significant change in the Texas Water Code applicable to this case (i.e. § 13.254(a-5) no longer exists except for cases pending prior to its repeal). Tex. Wat. Code § 13.254(a-5) ("Expired"). ROIDC, which is an involuntarily dissolved corporation[5] and as further provided below, cannot be deemed to have filed a petition retroactively, prior to the change in the law, through a simple amendment filed by Petitioner CROIDC—a separate legal entity from ROIDC.

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[2] Further research discloses that at the time ROIDC received deeds to the property as grantee, appended to the Petition, ROIDC was both a dissolved corporation and barred from conducting business in the state of Texas. As a matter of law, ROIDC could not acquire property in the state of Texas as a dissolved corporation, with its right to conduct affairs in Texas having been forfeited. See Attachment 1.

[3] Rockett Special Utility District's Response and Objection to Petitioner's Second Motion to Lift Abatement and Motion to Dismiss, Item 21, at 1-2, Exs. A-B (Feb. 11, 2020).

[4] City of Red Oak Industrial Development Corporation's Reply to Rockett Special Utility District's Response and Objection to Petitioners Motion to Lift Abatement and Motion to Dismiss the Petition, Item 23, at 1 (Feb. 12, 2020).

[5] Rockett's Response and Objection, Item 21, at Ex. A (Feb. 11, 2020).

CROIDC bears the burden to plead and prove standing (jurisdiction).[6] CROIDC must concede that jurisdiction never existed here because CROIDC admits it was never the owner of the property described in the Petition for decertification when it was filed or thereafter.

CROIDC maintains that its failure to name the proper plaintiff (owner of the land) was a misnomer. CROIDC is wrong. This is a case of *misidentification* of the proper plaintiff/petitioner, which cannot be cured by amendment.[7] The change in the law while CROIDC's Petition was pending and before filing its Proposed Amendment is the equivalent to the expiration of the statute of limitations, since § 13.254(a-5) is no longer available to the land owner ROIDC. See *Gonzalez v. Greyhound Lines, Inc.,* 181 S.W.3d 386, 393 (Tex. App. 2005).

In *Gonzales*, the Texas Supreme Court held that "since the Appellants collectively *lacked standing to sue* the defendants in their lawsuit, *their petition could not be amended to confer subject matter jurisdiction on the trial court. Gonzales*, 181 S.W.3d at 393. (Emphasis added.)

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[6] "The plaintiff has the burden to allege facts that affirmatively show the trial court's jurisdiction to hear the case. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex.2004)." *Gonzalez v. Greyhound Lines, Inc.,* 181 S.W.3d 386, 391 (Tex. App. 2005).

"Standing is a component of subject matter jurisdiction, which we consider under the same standard by which we review subject matter jurisdiction generally. Tex. Ass'n of Bus., 852 S.W.2d at 445–46. A party has standing if it has a justiciable interest in the suit or a personal stake in the controversy. See Nootsie, Ltd. v. Williamson County Appraisal Dist., 925 S.W.2d 659, 661 (Tex.1996); Tex. Ass'n of Bus., 852 S.W.2d at 444." *Id* at 391.

[7] "*Under Texas law, there is a distinction drawn between misnomer and misidentification,* with particular consequences for tolling of limitations. See Enserch Corp. v. Parker, 794 S.W.2d 2, 4–5 (Tex.1990). Misnomer occurs where the plaintiff misnames either itself or the correct defendant, but the correct parties are involved. Id. **Misidentification, on the other hand, occurs when two separate legal entities with similar names actually exist** and the plaintiff sues the wrong one because he is mistaken about which entity is the correct defendant. Chilkewitz v. Hyson, 22 S.W.3d 825, 828 (Tex.1999); Enserch Corp., 794 S.W.2d at 4–5. While the alleged pleading defect may well be a case of misnomer, the jurisdictional evidence standing alone indicates that a separate legal entity other than 'Gonzalez Family, L.P.' was the limited partnership involved in the stock transaction. As such, we conclude that Appellant Gonzalez Family, L.P. lacked standing to sue the defendants. Since the Appellants collectively lacked standing to sue the defendants in their lawsuit, their petition could not be amended to confer subject matter jurisdiction on the trial court. We overrule Appellant's sole issue on appeal." *Gonzalez v. Greyhound Lines, Inc.,* 181 S.W.3d 386, 393 (Tex. App. 2005). (Emphasis added.).

Because subject matter jurisdiction does not exist in this case, the Petition filed by CROIDC (a non-owner) cannot be amended to correct a fatal jurisdictional error. In other words, a party plaintiff—having no standing—cannot seek any relief (i.e., amend its Petition) from the Commission.

If the Commission grants the Proposed Amendment, in effect it would be the filing of an entirely new suit by an entity claiming to be the landowner (land acquired while ROIDC was dissolved and barred from conducting business in Texas) premised on § 13.254(a-5), which is a legal impossibility since ROIDC has no legal right to commence an action under § 13.254(a-5) because § 13.254(a-5) expired during the pendency of this action.

II. ROIDC Has No Legal Existence and Forfeited its Right to Do Business.

The Commission can take judicial notice that ROIDC (the proposed new petitioner) filed its articles of incorporation with the Texas Secretary of State ("TSOS") on November 15, 1983. On October 12, 1994, the TSOS declared that ROIDC was involuntarily dissolved and rendered null and void. A true and correct certified copy of the certificate of involuntary dissolution of ROIDC issued by the TSOS on October 12, 1994 and accompanying notice thereof is attached as Attachment 1. *The TSOS further declared that ROIDC had forfeited its right to conduct affairs in Texas.* In the TSOS's notice to ROIDC of involuntary dissolution dated October 12, 1994 and notice of forfeiture to conduct affairs dated April 13, 1994 (see Attachment 1), the TSOS stated that ROIDC could be reinstated by filing a report pursuant to Article 1396-9.01 Texas Non-Profit Corporation Act (the "Act") and paying a fee. Article 1396-9.01 Texas Non-Profit Corporation Act expired on January 1, 2010. Prior to January 1, 2010, ROIDC had failed to file any form authorized by the Act to achieve reinstatement.

