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PETITION OF HONECREEK VENETIAN, LLC TO AMEND WESTON WATER SUPPLY CORPORATION'S CERTIFICATE OF CONVENIENCE AND NECESSITY IN COLLIN COUNTY BY EXPEDITED RELEASE	**§**	**BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS**

WESTON WSC'S RESPONSE TO HONEYCREEK VENETIAN, LLC'S MOTION TO WITHDRAW

Weston Water Supply Corporation (Weston) files this response objecting in part to Honeycreek Venetian LLC's (Applicant or Petitioner) Motion to Withdraw (Motion) its Petition to Amend Weston's Certificate of Convenience and Necessity in Collin County by Expedited Release (the Petition).[1] Withdrawal should only be granted "with prejudice" and not "without prejudice" as requested. This response to the Motion is timely filed "within five working days."[2] In support, Weston shows as follows.

I. PROCEDURAL BACKGROUND

The Applicant filed its Petition on January 13, 2021.[3] Weston responded to the Petition on May 5, 2021 and explained all the reasons why the Commission should deny it.[4] Yet, Commission Staff recommended approving the Petition,[5] and the presiding Administrative Law Judge (ALJ) issued a proposed order, and a revised proposed order, that would have approved the Petition if the Commission adopted it.[6] Weston was compelled to take this matter to federal district court to

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[1] Motion to Withdraw Petition (Jul. 29, 2022).
[2] 16 TAC § 22.78(a).
[3] Petition by Honeycreek Venetian, LLC for Streamlined Expedited Release Pursuant to Texas Water Code Section 13.2541 (Jan. 13, 2021).
[4] Weston WSC's Response to Petition and Motion to Dismiss (May 5, 2022).
[5] Commission Staff's Final Recommendation on Final Disposition (May 19, 2021).
[6] Memorandum from Hon. Gregory R. Siemankowski, Administrative Law Judge, to Stephen Journeay, Commission Counsel, with Proposed Order (Jun. 18, 2021); Memorandum from Hon. Gregory R. Siemankowski, Administrative Law Judge, to Stephen Journeay, Commission Counsel, with Revised Proposed Order (Feb. 16, 2022).

stop the Commission from approving the Petition and that case remains pending.[7] Now, after being dismissed as a party in the federal case,[8] Petitioner has filed the Motion and a new application seeking the same impermissible decertification relief under TWC § 13.254(a) and 16 TAC § 24.245(d) instead of through streamlined expedited release (SER) under TWC § 13.2541 and 16 TAC § 24.245(h).[9] Petitioner appears to have sought withdrawal here "without prejudice" to clear the way for the new application matter. This gamesmanship should not be permitted.

The Motion may be granted in part and denied in part. Petitioner's withdrawal must be "with prejudice" as opposed to "without prejudice" under the applicable Commission rules.[10] There is no good cause to allow Petitioner to withdraw "without prejudice" and the Petitioner should not be permitted to start this unlawful process over again after a year and a half.

II. ARGUMENTS AND AUTHORITIES

Petitioner's Motion cites 16 TAC § 22.181(g)(1) as authority to withdraw its Petition "without prejudice."[11] No good cause for withdrawal "without prejudice" is presented.[12] Therefore, dismissal "without prejudice" should not be permitted for several reasons.

First, the applicable rule here should be 16 TAC § 22.181(g)(3), not (g)(1), which provides, "A request to withdraw an application with or without prejudice after a proposed order or proposal for decision has been issued, may be granted only upon a finding of good cause by the commission. In ruling on the request, the commission will weigh the importance of the matter being addressed

