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PUC DOCKET NO. 51044

PETITION OF FCS LANCASTER, LTD TO AMEND ROCKETT SPECIAL UTILITY DISTRICT'S CERTIFICATE OF CONVENIENCE & NECESSITY IN DALLAS COUNTY BY EXPEDITED RELEASE	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

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

Now comes FCS Lancaster, Ltd (FCS Lancaster or Petitioner) and files this Response to the Motion to Dismiss filed by Rockett Special Utility District (Rockett).[1] Rockett's Motion to Dismiss was filed on August 21, 2020, therefore this Response is timely filed.

United States Magistrate Judge Mark Lane provided the most direct response to the assertion that Rockett has federal protection under 7 U.S.C. § 1926(b):

> **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 to not involve a federal controversy.**[2]

By way of further response to Rockett's Motion to Dismiss filed on August 21, 2020, FCS Lancaster states as follows:

I. INTRODUCTION

Rockett's Motion reflects that it has received from the USDA a Conditional Commitment to guarantee a loan that it has taken out from CoBank, ACB, a private lender.[3] But as the title would suggest, the Conditional Commitment is conditioned on the occurrence of certain conditions

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[1] Rockett Special Utility District's Response to the Petition and Motion to Dismiss (Aug. 21, 2020). (Rockett SUD's Motion to Dismiss).

[2] Report & Recommendation of the U.S. Magistrate Judge at 11, *Rockett Spec. Util. Dist. v. Botkin*, No. A-1-CV-1007-RP (W.D. Tex. July 29, 2020), Electronic Case Filing (ECF) No. 43 (attached as Exhibit "A").

[3] *See* Rockett SUD's Motion to Dismiss, Ex. C.

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precedent. Those conditions precedent have not occurred, and may never occur. Hence, the USDA has not issued a Loan Note Guarantee, which is the instrument that obligates the federal government on the debt.

With no federal indebtedness, there is no federal protection under 7 U.S.C. § 1926(b). That has been the consistent conclusion of the federal circuit courts. And, only weeks ago, that was the conclusion of United States Magistrate Judge Mark Lane, who reviewed Rockett's same documents at issue here and reported that Rockett's claim of Section 1926(b) protection was "absurd[]," "wholly insubstantial," "frivolous," and "completely devoid of merit."[4]

Rockett's Motion does not advise the Commission of these federal decisions. But they are determinative. Rockett's water CCN is not protected by Section 1926(b). And even if it was protected, Section 1926(b) does not restrict the Commission's actions in this case because Section 1926(b) only applies to local governmental entities. Accordingly, the Commission should deny Rockett's motion and proceed with the streamlined release sought in FCS Lancaster's Petition.

II. BACKGROUND FACTS

The background facts of this case have been thoroughly litigated, and need only brief review:

A. Rockett does not have a USDA-guaranteed loan.

Rather than provide its own narrative, FCS Lancaster will allow Rockett to provide the narrative of its quest for Section 1926(b) protection. "On November 21, 2018, Rockett and CoBank submitted their Application for Loan and Guarantee" to the USDA.[5] On July 25, 2019, the USDA issued its Conditional Commitment for Guarantee," which states "The United States of America . . . will execute the Loan Note Guarantee, subject to the conditions and requirements

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[4] *See* Rockett SUD's Motion to Dismiss, Ex. A at 5, 10, 13.

[5] Pl.'s Obj. to U.S. Magistrate Judge's Rep. & Recomm. at 6, Rockett Suit (W.D. Tex. Aug. 10, 2020), ECF No. 45 (attached as Exhibit "B").

specified in said regulations and below."[6] The conditions precedent to the issuance of the Loan Note Guarantee are set forth in 7 C.F.R. § 1779.63, which states that "The Loan Note Guarantee will not be issued until: (a) The lender certifies that [the conditions have occurred.]"[7]

The Conditions precedent have not occurred, and the USDA has not issued the Loan Note Guarantee.[8]

B. Rockett is not providing service to the Property.

FCS Lancaster owns two properties in Dallas County that are together approximately 155 acres in size.[9] Rockett is not currently providing service to the property.[10] It has water pipes near the property.[11] However, to actually provide service to the property, it will need to construct new waterlines that will not be completed before Autumn 2021—more than a year from now.[12]

III. RELATED FEDERAL LITIGATION

There are currently two lawsuits pending in federal district court relating to Rockett's claim—which it asserts in this Petition again—that its CCN is protected under Section 1926(b). In the first suit, *Rockett Special Utility District v. Botkin, et al.*,[13] (the "Rockett Suit") Rockett challenges the authority of the Commission to act on petitions filed under Texas Water Code (TWC) § 13.2541 when the certificate holder is indebted to the federal government. Specifically, Rockett

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6 *Id.* (emphasis extracted).

7 *Id.* at 7 (quoting 7 C.F.R. § 1779.63(a)).

8 *See id.* at 5.

9 *See* Rockett SUD's Motion to Dismiss at 1.

10 *Id.* at 8–9.

11 *Id.* at 9.

12 *Id.* at 9–10.

13 Civil Action No. 19-CV-1007 in the United States District Court for the Western District of Texas, filed October 16, 2019.

claims that "Rockett is indebted on a loan guaranteed by the United States Department of Agriculture ('USDA')."[14]

In the second suit, styled *City of Red Oak et al. v. United States Department of Agriculture et al.*,[15] the City of Red Oak challenges the validity and Rockett's very right to the federal guarantee claimed by Rockett in the Rockett Suit. In its suit, Red Oak claims that Rockett is ineligible to receive any loans under Section 1926(a), and seeks an injunction against the USDA from issuing the Loan Note Guarantee in violation of its regulations.

C. Magistrate Judge Lane recommends dismissal of the Rockett Suit, finding Rockett's claim of Section 1926(b) protection to be "frivolous."

In response to the Rockett Suit, Red Oak Industrial Development Corp. (ROIDC)—one of the property owners that had petitioned the Commission for streamlined release—moved to dismiss Rockett's suit on the basis that Rockett's water CCN is not protected under Section 1926(b) because the USDA has not issued a Loan Note Guarantee.[16] ROIDC argued that Section 1926(b) only protects loans that are guaranteed by the USDA. And because the USDA has not issued the Loan Note Guarantee, there is no federal guarantee, hence no federal protection, and hence no federal question before the court that would give it subject-matter jurisdiction.[17]

In his Report & Recommendation, United States Magistrate Judge Lane agreed.[18] Judge Lane noted that while the USDA has issued a Conditional Commitment to guarantee Rockett's loan

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[14] Pl.s' Orig. Compl. at 2, Rockett Suit (W.D. Tex. Oct. 16, 2019) ECF No. 1 (attached without exhibits as Exhibit "C").

[15] Civil Action No. 19-2761 in the United States District Court for the Western District of Texas, filed November 19, 2019.

[16] Def.'s Mot. to Dism. for Lack of Subject-Matter Jurisd., Rockett Suit (W.D. Tex. Dec. 3, 2019) ECF No. 21 (attached without exhibits as Exhibit "D").

[17] *Id.* at 3.

[18] U.S. Magistrate Judge's Rep. & Recomm., Rockett Suit (W.D. Tex. July 29, 2020).

in the future when (and if) certain conditions precedent occur, a loan guarantee is only "evidenced by a Loan Note Guarantee issued by the Agency."[19] Without a Loan Note Guarantee, Rockett's loan is not a "guaranteed loan" that entitles it to Section 1926(b) protection.[20]

Accordingly, Judge Lane concluded that Rockett's claim that its water CCN is protected by Section 1926(b) was "so completely devoid of merit as to not involve a federal controversy."[21] As Judge Lane noted, a claim cannot be dismissed for lack of federal-question jurisdiction unless the "claim is wholly insubstantial and frivolous."[22] Having found Rockett's claim to Section 1926(b) protection to be "wholly insubstantial," "frivolous," and "completely devoid of merit," Judge Lane recommended dismissing the claim for lack of subject-matter jurisdiction.[23]

D. The USDA agrees that Rockett does not have a federal loan guarantee.

In Red Oak's case against the USDA, the USDA agreed with Red Oak that Rockett does not hold a debt for which there is there a federal guarantee, stating: "[t]he conditional loan approval [by the USDA] remains subject to several conditions precedent and therefore does not constitute 'final agency action.'"[24] Thus, the very agency that issues and guarantees loans under Section 1926 has denied that Rockett has such a guarantee.

IV. ARGUMENT & AUTHORITIES

Rockett's argument in support of dismissal lacks factual and legal support. Its Motion should be denied.

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19 *Id* at 7 (quoting 7 C.F.R. § 1779.4.

20 *Id.* at 9.

21 *Id.* at 11.

22 *Id.* at 5 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

23 *Id.* at 13.

24 Def.'s Br. in Support of its Mot. to Dism. at 11, Red Oak Suit (W.D. Tex. Feb. 14, 2020), ECF No. 38 (attached as Exhibit "E").

A. Rockett does not have a USDA-guaranteed loan.

Rockett does not have a federally guaranteed loan. In the absence of a federal guarantee, Rockett's CCN does not have federal protection.

1. Section 1926 loans and loan guarantees afford Section 1926(b) protection.

Section 1926 was enacted as part of a program to facilitate federal funding for rural utilities, which would otherwise be unable to fund infrastructure improvements.[25] The program is designed to serve entities that cannot qualify for comparable credit in the private sector, and are thus loans and loan guarantees of last resort.[26]

Because the borrower has limited financial resources, its utility system acts as collateral for the federal loan. Section 1926(b) secures that collateral. Thus, Section 1926(b) protects the borrower's service areas from being taken over by other retail water or wastewater service providers. That protection remains in effect for the term of the loan.[27]

Because the purpose of Section 1926(b) is to protect the government's collateral, it is a defensive mechanism. Although it was not intended to be an offensive tool to be used by retail service providers (e.g., Rockett) to create a federally protected long-term monopoly, it is often used as such.[28]

2. Rockett does not have a federally guaranteed loan.

All of the above presumes that the lender and the government have actually closed on a federal loan or a federally guaranteed loan.

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[25] Note, Water Associations & Federal Protection under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status, 80 TEX. L. REV. 155, 157-60 (2001) (outlining the history of 7 U.S.C. § 1926(b)).

[26] *See* 7 C.F.R. §§ 1779.2(2), 1780.7(d).

[27] 7 U.S.C. § 1926(b).

[28] *See e.g.*, *Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 980 (10th Cir. 2011).

That is not true in this case.

Rockett has closed on a loan funded by CoBank, ACB.[29] But that loan is not currently guaranteed by the federal government. Rather, the USDA has issued a Conditional Commitment, which has the effect of approving the issuance of a guarantee once certain conditions precedent occur.[30]

The conditions precedent to the federal guarantee are listed in 7 C.F.R. § 1779.63 and include the conditions that: "all planned property acquisition has been completed and all development has been substantially completed in accordance with plans, specifications, and applicable building codes."[31] Those conditions precedent have not occurred, and the USDA confirms the guarantee has not yet closed.[32] Moreover, it is possible that the conditions are *never* satisfied—in which case, Rockett would *never* obtain a federal guarantee.

3. With no federal loan guarantee, Section 1926(b) does not protect the property.

Without a guarantee, there is no Section 1926(b) protection. Rockett's Conditional Commitment is not a guarantee. Today, Rockett has nothing more than a loan from a private lender.[33] A loan and a guarantee can be related, but they are not one and the same.[34] A loan from CoBank (or any other private lender) may be obtained with or without a USDA guarantee.[35]

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29 *See* Rockett SUD's Motion to Dismiss, Ex. B.

30 *See* Rockett SUD's Motion to Dismiss,Ex. C.

31 7 C.F.R. § 1779.63(a)(2).

