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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	§	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

RED OAK INDUSTRIAL DEVELOPMENT CORPORATION'S
RESPONSE TO ORDER NO. 11

Now comes Red Oak Industrial Development Corporation (Red Oak or Petitioner) and files this Response to Order No. 11 requesting briefing regarding Rockett Special Utility District's (Rockett) Motion to Dismiss.[1] Order No. 11 directs Petitioner to respond on or before December 14, 2020; therefore, this Response is timely filed.[2]

I. INTRODUCTION AND BACKGROUND

Nearly 16 months ago—on August 19, 2019—Red Oak filed its petition for *streamlined expedited* release under the provisions of Texas Water Code (TWC) § 13.254(a-5)[3] and 16 Texas Administrative Code (TAC) § 24.245(l)[4] (Petition) of certain lands from the water Certificate of Convenience and Necessity (CCN) held by Rocket Special Utility District (Rockett). On September 25, 2019, the Commission's administrative law judge (ALJ) declared Red Oak's Petition administratively complete and set out a procedural schedule, which included an

[1] Order No. 11 (Nov. 16, 2020).

[2] While Petitioner is providing this response in compliance with Order No. 11, it notes that on December 7 2020, it filed a Motion for Final Order.

[3] This section was moved and recodified to TWC § 13.2541 effective September 1, 2019. As it was the applicable statutory provision in effect as of the time this petition was filed, this motion will reference that provision accordingly.

[4] 16 TAC § 24.245(l) is currently housed in § 24.245(h) as of July 2, 2020.

administrative approval deadline of November 25, 2019.[5] Commission Staff then issued its recommendation for final disposition, recommending that the Commission grant the Petition as the Petition met the requirements for streamlined expedited release.[6]

Rockett objected to the Petition, and on October 19, 2019, filed suit (Rockett Suit) against the Public Utility Commission (Commission), Red Oak, and Alamo Mission, LLC (Alamo Mission) (an entity that had also filed a petition to remove properties from Rockett's CCN).[7] Instead of approving the Petition as required by both the applicable statute and the Commission's Rules, the ALJ issued Order No. 4, abating the processing of Red Oak's Petition "due to the pendency of the federal litigation."[8]

That federal litigation is now concluded. Rockett's suit has been dismissed.

On July 29, 2020, United States Magistrate Judge Mark Lane issued a Report and Recommendation recommending dismissal of Rockett's suit.[9] The Report and Recommendation concluded:

> 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.[10]

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[5] Order No. 2 Granting Motion to Intervene and Finding Petition Administratively Complete (Sep. 25, 2019). The ALJ set the deadline for granting the Petition 60 days from the date the Petition was declared administratively complete, as required by statute and Commission rule. *See* 16 TAC § 24.245.

[6] Commission Staff's Recommendation on Final Disposition (Oct. 11, 2019).

[7] *Rockett Special Util. Dist. v. Botkin, et al.*, No. 19-CV-1007, Western District of Texas, Austin Division.

[8] Order No. 4 Abating Proceeding (Nov. 15, 2019).

[9] Attachment A, Report and Recommendation in Rockett Suit (Jul. 29, 2020).

[10] Attachment A at 11 (emphasis added).

The district court adopted the magistrate's Report and Recommendation "as its own order," and dismissed the Rockett Suit.[11] The court entered its Final Judgment on November 6, 2020.[12]

II. ARGUMENT & AUTHORITIES

A. Rockett is not federally indebted, and its CCN is not protected by Section 1926(b).

As an initial matter, the ALJ directed Rockett to file briefing as to the effect the federal district court's order had on its motion to dismiss dated December 2, 2019.[13] Rockett's responsive briefing does not reference its motion to dismiss *at all*.[14] Rockett moved for dismissal claiming: (1) Rockett is indebted on a loan entitled to protection under 7 U.S.C. Section 1926; (2) Rockett had a guaranteed loan; (3) Rockett's loan closed and has been funded; and (4) denial of the petition is consistent with other ALJ decisions where the certificated area was entitled to federal protection.[15]

Each of those arguments were considered and rejected by the federal court.[16]

Each of Rockett's arguments for dismissal rest on the premise that Rockett has a federally guaranteed loan, and thus its certificated area is protected from decertification under 7 U.S.C. Section 1926. In support of its argument, Rockett regurgitates the same arguments that were unsuccessful in the federal court. But the federal court has spoken; Rockett does not have a federally guaranteed loan.