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[7] **Exhibit A** – Order, Case No. 1:21-cv-00608-LY, *Weston Water Supply Corp. v. Lake* (Jul. 14, 2021); **Exhibit B** - Order, Case No. 1:21-cv-00608-LY, *Weston Water Supply Corp. v. Lake* (Jun. 24, 2022).
[8] *Id.*
[9] *Petition of Honeycreek Venetian, LLC to Amend Weston Water Supply Corporation's Certificate of Convenience and Necessity 12330 by Decertifying a Portion of the Service Area Under Texas Water Code § 13.254(a) and 16 Texas Administrative Code § 24.245(d)*, Docket No. 53822, Petition (Jul. 13, 2022).
[10] 16 TAC § 22.181(g).
[11] Motion at 1 (citing 16 TAC § 22.181(g)(1)) (Jul. 29, 2022).
[12] *Id.*

to the jurisprudence of the commission and the public interest."[13] As mentioned previously, and as the Petitioner should be aware, the presiding ALJ issued a proposed order in this matter last year and revised it earlier this year.[14] However, the Commission may not grant the Petition under federal law as reflected in rulings from the pending federal case prompted by the Petition, including a temporary restraining order enjoining that Commission action.[15] Thus, while there may be "good cause" for the Petitioner to withdraw its Petition "with prejudice" if withdrawal is what Petitioner seeks, Petitioner has not offered any "good cause" to dismiss its Petition "without prejudice" and there is no such "good cause."[16] Therefore, the Commission should dismiss the Petition "with prejudice" so that it may not be refiled.[17]

Second, 16 TAC § 22.181(g)(1) does not apply if the party that initiated a proceeding has already presented its "direct case."[18] Here, that party is the Petitioner. But the Commission has not allowed contested case hearings under the Texas Administrative Procedure Act for SER petitions and there is no "direct case" to present other than the Petition itself.[19] Therefore, 16 TAC § 22.181(g)(1) is inapplicable here in the SER context.[20]

Finally, in considering the Motion, the Commission should also consider the federal court order temporarily enjoining the Commissioners from decertifying the Petition tract because Weston WSC was "substantially likely to prove" that § 1926(b) protects Weston WSC's service

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[13] 16 TAC § 22.181(g)(3).
[14] Memorandum from Hon. Gregory R. Siemankowski, Administrative Law Judge, to Stephen Journeay, Commission Counsel, with Proposed Order (Jun. 18, 2021); Memorandum from Hon. Gregory R. Siemankowski, Administrative Law Judge, to Stephen Journeay, Commission Counsel, with Revised Proposed Order (Feb. 16, 2022).
[15] *See* **Exhibit A** and **Exhibit B**.
[16] 16 TAC § 22.181(g)(3).
[17] *Id.*
[18] 16 TAC § 22.181(g)(1).
[19] 16 TAC § 24.245(h)(6)-(7).
[20] 16 TAC § 22.181(g)(2) could potentially be used in a SER matter to request withdrawal "with or without prejudice" if a proposed order is not yet issued, but it would also require a "finding of good cause by the presiding officer." 16 TAC § 22.181(g)(2). Here, however, a proposed order was issued so 16 TAC § 22.181(g)(3) applies.

area from decertification by the Commission.[21] Further, while the federal district court has not yet reached the merits of the preemption issue, the court has ruled that the issue supports a valid claim:

> Weston's fundamental claim is that Section 1926(b) of the United States Code preempts and voids Section 13.2541(d) of the Texas Water Code. . . . Weston's federal lawsuit can be premised on a claim of federal preemption, even though the Supremacy Clause creates a rule of decision, not a right of action. . . . Without clear support in the text, legislative history, or case law, the court declines to unduly narrow the scope of Section 1926(b) to local-government action. The PUC Officials' concern that such a holding commandeers a state agency to the detriment of a rural area is unfounded for a few reasons. "There is no commandeering at play" where PUC Officials are asked to consider a rural water association's federally indebted status before decertifying the association's territory.[22]

Given Judge Yeakel's orders in lawsuits to which the Commissioners are parties, the Commission must respect the supremacy of federal law and cannot obey TWC § 13.2541. The Commission must respect a retail public utility's federal indebtedness and cannot decertify any property where the retail public utility is making available (not just actually providing) service.[23] Consequently, there is "good cause" to approve withdrawal and dismissal of the Petition "with prejudice," but not "without prejudice."

CONCLUSION AND PRAYER

Weston WSC respectfully requests the Commission deny the Motion in part and grant it in part by authorizing Honeycreek Venetian LLC to only withdraw its Petition with prejudice, not without prejudice. Weston also seeks all and further relief to which it may be justly entitled at law or in equity.