32 *See* Exhibit E at 6.

33 *See* Rockett SUD's Motion to Dismiss, Ex. B.

34 *Rural Water Dist. No. 4*, 659 F.3d at 977 (stating that the guarantee should be considered the trigger for federal indebtedness, not the loan.).

35 *Id.*

The USDA's Regulations contemplate the agency first issuing a Conditional Commitment and then, if all conditions are satisfied, a Loan Note Guarantee.[36] A loan on which a Conditional Commitment has been extended, however, is not a "guaranteed loan." The Regulations define a "guaranteed loan" as "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.*"[37]

A Section 1926 guarantee can be made only after the conditions precedent listed in 7 C.F.R. §§ 1779.53 and 1779.63 are met. This requirement is reiterated on the face of the Conditional Commitment.[38] Those conditions have not yet occurred. Rockett does not claim otherwise.

Without a Loan Note Guarantee, Rockett does not have a federally guaranteed loan, even though Rockett has received loan funds from CoBank. If Rockett were to default on the loan, CoBank would have no recourse against the USDA. With no federal guarantee to collateralize, there is no need for Section 1926(b) protection over Rockett's certificated area.

Federal courts have consistently held that "a water district must have a continuing indebtedness to the USDA" to receive Section 1926(b) protection.[39] Accordingly, "when an issuer buys back its own bond and cancels the debt, it no longer qualifies as a debtor for Section 1926(b) protection."[40]

Scioto, *Sequoyah*, and *Bell Arthur* all deal with the end of Section 1926(b) protection on the back-end of a loan. This case deals with the beginning of Section 1926(b) on the front-end—before

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36 *See* 7 C.F.R. § 1779.2.

37 *Id.* (emphasis added).

38 Rockett SUD's Motion to Dismiss, Ex. C; *see also* 7 C.F.R. § 1779.64 (listing procedure for issuance of Lender's Agreement and Guarantee).

39 *Rural Water Dist. No. 4*, 659 F.3d at 977 (10th Cir. 2011) (cleaned up).

40 *Scioto Cnty Reg'l Water Dist. No. 1 v. Scioto Water Inc.*, 103 F.3d 38, 42 (6th Cir. 1996) (cleaned up); *accord Sequoyah Cty. Rural Water Dist. No 7 v. Town of Muldrow*, 191 F.3d 1192, 1199 (10th Cir. 1999); *Bell Arthur Water Corp v. Greenville Utls. Comm'n*, 173 F.3d 517, 522 (4th Cir. 1999).

a Loan Note Guarantee is issued. But the different scenarios all point back to the same fundamental point: existing federal indebtedness is a requirement for Section 1926(b) protection.

And in this case, there is no federal indebtedness.

4. Rockett's assertion has been rejected by United States Magistrate Lane.

In its Motion, Rockett neglected to advise the Commission of the Report and Recommendation issued by United States Magistrate Judge Lane in which Judge Lane variously characterized Rockett's position as "absurd[]," "wholly insubstantial," "frivolous," and "completely devoid of merit."[41] As Judge Lane rightly observed, under Rockett's theory, "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 guarantee in place when the service area was limited."[42] That absurdity is precisely what Rockett argues in its Motion.

Rockett's position is contrary to the decisions of the Fourth, Sixth, and Tenth Circuits. It has specifically been rejected by Magistrate Judge Lane just weeks ago. Rockett does not inform the Commission of any of these authorities. And, in support of its theory provides no legal authority of its own. Rockett's theory should be rejected, and its Motion denied.

B. Even if Rockett did have a USDA-guaranteed loan, Section 1926(b) does not impair the Commission's mandate to release the Property from Rockett's CCN.

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

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such

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41 *See* Rockett SUD's Motion to Dismiss, Ex. A at 5, 10, 13.

42 *See* Rockett SUD's Motion to Dismiss, Ex. A at 9–10.

> 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.[43]

In its Brief to the United States Court of Appeals for the Fifth Circuit, the Commission argued that because Section 1926(b) only restricts local governments, it "cannot limit the State's activities."[44] Accordingly, nothing in Section 1926(b) limits the Commission's authority to "examin[e] whether the loan-recipient continues to deserve or has the ability to fulfill its legal duty to serve."[45]

The district court rejected the Commission's argument.[46] On appeal, however, the Fifth Circuit vacated the district court's judgment.[47] Though the Fifth Circuit declined to address the Commission's argument,[48] the district court's rejection of the argument has been set aside.

Presumably, the Commission still holds the position that it briefed to the Fifth Circuit—that Section 1926(b) does not apply to restrict its actions under the Texas Water Code. FCS Lancaster agrees with the Commission's position for the reasons the Commission thoughtfully laid out in its Fifth Circuit briefing. And because Section 1926(b) does not apply to restrict the Commission's actions that it must take under the Texas Water Code, the Commission should deny Rockett's Motion irrespective of whether Rockett has (or may have) a loan guarantee entitling it to Section 1926(b) protection.

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43 7 U.S.C. § 1926(b).

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

45 *Id.*

46 *See Green Valley Spec. Util. Dist. v. Walker*, 351 F. Supp. 3d 992, 1004 (W.D. Tex. 2018).

47 *See Green Valley Spec. Util. Dist. v. City of Schertz*, --- F.3d ---, 2020 WL 4557844, at *13 (5th Cir. Aug. 7, 2020).

48 *See id.*, 2020 WL 4557844, at *13 n.39.

V. CONCLUSION

The Commission was correct when it argued to the Fifth Circuit that Section 1926(b) does not apply to restrict its regulation of retail water utilities. But that position is academic to the current case. Rockett does not have Section 1926(b) protection because its loan from CoBank is not currently guaranteed by the USDA (and may never be guaranteed by the USDA if the conditions precedent are not fulfilled). Accordingly, the Commission should deny Rockett's Motion to dismiss the Petition.

Respectfully submitted,

/s/ James F. Parker

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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 August 28, 2020, in accordance with the Order Suspending Rules, issued in Project No. 50664.

/s/ James F. Parker
James F. Parker

EXHIBIT A

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

EXHIBIT B

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, vs. SHELLY BOTKIN, DEANN T. WALKER, and ARTHUR C. D'ANDREA, in their official capacities as Commissioners of the PUBLIC UTILITY COMMISSION OF TEXAS; JOHN PAUL URBAN, in his official capacity as 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.	§	Civil Action No.: 1:19-CV-1007 Jury Trial Demanded

PLAINTIFF'S OBJECTION TO U. S. MAGISTRATE JUDGE REPORT AND RECOMMENDATION (DOC. 43) AND BRIEF IN SUPPORT

Rockett Special Utility District ("Rockett") objects to the U.S. Magistrate Report and Recommendation (Doc. 43) and presents the following in support of its objection.[1]

[1] "Under 28 U.S.C. § 636(b)(1)(C), a party may serve and file specific, written objections to a magistrate judge's proposed 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. In de novo review, the Court "conduct[s] an independent review of the entire record and ... the matters raised by the objections." Campos v. U.S. Parole Comm'n, 984 F. Supp. 1011, 1017 (W.D. Tex.

Introduction

The Report and Recommendation by U.S. Magistrate Judge Lane (the "R & R") presents a narrow and overly literal reading of 7 U.S.C. §§ 1926(a) and 1926(b) and associated federal regulations that is contrary to the intent of the drafters (U.S. Congress) and would thwart the obvious purpose of 7 U.S.C. § 1926(b) ("§ 1926(b)"). *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 3250, 73 L. Ed. 2d 973 (1982); *see also Caldwell v. Solus Ocean Sys., Inc.*, 734 F.2d 1121, 1123 (5th Cir. 1984).

It is true, as the Magistrate Judge states at p. 8 of the R & R, that when interpreting statutes, we begin with the plain language used by the drafters. However, that rule does not apply when the plain language leads to an absurd result and defeats Congress's intent.[2] Here, the R & R relies on federal regulations to reach its conclusion that § 1926(b) protection associated with a "such loan" only occurs upon the issuance of a Loan Note Guarantee. However, the R & R's interpretation of the federal regulations will lead to an unreasonable implementation which defeats the purpose of § 1926(b). In those instances, the federal regulations do not control.[3]

1996), aff'd, 120 F.3d 49 (5th Cir. 1997)." *Zuniga v. Yeary*, No. 1:18-CV-434-RP, 2020 WL 1329908, at *1 (W.D. Tex. Mar. 20, 2020).

[2] "We are authorized to deviate from the literal language of a statute only if the plain language would lead to absurd results, or if such an interpretation would defeat the intent of Congress." *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 451 (5th Cir. 2008) (first citing *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004); then citing *Johnson v. Sawyer*, 120 F.3d 1307, 1319 (5th Cir. 1997)). *See also Schaeffler v. United States,* 889 F.3d 238, 242 (5th Cir. 2018).

[3] "In the process of considering a regulation in relation to specific factual situations, a court may conclude *the regulation is inconsistent with the statutory language* or is

One purpose of § 1926(b), not referenced in the R & R, is that § 1926(b) is intended to *protect the collateral* for loans made by or guaranteed by the U.S. Government.[4] If this collateral (here, Rockett's service area and future customers) is taken after a § 1926(b) "such loan" has been made, the financial integrity of Rockett is threatened (loss of future net revenue). Correspondingly, the lender CoBank and the guarantor United States Department of Agriculture (USDA) are threatened by the loss of collateral securing the loan. Further, Rockett's diminished ability to repay the loan places a heavy burden on all remaining customers of Rockett to repay the loan without help from future customers. The purpose of 1926b's "government-sanctioned monopoly" is to ensure that indebted utilities, like Rockett, "repay their loans[.]" *Green Valley Special Util, Dist. v. City of Schertz, Texas*, No. 18-51092, 2020 WL 4557844, at *10-11, --F.3d-- (5th Cir. Aug. 7, 2020).[5]

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an unreasonable implementation of it. *In those instances, the regulation will not control." United States v. Haggar Apparel Co.*, 526 U.S. 380, 392, 119 S.Ct. 1392, 143 L.Ed.2d 480 (1999); *United States v. Castro-Gomez,* 365 F. Supp. 3d 801, 812–13 (W.D. Tex. 2019). (Emphasis added.)

[4] "When USDA and an association close a loan under § 1926(b), the loan generally *uses the association's customers or service areas as the collateral*, and the statute *protects the government's interest in that collateral* by preventing those customers or service areas from annexation by municipalities or other associations." *City of Schertz v. United States Dep't of Agric. by & through Perdue*, No. 18-CV-1112-RP, 2019 WL 5579541, at *1 (W.D. Tex. Oct. 29, 2019). (Emphasis added.)

[5] "To ensure that federally indebted utilities *repay their loans*, Congress enacted a provision [7 U.S.C. § 1926(b)] protecting utilities from curtailment and encroachment by municipalities and other public bodies." *Green Valley*, 2020 WL 4557844 at *10. (Emphasis added.)

Rockett filed its suit here to protect its service area and the collateral securing the loan and loan guarantee from the expedited release actions filed by City of Red Oak Industrial Development Corporation ("CROIDC") and Alamo Mission LLC ("Alamo") with the Public Utility Commission of Texas ("PUCT"). See Doc. 1, pp 22-25, 77–80.