ROIDC filed a report with the TSOS on March 24, 2020; however, the legal effect of such filing is a nullity. A search of the records of the TSOS does not reveal an order by any Court or certificate of reinstatement by an authorized agency with legal authority to make such a determination to reinstate ROIDC. ROIDC's statutory right to reinstatement expired on or before January 1, 2010 (expiration of the reinstatement statute) and therefore ROIDC lacks the capacity to pursue a petition with the Commission or engage in any business in Texas following its involuntary dissolution. There is no factual dispute that ROIDC failed to seek reinstatement within three years of its termination/dissolution prior to the third anniversary of the date the termination took effect *as required by the Texas Business and Organizations Code § 11.202.*

Even if ROIDC could claim a right to reinstatement under Texas Business Organizations Code § 11.253, ROIDC did not accomplished reinstatement within three years of ROIDC's involuntary dissolution (see § 11.253(d)); therefore, ROIDC did not continue in existence once dissolved. Because the deeds attached to the Petition were recorded prior to March 24, 2020, ROIDC had no legal authority (and no legal existence) to acquire or accept title to the land when the deeds were signed and recorded.

ROIDC's legal existence is an issue now pending before the United States District Court for the Western District of Texas. See paragraph 2 of the Answer filed by Rockett in the case of Red Oak et al., v. United States Department of Agriculture, et al., attached as Attachment 2.

Rockett moves the Commission to take judicial notice of the public records and statutes referenced above.

Because CROIDC is seeking to substitute ROIDC in place of CROIDC as Petitioner, and because ROIDC was dissolved and its statutory right to seek re-instatement has expired, the Proposed Amendment must be rejected.

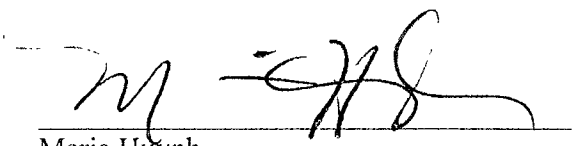
III. The Petition Must Be Dismissed.

CROIDC concedes it is not a proper Petitioner in this action. Because CROIDC lacks standing and therefore the Commission lacks jurisdiction, CROIDC's Petition must be dismissed. The correct landowner, allegedly ROIDC, if and when properly reinstated and legal title is obtained, must file a Petition with the Commission to request expedited release of property it *actually* and *currently* owns, in accordance with Texas Water Code § 13.2541 and 16 Texas Administrative Code § 24.245(h), or other provisions accordingly.

CONCLUSION

For the reasons expressed above, CROIDC's Proposed Amendment should be denied and this case dismissed.

Respectfully submitted,



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ATTORNEYS FOR ROCKETT SPECIAL UTILITY DISTRICT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document was served on the following parties of record on September 28, 2020, via electronic mail in accordance with the Order Suspending Rules, issued in Project No. 50664.

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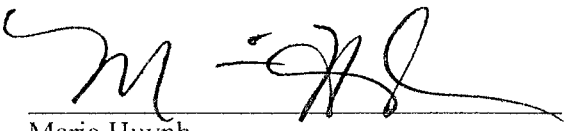

Maria Huynh

ATTACHMENT 1

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Ruth R. Hughs
Secretary of State

Office of the Secretary of State

The undersigned, as Secretary of State of Texas, does hereby certify that the attached is a true and correct copy of each document on file in this office as described below:

RED OAK INDUSTRIAL DEVELOPMENT CORPORATION
Filing Number: 67984201

Notice of Forfeited Rights for Non-Filing of Periodic Report	April 13, 1994
Involuntary Dissolution	October 12, 1994

In testimony whereof, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in Austin, Texas on September 27, 2020.

Ruth R. Hughs
Secretary of State

The State of Texas

Secretary of State

OCT 12, 1994

DIANE ROBERTSON, REGISTERED AGENT
RED OAK INDUSTRIAL DEVELOPMENT CORPORATION
411 W. RED OAK RD.
RED OAK, TX

RE: RED OAK INDUSTRIAL DEVELOPMENT CORPORATION
CHARTER NO. 00679842-01

DEAR SIR OR MADAM:

OUR RECORDS SHOW THAT YOU WERE NOTIFIED THAT THE ABOVE REFERENCED CORPORATION HAD NEGLECTED TO FILE THE REPORT REQUIRED UNDER THE PROVISIONS OF ARTICLE 1396-9.01, TEXAS NON-PROFIT CORPORATION ACT. THE REPORT WAS NOT FILED WITHIN THE TIME PERIOD PRESCRIBED BY LAW, AND CONSEQUENTLY, THE CORPORATION'S RIGHT TO CONDUCT AFFAIRS WAS FORFEITED.

THE 120-DAY PERIOD DURING WHICH THIS DELINQUENCY MAY HAVE BEEN CORRECTED HAS EXPIRED, AND THE CORPORATION HAS BEEN INVOLUNTARILY DISSOLVED BY ORDER OF THE SECRETARY OF STATE. ENCLOSED IS A COPY OF THAT CERTIFICATE OF INVOLUNTARY DISSOLUTION.

ANY CORPORATION INVOLUNTARILY DISSOLVED FOR THIS DELINQUENCY MAY BE REINSTATED AT ANY TIME BY FILING THE REPORT PRESCRIBED BY ARTICLE 1396-9.01, TEXAS NON-PROFIT CORPORATION ACT, TOGETHER WITH A FILING FEE OF $25.00, AS PRESCRIBED BY ARTICLE 1396-9.02F, TEXAS NON-PROFIT CORPORATION ACT.

SINCERELY,

ENCLOSURE

CORPORATIONS SECTION
STATUTORY FILINGS DIVISION

Secretary of State

The State of Texas

Secretary of State

INVOLUNTARY DISSOLUTION

CAME ON TO BE CONSIDERED THIS DAY BY THE SECRETARY OF STATE: INVOLUNTARY DISSOLUTION OF:

RED OAK INDUSTRIAL DEVELOPMENT CORPORATION

THE SECRETARY OF STATE HEREBY DETERMINES AND FINDS THE FOLLOWING:

1. THAT THE CORPORATION IS REQUIRED TO FILE THE REPORT SPECIFIED IN ARTICLE 1396-9.01, TEXAS NON-PROFIT CORPORATION ACT, AS REQUIRED BY THE SECRETARY OF STATE.

2. THAT THE CORPORATION HAS FAILED TO FILE THE REPORT PRESCRIBED BY LAW WHEN THE SAME HAS BECOME DUE.

3. THAT THE CORPORATION FORFEITED ITS RIGHT TO CONDUCT AFFAIRS IN THIS STATE FOR FAILURE TO FILE SAID REPORT.

4. THAT THE CORPORATION WAS MAILED NOTICE OF SUCH FORFEITURE FOLLOWING A PERIOD OF NOT LESS THAN 30 DAYS NOTICE OF THE REQUIREMENT TO FILE SAID REPORT, AND SIMULTANEOUSLY THEREWITH GIVEN AN ADDITIONAL PERIOD OF NOT LESS THAN 120 DAYS TO CORRECT THIS DELINQUENCY.