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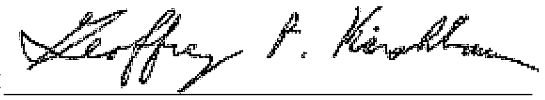
[21] **Exhibit A**.
[22] **Exhibit B**.
[23] 7 U.S.C. § 1926(b); *Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 477 (5th Cir. 2020).

Respectfully submitted,

By: 

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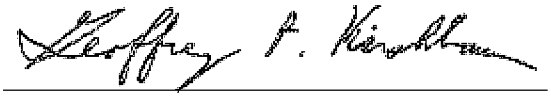
ATTORNEY FOR WESTON WATER SUPPLY CORPORATION

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 5, 2022 in accordance with the Order Suspending Rules filed in Project No. 50664.



Geoffrey P. Kirshbaum

EXHIBIT
A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WESTON WATER SUPPLY CORPORATION, Plaintiff, v. PETER LAKE, WILL McADAMS, and LORI COBOS in their official capacities as Commissioners of the Public Utility Commission of Texas; and HONEYCREEK VENETIAN, LLC., Defendants.	§ § § § § § § § § § § § § § §	1:21-CV-608-RP

ORDER

Before the Court is Plaintiff Weston Water Supply Corporation's ("Weston") Application for a Temporary Restraining Order against Defendants Peter Lake, Will McAdams, and Lori Cobos, in their official capacities as Commissioners of the Public Utility Commission of Texas (collectively, the "PUC Officials"), (Dkt. 4). The PUC Officials, along with Defendant HoneyCreek Venetian, LLC ("Honeycreek," and together with the PUC Officials, "Defendants") appeared for a hearing on the application on July 14, 2021. (Dkt. 7). Honeycreek also filed a response in opposition to the application for a temporary restraining order. (Resp., Dkt. 8). After considering the motion, the supporting evidence, Honeycreek's response, and the relevant law, the Court finds that the motion should be granted.

I. BACKGROUND

Weston is a water supply corporation that provides and makes water service available in Collins County, Texas pursuant to Certificate of Convenience and Necessity ("CCN") issued by the Public Utility Commission of Texas ("PUC"). (Compl., Dkt. 1, at 1–2). Weston is the recipient of an outstanding federal loan issued by the United States Department of Agriculture and Rural

Development ("USDA") under 7 U.S.C. § 1926 ("Section 1926"). (*Id.*; Not Loan, Dkt. 4-1, at 14). In January 2021, Defendant Honeycreek applied for expedited release of its property (the "Honeycreek Property") from Weston's CCN pursuant to Texas Water Code § 13.2541. (PUC Docket No. 51710, Dkt. 4-1, at 34–168). The PUC is scheduled to grant this request at its next public meeting on July 15, 2021. (Dkt 1, at 3; Mot. TRO, Dkt. 4, at 5). Weston claims that its certificated area is protected from curtailment or limitation by Section 1926(b), which preempts Texas Water Code § 13.2541. (Dkt. 1, at 4) ("The state statute violates the Supremacy Clause and cannot be enforced."). As such, Weston has moved for a temporary restraining order to prevent the PUC from granting Honeycreek's request to release its property from Weston's CCN on July 15. (Dkt. 4, at 5). Weston's motion is accompanied by an affidavit from the President of the Board of Directors of Weston, Tony Del Plato, and a number of supporting exhibits. (*See* Dkt. 4-1). Honeycreek filed a response in opposition to Weston's motion. (Dkt. 8).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 65 permits the Court to issue a temporary restraining order without notice[1] to the adverse party only where "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition," and "the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). The party moving for a temporary restraining order must establish that: "(1) there is a substantial likelihood that the movant will prevail on the merits; (2) there is a substantial threat that irreparable harm will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the defendant; and (4) the granting of the preliminary injunction will not disserve the public

[1] Here, because Defendants' counsel had been identified at the status conference regarding this application for a temporary restraining order, (Conf., Dkt. 6), the Court was able to hold a hearing in which Defendants presented argument in opposition to the application for a temporary restraining order. (Hr'g., Dkt. 9).

interest." *Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). The party seeking relief has the burden of proving each element. *Id.* Upon reviewing Weston's motion, the Court concludes that Weston has met its burden under Rule 65 and the Fifth Circuit's requirements.