Expedited release of water district service areas (sometimes called "decertification") jeopardizes not only CoBank's and USDA's loan collateral, but the repayment ability of the borrower itself (Rockett), resulting in an increased risk of non-payment to lender CoBank and guarantor USDA. § 1926(b) was intended to preserve and protect lender and guarantor collateral, and the financial ability of water districts like Rockett, to repay a § 1926(b) "such loan." § 1926(b) was also intended to protect Rockett from a neighboring municipality stealing Rockett's customers.[6] Moreover, another purpose of § 1926(b) is to encourage rural development by expanding the number of rural customers, thus reducing the per user cost of water.[7]

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[6] "[7 U.S.C. § 1926(b)] prevents local governments from expanding into a rural water association's area *and stealing its customers*; the legislative history states that the *statutory provision was intended to protect 'the territory served by such an association facility against [other] competitive facilities*' such as local governments, as otherwise rural water service might be threatened by 'the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.'" S.Rep. No. 87–566, at 67 (1962), reprinted in 1961 U.S.C.C.A.N. 2243, 2309." *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 705 (6th Cir. 2003). (Emphasis added.)

[7] "The Court notes, however, that the facts of this case highlight a tension in the purposes of Section 1926, which the Fifth Circuit has stated was enacted '(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 FmHA's loans) by protecting them from the expansion of nearby cities and towns.' *N. Alamo*, 90 F.3d at 915." *Crystal Clear*

Denying § 1926(b) protection *after* the loan has been approved by the USDA, *after* the loan has been funded by lender CoBank, *after* the money is spent for construction of water system improvements (i.e. construction of pump stations, water towers, water main extensions, etc.), and *after* the conditional commitment has been issued by the USDA that binds the USDA to issue the Loan Note Guarantee once the water system improvements have been constructed, simply because a discrete document called the Loan Note Guarantee had not yet been issued (and for which the USDA is obligated to issue if the USDA conditions are satisfied), would thwart the obvious purpose of § 1926(b).

As explained in greater detail below, the Magistrate Judge's interpretation of the "such loan" provision in § 1926(b) would allow landowners and competitor municipalities to (1) remove/take the collateral (anticipated source of revenue for loan repayment) supporting the loan and guarantee long after the loan is closed and the loan proceeds are spent; and (2) jeopardize the loan repayment ability of the federally guaranteed debtor (here, Rockett).

The 5th Circuit and all other courts that have considered the issue have held that § 1926(b) must be read liberally to accomplish its purposes.[8] Moreover, doubts

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

[8] "All of the courts that have reviewed § 1926(b) acknowledge that is provisions should be given a liberal interpretation *that protects water associations* indebted to the [Farmers Home Administration] *from municipal encroachment.*" *Bell Arthur Water Corp. v. Greenville Util. Comm'n*, 972 F.Supp. 951, 959 (E.D.N.C.1997); *Bluefield Water Ass'n, Inc. v. City of Starkville, Miss.*, 577 F.3d 250, 252, footnote 2. (5th Cir. 2009); *see also N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996). (Emphasis added.)

about whether Rockett qualifies for § 1926(b) protection must be resolved in Rockett's favor.[9]

"Such loan" which qualifies the borrower for § 1926(b) protection from municipal competition, includes loans made, insured, or guaranteed by the U.S. Government.[10]

Statement of Facts

1. On November 21, 2018, Rockett and CoBank submitted their Application for Loan and Guarantee. Doc. 34-5.

2. On July 25, 2019, the USDA issued its Conditional Commitment for Guarantee ("Conditional Commitment"). Doc. 34-6. The Conditional Commitment states in pertinent part that "...the United States of America...*will execute* the Loan Note Guarantee, subject to the conditions and requirements specified in said regulations and below." (Emphasis added.)

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[9] "Finally, any "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir.1999) (citations omitted). Congress enacted section 1926(b) to encourage rural water development *and to provide greater security for FmHA loans. See id.* at 1196. Therefore, our holding is supported by the policy underlying the federal statute." *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 202 F.3d 1035, 1038 (8th Cir. 2000). (Emphasis added.)

[10] "Under Section 1926(a), 'such loans' include loans the government makes or insures, see id. § 1926(a)(1), *and loans the government guarantees*, see id. § 1926(a)(24). Therefore, under § 1926(b), the federal guarantee of Douglas–4's private loan may be considered one 'such loan' for purposes of meeting the requirements of § 1926(b)." *Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 976 (10th Cir. 2011). (Emphasis added.)

3. The Conditional Commitment extends to (expires on) December 31, 2020, unless extended by the Government. Doc. 34-6.

4. On August 7, 2019, the USDA issued its "Request for Obligation of Funds Guaranteed Loans." Doc. 34-7. This document states at p. 2, in pertinent part: "(2) *This loan guarantee is approved* subject to the conditions on the Conditional Commitment." (Emphasis added.)

5. On August 16, 2019 Alamo filed its petition for expedited release (removal) of portions of Rockett's Certificate of Convenience and Necessity ("CCN"). Doc. 1, pp. 77–80.

6. On August 19, 2019, CROIDC filed its petition for expedited release (removal) of portions of Rockett's CCN. Doc. 1, pp. 22–25.

7. On August 19, 2019, CoBank and Rockett accepted the conditions imposed by the USDA in the Conditional Commitment. Doc. 34-8.

8. Rockett closed its loan with lender CoBank and received the loan proceeds on September 26, 2019. Doc. 34-2, p. 2, ¶¶ 5(G). Phillips Declaration.

9. 7 C.F.R. § 1779.63(a)(2) states in pertinent part: "The Loan Note Guarantee *will not be issued until*: (a) The lender certifies that: ...(2) All planned property acquisition has been completed *and all development has been substantially completed in accordance with plans, specifications, and applicable building codes*." (Emphasis added.)

10. Both the Conditional Commitment issued by the USDA to CoBank and Rockett, and the Loan Note Guarantee form used by the USDA, contain substantial

"subject to" conditions. Doc. 34-6 (Conditional Commitment); Doc. 34-16, pp. 2–3 (USDA Loan Note Guarantee form).

Argument

I. § 1926(b)'s "Such Loan."

§ 1926(b) provides:

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

7 U.S.C. § 1926(a) provides guidance as to what the phrase "such loan" (not defined by § 1926(b)) applies to: "The Secretary is also authorized to make or insure loans to associations..."

The words "loan" or "loans" appear 34 times in 7 U.S.C. § 1926, in a variety of contexts. The phrases Conditional Commitment and Loan Note Guarantee never appear. These two regulatory or administrative mechanisms only become operative once a § 1926(b) "such loan" application submitted by a borrower (like) Rockett and lender (like CoBank) has been approved and "authorized" by the USDA. See Doc. 34-5. The approval and authorization for Rockett's "such loan" occurred on August 7, 2019. See Doc. 34-7.

The R & R relies on a federal regulation to narrow the scope of what is meant by the terms "insured loan," "guaranteed loan," and "such loan" in §§ 1926(a) and

1926(b). No Court has previously held that a Conditional Commitment issued by the USDA is an insufficient form of insurance or guarantee for a loan (authorized and approved by the USDA) to implicate the statute's loan-repayment protections. Here, the USDA expressly authorized the loan from CoBank to Rockett and approved the guarantee, subject to conditions. As reflected in both the Conditional Commitment and the "form" Loan Note Guarantee, there is no end (during the life of the loan) to the "conditions" imposed by both documents. The "conditions" do nothing more than allow the government an escape plan from its contractual obligations, if certain "conditions subsequent" do not occur.

The closest case on point dealing with a USDA Conditional Commitment is *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1015 (Fed. Cir. 1996). In *Wells Fargo*, the bank brought a breach of contract action against the Farmers Home Administration (FmHA)[11] for failing to honor its commitment to guaranty a construction loan that the bank extended pursuant to a federal ethanol loan guaranty program. When the FmHA refused to issue the guarantee, USDA relied not on the lack of a binding commitment to do so (i.e. the Conditional Commitment), but on changes in the borrower's situation that it alleged constituted a failure to comply with the conditions upon which the commitment was based. *Id.* at 1020.

Because Wells Fargo had fulfilled the conditions of the Conditional Commitment, the Federal Circuit Court held that FmHA was required to issue the loan

[11] "FMHA loans are now administered by the United States Department of Agriculture. See Pub.L. No. 103–354 (1994)." *Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 701 (10th Cir. 2004).

guarantee. *Id.* at 1012. In effect the Conditional Commitment was a guarantee, to issue yet another guarantee. (The dictionary definition of a guarantee is an assurance for the fulfillment of a condition.) This "two staged" process under the regulations, of a Conditional Commitment followed by a Loan Note Guarantee, does not make the CoBank loan to Rockett any less a "such loan" as contemplated by § 1926(b).

The R & R states that Rockett's reliance on *Wells Fargo* is misplaced, because "that case did not hold that the commitment to guarantee and the guarantee were interchangeable." Respectfully, the Magistrate Judge overlooked that the Conditional Commitment and the Loan Note Guarantee are both "guarantees" and serve essentially identical purposes. Nowhere in 7 U.S.C. § 1926, is there any indication that a "guarantee" needs to have a narrow scope or contain any particular words to be effective. To the contrary, the words "such loan" and "guarantee" in 7 U.S.C. § 1926 must be given a broad and liberal interpretation. *See N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996).

CoBank understood that if the conditions in the Conditional Commitment were satisfied, it could enforce the Conditional Commitment just as Wells Fargo did. To hold that a loan issued on the strength of a Conditional Commitment (coupled with formal USDA approval of the loan and guarantee as reflected in Doc. 34-7, which is "final agency action") is not a guarantee, is to hold that the Conditional Commitment has no legal significance. *Wells Fargo* advises otherwise.

The CoBank loan made in reliance on a USDA issued Conditional Commitment and a formal approval of the guarantee by the USDA (subject to conditions) is a "such

loan" as contemplated by § 1926(b). To hold otherwise allows the absurd result of permitting municipal encroachment and the taking of the loan collateral (i.e. taking Rockett's territory and future customers), *after* the loan has closed, and *after* the USDA contractually bound itself to issue the Loan Note Guarantee. Congress did not intend this result when it drafted § 1926(b), namely exposing the government to greater risk of loan default, inability to enforce the USDA's interest in the collateral (because the collateral was taken via expedited release), and discouraging if not directly defeating rural water development.

II. Strict Compliance With Federal Regulations Would Thwart § 1926(b).

Wherever possible, courts should read regulations to be consistent with the statutes that authorize them, and a construction that thwarts the statute which the regulation implements is impermissible. *Montero v. Meyer*, 861 F.2d 603, 609 (10th Cir.1988), cert. denied, 492 U.S. 921, 109 S.Ct. 3249, 106 L.Ed.2d 595 (1989); *Jochum v. Pico Credit Corp. of Westbank, Inc.*, 730 F.2d 1041, 1047 (5th Cir.1984); *Insurance Company of North America v. Gee, 702 F.2d 411, 414 (2d Cir.1983). See also Progressive Corp. & Subsidiaries v. United States*, 970 F.2d 188, 192–93 (6th Cir. 1992).

Interpreting "such loan" in § 1926(b) to require a specific document (the Loan Note Guarantee), after the loan was approved and funded (and the money spent), after the guarantee was approved (subject to conditions), and after issuance of a Conditional Commitment that binds USDA to issue the Loan Note Guarantee will lead to a result contrary to the purpose of § 1926(b).

No lender would ever consider loaning money to a water district if all of the collateral (territory and future customers) could be swept away during the period from funding the loan (in reliance on the Conditional Commitment) and before the USDA finally issues the Loan Note Guarantee.