5. THAT THE CORPORATION HAS FAILED PRIOR TO SUCH INVOLUNTARY DISSOLUTION TO CORRECT THE NEGLECT, OMISSION OR DELINQUENCY.

IT IS THEREFORE ORDERED THAT THE ABOVE NAMED CORPORATION BE INVOLUNTARILY DISSOLVED WITHOUT JUDICIAL ASCERTAINMENT AND MADE NULL AND VOID PURSUANT TO ARTICLE 9.02E, TEXAS NON-PROFIT CORPORATION ACT.

WITNESS MY HAND AND OFFICIAL SEAL, THIS TWELVTH DAY OF OCTOBER, 1994.

Secretary of State

0 0 1 3 1 5 0 2 5 1 2

The State of Texas

Secretary of State

APR 13, 1994

DIANE ROBERTSON, REGISTERED AGENT
RED OAK INDUSTRIAL DEVELOPMENT CORPORATION
411 W. RED OAK RD.
RED OAK, TX

RE: RED OAK INDUSTRIAL DEVELOPMENT CORPORATION
CHARTER NO. 679842-01

DEAR SIR OR MADAM:

NOT MORE THAN ONCE EVERY FOUR YEARS THE SECRETARY OF STATE MAY REQUEST THAT NON PROFIT CORPORATIONS PROVIDE CURRENT INFORMATION REGARDING THEIR REGISTERED AGENT, OFFICERS AND DIRECTORS. ARTICLE 1396-9.01 OF THE TEXAS NON-PROFIT CORPORATION ACT REQUIRES A CORPORATION TO FILE THE REPORT CONTAINING THIS INFORMATION WITHIN THIRTY (30) DAYS OF THE MAILING OF NOTICE BY THE SECRETARY OF STATE TO THE CORPORATION THAT SUCH REPORT IS DUE. THE RECORDS OF THIS OFFICE REFLECT THAT THE ABOVE REFERENCED CORPORATION WAS NOTIFIED CONCERNING THE FILING OF THIS REPORT OVER THIRTY DAYS AGO.

IF YOU HAVE RECENTLY FILED THIS REPORT, PLEASE DISREGARD THIS NOTICE.

HOWEVER, IF YOU HAVE NOT FILED THIS REPORT PLEASE BE ADVISED THAT PURSUANT TO ARTICLE 1396-9.02 OF THE TEXAS NON-PROFIT CORPORATION ACT THE ABOVE REFERENCED CORPORATION'S RIGHT TO CONDUCT AFFAIRS HAS BEEN FORFEITED FOR FAILURE TO FILE THE REPORT AS OF THE DATE OF THIS LETTER.

THE RIGHT TO CONDUCT AFFAIRS MAY BE REVIVED BY SUBMITTING THE ATTACHED FORM TO THIS OFFICE ALONG WITH A FILING FEE OF $5.00 PLUS $1.00 LATE FEE.

FAILURE TO FILE THE REPORT WITHIN ONE-HUNDRED-TWENTY (120) DAYS FROM THE DATE OF THIS LETTER WILL RESULT IN THE FORFEITURE OF THE CORPORATION'S CHARTER, PURSUANT TO ARTICLE 1396-9.02E OF THE TEXAS NON-PROFIT CORPORATION ACT.

IF YOU HAVE ANY QUESTIONS CONCERNING THIS REPORT, PLEASE CONTACT THIS OFFICE AT (512) 463-5582.

SINCERELY,

CORPORATIONS SECTION.
STATUTORY FILINGS DIVISION

ATTACHMENT 2

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

CITY OF RED OAK, TEXAS, and the RED OAK INDUSTRIAL DEVELOPMENT CORPORATION, Plaintiff, vs. UNITED STATES DEPARTMENT OF AGRICULTURE, acting by and through George Ervin "Sonny" Perdue, III, Secretary of Agriculture; RURAL UTILITIES SERVICE, acting by and Through Edd Hargett, State Director; ROCKETT SPECIAL UTILITY DISTRICT, and COBANK, ACB, Defendants.	)	Civil Action No: 1:20-CV-00483-RP

DEFENDANT ROCKETT SPECIAL UTILITY DISTRICT'S ANSWER, AFFIRMATIVE DEFENSES AND AVOIDANCES TO PLAINTIFFS' FIRST AMENDED COMPLAINT (DOC. 25)

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Michael D. Davis, OBA #11282
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Allensworth and Porter, LLP
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Austin, TX 78701
512-708-1250
512-708-0519 (fax)

COMES NOW the Defendant, Rockett Special Utility District ("Rockett") and submits its Answer, Affirmative Defenses and Avoidances to Plaintiffs' First Amended Complaint.

1. Rockett admits paragraph 1 of the First Amended Complaint.

2. Rockett lacks knowledge or information sufficient to form a belief regarding the truthfulness of paragraph 2 of the First Amended Complaint and therefore denies said paragraph 2 at this time. Plaintiff Red Oak Industrial Development Corporation ("ROIDC") filed its articles of incorporation with the Texas Secretary of State ("TSOS") on November 15, 1983. On October 12, 1994, the TSOS declared that ROIDC was involuntarily dissolved and rendered null and void. The TSOS further declared that ROIDC had forfeited its right to conduct affairs in Texas. In the TSOS's notice to ROIDC of involuntary dissolution, the TSOS stated that ROIDC could be reinstated by filing a report pursuant to Article 1396-9.01 Texas Non-Profit Corporation Act (the "Act") and paying a fee. Article 1396-9.01 Texas Non-Profit Corporation Act expired on January 1, 2010. Prior to January 1, 2010, ROIDC had failed to file any form authorized by the Act to achieve reinstatement. A search of the records of the TSOS does not reveal an order reinstating ROIDC. ROIDC did file a report with the TSOS on March 24, 2020 however the legal effect of such filing is unknown. On information and belief, ROIDC's statutory right to reinstatement expired on or before January 1, 2010 and therefore ROIDC lacks the capacity to file suit or engage in any business in Texas following its involuntary dissolution. ROIDC failed to seek reinstatement within three years of its termination/dissolution prior to the third anniversary of the date the termination took effect as required by the Texas Business and Organizations Code § 11.202.

3. Rockett admits paragraph 3 of the First Amended Complaint.

4. Rockett admits paragraph 4 of the First Amended Complaint except that the Rural Utilities Service ("RUS") is a component division within United States Department of Agriculture

("USDA") and not a separate person or agency. RUS is not a proper party to this suit.