III. DISCUSSION

Section 1926(b) provides federally indebted utility providers with protection from curtailment of their certificated area. 7 U.S.C. § 1926(b).[2] To qualify for the Section 1926's protection, Weston must show that it has (1) adequate facilities to provide service to the area within a reasonable time after a request for service is made and (2) the legal right to provide services. *Green Valley Special Utility District v. City of Schertz*, 969 F.3d 460, 465 (5th Cir. 2020). Weston argues that it has established its likelihood of success on the merits of this claim because it has a legal right to service the certificated area and has adequate facilities to provide water to the Honeycreek Property should a request for service be made. (Dkt. 4, at 3–4; Daniel Aff., Dkt. 4-1, at 2–4; Del Plato Affi., Dkt. 4-1, at 7). Defendants do not dispute that Weston currently has a legal right to provide service, though they disputed whether Weston has adequate facilities to supply water to the Honeycreek Property. (Dkt. 8, at 5; TRO Hr'g, Dkt. 7).

This evidence is sufficient at this stage to show that Weston is substantially likely to prove that it is entitled to protection from curtailment of its certificated area under Section 1926(b). Weston has demonstrated that it has facilities located in close proximity to the Honeycreek Property that have the ability to supply water to the property, including four water mains, a pump station and a ground storage tank. (Daniel Aff., Dkt. 4-1, at 3; Del Plato Affi., Dkt. 4-1, at 7; Infrastructure Map, Dkt. 4-1, at 27). Although Defendants argue that this infrastructure is insufficient to supply water to

[2] Section 1926(b) provides that: "[t]he 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 (West).

the Honeycreek Property, at this stage Weston has provided sufficient factual support to show that it is likely entitled to protection under Section 1926(b) for its provision of water services to the Honeycreek Property, especially given that under Fifth Circuit precent it need not strictly show that it has "pipes in the ground," but rather that it has "something in place to merit § 1926(b)'s protection." *Green Valley*, 969 F.3d at 477 n.36.

Though Weston claims that it need only establish a likelihood of success on the merits to obtain temporary injunctive relief, it is not evident from the case law Weston cited that this is the case. The hearing on this motion, however, revealed doubts as to this Court's authority to restore the *status quo* should the PUC grant Honeycreek's request for expedited release at its public hearing tomorrow, on July 15, 2021. (Hr'g., Dkt. 7). As such, the Court finds that Weston has shown that it is substantially likely to suffer irreparable harm in the absence of an injunction given that it is unclear whether this Court could restore Weston's legal right to provide water service to the Honeycreek Property should that right be stripped by the PUC at its next public meeting. The Court further finds that the balance of equities weighs in Weston's favor given the "very strong public interest" in protecting the rights of federally indebted utility providers to supply consistent water service to rural areas. *Post Oak Special Util. Dist. v. City of Coolidge, TX*, 98 F.3d 1339 (5th Cir. 1996) ("the very strong public interest promoted by § 1926(b) is more important than individual equitable concerns.") (citing *Jennings Water, Inc. v. City of N. Vernon, Ind.*, 895 F.2d 311, 318 (7th Cir. 1989) ("1926(b), absolutely bars any encroachment by a competing water system on a rural water system indebted to the [UDSA]. Injunctive relief is clearly the appropriate remedy to ensure the continued, uninterrupted service by the federally indebted entity."). Any burdens to Defendants in complying with a temporary injunction are outweighed by the potential harm to Weston should it lose its right to provide water service to the Honeycreek Property, and this Court is later unable to restore that right.