The R & R draws an unworkable distinction between loans made by the USDA and loans guaranteed by the USDA, contrary to the plain language of the statute. If the USDA makes a loan to a water district, § 1926(b) protection becomes immediately available, before construction begins, preventing encroaching municipalities from taking the loan collateral (borrower's territory and customers including future customers), which is necessary to enable the borrowing water district to repay the loan. However, per the R & R, guaranteed loans (that are under the umbrella of a "such loan") would be treated differently than a direct loan, namely no protection for the loan collateral attaches until after the project is built and the money is spent. The R & R, if adopted by the District Court, would result in a swift end to the USDA guaranteed loan program, harming water districts and other water service providers nationwide, the lenders, and the USDA itself. There is nothing in the text of § 1926(b) indicating disparate treatment between direct loans from the USDA versus loans guaranteed by the USDA.[12]

[12] To the contrary, the statute elsewhere treats direct loans and guaranteed loans both as "such loans[.]" *See, e.g.*, 7 USC 1926(a)(18) ("In making *or insuring* loans . . . the Secretary may not condition of approval of *such loans* . . . upon any requirement, condition or certification other than those specified under this chapter.") (Emphasis added.)

A. The PUC Proceedings.

The R & R opens the door for municipalities and landowners to aggressively attack the borrower (here, Rockett) immediately upon issuance of a Conditional Commitment or guarantee approval, which is precisely what is happening here.

The Conditional Commitment was issued on July 25, 2019. The approval of the guarantee (subject to conditions) was issued August 7, 2019. See Statements of Fact nos. 1 and 3 above.

On August 16, 2019 (less than 30 days later) Alamo filed its Petition to remove territory from Rockett's state law service area (its CCN). See Doc. 1, pp. 77-80. Three days later, on August 19, 2019, CROIDC filed its Petition to remove territory from Rockett's state law service area. See Doc. 1, pp. 22-25. The race was on. Alamo and CROIDC were hoping to remove territory (and thus future water customers) before the CoBank loan closed (a "such loan" contemplated by § 1926(b)) and before Rockett's rights under § 1926(b) attached.

The PUCT did not enter an order removing territory from Rockett before the Rockett/CoBank loan closed. That would have ended the matter. However, under the interpretation given "such loan" in the R & R, Alamo and CROIDC (and the City of Red Oak, Texas) are granted a lengthy opportunity to seize the loan collateral until the USDA issues the Loan Note Guarantee. Issuance of the Loan Note Guarantee will not happen until substantial completion of the infrastructure for which the loan

was made.[13] This opportunity granted to Alamo, CROIDC and a direct competitor (City of Red Oak) by the R & R stands in stark contrast to the purposes of § 1926(b).

B. Consequences of the R & R Interpretation of § 1926(b).

Construction of water main extensions, pump stations and water towers, may take 2-3 years (or longer) to complete and require the expenditure of millions, if not tens of millions of dollars. Imagine construction of water towers and pump stations designed to serve thousands of future water customers, left useless and stranded, because all of the projected development areas (the future customers) were taken away by neighboring municipalities using Texas state law's accelerated release/de-certification proceedings like the ones commenced by Alamo and CROIDC against Rockett. § 1926(b) was specifically designed to prevent that scenario to protect the federal government from default risk by debtors on federally guaranteed loans. That protection is the sole purpose of the "government-sanctioned monopoly". *Green Valley*, 2020 WL 4557844 at *11.

The R & R envisions § 1926(b) will only be triggered after the Loan Note Guarantee is issued. However, that cannot occur until after the water district has completed construction of the water towers, pump stations, water mains, etc. The R & R analysis also encourages municipalities to accelerate the "taking" of territory from the water district borrower prior to issuance of the Loan Note Guarantee to evade the

[13] The project must be substantially complete before the Loan Note Guarantee will issue. "The Loan Note Guarantee will not be issued until: (a) The lender certifies that: (2) All planned property acquisition has been completed *and all development has been substantially completed in accordance with plans, specifications, and applicable building codes.*" 7 C.F.R. § 1779.63(a)(2). (Emphasis added.)

protections of § 1926(b), leaving nothing to protect by the time the Loan Note Guarantee is issued.

Congress did not contemplate or intend this interpretation of "such loan" or the consequences associated with a delay in triggering § 1926(b) protection, when it drafted § 1926(b).

Conclusion

This is not a case where application of the literal terms of the statute will produce a result that is "demonstrably at odds with the intentions of its drafters" but rather a case in which the application of the literal terms of federal regulations is at odds with § 1926(b) itself, and the intentions of the drafters of that statute. The federal regulations cited in the R & R must be disregarded, and the purpose of § 1926(b) preserved.

For the reasons expressed above, Rockett moves the Court to deny the Motions to Dismiss filed by the defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic filing case management system and electronic mail on this 10th day of August, 2020:

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EXHIBIT C

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,	§	
	§	Civil Action No.:
vs.	§	19-CV-1007
SHELLY BOTKIN, DEANN T. WALKER, and ARTHUR C. D'ANDREA, in their official capacities as Commissioners of the PUBLIC UTILITY COMMISSION OF TEXAS; JOHN PAUL URBAN, in his official capacity as 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,	§	Jury Trial Demanded
Defendants.	§	

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW Rockett Special Utility District, and for its Original Complaint against Defendants Shelly Botkin, Deann T. Walker and Arthur C. D'Andrea, in their official capacities as Commissioners of the Public Utility Commission of Texas; John Paul Urban in his official capacity as Executive Director of the Public Utility Commission of Texas; Alamo Mission LLC; and City of Red Oak Industrial Development Corporation, respectfully states and alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C. § 1331, as this case is based on a federal question claim brought under 7 U.S.C. § 1926(b) ("1926(b)"), 42 U.S.C. § 1983 ("1983"), and U.S. Const. art. VI, cl. 2, otherwise known as the Supremacy Clause. This Court has jurisdiction over Plaintiff's claims for declaratory judgment under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and Rule 57 of the Federal Rules of Civil Procedure.

2. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(1) and (2) because at least one Defendant resides in this judicial district, and a substantial part of the events giving rise to Plaintiff's claims occurred, and continues to occur, in this judicial district.

PARTIES

3. Rockett Special Utility District ("Rockett") is a political subdivision of the State of Texas and is a retail public utility operating under Chapter 65 of the Texas Water Code furnishing water to areas in Ellis and Dallas Counties. Rockett is an "association" as that term is used in 7 U.S.C. § 1926(a). Rockett is indebted on a loan guaranteed by the United States Department of Agriculture ("USDA"). Rockett holds the federal right to be the exclusive water service provider within any area for which Rockett has the legal right to provide water service and has provided or made service available (can provide water service within a reasonable period of time),

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

4. Defendants Shelly Botkin, Deann T. Walker and Arthur C. D'Andrea, (collectively referred to as the "Commissioners") are commissioners for the Public Utility Commission of Texas, a state agency ("PUC"). The Commissioners are named as Defendants solely in their official capacities as commissioners of the PUC. The Commissioners are charged with the primary responsibility for regulating, and implementing the state's laws concerning, electric, telecommunication, and water and sewer utilities. The Commissioners may be served with process by serving each at the William B. Travis Building, 1701 North Congress Avenue, 7th Floor, Austin, TX 78701.

Rockett seeks only prospective injunctive relief against the Commissioners.

> "To ensure the enforcement of federal law ... the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."

Frew v. Hawkins, 540 U.S. 431, 437 (2004). *See also Pzifer, Inc. v. Texas Health & Human Servs. Comm'n*, No. 1:16-CV-1228-LY, 2017 WL 11068849, at *2 (W.D. Tex. Sept. 29, 2017); *Nelson v. Univ. of Tex. At Dallas*, 535 F.3d 318, 322 (5th Cir. 2008).

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

5. Defendant John Paul Urban ("Urban"), in his official capacity as Executive Director of the Texas Public Utility Commission, is named as a Defendant solely with respect to his official capacity as Executive Director of the PUC. Urban may be served with process at the William B. Travis Building, 1701 North Congress Avenue, 7th Floor, Austin, TX 78701.

Rockett seeks only prospective injunctive relief against Urban.

6. Defendant Alamo Mission LLC ("Alamo") is a Delaware limited liability company, authorized to conduct business in the State of Texas. Alamo may be served with process by serving its registered service agent: Corporation Service Company dba CSC – Lawyers Incorporating Company, 211 E. 7th Street, Suite 620, Austin, Texas 78701-3218.

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

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

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

"The court **ORDERS AND DECLARES:**

(1) PUC Officials' Final Order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, *Petition of Las Colinas San Marcos Phase ILLC*, Docket No. 46148 **was entered in violation of 7 U.S.C. § 1926(b)** and is void.

(2) **7 U.S.C. § 1926 preempts and voids** the following section of Tex. Water Code § 13.254(a-6): "The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program."

(3) To the extent that Tex. Water Code § 13.254(a-5) directs PUC Officials to grant a petition for decertification that meets the requirements of that provision without regard to whether the utility holding the certification is federally indebted and otherwise entitled to the protections of 7 U.S.C. § 1926(b), **the statute is preempted and is void.**

IT IS FURTHER ORDERED that the PUC, its officers, employees, and agents **are permanently enjoined** from enforcing in any manner the order of September 28, 2016, in the matter titled Tex. Pub. Util. Comm'n, Petition of Las Colinas San Marcos Phase I LLC, Docket No. 46148 (Final Order)."

Crystal Clear Special Util. Dist. v. Walker, No. 1:17-CV-254-LY, 2019 WL 2453777, at *2 (W.D. Tex. Mar. 27, 2019). (Emphasis added.)

9. Prior to this Court entering judgment against the Commissioners and declaring Tex. Water Code §§ 13.254(a-5) and (a-6) void (relative to entities that enjoy the protection of 1926(b)) the Commissioners suggested that they had no choice but to follow state law despite that law being directly contradictory to federal law. U.S. Magistrate Judge Andrew Austin (Western District) stated in his recommendation to this Court:

> "Thus, regardless of whether § 13.254(a-5) explicitly directs the PUC to consider the provisions of 7 U.S.C. § 1926(b), the PUC has no choice in the matter, as the Constitution compels it to consider that applicable federal law. The fact that the PUC suggests otherwise is troubling. Generally, a court should be as circumscribed as possible when it determines the scope of a ruling invalidating a statute, and this is particularly true when there are both separation of powers and federalism issues implicated, as there are here. **But the PUC Officials' suggestion that they have no choice but to follow state law even in the face of a directly contrary federal law—despite the fact that the agency has a general counsel and a staff full of attorneys**—supports Crystal Clear's argument that the Court should go further than simply enjoining enforcement of § 13.254(a-6).[4] Accordingly, the Court has added in its recommended relief, a declaration regarding § 13.254(a-5) as well."

Crystal Clear Spec. Util. Dist. v. Walker, No. A-17-CV-00254-LY, 2018 WL 6242370, at *4 (W.D. Tex. Nov. 29, 2018), *report and recommendation adopted as modified sub nom. Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019). (Emphasis added.)

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

10. On August 16, 2019, more than 4 months after judgment was entered in *Crystal Clear*, Defendant Alamo filed its Petition with the PUC (case number 49863) seeking a decertification of property situated within Rockett's Certificate of Convenience and Necessity ("CCN") purportedly owned by Defendant Alamo, pursuant to Tex. Water Code § 13.254(a-5). After Alamo was notified that Rockett was indebted on a loan guaranteed by the USDA and qualified for the protections of 1926(b), Alamo ignored this notice and intensified its efforts to diminish and alter the territory for which Rockett holds the legal right to provide water service under Rockett's CCN. This form of interference with Rockett's federal rights under 1926(b) is a violation of 1926(b), as Alamo is seeking to reduce the customer pool for Rockett within Rockett's protected service area.

> "Indeed, the type of encroachment contemplated by § 1926(b) is not limited to the traditional guise of an annexation followed by the city's initiation of water service. **It also encompasses other forms of direct action that effectively reduce a water district's customer pool within its protected area.** *See id.* at 716 ("[T]he question becomes whether McAlester's sales to customers ... purport to take away from Pitt 7's § 1926 protected sales territory.")."

Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan., 659 F.3d 969, 985 (10th Cir. 2011) (Emphasis added.)