5. Rockett admits paragraph 5 of the First Amended Complaint.

6. Rockett admits paragraph 6 of the First Amended Complaint. Rockett is a political subdivision and is an agent and instrumentality of the State of Texas created under the authority of Article XVI, Section 59 of the Texas Constitution, and operating pursuant to Chapters 49 and 65 of the Texas Water Code, among others. Rockett holds Certificate of Convenience and Necessity ("CCN") No. 10099 by Order of the Texas Commission on Environmental Quality ("TCEQ") or its predecessor agency, granting Rockett the exclusive right to own and operate a retail public water utility system serving persons and entities located inside a defined geographical service area specified in Rockett's CCN.

7. Rockett admits paragraph 7 of the First Amended Complaint except that (a) the USDA owes no duty to the Plaintiffs as alleged by Plaintiffs, (b) Plaintiffs' suit lacks merit and Plaintiffs are not entitled to any relief, and (c) all federal regulations associated with Rockett's entitlement to the protections afforded by 7 U.S.C. § 1926(b) ("§ 1926(b)") have been properly satisfied.

8. Rockett denies the first sentence of paragraph 8 of the First Amended Complaint. Rockett admits the second sentence of paragraph 8 of the First Amended Complaint. The actions of the USDA have done nothing to alter the status quo, namely that Rockett is and has been the exclusive water service provider for the past 29 years, for all land within Rockett's CCN, as Plaintiffs concede in ¶ 34 of the First Amended Complaint.

9. Rockett admits paragraph 9 of the First Amended Complaint. However, Plaintiffs have no prudential standing to bring their suit.

10. Rockett admits paragraph 10 of the First Amended Complaint. However, this case has been transferred to the U.S. District Court for the Western District of Texas.

11. Rockett admits paragraph 11 of the First Amended Complaint. However, this case has been transferred to the U.S. District Court for the Western District of Texas.

12. Rockett denies the first sentence of paragraph 12 of the First Amended Complaint. Rockett admits the second sentence of paragraph 12 of the First Amended Complaint. Rockett has already obtained a loan guarantee in the form of a "Conditional Commitment" issued by the USDA which was properly issued by the USDA. Plaintiffs are not entitled to obtain the injunctive relief they seek.

13. Rockett denies paragraph 13 of the First Amended Complaint. All actions of the USDA in approving the loan by CoBank ACB ("CoBank") to Rockett, approving the loan guarantee, and issuing the USDA's Conditional Commitment are and were proper. Rockett already enjoys monopoly protection sanctioned under 7 U.S.C. § 1926(b) during the term of the CoBank loan to Rockett, to prevent competitive water sales by others including the City of Red Oak ("City"), within Rockett's CCN and elsewhere in Texas where Rockett has the legal right under Texas law, to provide water service. Rockett denies that City has any coherent development plan for the delivery of water service, for areas situated within Rockett's CCN. Rockett already enjoys, and has for over 29 years enjoyed, monopoly protection under Texas state law, and therefore the City is precluded from formulating a development plan that would violate Texas law, which would interfere with Rockett's right to be the exclusive provider of water service within its CCN. *See Green Valley Special Util. Dist. v. City of Schertz, Texas*, No. 18-51092, 2020 WL 4557844, at *10, __F.3d__ (5th Cir. Aug. 7, 2020) (overruled on other grounds) ("The panel correctly observed that, under Texas law, a CCN gives a utility both (1) "*the exclusive right to serve the area within its CCN*" and (2) an obligation "to serve every consumer within its certified area and render continuous and adequate service within the area....") (internal citations omitted) (emphasis added). Plaintiffs concede this issue in ¶ 34 of the First Amended Complaint. Any development plan created by the

City, that is inconsistent with Rockett's rights under state law to be the exclusive water service provider within Rockett's CCN, would be both ill conceived, and an unlawful development plan and therefore void.

14. Rockett denies paragraph 14 of the First Amended Complaint. Rockett is making defensive use of its § 1926(b) rights and state law rights before the Public Utility Commission of Texas ("PUCT") because all the land at issue before the PUCT is within the boundaries of Rockett's CCN. *See Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701 (6th Cir. 2003). The City and ROIDC are not parties to the PUCT actions nor are they parties to the suit filed by Rockett in U.S. District Court for the Western District of Texas.

15. Rockett denies paragraph 15 of the First Amended Complaint. Plaintiffs concede in ¶ 34 of the First Amended Complaint that Rockett holds the undisputed state law sanctioned monopoly for water service, for all land situated within its CCN.

16. Rockett admits the first two sentences and denies the third sentence in paragraph 16 of the First Amended Complaint. City and ROIDC are not parties to the PUCT proceedings which Plaintiffs refer to in ¶ 16 of the First Amended Complaint therefore there are no proceedings before the PUCT for which these Plaintiffs and Rockett are opponents. Rockett has the exclusive right to provide water service under Texas state law within the boundaries of its CCN. In further response, Rockett incorporates ¶ 13 of this Answer.

17. Rockett admits paragraph 17 of the First Amended Complaint with the following exception. 7 C.F.R. § 1779.1(b) states" "(b) The purpose of the WW guaranteed loan program is to provide a loan guarantee for the construction or improvement of water and waste projects *serving the financially needy communities in rural areas*." (Emphasis added.) The USDA determined by final agency action that the system improvements to be made with proceeds from the CoBank loan,

guaranteed by the USDA, will serve areas contemplated by federal regulations.

18. Rockett admits the first sentence of paragraph 18 of the First Amended Complaint and denies the remaining sentences. A loan guarantee by the USDA does not involve federal funds and thus provisions associated with early repayment (often called "graduation") are *not* applicable to USDA guaranteed loans. Early graduation of a USDA guaranteed loan would not "free up" federal funds because no federal funds were loaned to Rockett, but rather only funds from CoBank.

19. Rockett admits paragraph 19 of the First Amended Complaint except for the last sentence. Section 1926(b) was intended to create a federally sanctioned monopoly for Rockett for its CCN during the term of such loan, as stated in § 1926(b). Rockett is only making defensive use of its § 1926(b) rights because all the land at issue before the PUCT is within the boundaries of Rockett's CCN. *See Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701 (6th Cir. 2003).