IV. CONCLUSION

For the reasons given above, it is **ORDERED** that Weston's motion, (Dkt. 4), is **GRANTED**. The Court will therefore enter the following temporary injunctive relief:

1. The PUC Officials are enjoined from granting Defendant Honeycreek Venetian, LLC's petition for expedited release of its property in PUC Docket No. 51710.
2. The PUC Officials are enjoined from curtailing Plaintiff Weston Water Supply Corporation's certificated water service area in PUC Docket No. 51710.

This Order will expire after 14 days from the date of its issuance.

SIGNED on July 14, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

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

WESTON WATER SUPPLY CORPORATION,	§	
	§	
PLAINTIFF,	§	
	§	
V.	§	1:21-CV-608-LY
	§	
PETER LAKE, WILL MCADAMS, AND LORI COBOS, IN THEIR OFFICIAL CAPACITIES AS COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION OF TEXAS; AND HONEYCREEK VENETIAN, LLC,	§	
	§	
DEFENDANTS.	§	

ORDER

This is a case involving the Public Utility Commission of Texas (the "PUC"), which regulates the state's water utilities. Before the court are the motions to dismiss filed by Peter Lake, Will McAdams, and Lori Cobos, in their official capacities as commissioners of the PUC (collectively, the "PUC Officials") (Doc. 16), and by Honeycreek Venetian, LLC ("Honeycreek") (Doc. 18). Plaintiff Weston Water Supply Corporation ("Weston") filed a joint response to the dismissal motions on September 30, 2021 (Doc. 22), to which Defendants Honeycreek and the PUC Officials (collectively, "Defendants") timely replied (Doc. 27–28, respectively).

STANDARD

Defendants move the court to dismiss Weston's complaint under Rules 12(b)(1) for "lack of subject-matter jurisdiction" or (b)(6) for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(1), (b)(6).

As courts of limited jurisdiction, federal courts must have jurisdiction over the subject matter of a case. And subject-matter jurisdiction, such as federal-question jurisdiction, has both constitutional and statutory requirements. *See id.* at 12(b)(1); U.S. CONST. art. III (conferring jurisdiction on "all cases, in law and equity, arising under this Constitution"); 28 U.S.C. § 1331 (conferring jurisdiction on "all civil actions arising under the Constitution, laws, or treaties of the United States"); *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (explaining statutory requirement is more narrow than constitutional one, considering question whether civil action arises under federal law must be "determined by reference to the well-pleaded complaint)). Federal-question jurisdiction provides a forum for the vindication of federal rights, conferring jurisdiction on cases "arising under" federal law. A suit generally "arises under" the law "that creates the cause of action." *American Well Works v. Layne*, 241 U.S. 257, 260 (1916).

Furthermore, a state official's immunity from suit is regularly treated as jurisdictional. The circuit has explained, because Eleventh Amendment "sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1)." *Warnock v. Pecos Cty., Tex.*, 88 F.3d 341, 343 (5th Cir. 1996).

On a motion to dismiss under Rule 12(b)(6), the court draws all facts from a plaintiff's complaint. Indeed, the court "must accept as true all of the factual allegations" contained in the complaint, though it need not credit "legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 572 (2007). Ultimately, "only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

BACKGROUND

Weston is a water supply corporation created under Chapter 67 of the Texas Water Code. Tex. Water Code § 67.001 *et seq*. Weston's principal place of business is in Weston, Collin County, Texas. Weston provides water service in Collin County pursuant to Certificate of Convenience and Necessity #12330 (the "CCN") issued and regulated by the PUC. The CCN grants Weston the exclusive right to provide water service within its certificated area.

To provide such service, Weston borrowed $405,900 in 2003 from the United States under Section 1926 of the United States Code ("Section 1926"). 7 U.S.C. § 1926(a) ("The Secretary is also authorized to make or insure loans to associations . . . to provide for the . . . control of water . . . ."). Weston's federal loan is for a term of 40 years and remains outstanding.

Honeycreek is the owner of a tract of land in Collin County that lies within Weston's CCN. In 2021, Honeycreek filed an application for streamlined expedited release asking the PUC to decertify 137 acres of real property within Collin County (the "Property") from Weston's CCN. Decertification would allow a political subdivision of Texas called North Collin Special Utility District to replace Weston as the water service provider for the Property.