The federal court's ruling disposed of the Rockett Suit, and the applicable federal regulations make it clear that a conditional commitment is insufficient evidence of a guaranteed

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[11] Attachment B, Order Adopting Report and Recommendation at 1 (Nov. 3, 2020).

[12] Attachment C, Final Judgment (Nov. 6, 2020).

[13] Order No. 11 at 1 (Nov. 16, 2020).

[14] Rockett Special Utility District's Response to Order No. 11.

[15] Rockett SUD's Response and Objection to Petitioner's Motion to Lift Abatement and Motion to Dismiss the Petition (Dec. 2, 2019). Rockett also filed a motion to dismiss because the Petition contained a misnomer, identifying the Petitioner as "City of Red Oak Industrial Development Corporation." That issue is fully briefed and is not part of the requested briefing identified in Order No. 11. Further, Commission Staff recommended that the motion to dismiss based on identification of Petitioner be denied. Commission Staff's Response to Rockett Special Utility District's Motion To Dismiss (Oct. 22, 2020).

[16] Attachment A; Attachment B.

loan.[17] Without a federal loan guarantee, there is no qualifying federal protection under Section 1926. At this point, in order to dismiss this action as Rockett requests, the ALJ would have to find and issue a determination that the federal district court's judgment was in error and render a decision contrary to that of the federal court.

B. The *Crystal Clear* decision has been vacated by the Fifth Circuit.

In its response to Order No. 11, Rockett cited *Crystal Clear Special Utility District v. Walker*, arguing that the Commission cannot grant decertification because the authorizing statute is void.[18] *Crystal Clear*, however, does not apply to this case because it relates only to utilities that have federal indebtedness that meets the requirements of 7 U.S.C. § 1926.[19] And, as the federal court has held, Rockett does not have federal indebtedness and is not protected by Section 1926(b).[20]

Regardless, the district court's decision on which Rockett relies has been vacated by the United States Court of Appeals for the Fifth Circuit.[21] The case has been remanded to the district court for further proceedings consistent with the Fifth Circuit's recent en banc decision in *Green Valley Special Utility District v. City of Schertz*.[22] Rockett's reliance on the district court's now-vacated decision in *Crystal Clear* is thus misplaced.

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[17] Rockett contends there is still a federal question because it filed an appeal and continues to claim Section 1926(b) protection. Rockett Special Utility District's Response to Order No. 11 (Dec. 7, 2020). Rockett's argument is internally inconsistent. Rockett argues that the district court's *Crystal Clear* decision, which has now been vacated, should be treated as a settled matter barring the release of this property, while simultaneously (and inconsistently) arguing that its appeal of the federal district court's dismissal warrants, at a minimum, abatement of this proceeding.

Regardless, the present federal court decision that decided that Rockett does not have federal Section 1926(b) protection is what the Commission should consider, rather than a future hypothetical (and unlikely) reversal. None of the language in TWC § 13.2541 that speaks to federal protection is at issue, regardless of *Crystal Clear's* future.

[18] Rockett Special Utility District's Response to Order No. 11 (Dec. 7, 2020).

[19] *See* Attachment A; Attachment B.

[20] *Id.*

[21] *See* Attachment D, Order, *Crystal Clear Spec. Util. Dist. v Marquez*, No. 19-50556 (5th Cir. Nov. 6, 2020) (per curiam).

[22] *See id.*

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

Rockett attempts to shift focus from the applicable standard for water service by claiming that it met service requirements under federal law as described in the Fifth Circuit's decision in *Green Valley*.[23] However, *Green Valley's* analysis involves the provision of water service as that term is used in Section 1926(b). And inasmuch as Rockett does not have a federal loan guarantee, that analysis is irrelevant in this case. The only law the Commission needs to look to and apply is Texas law.

Pursuant to the TWC and the Commission's rules, the relevant question and standard is whether the property is *receiving* water service.[24] With respect to Red Oak's petition, the Commission Staff answered that question *over a year ago*—"no."[25]

The federal district court decision dispenses with all of the arguments in Rockett's Motion to Dismiss. Thus, the ALJ should deny Rockett's December 2, 2019 Motion to Dismiss.

III. CONCLUSION

Any concern regarding preemption is moot based on the decision of the federal court, which confirmed that Rockett is not federally indebted. The federal district court decision dispenses with all of the arguments in Rockett's Motion to Dismiss. Because there is no federal question, this is purely a state-law matter.