20. Rockett denies paragraph 20 of the First Amended Complaint to the extent that this allegation implies that Rockett's § 1926(b) protection adversely affects persons or even municipalities merely seeking to develop land. Rather, to enjoy § 1926(b) protection, Rockett must demonstrate that it has the physical capability to provide water service within a reasonable period of time, which has no adverse effect on such developers. *See Green Valley Special Util. Dist. v. City of Schertz, Texas*, No. 18-51092, 2020 WL 4557844, __F.3d__ (5th Cir. Aug. 7, 2020). Persons or entities seeking to develop land are already under restrictions imposed by Texas state law, which grants Rockett the exclusive right to be the water service provider within its CCN. This restriction is also true for municipalities who also enjoy and enforce their legal rights where the municipality is the exclusive water service provider under Texas state law.

21. Rockett denies paragraph 21 of the First Amended Complaint except as expressly admitted herein. A developer's preference is not relevant to § 1926(b). *See Pub. Water Supply Dist. No. 3 of*

Laclede Cty., Mo. v. City of Lebanon, Mo., 605 F.3d 511, 522 (8th Cir. 2010). Fire protection is also not relevant to § 1926(b). *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cty., Oklahoma v. City of Guthrie*, 654 F.3d 1058, 1066–1067 (10th Cir. 2011). Rockett admits that its CCN cannot be taken in a non-consensual matter, such as an expedited release of portions of its CCN by the PUCT, if Rockett is compliant with the "made service available" requirement in § 1926(b). The same is true in the context of a PUCT proceeding, namely Rockett cannot be divested of a portion of its CCN by the PUCT if Rockett is compliant with the applicable Texas Water Code sections. Rockett has the responsibility under federal regulations to initiate an action to protect its territory (and the interests of CoBank and the USDA) from violations of § 1926(b). *See* 7 C.F.R. § 1782.14. There is no "preference" recognized or allowed under Texas state law in this context, for the developer/landowner to "choose" the water service provider when the land is within municipal city limits or within a water district CCN.

22. Rockett denies paragraph 22 of the First Amended Complaint. Rockett is obligated under federal regulations to protect its territory (and the interests of the USDA) from violations of § 1926(b). *See* 7 C.F.R. § 1782.14. Rockett cannot "sell" its territory to others without USDA consent. *See City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987) ("These regulations require that any transfer *must be approved by FmHA* to insure that services will not be curtailed and that repayment of the FmHA loans is not jeopardized.") (internal citations omitted) (Emphasis added.) It is also mandatory for Rockett to provide water service to applicants pursuant to federal regulations. *See* 7 C.F.R. § 1942.17(n)(2)(vii). The same hypothetical described by Plaintiffs exists for the landowner that desires to obtain water service from a water district rather than a municipality, where the municipality holds the exclusive right to be the water service provider under Texas state law.

23. Rockett denies paragraph 23 of the First Amended Complaint. Congress intentionally gave borrowers like Rockett monopoly protection for services they provide or make available. *See* 7 U.S.C. § 1926. Congress's purpose in enacting § 1926(b) was to: 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* and USDA loans by protecting the water district from the expansion of nearby cities and towns. *See City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987). Under Texas state law, the Texas legislature also intentionally created monopolies for municipalities and water districts eliminating any right of choice in selecting a water service provider.

24. Rockett denies paragraph 24 of the First Amended Complaint. Section 1926(b) was intended (and has succeeded) in encouraging development so as to drive down the per-user cost of water and better ensure repayment of loans made or guaranteed by the USDA. § 1926(b) protection exists during the term of the § 1926(b) qualifying loan(s), which can result in § 1926(b) protection, for more or less than 40 years. Successive § 1926(b) loans can extend protection far longer than 40 years. Rockett incorporates by reference its paragraph 23 above, in further response to paragraph 24 of the First Amended Complaint. The economic value associated with monopoly protection for municipalities and water districts under state and federal law belongs to the membership (water customers) so they can achieve an economy of scale and reduce the per-user cost of water. Every federal court to consider the issue has concluded that § 1926(b) was intended to encourage development, not serve as a barrier to development. Moreover, the statute was intended to prevent municipalities from taking customers away from the § 1926(b) protected entity. *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 705 (6th Cir. 2003) ("7 U.S.C. § 1926(b). This provision

prevents local governments from expanding into a rural water association's area and stealing its customers.")

25. Rockett denies paragraph 25 of the First Amended Complaint, except as expressly admitted herein. Plaintiffs' suit exemplifies the evil Congress wished to avoid when it passed § 1926(b) and why the Fifth Circuit adopted its "Bright-Line" rule. *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.,* 816 F.2d 1057, 1060 (5th Cir. 1987).[1] Plaintiffs' argument here is anathematic to the purposes of § 1926(b) as discussed in *Bear Creek.* The water service provided and made available by Rockett directly encourages development. There is no evidence that the hypothetical developers described by Plaintiffs have an actual and genuine water need that exceeds what Rockett can provide within a reasonable period of time.

26. Rockett denies paragraph 26 of the First Amended Complaint and moves to strike the allegation as merely comprising speculation about possible future events, none of which have occurred. Plaintiffs omits the fact that Rockett also has a Texas state law monopoly to be the exclusive water service provider for the land at issue. All the "hoped for" (speculative) development described by Plaintiffs, if it does occur, will occur under Rockett's state law monopoly to be the exclusive water service provider.

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[1] "The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts." *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987)

In further response to paragraph 26(a) of the First Amended Complaint, the speculation alleged by Plaintiffs will remain undisturbed if Rockett's § 1926(b) rights are enforced.

In further response to paragraph 26(b) of the First Amended Complaint, the speculation alleged by Plaintiffs will remain undisturbed if Rockett's § 1926(b) rights are enforced.

In further response to paragraph 26(c) of the First Amended Complaint, the speculation alleged by Plaintiffs will remain undisturbed if Rockett's § 1926(b) rights are enforced, with the sole exception that Rockett rather than the City, will receive the fees associated with water service.

In further response to paragraph 26(d) of the First Amended Complaint, the speculation alleged by the City will remain undisturbed if Rockett's § 1926(b) rights are enforced.

27. Rockett denies paragraph 27 of the First Amended Complaint. There is no causal relationship between a developer's decision to move a theoretical project elsewhere if Rockett is the water service provider instead of the City being the water service provider. Plaintiffs are merely "crying wolf" here. If a developer moves the theoretical unconstructed project, it is equally likely (or equally speculative) that the developer had reasons other than water service that motivated the move, and in any event, the developer will be replaced by yet another developer.