Weston intervened, claiming Section 1926 bars the PUC Officials from decertifying Weston's service area. *Id.* § 1926(b) ("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 . . . ." (emphasis added)). In May 2021, an administrative law judge denied Weston's motion to dismiss pursuant to state law—specifically, Section 13.2541(d) of the Texas Water Code ("Section 13.2541").

Tex. Water Code § 13.2541(d) ("The utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program."). In July 2021, this court granted Weston's application for a temporary restraining order (Doc. 10). The parties have agreed to remain in place until the earlier of a ruling on Weston's application for preliminary injunction or an entry of final judgment.

Weston's fundamental claim is that Section 1926(b) of the United States Code preempts and voids Section 13.2541(d) of the Texas Water Code. For this, Weston seeks equitable relief. *See* FED. R. CIV. P. 57, 65. Specifically, Weston seeks a declaration providing that Section 1926(b) preempts and voids Section 13.2541(d), and that the PUC Officials may neither decertify the Property nor authorize a third party to provide water service on the Property. Weston likewise seeks to enjoin the PUC Officials from decertifying the Property and to enjoin Honeycreek from procuring a third party to provide water service on the Property. Weston also asserts claims under 42 U.S.C. Sections 1983 ("Section 1983"),[1] which provides redress against unconstitutional action carried out "under color of" state law, and 1988 ("Section 1988"),[2] which permits recovery of attorneys' fees in a Section-1983 case.

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[1] Section 1983 states: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[2] Section 1988(b) provides: "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

ANALYSIS

Despite citing Sections 1926, 1983, and 1988, Section 1983 and 1988 relief are unavailable. Section 1988 permits a reasonable attorney's fee for a Section 1983 claim, but there is no valid Section 1983 claim here. Weston concedes there is no Section 1983 claim alleged against Honeycreek. *See Geinosky v. City of Chicago*, 675 F.3d 743,745 n.1 (7th Cir. 2012) (noting plaintiff opposing dismissal may elaborate on allegations contained in complaint). Additionally, under binding precedent, the PUC Officials are not proper Section 1983 defendants. *Green Valley Special Utility Dist. v. City of Schertz, Tex.*, 969 F.3d 460, 472 (5th Cir. 2020) (en banc) (explaining, albeit in *dicta*, "the PUC Officials are not proper [Section]1983 defendants" (citing *Birchfield Meadows v. Cohen*, 409 F.2d 750, 753 (5th Cir. 1969) (holding political subdivisions are not proper parties under Section 1983), and *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (stating "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"))).

Instead, the heart of this case is the obvious interplay between Section 1926 of the United States Code and Section 13.2541 of the Texas Water Code.

Section 1926 protects a rural water association with a qualifying, outstanding federal loan from curtailment of its service area—if the association has "provided or made available" service. 7 U.S.C. § 1926(b). An association has provided or made available service if it "(1) has adequate facilities to provide service to the relevant area within a reasonable time after a request for service is made and (2) has the legal right to provide service," dubbed the two-part "physical ability" test. *Green Valley*, 969 F.3d at 472 (citing *Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701 (6th Cir. 2003)) (overruling *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996)).

Meanwhile, Section 13.2541 of the Texas Water Code authorizes the PUC to remove property from an association's service area under particular circumstances. *See, e.g.*, Tex. Water Code § 13.2541 (providing, *inter alia*, for expedited release of certificated tracts in specific counties not receiving water or sewer service). Section 13.2541 even instructs the PUC to remove such property regardless of whether the association is "a borrower under a federal loan program." *Id.* § 13.2541(d) ("The utility commission may not deny the petition based on the fact that the certificate holder is a borrower under a federal loan program.").

When federal and state law is at odds, the Constitution's Supremacy Clause provides that federal law is "the supreme Law of the Land." U.S. CONST. art. VI. That is, federal legislation enacted within Congress's constitutional authority can preempt conflicting state laws, either expressly or impliedly. The "ultimate touchstone" of determining whether, and to what extent, federal law preempts state law is Congress's preemptive intent, discerned "primarily" from a statute's text. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996); *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (introducing "presumption against preemption").