All land that Alamo seeks to decertify is situated within Rockett's CCN 10099.

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

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

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

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

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

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

16. Rockett is indebted on a loan guaranteed by the USDA ("Guaranteed Loan"). A USDA guaranteed loan qualifies Rockett for 1926(b) protection.

> "Under Section 1926(a), "such loans" include loans the government makes or insures, *see id.* § 1926(a)(1), and loans the government guarantees, *see id.* § 1926(a)(24). Therefore, under § 1926(b), **the federal guarantee of [a] private loan may be considered one "such loan" for purposes of meeting the requirements of § 1926(b).**"

Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan., 659 F.3d 969, 976 (10th Cir. 2011). (Emphasis added.)

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

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

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

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

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

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

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

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

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

19. Rockett's "territory" for which it has the *legal right* to provide water service under Texas law, which includes land identified in the Petitions that Defendants Alamo and Red Oak have filed with the PUC (referenced above in numbered paragraphs 10 and 11), cannot be diminished or altered after Rockett became indebted on a loan guaranteed by the USDA.

> "In addition to these principles defining the protection § 1926(b) affords rural water districts from competition, **state law cannot change the service area to which the protection applies, *after* that federal protection has attached**. *See Pittsburg County,* 358 F.3d at 715. For instance, "where the federal § 1926 protections have attached, § 1926 preempts local or state law that can be used to justify a municipality's encroachment upon disputed area in which an indebted association is legally providing service under state law." *Pittsburg County,* 358 F.3d at 715 (quotation, alteration omitted)."

Rural Water Sewer & Solid Waste Mgmt. v. City of Guthrie, 344 F. App'x 462, 465 (10th Cir. 2009), *certified question answered sub nom. Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cty., Oklahoma v. City of Guthrie*, 2010 OK 51, 253 P.3d 38. (Emphasis added.)

Defendants Alamo and Red Oak are engaged in an attempt to diminish or alter the territory of Rockett, through their Petitions filed with the PUC in violation of 1926(b).

20. Any doubts regarding whether Rockett is entitled to the protections of 1926(b) must be resolved in Rockett's favor. Rockett's territory is sacrosanct.

> "In order to achieve both of these stated purposes, **"[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the F[M]HA-indebted party seeking protection for its territory**." Sequoyah Cnty. Rural Water Dist. No. 7, 191 F.3d at 1197 (*citing* ***North Alamo Water Supply Corp.,*** 90 F.3d at 913 *and* ***Jennings Water, Inc.,*** 895 F.2d at 315(citing five federal courts which have held that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment)).
>
> In addition to interpreting § 1926(b) broadly to "indicate a congressional mandate" that local governments not encroach upon the services provided by federally indebted water associations, regardless of the method of encroachment, **the Fifth Circuit has gone so far as to designate "the service area of a federally indebted water association" as "sacrosanct", emphasizing the virtually unassailable right of an indebted association to protection from municipal encroachment.** ***North Alamo Water Supply Corp.,*** 90 F.3d at 915; ***see also Bear Creek Water Ass'n, Inc.,*** 816 F.2d at 1059(affirming that one dollar of debt would be enough to afford the statute's protection because Congress "literally proscribed interference by competing facilities ... 'during the term of said loan' ")."

El Oso Water Supply Corp. v. City of Karnes City, Tex., No. SA-10-CA-0819-OLG, 2011 WL 9155609, at *6 (W.D. Tex. Aug. 30, 2011), *report and recommendation adopted,* No. CIV. SA-10-CA-819-OG, 2012 WL 4483877 (W.D. Tex. Mar. 19, 2012), *judgment entered,* No. SA10CA0819-0G, 2012 WL 4747680 (W.D. Tex. Apr. 11, 2012). (Emphasis added.)

21. The Commissioners are precluded from re-litigating the issues decided in *Crystal Clear*.

> "**Collateral estoppel, or issue preclusion, may be applied to bar relitigation of an issue previously decided by a court of competent jurisdiction** where: (1) the issue under consideration is identical to that litigated in the prior action; (2) the issue was fully and vigorously litigated in the prior action; (3) the issue was necessary to support the judgment in the prior case; and (4) there is no special circumstance that

> would make it unfair to apply the doctrine. *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998) (quoting *Copeland, et al. v. Merrill Lynch & Co., et al.*, 47 F.3d 1415, 1422 (5th Cir. 1995)). " '**Complete identity of parties in the two suits is not required**.' " *Robin Singh Educ. Servs. Inc. v. Excel Test Prep Inc.*, 274 F. App'x 399, 404 (5th Cir. 2008) (quoting *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the seminal Supreme Court case setting out the parameters of the *offensive* use of collateral estoppel—the type at issue here—the Court observed that "[t]he general rule should be that in cases ... [where] the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." *Id.* at 330–31. **The Court emphasized, however, that the trial court has *broad* discretion to determine whether collateral estoppel is appropriately employed offensively to preclude issue relitigation.** *Id.* at 331; *see also Winters*, 149 F.3d at 392 (highlighting the Supreme Court's grant of broad discretion to trial court's determination of whether offensive collateral estoppel is appropriate)."

Taylor v. Vaughn, No. A-15-CV-648-LY-ML, 2016 WL 11588707, at *5 (W.D. Tex. July 25, 2016). (Emphasis added.)

Count 1

Violation of 42 U.S.C. § 1983 – Commissioners and Urban

22. Rockett incorporates all allegations above.

23. In order to state a cause of action under 42 U.S.C. § 1983, Rockett must allege only that some person has deprived it of a federal right and that such person acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

24. Rockett has a federal right under 1926(b) to be protected from any curtailment or limitation of its right to sell water within Rockett's territory.

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

26. The actions of the Commissioners and Urban are conducted under color of state law, by virtue of their statutory power to decertify land situated within the boundaries of Rockett's CCN, after Rockett became indebted on a loan which qualified Rockett for 1926(b) protection, and for which Rockett has made water service available, as the term "made water service available" has been interpreted by the 5th Circuit and other Federal Circuit Courts of Appeals.

27. Rockett has suffered or is in immediate jeopardy of suffering loss and damage as a result of the wrongful acts of the Commissioners and Urban in connection with the Alamo and Red Oak Petitions for Decertification.

Count 2

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

28. Rockett incorporates by reference all allegations above.

29. This claim is brought pursuant to and in accordance with 28 U.S.C. §§ 2201 and 2202, seeking a declaration of the rights and other legal relations of the Parties under 1926(b).

30. There exists an actual case or controversy between Rockett and all of the Defendants concerning the Commissioners or Urban's authority to decertify a portion of Rockett's CCN, namely to remove the Land at Issue, from Rockett's

territory (its CCN) to allow Alamo and Red Oak to obtain water service from another entity (presumably the City of Red Oak), and/or whether such decertifications, if not directly prohibited, will negatively affect Rockett's rights under 1926(b) to be the excusive water service provider to the Land at Issue.

31. 1926(b) prohibits decertification of any portion of Rockett's CCN if the decertification would function to limit or curtail the water service provided or made available by Rockett or would otherwise allow competition with Rockett within Rockett's CCN, or function to impair the collateral pledged to secure the federally guaranteed loan referenced above or deprive the lender (CoBank) and guarantor (USDA) of their rights in the collateral. Decertification of Rockett's territory/CCN is prohibited. The threatened decertification violates Rockett's 1926(b) rights and any order issued by the PUC or Commissioners, if issued, shall be a nullity and of no force or effect.

32. (a-6) states in pertinent part: "The utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program." This portion of (a-6) has been expressly declared void because it violates the Supremacy Clause. The Commissioners were parties to *Crystal Clear*, and are bound by the judgment entered in that case. (See *Crystal Clear Special Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).) The Commissioners and Urban cannot

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

33. Regardless of whether (a-5) or (a-6) explicitly directs the PUC to disregard the provisions of 1926(b), the PUC has no choice in the matter, as the Constitution compels it to consider and comply with applicable federal law. (See *Crystal Clear Spec. Util. Dist. v. Walker*, No. A-17-CV-00254-LY, 2018 WL 6242370, at *4 (W.D. Tex. Nov. 29, 2018), report and recommendation adopted as modified sub nom. Crystal Clear Special Util. Dist. v. Walker, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).)

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

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

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

Count 3

Injunctive Relief – All Defendants

36. Rockett incorporates by reference all allegations above.

37. Rockett does not have a proper and adequate remedy at law and injunctive relief is a proper remedy for violation of 1983 as well as for violations of 1926(b).

Jury Demand – Rockett demands a jury trial as to all issues triable by jury.

Prayer

Rockett prays the Court grant the following relief:

1. The Court enter a declaration that Texas Water Code § 13.254(a-5) and (a-6) are preempted to the same extent and in the same manner as that specified in *Crystal Clear*.

2. The Court enter a permanent injunction against all of the Defendants precluding any further presentation, prosecution, consideration, or granting relief under the pending Petitions for Decertification filed by Alamo and Red Oak.

3. The Court award attorney fees and costs of this action in the form of a judgment in favor of Rockett and against Defendants Alamo and Red Oak.

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

Respectfully submitted,

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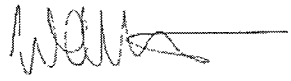

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ATTORNEYS FOR PLAINTIFF

EXHIBIT D

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, DEANN T. WALKER, and ARTHUR C. D'ANDREA, in their official capacities as Commissioners of the PUBLIC UTILITY COMMISSION OF TEXAS; JOHN PAUL URBAN, in his official capacity as 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.*	§	CIVIL ACTION NO: 1:19-CV-1007 JURY TRIAL DEMANDED

DEFENDANT RED OAK INDUSTRIAL DEVELOPMENT CORPORATION'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND OPPOSED MOTION TO EXPEDITE RULING

Defendant Red Oak Industrial Development Corporation ("Defendant" or "ROIDC") moves under Federal Rule of Civil Procedure 12(b)(1) to dismiss the claims of Plaintiff Rockett Special Utility District ("Rockett" or "Plaintiff") for lack of subject-matter jurisdiction *and for the Court to expedite its ruling on the motion*.

I.
MOTION TO EXPEDITE RULING AND CERTIFICATE OF CONFERENCE

Rockett filed this lawsuit to stop a Public Utility Commission ("PUC") proceeding to decertify a portion Rockett's water service area. ROIDC seeks

decertification so it can obtain water service to its property, which is slated for a development project requiring large amounts of water that Rockett cannot provide.

Without water service, the development will not happen. ROIDC's property is not the only property suitable for this development. Other sites are actively seeking to woo the developer. Without immediate access to water service on the property, that wooing will be successful. Thus, ROIDC seeks expedited decertification from the PUC.

Knowing this, Rockett filed this lawsuit based on the demonstrably false allegation that its certificated area is protected by a federal loan guarantee. And because of this lawsuit, the PUC abated its proceeding until this suit is resolved. Thus, by making demonstrably false allegations of a federal loan guarantee where none exists, Rockett has improperly gained leverage over ROIDC and the City of Red Oak in their negotiations for the City to buy Rockett out of its certificated right to exclusively provide water service to the property.

Because time is of the essence, and because the issues presented in its Motion to Dismiss are simple, ROIDC moves the Court to shorten the time for Plaintiff to respond to this motion to seven (7) days, the time for ROIDC to reply to Plaintiff's response to three (3) days, and to expedite its ruling on this motion so that ROIDC may obtain a ruling (and the proper dismissal of this non-jurisdictional case) before it loses its opportunity to develop its property.

Counsel for the parties have conferred in good-faith. Consistent with its goal of delaying PUC proceedings as long as possible, however, Rockett opposes expedited consideration of ROIDC's Motion.