28. Rockett denies paragraph 28 of the First Amended Complaint except as expressly admitted herein. All present water needs for the property at issue are being satisfied by Rockett. Rockett is *required*, under federal regulations, to provide water service as requested where service is feasible and legal. *See* 7 C.F.R. § 1942.17(n)(2)(vii). Further, Rockett's federal right to be the exclusive water service provider is in furtherance of Congress's intent and purpose in enacting § 1926(b). *See City of Madison, supra.*

29. Rockett denies paragraph 29 of the First Amended Complaint. The City does not have existing infrastructure to provide water service to the properties located within Rockett's CCN. It

is undisputed that the City has no facilities within Rockett's CCN to provide water service to anyone within Rockett's CCN. Rockett is presently providing all water service required by the existing landowners for the properties at issue. Rockett has the physical ability to provide additional water service, once a request for service is made, within a reasonable period of time. Rockett is not required to have the capability of immediately providing water service, an issue recently resolved by the Fifth Circuit. *See Green Valley Special Util. Dist. v. City of Schertz, Texas,* No. 18-51092, 2020 WL 4557844, __F.3d__ (5th Cir. Aug. 7, 2020).

30. Rockett denies paragraph 30 of the First Amended Complaint. Rockett objects to decertification of any portion of its CCN because the petitions to decertify portions of Rockett's CCN are a violation of § 1926(b) and Rockett has the responsibility to initiate an action to stop the violation pursuant to 7 C.F.R. § 1782.14. Rockett is currently providing all water service for the properties at issue. Rockett has the physical ability to provide additional water service, once a request for service is made, within a reasonable period of time. Rockett is not required to have the capability of immediately providing water service, an issue recently resolved by the Fifth Circuit. *See Green Valley Special Util. Dist. v. City of Schertz, Texas,* No. 18-51092, 2020 WL 4557844, __F.3d__ (5th Cir. Aug. 7, 2020). The City and ROIDC have never requested water service from Rockett.

31. Rockett denies paragraph 31 of the First Amended Complaint except as expressly admitted herein. Rockett has responded to two petitions for decertification, neither was which were filed by either of the Plaintiffs here. Rockett maintains in both decertification actions and in three separate federal actions filed thereafter for which Rockett is a party plaintiff or defendant, that Rockett holds a loan that qualifies it for § 1926(b) protection. Rockett has maintained that Rockett enjoys § 1926(b) protection because (1) USDA approved the CoBank loan to Rockett, (2) USDA approved

the USDA guarantee subject to conditions subsequent, (3) USDA has bound itself under its Conditional Commitment which is a form of guarantee and which cannot be withdrawn during the term of the Conditional Commitment, and (4) CoBank has closed the loan and the loan proceeds were paid to Rockett. Rockett admits that a document called the "Loan Note Guarantee" has not been issued by the USDA, however that specific document is not needed to trigger or initiate § 1926(b) protection.

32. Rockett denies paragraph 32 of the First Amended Complaint except as expressly admitted herein. The "companies" that Plaintiffs refer to, on information and belief, are Compass Datacenters, LLC ("Compass"), ROIDC, and Alamo Mission, LLC ("Alamo"). Compass and ROIDC have not threatened to move any project elsewhere. Plaintiffs allege that Alamo has made a threat to move its uncommitted hypothetical project elsewhere, but Plaintiffs have never provided any evidence of such a threat. There is no danger here that a "pie" will fall on the floor. Moreover, the pie here is the exclusive property of Rockett (for the benefit of its water customers) under both Texas state law and federal law for which Plaintiffs have no legally recognizable interest.

33. Rockett denies paragraph 33 of the First Amended Complaint except as expressly admitted herein. Rockett and CoBank applied for and the USDA issued its "Conditional Commitment" which is a form of guarantee contemplated by 7 U.S.C. § 1926. Rockett presently holds a state law sanctioned and a federal law sanctioned monopoly to be the exclusive water service provider for all land within its CCN. The City also holds a state law monopoly to be the exclusive water service provider in areas adjacent to Rockett's CCN, however the City's monopoly does not overlap Rockett's CCN. Rockett's state law monopoly has been in effect for over 29 years.

34. Rockett admits paragraph 34 of the First Amended Complaint.

35. Rockett denies paragraph 35 of the First Amended Complaint. ROIDC did not file an

application or petition with the PUC seeking streamlined expedited release nor could it because ROIDC is dissolved and not permitted to conduct affairs in Texas. The petition for expedited release was filed by a non-owner of the property namely City of Red Oak Industrial Development Corporation ("CROIDC"). ROIDC and CROIDC are two separate and different entities formed separately with the TSOS. ROIDC was involuntarily dissolved in 1994 and there is no documentation reflecting that ROIDC was ever reinstated or can be reinstated. CROIDC is not a party to this suit.

36. Rockett denies paragraph 36 of the First Amended Complaint except as expressly admitted herein. The petition referred to here was filed by CROIDC, not ROIDC. Rockett admits it timely intervened in the action commenced by CROIDC and has substantively responded to the petition filed by CROIDC.

37. Rockett admits paragraph 37 of the First Amended Complaint. Rockett filed its motion to intervene on September 13, 2019. The CoBank loan to Rockett which qualifies Rockett for § 1926(b) protection, was not closed and funded until September 26, 2019, thirteen days *after* Rockett filed its motion to intervene.

38. Rockett denies paragraph 38 of the First Amended Complaint. On October 2, 2019, Rockett filed a Response and Objection to CROIDC's Petition for Expedited Release, indicating that CROIDC's petition should not be granted because the property is protected by 7 U.S.C. § 1926(b) and because the property is not eligible for expedited decertification because it is receiving water service.

39. Rockett admits paragraph 39 of the First Amended Complaint.

40. Rockett admits paragraph 40 of the First Amended Complaint. At the time of Kay Phillips' statement, the "Loan Note Guarantee" had not been issued. However Rockett holds § 1926(b) rights

because: (1) the USDA approved the CoBank loan to Rockett, (2) USDA approved the USDA guarantee subject to conditions subsequent, (3) the USDA has bound itself under its Conditional Commitment which is a form of guarantee and which cannot be withdrawn during the term of the Conditional Commitment, and (4) CoBank has closed the loan and the loan proceeds were paid to Rockett.

41. Rockett admits paragraph 41 of the First Amended Complaint.

42. Rockett denies paragraph 42 of the First Amended Complaint except as expressly admitted herein. Rockett has closed on the CoBank loan and loan proceeds were paid to Rockett. The Loan Note Guarantee, which is also a conditional guarantee, has not been issued, and it only continues the guarantee provided by the USDA by its issuance of the Conditional Commitment for Guarantee which is another conditional guarantee.