However, the Supremacy Clause "certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Instead, "this Clause creates a rule of decision: Courts 'shall' regard the 'Constitution,' and all laws 'made in Pursuance thereof,' as 'the supreme Law of the Land . . . . It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.'" *Id.* at 324–325. The Court explained:

> If the Supremacy Clause includes a private right of action, then the Constitution *requires* Congress to permit the enforcement of its laws by private actors, significantly curtailing its ability to guide the implementation of federal law. It would be strange indeed to give a clause that makes federal law supreme a reading that *limits* Congress's power to enforce that law, by imposing mandatory private enforcement—a limitation unheard-of with regard to state legislatures.

Id. (emphasis in original).

Litigants seeking to enforce federal law through the Supremacy Clause, but lacking a statutory cause of action, must therefore rely on the equitable power of courts. Federal lawsuits for "injunctive relief against state officers who are violating, or planning to violate, federal law" are in some circumstances permitted. *Id.* at 326. But because "that has been true not only with respect to violations of federal law by state officials, but also with respect to violations of federal law by federal officials," the Supremacy Clause need not and cannot be the explanation. *Id.* at 327. Instead, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity . . . ." *Armstrong*, 575 U.S. at 327.

To that end, it is true that most suits against state and federal officers are barred by Eleventh Amendment sovereign immunity; this includes "suits against state officers or agencies that are effectively suits against a state." *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). However, a notable exception to Eleventh Amendment sovereign immunity is "the *Ex parte Young* exception." *Id.* (referencing *Ex parte Young*, 209 U.S. 123 (1908)). The *Ex parte Young* exception permits a suit for prospective relief against state officials violating federal law, where three criteria are satisfied: the plaintiff (1) sues individual "state commissioners in their official capacities," (2) alleges "an ongoing violation of federal law," and (3) seeks relief that is "properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645–646 (2002).

The Fifth Circuit has squarely discussed the applicability of *Ex parte Young* to a dispute over a Section-1926(b) loan. *Green Valley*, 969 F.3d at 472. In *Green Valley*, the plaintiff requested injunctions prohibiting PUC officials from decertifying plaintiff's certificated area and from authorizing any entity besides plaintiff to provide water service within the area under Section 13.2541[3] for as long as plaintiff's Section-1926(b) loan remained outstanding. *Id.* Even though PUC officials had already rendered an order decertifying plaintiff's territory, the circuit held that further "curtailment of territory where [plaintiff] maintains it provided service or made it available" constituted an "ongoing" violation of plaintiff's rights under Section 1926(b). *Id.* And equitable relief restraining PUC officials from taking additional "actions going forward" enforcing the decertification order amounted to "prospective relief." *Id.* at 473. Although plaintiff's other, "quintessentially retrospective" relief was untenable, plaintiff's lawsuit was *not* barred by the Eleventh Amendment since "at least one form of prospective relief [wa]s possibly available." *Id.* (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Furthermore, because plaintiff's suit could proceed at equity, it was irrelevant whether plaintiff's suit could proceed under Section 1983. *Green Valley*, 969 F.3d at 475.

Green Valley is instructive; Weston's suit plainly satisfies the *Ex parte Young* standard. That is, Weston's request to enjoin the PUC Officials from taking additional actions to decertify the Property is a proper request against "state commissioners in their official capacities" for "prospective relief" regarding an "ongoing violation." *See Green Valley*, 969 F.3d at 472–473. This is important for at least four reasons. First, the PUC Officials are not insulated from suit by Eleventh Amendment sovereign immunity. *See Green Valley*, 969 F.3d 460, 473 ("[Plaintiff']s

[3] This was formerly numbered Section 13.254(a-5).