II.
MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION:

EXECUTIVE SUMMARY

The purported federal question underlying Plaintiff's claim is based on a loan guarantee by the USDA, which creates federal protection of its certificated area under 7 U.S.C. § 1926(b).

The guarantee does not exist. It has not been executed.

Accordingly, there is no federal guarantee under § 1926, no federal protection under § 1926(b), and no federal question presented in this case. There is no pleading amendment that would cure this deficiency. Rockett's claim against ROIDC should therefore be dismissed with prejudice for lack of subject-matter jurisdiction.

FACTUAL BACKGROUND[1]

Plaintiff's Original Complaint arises against the backdrop of ongoing proceedings in which Red Oak seeks to decertify a portion of Rockett's exclusive

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[1] In support of this Motion, ROIDC submits the following evidence:

Exhibit 1: Declaration of Todd Fuller

Exhibit 2: Petition by City of Red Oak Industrial Development Corporation for Expedited Release

Exhibit 3: November 19, 2019 Letter from the Board of Directors regarding the City of Red Oak

Exhibit 4: Rockett Special Utility District's Response and Objection to Petition for Expedited Release

Exhibit 5: Order No. 4 Abating Proceeding

Exhibit 6: Motion to Lift Abatement

service area. Rockett has opposed decertification, alleging that its service area is federally protected under 7 U.S.C. § 1926(b). That statement, however, is false.

A. Rockett holds a Certificate of Convenience and Necessity to provide water service.

ROIDC's property is located within Rockett's Certificate of Convenience and Necessity ("CCN"). (Doc. 1 at ¶ 10–11.) The CCN grants Rockett the exclusive right to provide retail water service. *See* Tex. Water Code § 13.242. But that monopoly comes with an obligation to "provide continuous and adequate service." Tex. Water Code § 13.250(a). If Rockett fails to do so, Texas law creates an expedited procedure for decertification. 16 Tex. Admin. Code § 24.245; Tex. Water Code § 13.254(a-5).

B. Red Oak seeks decertification of part of Rockett's water service area from the PUC.

The expedited procedure for decertification is created exactly for a case like this, in which Rockett is not serving the property and does not have current ability to do so. (Ex. 1 at ¶ 9.) ROIDC identified a lucrative development opportunity for the property that will require large amounts of water, and sought to remove the property from Rockett's CCN so that the City of Red Oak can immediately provide water service. (Ex. 1.) Development of the property will increase tax revenues to the City of Red Oak and other local governmental entities. (Ex. 1 at ¶¶ 3-7.) The school district alone anticipates an annual increase of $2,000,000 in tax revenue in the first

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Exhibit 7: Rockett Special Utility District's Response and Objection to Petitioner's Motion to Lift Abatement and Motion to Dismiss

Exhibit 8: Declaration of James F. Parker

build out phase. (Ex. 1 at ¶ 4.) Accordingly, ROIDC applied to the PUC for expedited decertification. (Ex. 2.)[2]

C. Rockett objects to decertification on the basis that the property is protected by 7 U.S.C. § 1926(b).

But Rockett wants a piece of the development pie (even though it can't provide service). As Rockett's Board of Directors have framed the dispute, Red Oak is "seeking to take territory from Rockett without offering to pay fair compensation," and Rockett cannot afford to allow Red Oak to "take this value away from us." (Ex. 3.)[3] But it has no legal basis for opposition. It can only delay the inevitable.

But with a development as desirable as this one, delay could scuttle the deal.

Knowing that delay was its best defense, Rocket argued that the PUC should not decertify the property because it is federally protected. (Ex. 4.) In support, Rockett submitted a supporting affidavit of its General Manager, Kay Phillips, attesting to federal funding and ancillary loan documents. (Ex. 4 at Ex. A.) Phillips' Affidavit states, "Rockett has an outstanding federal USDA guaranteed loan qualifying Rockett for 7 U.S.C. § 1926(b) protection." (Ex. 4 at Ex. A.)

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[2] The Public Utility Commission filings are public records available online at https://interchange.puc.texas.gov/. ROIDC asks the Court to take judicial notice of the fact of the filings cited (along with their contents). *See* Fed. R. Evid. 201; *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998).

[3] The November 19, 2019, letter from the Rockett Board of Directors is available on Rockett's website at https://rockettwater.com/news-detail?item_id=13196 (last accessed on Nov. 29, 2019).

Curiously, however, Rockett did not include a copy of the USDA guarantee, nor did Phillips attest of the existence of such a document. (Ex. 4 at Ex. A.) That is because ***there is no such guarantee***.

D. Rockett files this suit seeking to enjoin the PUC from granting the petition for decertification.

At the same time that it filed its opposition in the PUC, Rockett filed this suit alleging that it "is indebted on a loan guaranteed by the United States Department of Agriculture ("USDA")." (Doc. 1 at ¶ 3, *see also* ¶¶ 16, 18, 24, 26, 30, 31.) Rockett alleged that because it is indebted on a federally guaranteed loan, decertification violates 7 U.S.C. § 1926(b). (Doc. 1 at ¶ 11.)

E. The PUC abates its proceeding pending resolution of this suit.

After the PUC abated its case, (Ex. 5), ROIDC moved to lift the abatement on the grounds that Rockett does not have § 1926(b) protection. (Ex. 6.) Rockett responded, arguing that it is indebted on a loan that qualifies for § 1926(b) protection because the USDA has made a Conditional Commitment to issue a guarantee once certain conditions precedent occur. (Ex. 7.)

In support of its response, Rockett submitted a second supporting affidavit of its General Manager. (Ex. 7 at Ex. 1.) The Affidavit states, "Rockett has an outstanding loan classified by the United States Department of Agriculture ('USDA') as a 'rural utilities guaranteed loan'...which qualifies Rockett for 7 U.S.C. § 1926(b) protection." (Ex. 7 at Ex. 1.)

Despite that statement, Rockett again did not include a copy of the guarantee, nor did any witness testify to the existence of such a document. (Ex. 7 at Ex. 1.)

Rockett nonetheless alleges that despite the non-existence of this document, the property is protected by § 1926(b).

It isn't.

F. There is no loan note guarantee.

The property is not protected by § 1926(b) because, although Rockett is in the process of attempting to obtain a § 1926 loan note guarantee, Rockett has not completed the conditions precedent to the issuance of the guarantee. (Ex. 8 at ¶¶ 3-5.) The U.S. Attorney, representing the USDA, has informed Red Oak that no guarantee exists. (Ex. 8 at ¶¶ 3-5.) Moreover, "the USDA does not expect the Section 1926 loan [to Rockett] to be approved or close in the next sixty days." (Ex. 8 at ¶ 4-5.) Therefore, there is no § 1926 guarantee.

While Rockett has closed on a loan funded by a private lender, CoBank, ACB, that loan is not currently guaranteed by the USDA. (Ex. 4 at Exs. A, B; Ex. 8 at ¶¶ 3-5.) Rather, the USDA has issued a Conditional Commitment, which is exactly what its name indicates: an agreement to guarantee the loan in the future once certain conditions precedent occur. (Ex. 4 at Exs. A, C.) The Conditional Commitment states:

> "The [USDA] hereby agrees that, in accordance with applicable provisions of Governmental regulations published in the Federal Registers and related forms, it will execute the 'Loan Note Guarantee,' **subject to the conditions and requirements specified in said regulations and below**."

(Ex. 4 at Ex. C.) (emphasis added.) Issuance of a guarantee may only be made after the conditions precedent listed in 7 C.F.R. §§ 1779.53 and 1779.63 are met, including "all planned property acquisition has been completed and all development has been

substantially completed in accordance with plans, specifications, and applicable building codes." 7 C.F.R. § 1779.63(a)(2); *see also* 7 C.F.R. § 1779.64 (listing procedure for issuance of Lender's Agreement and Guarantee).

ARGUMENT AND AUTHORITIES

Rockett does not have a federally guaranteed loan. In the absence of a federal guarantee, this case does not present any federal question. Accordingly, this Court does not have subject-matter jurisdiction to hear this case.

A. Section 1926 loans and loan guarantees afford § 1926(b) protection.

Section 1926 was enacted as part of a program to facilitate federal funding for rural utilities, which would otherwise be unable to fund infrastructure improvements. Note, Water Associations & Federal Protection under 7 U.S.C. § 1926(b): A Proposal to Repeal Monopoly Status, 80 TEX. L. REV. 155, 157-60 (2001) (outlining the history of 7 U.S.C. § 1926(b)). The program is designed to serve entities that cannot qualify for comparable credit in the private sector, and are thus loans and loan guarantees of last resort. *See* 7 C.F.R. §§ 1779.2(2), 1780.7(d).

Because the borrower has limited financial resources, its utility system acts as collateral for the federal loan. Section 1926(b) secures that collateral. Thus, § 1926(b) protects the borrower's service areas from being taken over by nearby cities or other entities that provide retail water or wastewater service. That protection remains in effect for the term of the loan. 7 U.S.C. § 1926(b).

Because the purpose of § 1926(b) is to protect the Government's collateral, it is a defensive mechanism. Although it was not intended to be an offensive tool to be

used by retail service providers (e.g., Rockett) to create a federally protected long-term monopoly, it is often used as such. *See e.g., Rural Water Dist. No. 4, Douglas Cty., Kan. v. City of Eudora, Kan.*, 659 F.3d 969, 980 (10th Cir. 2011).

B. Plaintiff's claim against ROIDC is based on federal-question jurisdiction.

Rockett alleges that this Court has jurisdiction because its allegations are based on a federal question. (Doc. 1 at ¶ 1.)[4] Specifically, Plaintiff alleges ROIDC interfered with Plaintiff's § 1926(b) protection by seeking to decertify land within Rockett's CCN that is protected by § 1926(b). (Doc. 1 at ¶ 11.)

To secure the protections of § 1926(b) Plaintiff must establish that (1) it has a continuing indebtedness to the USDA and (2) ROIDC has encroached on an area to which Plaintiff "made service available." *N. Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996). A loan guaranteed by the government is covered by § 1926(b). *See* 7 U.S.C. § 1926(a)(24); *Rural Water Dist. No. 4*, 659 F.3d at 976.

C. Plaintiff does not have a federally guaranteed loan.

All of the above presumes that the lender and the government have actually closed on a federal loan or a federally guaranteed loan.

That is not true in this case.

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[4] Rockett also filed suit against the other Defendants for violations of § 1983. Although the Court has jurisdiction over those claims, the fact remains that Rocket does not have a federal guarantee and therefore has not stated a claim for which the Court can grant relief. ROIDC anticipates the other Defendants will file a motion to dismiss on these grounds.

In fact, despite Rockett's allegation that "Rockett is indebted on a loan guaranteed by the United States Department of Agriculture ('USDA')" (Doc. 1 at ¶ 3) and the testimony of Kay Phillips, Rockett's General Manager, that "Rockett has an outstanding federal USDA guaranteed loan qualifying Rockett for 7 U.S.C. § 1926(b) protection," (Ex. 4 at Ex. A) the USDA has not issued a guarantee.

Rockett has closed on a loan funded by CoBank, ACB. (Ex. 4 at Ex. B.) But that loan is not currently guaranteed by the federal government. (Ex. 8 at ¶¶ 3-5.) Rather, the USDA has issued a Conditional Commitment, which has the effect of approving the guarantee, once certain conditions precedent occur. (Ex. 4 at Ex. C.)

The conditions precedent to the federal guarantee are listed in 7 C.F.R. § 1779.63 and include "all planned property acquisition has been completed and all development has been substantially completed in accordance with plans, specifications, and applicable building codes." 7 C.F.R. § 1779.63(a)(2). Those conditions precedent have not occurred, and counsel for the USDA confirms the guarantee has not yet closed. (Ex. 8 at ¶¶ 3-5.)