43. Rockett denies paragraph 43 of the First Amended Complaint except as expressly admitted herein. The Conditional Commitment was issued by the USDA, subject to conditions subsequent. The Conditional Commitment is binding on the USDA during the term of the Conditional Commitment and is not subject to cancellation or termination during it term. *See Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012 (Fed. Cir. 1996).

44. Rockett denies paragraph 44 of the First Amended Complaint except as expressly admitted herein. The conditions that the City refers to are conditions subsequent, not conditions precedent. It is true that not all conditions subsequent have been satisfied, however, Rockett and CoBank are allowed under the terms of the Conditional Commitment to satisfy the conditions subsequent on or before December 31, 2020 or thereafter if the term is extended by the USDA. The Conditional Commitment and the Loan Note Guarantee are two different "conditional guarantees" each having their own unique conditions subsequent.

45. Rockett denies paragraph 45 of the First Amended Complaint. The issuance of the Conditional Commitment by the USDA is a guarantee within the contemplation of 7 U.S.C. § 1926.

46. Rockett denies paragraph 46 of the First Amended Complaint. Rockett has already obtained a guaranteed loan, which is a "such loan" within the contemplation of § 1926(b).

47. Rockett denies paragraph 47 of the First Amended Complaint. USDA's approval of the CoBank loan and the guarantee, and its issuance of the Conditional Commitment, which grants Rockett protection under § 1926(b) was for a legitimate purpose. The City is attempting here to impose its state law monopoly on a portion of Rockett's CCN. The City's ambition and efforts to replace Rockett as the water service provider for portions of Rockett's CCN, and impose the City's own state law sanctioned monopoly, is improper. The City cannot have a legitimate development plan that violates Texas state law. If such a development plan exists (which Rockett denies) it would violate Texas state law, because Rockett is the exclusive water service provider within its CCN under state law. The City concedes that Rockett is the exclusive water service provider under state law to all areas within Rockett's CCN. See First Amended Complaint at ¶ 34.

48. Rockett denies paragraph 48 of the First Amended Complaint.

49. Rockett admits paragraph 49 of the First Amended Complaint.

50. Rockett admits paragraph 50 of the First Amended Complaint provided however that USDA regulations do not modify the language of or conflict with the purpose and intent of §1926(b).

51. Rockett admits paragraph 51 of the First Amended Complaint. Guaranteed loan funds were used here in compliance with federal regulations. Rockett's own funds were used to pay for that part of the infrastructure serving areas within city limits. Rockett's loan proceeds were used to pay for that part of the infrastructure serving areas beyond city limits. This allocation of funds was conducted in coordination with the USDA.

52. Rockett denies paragraph 52 of the First Amended Complaint. Rockett incorporates by reference its paragraph 51 above in further response to paragraph 52 of the First Amended Complaint.

53. Rockett admits paragraph 53 of the First Amended Complaint.

54. Rockett admits paragraph 54 of the First Amended Complaint.

55. Rockett admits paragraph 55 of the First Amended Complaint.

56. Rockett admits paragraph 56 of the First Amended Complaint.

57. Rockett lacks knowledge or information sufficient to form a belief regarding the truthfulness of paragraph 57 of the First Amended Complaint and therefor denies said paragraph 57 at this time.

58. Rockett denies paragraph 58 of the First Amended Complaint. The system improvements are designed to serve areas both inside and outside of city limits. The project cost was divided between the cost to serve residents beyond city limits and the cost to serve residents within city limits. The portion of the project cost to serve residents within city limits was paid for by Rockett from its separate funds not associated with the funds loaned by CoBank to Rockett. The portion of the project cost to serve residents beyond city limits was paid for by Rockett from funds loaned by CoBank to Rockett. This division of project costs was thoroughly reviewed and approved by the USDA.

59. Rockett denies paragraph 59 of the First Amended Complaint, except as expressly admitted herein. Rockett admits that 7 C.F.R. § 1779.20(a) states: "(a) Availability of credit from other sources. The Agency must determine that the borrower is unable to obtain the required credit without the loan guarantee from private, commercial, or cooperative sources at reasonable rates and terms for loans for similar purposes and periods of time." Rockett admits that 7 C.F.R. § 1779.1(b) states: "(b) The purpose of the WW guaranteed loan program is to provide a loan guarantee for the

construction or improvement of water and waste projects serving the financially needy communities in rural areas. This purpose is achieved through bolstering the existing private credit structure through the guarantee of quality loans which will provide lasting benefits."

60. Rockett denies paragraph 60 of the First Amended Complaint, except as expressly admitted herein. In further response to paragraph 60 of the First Amended Complaint, Rockett incorporates by reference paragraph 59 of its Answer above. The USDA properly determined that Rockett is/was unable to obtain the required credit without the loan guarantee from private, commercial, or cooperative sources at reasonable rates and terms for loans for similar purposes and periods of time.

61. Rockett denies paragraph 61 of the First Amended Complaint. Rockett complied with all federal regulations associated with a USDA guaranteed loan, and the USDA properly determined that Rockett and CoBank were respectively a qualified borrower and lender. As a matter of law, there is a presumption that the USDA has acted with regularity. It is well-settled that an action by the USDA must be upheld, on the basis articulated by the agency itself. Courts may not substitute their judgment for that of the agency. *See Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 380 (5th Cir. 2008).

62. Rockett lacks knowledge or information sufficient to form a belief regarding the truthfulness of paragraph 62 of the First Amended Complaint because Rockett does not understand what Plaintiffs mean by the term "Bond Transcript." The USDA did not guarantee the bonds, or issue a guarantee to Rockett, but rather issued its guarantee to CoBank who is the lender. CoBank is not the issuer of the bonds.

63. Rockett denies paragraph 63 of the First Amended Complaint.

64. Rockett incorporates its answers above in paragraphs 1–63 as its response to paragraph 64 of the First Amended Complaint.

65. Rockett denies paragraph 65 of the First Amended Complaint and all its subparts. The USDA has already issued its guarantee in the form of a Conditional Commitment for Guarantee which is binding on the USDA. The "Loan Note Guarantee" is also a conditional guarantee and merely another part of the guarantee process. The guarantee was issued by USDA to CoBank.

66. Rockett denies paragraph 66 of the First Amended Complaint and all its subparts.

67. Rockett denies paragraph 67 of the First Amended Complaint. Plaintiffs are not entitled to any relief, equitable or otherwise. Plaintiffs have no property interests here because Rockett is already the exclusive provider of water service to the property at issue here under Texas state law.