Under state law, Red Oak has satisfied the requirements for the release of the petitioned tracts from Rockett's CCN. This petition for streamlined expedited release was held in abatement for almost a year, and is still pending and being subjected to further delay in additional briefing. Rockett's efforts to delay in the hopes that it will delay long enough to eventually make its misrepresentations true, should not be further rewarded. Accordingly, the Commission should deny Rockett's Motion to Dismiss the Petition. Further, and as evidenced herein, the Commission should grant the Petition.

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[23] Rockett Special Utility District's Response to Order No. 11 (Dec. 7, 2020).

[24] TWC §13.254(a-5); 16 TAC § 24.245.

[25] Commission Staff Recommendation on Final Disposition at 4 (Oct. 11, 2019).

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that, unless otherwise ordered by the presiding officer, notice of the filing of this document was provided to all parties of record via electronic mail on December 8, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

Georgia Crump

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

 Attachment B

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

ROCKETT SPECIAL UTILITY DISTRICT, a political subdivision of the State of Texas, Plaintiff, v. SHELLY BOTKIN, et al., Defendants.	§	1:19-CV-1007-RP

ORDER

Before the Court is the report and recommendation of United States Magistrate Judge Mark Lane concerning Defendants Red Oka 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. 35), and all related briefing. (R. & R., Dkt. 43). In his report and recommendation, Judge Lane denied Red Oak's request for a hearing, (Dkt 25), and recommended granting the remaining motions. (*Id.* at 13). Rockett Special Utility District ("Rockett") timely filed objections to the report and recommendation. (Objs., Dkt. 45).

A party may serve and file specific, written objections to a magistrate judge's findings and recommendations within fourteen days after being served with a copy of the report and recommendation and, in doing so, secure *de novo* review by the district court. 28 U.S.C. § 636(b)(1)(C). Because Rockett timely objected to each portion of the report and recommendation, the Court reviews the report and recommendation *de novo*. Having done so, the Court overrules Rockett's objections and adopts the report and recommendation as its own order.

Accordingly, the Court **ORDERS** that the report and recommendation of United States Magistrate Judge Mark Lane, (Dkt. 42), is **ADOPTED**.

Accordingly, the Court **ORDERS** that 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), are **GRANTED**.

IT IS FURTHER ORDERED that this case be **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

The Court will enter final judgment in a separate order.

SIGNED on November 3, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

 Attachment C

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

ROCKETT SPECIAL UTILITY DISTRICT, a political subdivision of the State of Texas, Plaintiff, v. SHELLY BOTKIN, et al., Defendants.	§	1:19-CV-1007-RP

FINAL JUDGMENT

On November 3, 2020, the Court adopted United States Magistrate Judge Mark Lane's report and recommendation concerning Defendants 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. 35). (R. & R., Dkt. 43). The Court's Order dismissed this case without prejudice (Order, Dkt. 61).

As nothing remains to resolve, the Court renders final judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that each party bear its own costs.

IT IS FURTHER ORDERED that the case is **CLOSED**.

SIGNED on November 6, 2020.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Case: 19-50556 Document: 00515629091 Page: 1 Date Filed: 11/06/2020

United States Court of Appeals for the Fifth Circuit

No. 19-50556

CRYSTAL CLEAR SPECIAL UTILITY DISTRICT,

Plaintiff—Appellee Cross-Appellant,

versus

BRANDY MARTY MARQUEZ, *in her official capacity as Commissioner of the Public Utility Commission of Texas*; LAS COLINAS SAN MARCOS PHASE I, L.L.C.; DEANN T. WALKER, *in her official capacity as Commissioner of the Public Utility Commission of Texas*; ARTHUR C. D'ANDREA, *in his official capacity as Commissioner of the Public Utility Commission of Texas*; SHELLY BOTKIN,

Defendants—Appellants Cross-Appellees.

Appeals from the United States District Court
for the Western District of Texas
USDC No. 1:17-CV-254

Before WILLETT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellants Cross-Appellees' opposed motion to vacate the district court judgment is GRANTED.

IT IS FURTHER ORDERED that Appellants Cross-Appellees' opposed motion to remand the case to the district court is GRANTED. The

case is remanded for reconsideration in light of *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460 (5th Cir. 2020) (en banc). We express no opinion how the issues in this case should be resolved on remand.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 06, 2020

Ms. Jeannette Clack
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 19-50556 Crystal Clear Spec Util Dist v. DeAnn Walker, et al
USDC No. 1:17-CV-254

Dear Ms. Clack,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

Laney Lampard

By: _____
Laney L. Lampard, Deputy Clerk
504-310-7652