D. With no federal loan guarantee, § 1926(b) does not protect the property.

Without a guarantee, there is no § 1926(b) protection. Rockett has argued to the PUC that the Conditional Commitment and the loan funds entitle it to § 1926(b) protection because the Conditional Commitment is an enforceable contract between CoBank and the USDA. (Ex. 7.) It may be a contract. But that's irrelevant.

A Conditional Commitment is not a guarantee. Rockett has a loan from CoBank, ACB, a private lender. (Ex. 4 at Exs. B, C.) A loan and a guarantee can be

related, but they are not one and the same. *Rural Water Dist. No. 4*, 659 F.3d at 977 (stating that the guarantee should be considered the trigger for federal indebtedness, not the loan.). A loan may be obtained with or without a guarantee. *Id.*

A § 1926 guarantee can be made only after the conditions precedent listed in 7 C.F.R. §§ 1779.53 and 1779.63 are met. This requirement is reiterated on the face of the Conditional Commitment. *See also* 7 C.F.R. § 1779.64 (listing procedure for issuance of Lender's Agreement and Guarantee). Those conditions have not yet occurred. Rockett does not claim otherwise.

Without a loan note guarantee, Rockett does not have a federally guaranteed loan, even though Rockett has received loan funds from CoBank. If Rockett were to default on the loan, CoBank would have no recourse against the USDA. With no federal guarantee to collateralize, there is no need for § 1926(b) protection over Rockett's certificated area.

E. Without a federally guaranteed loan, the Court does not have subject-matter jurisdiction to hear § 1926(b) claims.

The absence of a valid cause of action does not implicate subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S. Ct. 1003, 1010, 140 L. Ed. 2d 210 (1998). But dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper 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."[5] *Oneida Indian Nation of N.Y. v. Cty. of Oneida*, 414 U.S. 661, 666 (1974); *see also Fermin v. Priest of Saint Mary - Marfa, Tex.*, 775 Fed. Appx. 162, 163 (5th Cir. 2019) (pet. for cert. filed Oct. 10, 2019) (affirming dismissal of First Amendment claim against a church and a priest as "completely devoid of merit as to not involve a federal controversy").

This case falls under this umbrella. Rockett has falsely alleged the existence of a federal loan guarantee that would qualify it for § 1926(b) protection. No such protection exists without the guarantee, and no such guarantee exists. Accordingly, Rockett's claim against ROIDC is completely devoid of merit such that it does not involve a federal controversy and its claim should be dismissed for lack of subject-matter jurisdiction.

CONCLUSION

Rockett's loan from CoBank is not guaranteed by the USDA. With no federal guarantee, there is no federal question before the Court. The Court therefore lacks jurisdiction, and should dismiss Rockett's suit with prejudice on an expedited basis.

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[5] A Rule 12(b)(1) motion should be granted when it appears that the plaintiff cannot prove a plausible set of facts to establish subject-matter jurisdiction after considering "(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008). The party seeking to invoke the Court's jurisdiction must demonstrate "subject matter jurisdiction by a preponderance of the evidence." *Vantage Trailers, Inc. v. Beall Corp.*, 567 F.3d 745, 748 (5th Cir. 2009) (citing *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to the following attorneys via the Court's electronic filing case management system and electronic mail on this 3rd day of December, 2019:

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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CITY OF RED OAK, TEXAS, and the RED OAK INDUSTRIAL DEVELOPMENT CORPORATION,

Plaintiffs,

v.

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.

Civ. No. 3:19-CV-02761-S

DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND MOTION TO TRANSFER

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Defendant United States Department of Agriculture (USDA) files this Brief in Support of its Motion to Dismiss (ECF No. 35) under Federal Rule of Civil Procedure 12(b)(1) and requests that the Court transfer or dismiss all of Plaintiffs City of Red Oak and Red Oak Industrial Development Corporation (together, Red Oak)'s claims against the USDA in the First Amended Complaint (ECF No. 25), as explained below.

I. SUMMARY OF THE ARGUMENT

First, this lawsuit should be transferred[1] or dismissed under the first-to-file rule because the issues in this case substantially overlap with issues already pending before U.S. District Judge Robert L. Pitman in the Western District of Texas in *Rockett Special Utility District v. Botkin*, No. 1:19-CV-1007 (W.D. Tex. Oct. 16, 2019). Second, the case should be dismissed for lack of subject-matter jurisdiction because there has been no final agency action and because the case is unripe, as Red Oak admits in its pleadings in the Western District. App. 064, 066 n.2 (Red Oak represented to Judge Pitman that "[u]ntil" Rockett has a federal loan guarantee—which has not yet occurred—"the case is unripe," and "the Court lacks subject-matter jurisdiction.").[2]

In truth, this case is not the *real* lawsuit. Instead, this case is Red Oak's procedural gambit to obtain helpful statements from the USDA (and potentially this Court) as levers to defend itself in the real lawsuit first-filed by Rockett Special Utility

[1] Under Fifth Circuit case law, "once [a] district court [finds] that the issues might substantially overlap, the proper course of action [is] for the court to transfer the case" to the first-filed court for *that court* to determine "which case should, in the interests of sound judicial administration and judicial economy, proceed." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

[2] "App." citations refer to the Appendix to Support Defendant United States Department of Agriculture's Motion to Dismiss Plaintiffs' First Amended Complaint and Motion to Transfer filed with this Brief. *See* Local Civ. R. 7-2(e).

District (Rockett) in the Western District. *See, e.g.*, App. 042, 048 (citing an email from counsel for the USDA as proof that Rockett has not yet obtained a loan note guarantee (App. 058, 062)). In the real lawsuit, Rockett sued to enjoin the Public Utility Commission of Texas (PUC) from amending Rockett's water certificate of convenience and necessity under certain provisions of the Texas Water Code. App. 022, 038.

Red Oak's strategy directly implicates the purposes of the first-to-file rule—to avoid involving federal courts in the complexity of parallel lawsuits. This prudential doctrine of comity serves to "maximize judicial economy and minimize embarrassing inconsistencies by [requiring that federal courts refuse] to hear a case raising issues that might substantially duplicate those raised by a case pending in another court." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 604 (5th Cir. 1999).

For these reasons and as elaborated below, the Court should dismiss or transfer this case in favor of the first-filed case pending in the Western District or for lack of subject-matter jurisdiction.

II. LEGAL BACKGROUND OF SECTION 1926(B)

The underlying legal battle between Red Oak and Rockett centers on a federal program administered by the USDA's Rural Utilities Service (RUS)[3] that provides federal loans to rural water districts like Rockett. *See* 7 U.S.C. § 1926(b).

[3] Red Oak has also sued the RUS, which is a component division within USDA and not a separate person or agency. To the extent a response to Red Oak's First Amended Complaint is deemed required, RUS is filing a motion to join the USDA's motion to dismiss and this Brief.

A. Section 1926(b) protects rural water districts' ability to repay.

To protect rural water districts' ability to repay federal loans, section 1926(b) unambiguously prohibits local governments (like Red Oak) from curtailing, encroaching, interfering, or competing within the participating utilities' service areas:

> The service provided or made available through any such [rural water district] shall not be curtailed or limited by the inclusion of the area 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 said loan; nor shall the happening of 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.

Accord N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 915 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct."); *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987) ("The statute unambiguously prohibits any curtailment or limitation of an . . . indebted water association's services . . . ."). As the Fifth Circuit explained, "Congress's purpose" in enacting section 1926 was to encourage "inexpensive water supplies for farmers and other rural residents and [protect] those associations' ability to repay their [federal] debts." *Madison*, 816 F.2d at 1060.

B. The requirements for section 1926(b) include (1) making service available, (2) being unable to access credit elsewhere, and (3) servicing a rural area.

To qualify for protection under section 1926(b), the rural utility must establish, among other things, that a local government "has encroached on an area to which the [u]tility '*made service available.*'" *N. Alamo*, 90 F.3d at 915 (emphasis added) (quoting

§ 1926(b)). To qualify for a section 1926(b) loan guarantee, the agency must first "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." 7 C.F.R. § 1779.20(a). And the facilities "must be located in rural areas," with certain exceptions. § 1779.20(e).

C. A Texas CCN is legally equivalent to making service available.

The Fifth Circuit has held that a Certificate of Convenience and Necessity (CCN) issued under Texas law by the PUC is the "legal equivalent to," and establishes, the utility making "'service available' under § 1926(b)." *Id.* at 916. Thus, one avenue for a local government like Red Oak to challenge section 1926(b) protection is to petition the PUC to decertify or amend the CCN. *See* Leonard H. Dougal, *State Bar of Texas: Essentials of Water Resources* § 29.9:5, 2018 WL 792871 (2018) ("Any decertification by the PUC based on inadequate service brings into question whether service is being made available in satisfaction of section 1926(b).").

III. FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. Red Oak petitions the PUC to decertify Rockett's CCN.

In August 2019, Red Oak petitioned the PUC to decertify areas within Rockett's CCN.[4] Red Oak intends to develop property located within Rockett's CCN "for lucrative industrial development requiring large amounts water," which Red Oak alleges,

[4] Tex. Pub. Utils. Comm'n, *Pet. of City of Red Oak Indus. Dev't*, No. 49871 (docket), *available at* https://interchange.puc.texas.gov/Search/Filings?ControlNumber=49871. This Court may take judicial notice of court and administrative proceedings as "matters of public record." *In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019); *accord* Fed. R. Evid. 201(b)(2).

"Rockett does not have the existing infrastructure to provide." Pls.' First Am. Compl. ¶¶ 25–26, 29, ECF No. 25.

B. Rockett sues the PUC to enjoin the decertification proceedings.

In October 2019, Rockett sued the PUC Commissioners in their official capacities in the U.S. District Court for the Western District of Texas—the first-filed lawsuit in Judge Pitman's court referenced above—seeking to enjoin the PUC from decertifying Rockett's CCN and requesting a declaratory judgment that section 1926(b) preempts conflicting provisions in the Texas Water Code. App. 022, 037–38, ¶¶ 33–37.

In November 2019, the PUC stayed the CCN decertification proceedings "due to the pendency of the federal litigation" in the Western District of Texas.[5]

C. Four days later, Red Oak files this lawsuit against the USDA seeking to enjoin the section 1926(b) loan note guarantee.

Four days later, Red Oak sued the USDA and Rockett seeking to enjoin the USDA from issuing a $1,720,000 loan note guarantee as contrary to USDA regulations and seeking a declaratory judgment regarding the same. Compl. ¶¶ 64, 66–67, ECF No. 1. In its amended complaint, Red Oak contends the loan will finance facilities that serve non-rural areas in violation of 7 C.F.R. §§ 1779.20(d) and 1779.25(d) and Rockett can obtain comparable credit from private or commercial lenders without a federal guarantee, which if true would disqualify Rockett from the program under 7 C.F.R. § 1779.20(a). Pls.'

[5] Tex. Pub. Utils. Comm'n, *Pet. of City of Red Oak Indus. Dev't*, No. 49871 (Nov. 15, 2019) (Order No. 4), *available at* https://interchange.puc.texas.gov/Documents/49871_13_1041342.PDF.

First Am. Compl. ¶¶ 51–63. As noted above, Red Oak is separately challenging the "making service available" factor through the now-stayed PUC proceedings.[6]

D. USDA has not yet issued a loan note guarantee.

Rockett has applied for a $1,720,000 loan note guarantee, and USDA (through its component RUS) issued a Conditional Commitment for Guarantee on Form RD 449-14 on July 23, 2019. App. 005–13. Under the terms of the Conditional Commitment, the final Loan Note Guarantee "will not be issued until the Lender certifies that there has been no adverse change in the borrower's financial condition, nor any other adverse change in the borrower's condition during the period of time from issuance of the Conditional Commitment for Guarantee to the date of Lender's certification." App. 005. The lender must also provide, among other things:

- "evidence that the borrower has adequate insurance and fidelity bond coverage" and
- the borrower's agreement "not to incur future indebtedness that would affect the security [offered] without the Lender's and the USDA Rural Development's consent." App. 008.