68. Rockett denies paragraph 68 of the First Amended Complaint. The City and/or ROIDC have never applied to Rockett for water service. Plaintiffs have no current need for water service on the property at issue here. Plaintiffs have no protectible interest here, because under state law, Rockett is the exclusive provider of water service for the property at issue. None of the proposed development is on property for which the City has the legal right to provide water service under state law. Rockett has already qualified for § 1926(b) protection and is the exclusive water service provider under state and federal law, therefore Plaintiffs' First Amended Complaint is moot. There is no case or controversy regarding Rockett's exclusive right to provide water service under state and federal law.

69. Rockett denies paragraph 69 of the First Amended Complaint. Plaintiffs have no protectible property rights here because Rockett is the exclusive water service provider under Texas state law. Rockett's right of exclusivity has been in place for more than 29 years. USDA has no discretion to refuse to issue the Loan Note Guarantee, but rather is required to issue the Loan Note Guarantee under applicable federal regulations and under the terms of the Conditional Commitment for Guarantee.

70. Rockett denies paragraph 70 of the First Amended Complaint.

71. Rockett incorporates its answers above in paragraphs 1-70 as its response to paragraph 71 of the First Amended Complaint.

72. Rockett denies paragraph 72 of the First Amended Complaint and all of its subparts.

73. Rockett denies paragraph 73 of the First Amended Complaint

Affirmative Defenses and Avoidances

74 The scope of review provided for under 5 U.S.C. § 706 is narrowly limited. Here, the actions taken by the USDA (approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent and issuance of the Conditional Commitment for Guarantee) were not arbitrary, capricious, or an abuse of discretion. All actions by the USDA complained of in the First Amended Complaint complied with applicable law and regulations and were discretionary.

75. The determinations and/or decisions made by USDA for approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent and issuance of the USDA Conditional Commitment for Guarantee, were fully warranted and were discretionary. *See* 5 U.S.C. § 706. Substantial evidence supporting the determinations and decisions was not required because no hearings were required pursuant to 5 U.S.C.A. §§ 556 and 557.[2]

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[2] "HMS maintains that agency findings 'are reviewed under the substantial evidence standard only where there has been a formal agency adjudication in which the agency was required to conduct a hearing on the record, which was not required and did not occur in this case.' HMS is correct. 5 U.S.C. § 706(2)(E) states that a reviewing court shall hold unlawful agency findings or conclusions found to be 'unsupported by substantial evidence ... reviewed on the record of an agency hearing provided by statute.' The Recovery Act, unlike other whistleblower statutes, does not allow a complainant to request a hearing. In this case, neither the HHS nor the OIG held a hearing. And other courts of appeals reviewing § 1553 claims have refrained from using the 'substantial evidence' standard." *Frey v. United States Dep't of Health & Human Servs.*, 920 F.3d

76. The District Court may only overturn USDA decisions and determinations if they are unwarranted in law and without justification in fact. *Terranova v. United States Dep't of Agric.,* No. 20-60003, 2020 WL 4589346, at *2, __F.3d__ (5th Cir. Aug. 10, 2020).

77. The determinations and/or decisions made by USDA for approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent, and issuance of the Conditional Commitment for Guarantee were legally correct and therefore as a matter of law, cannot be an abuse of discretion.

78. The determinations and/or decisions made by USDA for approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent and issuance of the Conditional Commitment for Guarantee were not arbitrary because there is a rational connection between the facts considered and the decision that was made. *See Corry v. Liberty Life Assur. Co. of Bos.*, 499 F.3d 389, 398 (5th Cir. 2007).

79. The determinations and/or decisions made by USDA for approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent, and issuance of the Conditional Commitment for Guarantee were reasonable. *Id.*

80. The determinations and/or decisions made by USDA for approval of the CoBank and Rockett application for loan and guarantee, approval of the loan made by CoBank to Rockett, approval of the loan guarantee subject to conditions subsequent, and issuance of the Conditional Commitment for Guarantee are not subject to de novo review.

319, 325–26 (5th Cir. 2019).

81. To the extent that substantial evidence is an issue to be considered, the substantial evidence standard is "highly deferential." *See U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 256 (5th Cir. 2004) (citation omitted). See also *Int'l Bhd. of Elec. Workers, Afl-cio, CLC, Local Unions 605 & 985 v. Nat'l Labor Relations Bd.,* No. 19-60616, 2020 WL 5229688, at *8, __F.3d__ (5th Cir. Sept. 2, 2020). Substantial evidence is more than a scintilla, and less than a preponderance. *Terranova v. United States Dep't of Agric.*, No. 20-60003, 2020 WL 4589346, at *2, __F.3d__ (5th Cir. Aug. 10, 2020). The decisions of the USDA at issue here are supported by substantial evidence.

82. Judicial review is unavailable to Plaintiffs and the District Court lacks jurisdiction over Plaintiffs' suit because Plaintiffs seek review of actions taken (approvals) by the USDA which are discretionary. *Singh v. Wolf,* No. 20-CV-0539, 2020 WL 3424850, at *4 (W.D. La. May 13, 2020), report and recommendation adopted, No. 20-CV-0539, 2020 WL 3421932 (W.D. La. June 22, 2020). See also *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020). ("But judicial review under the APA *is unavailable* when other statutes "preclude judicial review" *or when "agency action is committed to agency discretion by law."* 5 U.S.C. § 701(a); *Texas v. United States*, 787 F.3d 733, 755 (5th Cir. 2015)." *Sacal-Micha v. Longoria*, No. 1:20-CV-37, 2020 WL 1518861, at *7 (S.D. Tex. Mar. 27, 2020).83. Issuance of a Loan Note Guarantee is contractual in nature for which the USDA is obligated to issue once the conditions subsequent are satisfied. There is presently no case or controversy regarding the issuance of the Loan Note Guarantee therefore the Court lacks jurisdiction over that issue.

83. Plaintiff's claims are barred by 7 C.F.R. § 1779.13.

Wherefore having fully answered the First Amended Complaint, Rockett prays that all relief prayed for by Plaintiffs be denied and that Plaintiffs' suit be dismissed with prejudice.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT ROCKETT

CERTIFICATE OF SERVICE

I certify that on September 14, 2020, a copy of the above was electronically filed with the Court's CM/ECF system and served on Plaintiffs and Defendants CoBank and USDA by email in accordance with the agreement among Plaintiffs, Rockett Special Utility District, USDA, and CoBank.

/s/ Steven M. Harris