The lender must also certify:

- "The borrower has marketable title to the collateral,"
- "There has been no substantive adverse change in the borrower's financial condition or any other adverse change in the borrower," and
- "[T]he borrower has obtained":

[6] *See supra* Part III.B.

- "A legal opinion relative to the title to rights-of-way and easements" and
- "A title opinion or title insurance showing ownership of the land and all mortgages or other lien defects, restrictions, or encumbrances, if any."

App. 012–13.

Under 7 C.F.R. § 1779.64, the USDA cannot issue the Loan Note Guarantee until (1) the lender provides the required certifications and then (2) the USDA reviews the lender's certification and independently determines that "all requirements have been met." The lender has not yet provided the required certification, and the USDA does not believe the lender's certification is imminent. App. 001, 002, ¶¶ 7–8.

IV. LEGAL STANDARD

The USDA moves to dismiss under Federal Rule of Civil Procedure 12(b)(1), invoking the first-to-file rule[7] and because the Court lacks subject-matter jurisdiction (for lack of final agency action and ripeness). The Court should dismiss under Rule 12(b)(1) if "the court lacks the statutory or constitutional power to adjudicate the case." *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 311–12 (5th Cir. 2015). The plaintiff, "as the part[y] asserting federal subject-matter jurisdiction, [must] bear the burden of proving that its requirements are met." *Willoughby v. United States ex rel. U.S. Dep't of the Army*, 730 F.3d 476, 479 (5th Cir. 2013). The Court may dismiss claims under Rule 12(b)(1) based on "(1) the complaint alone; (2) the complaint supplemented by

[7] *See* 5B Arthur R. Miller et al., *Federal Practice and Procedure* § 1350 (3d ed. 2019) (identifying Rule 12(b)(1) as the proper "procedural vehicle for raising various residual defenses," including the first-to-file rule). USDA also moves to transfer under 28 U.S.C. § 1404 or dismiss under Rule 12(b)(3) and (6) if the Court deems any of these provisions the more appropriate procedural vehicle to invoke the first-to-file rule.

undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.*

Although subject-matter jurisdiction should usually be resolved first, *id.*, the Fifth Circuit instructs that a federal district court should start with the first-to-file rule—and limit "its inquiry to the potential overlap between the two cases" before "entertaining . . . jurisdiction or . . . standing arguments," *Cadle*, 174 F.3d at 606.

V. ARGUMENT & AUTHORITIES

All of Red Oak's claims against the USDA should be dismissed or transferred (A) under the first-to-file rule and (B) because the Court lacks subject-matter jurisdiction, as Red Oak itself admits in pending proceedings in the Western District.

A. The Court should transfer or dismiss this case under the first-to-file rule.

"Under the first-to-file rule, when related cases are pending before two federal courts, the court in which the case was last filed may refuse to hear it if the issues raised by the cases substantially overlap." *Cadle*, 174 F.3d at 603. "Courts use this rule to maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court." *Id.* at 604.

Cases substantially overlap if:

- "the core issue" is "the same," *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 730 (5th Cir. 1985);
- the relief requested is the same, *see In re Amerijet Int'l, Inc.*, 785 F.3d 967, 976 (5th Cir. 2015); and

- there exists a "substantial risk" of conflicting rulings and "'piecemeal resolution of issues that call for a uniform result,'" *id.* (quoting *Cadle*, 174 F.3d at 603).

"The rule does not, however, require that cases be identical. The crucial inquiry is one of 'substantial overlap.'" *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 950 (5th Cir. 1997). Cases may substantially overlap even if there is a "lack of identical parties." *Cadle*, 174 F.3d at 603.

Once a party demonstrates "the likelihood of a substantial overlap," then it is "no longer up to the second filed court to resolve the question of whether both should be allowed to proceed"; the second-filed court should transfer the case to the first-filed court. *Cadle*, 174 F.3d at 605–06 (cleaned up). Otherwise, the second-filed court would be acting "as a 'super appellate court'" and would impinge "on the authority of its sister court, one of 'the very abuses the first-to-file rule is designed to prevent.'" *Id.* at 606.

Here, the core issue in the Western District is the same as the core issue in this case—whether Rockett is entitled to section 1926(b) protection from Red Oak. The true parties in interest—Rockett and Red Oak—are the same.[8] The relief requested is the same. The plaintiffs in both cases seek mirror-image declaratory judgments: in the Western District, Rockett seeks a declaration that it is entitled to section 1926(b) protection; here, Red Oak seeks a declaration that Rockett is not entitled to section 1926(b) protection. In both cases, the parties dispute whether a federal lawsuit is ripe

[8] *See, e.g.*, *Kohn Law Grp., Inc. v. Auto Parts Mfg. Miss., Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015) (identifying "similarity of the parties" as an important factor and noting "the first-to-file rule does not require exact identity of the parties. Rather, the first-to-file rule requires only substantial similarity of parties." (citations omitted)).

before the USDA has finally approved the loan note guarantee. And if the PUC grants Red Oak's petition to amend Rockett's CCN, then Rockett may no longer have protection under section 1926(b) for the disputed area. After all, Rockett would no longer be making service available in those areas under Fifth Circuit case law—potentially obviating Red Oak's Administrative Procedure Act (APA) challenges to the USDA's determinations whether Rockett services rural areas or cannot access credit elsewhere. Thus, there is a substantial risk of conflicting rulings and "'piecemeal resolution of issues that call for a uniform result,'" *see In re Amerijet*, 785 F.3d at 976 (quoting *Cadle*, 174 F.3d at 603).

Because the issues in this case substantially overlap with those in the first-filed case, this Court should refuse to hear this later filed case and transfer this case to the Western District of Texas. *See Cadle*, 174 F.3d at 606 ("[O]nce the district court found that the issues might substantially overlap, the proper course of action was for the court to transfer the case to the [first-filed] court to determine which case should, in the interests of sound judicial administration and judicial economy, proceed.").

B. The Court should dismiss this case for lack of subject-matter jurisdiction because a conditional commitment is not "final agency action" and Red Oak admits this case is not ripe.

The USDA moves to dismiss Red Oak's allegations against it under Rule 12(b)(1) because the federal government has waived sovereign immunity under the APA only for "final agency action," 5 U.S.C. § 704, and the Conditional Commitment for Guarantee is not final action. Moreover, as Red Oak itself acknowledges in parallel proceedings before the Western District, this case is unripe. *See John Doe, Inc. v. Drug Enf't Admin.*,

484 F.3d 561, 567 (D.C. Cir. 2007) ("[Although] ripeness . . . and finality may be difficult to distinguish in some contexts, they must be carefully delineated.").

1. A conditional commitment for guarantee is not a final agency action.

"[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted). "And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.*

Here, the Conditional Commitment meets neither *Bennett* prong. On its face, the Conditional Commitment is precisely that—conditional. Under 7 C.F.R. § 1779.64, the USDA cannot finally approve the loan note guarantee until it receives the required certification from the lender, and then the USDA must independently determine that "all requirements have been met." The challenged Conditional Commitment decision is therefore interlocutory in nature, in that it expressly "anticipates the necessity of further agency action before" the loan note guarantee is finally approved. *La. State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 582 (5th Cir. 2016). As noted above, the loan note guarantee remains subject to numerous conditions precedent that must be satisfied by the lender and borrower before the final loan note guarantee may be issued.[9] And legal consequences do not flow until the loan note guarantee is finally issued. *Cf. La. State*, 834 F.3d at 583 ("[T]he legal consequences that typify final agency action reviewable

[9] *See infra* Part III.D.

under the APA . . . normally affect a regulated party's possible legal liability; these consequences tend to expose parties to civil or criminal liability for non-compliance with the agency's view of the law or offer a shelter from liability if the regulated party complies."). Red Oak has not identified potential civil or criminal liability that flows from a conditional commitment for guarantee (or shelter from liability), nor could it. Therefore, the Conditional Commitment is not final agency action.

2. Red Oak admits this case is not ripe.

To establish that an APA claim is "ripe," the Fifth Circuit requires "the party bringing the challenge" to establish all of the following four factors:

1. "the issues are purely legal,"
2. "the issues are based on a final agency action,"
3. "the controversy has a direct and immediate impact on the plaintiff," and
4. "the litigation will expedite, rather than delay or impede, effective enforcement by the agency."

Tex. Office of Pub. Util. Counsel v. F.C.C., 183 F.3d 393, 411 n.11 (5th Cir. 1999). If an application "may or may not be granted," the dispute is "'abstract and hypothetical' and thus unripe for judicial review." *Monk v. Huston*, 340 F.3d 279, 283 (5th Cir. 2003).

Because Red Oak admits in its pleadings before the Western District of Texas that "the case is unripe" since "Rockett has no federal loan guarantee," App. 064, 066 n.2, Red Oak cannot possibly carry its burden to establish that this controversy has a direct and immediate impact on Red Oak. Moreover, the loan guarantee may be denied if the lender and borrower do not meet the requirements of the regulations and the terms of the

Conditional Commitment. *See, e.g.*, *Suburban Trails, Inc. v. N.J. Transit Corp.*, 800 F.2d 361, 367–68 (3rd Cir. 1986) (holding case unripe because the federal agency was waiting on a third party before finally approving a federal grant and "would still be free to withhold funding," reasoning "[a]gency action may be found not ripe because the need will not arise until some action is taken by third parties"). And as noted above, a conditional commitment for guarantee does not constitute final agency action. Lastly, the issues are not purely legal. Whether Rockett can obtain credit elsewhere and is servicing rural areas are fact-bound questions. Therefore, this case is not ripe—as Red Oak is attempting to persuade Judge Pitman in Austin.

3. **Melissa *and* Schertz *are distinguishable.***

The government notes that federal district courts in the Eastern and Western Districts of Texas in different circumstances have concluded that USDA approval of a direct rural loan application constitutes ripe, final agency action. *City of Schertz v. U.S. Dep't of Agric. ex rel. Perdue*, No. 18-CV-1112, 2019 WL 5579541, at *3 (W.D. Tex. Oct. 29, 2019); *Melissa Indus. Dev. Corp. v. N. Collin Water Supply Corp.*, 256 F. Supp. 2d 557, 562 (E.D. Tex. 2003).

Schertz and *Melissa* are distinguishable. First, this case involves a contemplated USDA guaranteed loan being made by Defendant CoBank, ACB—not a direct loan from the USDA—whereas, *Melissa* and *Schertz* both involved direct loans. This distinction matters because in this case—unlike *Schertz* and *Melissa*—the USDA cannot legally act on the Conditional Commitment under the applicable regulations until it receives various commitments from the lender and the borrower detailed above. *See* 7 C.F.R. §§ 1779.2,

1779.64. Second, the plaintiff in this case (Red Oak) admitted in parallel proceedings that the case is not yet ripe until the USDA has issued a final loan note guarantee (App. 064, 066 n.2)—an admission not present in either *Melissa* or *Schertz*.

VI. CONCLUSION

The issues in this case substantially overlap with those already pending in the Western District. The Conditional Commitment does not constitute final agency action. And Red Oak admits the case is not ripe, depriving the Court of subject-matter jurisdiction. Therefore, the Court should refuse to hear this case, and either transfer to the Western District or dismiss the claims against the USDA for lack of subject-matter jurisdiction.

Dated: February 14, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

/s/ George M. Padis
George M. Padis