claims against the PUC Officials are not barred by the Eleventh Amendment."). Second, Weston's suit can proceed, despite whether Weston improperly requested retrospective relief in addition to prospective relief. *See id.* ("That relief—the voiding of a final state agency order—is quintessentially retrospective and thus out of bounds under *Young*. But even if some of the relief sought is not available, it does not follow that *Young* bars Green Valley's entire suit. Because at least one form of prospective relief is possibly available to Green Valley, its claims against the PUC Officials are not barred by the Eleventh Amendment."). Third, Weston has a cause of action against the PUC Officials at equity, despite whether Weston has a cause of action under Section 1983. *See id.* at 475 ("Green Valley has a cause of action against the [PUC Officials] *at equity*, regardless of whether it can invoke §1983.") Finally, Weston's federal lawsuit can be premised on a claim of federal preemption, even though the Supremacy Clause creates a rule of decision, not a right of action. *See Green Valley*, 969 F.3d at 475, n. 27 ("What our cases demonstrate is that, in a proper case, relief may be given in a court of equity to prevent an injurious act by a public officer.") (quoting *Armstrong*, 575 U.S. at 327).

Sidestepping the apparent tension between state and federal power here, the PUC Officials move to dismiss for a separate reason: Section 1926(b) applies to local governments, not state regulatory agencies. Holding otherwise, the argument goes, would amount to an unconstitutional commandeering of state regulation.

To determine whether Section 1926(b) applies to state-agency action in addition to local-government action, the court first turns to the text. Section 1926(b) limits curtailment generally, stating water service provided or made available shall not be curtailed by acts such as including the Property "within the boundaries of any municipal corporation or other public body"

or granting "any private franchise for similar service" on the Property. 7 U.S.C. § 1926(b). The text plainly refers to both "public" and "private" incursion. The text is not necessarily limited to local-government action.

The legislative history and intent likewise do not support such a limitation. Section 1926 is part of the Agricultural Act, which Congress passed in 1961 "to preserve and protect rural farm life in a number of respects." *Le-Ax Water Dist.*, 346 F.3d at 704 (citing Pub. L. No. 87-128, 75 Stat. 294). For example, subsection (a) authorized federal financing of domestic water supplies and pipelines serving farmers and other rural residents. S.Rep. No. 87–566, at 67 (1962), reprinted in 1961 U.S.C.C.A.N. 2243, 2309. The stated objectives included enabling "safe and adequate supply of running household water," reducing "cost[s] per" resident through economies of scale, and helping "secure" the underlying loan. To accomplish these objectives, subsection (b) was "added to assist in protecting the territory served by" the loan recipient *Id.* Limiting the statute to local-government curtailment, but permitting state-agency curtailment, would undermine the various purposes underlying Section 1926.

Case law reinforces this conclusion as well. Despite being lodged against several PUC commissioners in their official capacities, Green Valley's lawsuit was permitted to proceed. *Green Valley*, 969 F.3d at 475 ("Because, as we discussed above, Green Valley has satisfied *Young*'s requirements, its suit for injunctive relief against the PUC Officials may go forward."). Additionally, courts "should not read a loophole into [Section 1926(b)'s] absolute prohibition." *See City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1059 (5th Cir. 1987). And other circuits are in agreement, having "broad[ly]" applied the Section-1926(b) protection to instances of actual encroachment on a loan recipient's territory. *See, e.g., Le-Ax Water Dist.*, 346 F.3d at 708 (citing

Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 235 (6th Cir. 1996)). Without clear support in the text, legislative history, or case law, the court declines to unduly narrow the scope of Section 1926(b) to local-government action. *See Le-Ax Water Dist.*, 346 F.3d at 707.

The PUC Officials' concern that such a holding commandeers a state agency to the detriment of a rural area is unfounded for a few reasons. "There is no commandeering at play" where PUC Officials are asked to consider a rural water association's federally indebted status before decertifying the association's territory. *Crystal Clear Special Utility Dist. v. Marquez*, 316 F. Supp. 3d 965, 978 (W.D. Tex. 2018). Commandeering is about requiring a state to enact and enforce a federal program, not about encouraging a state to acknowledge a federal law. *Printz v. United States*, 521 U.S. 898 (1997) (where federal law required state police officers to conduct background checks on prospective handgun owners, Court held federal government cannot "command the States' officers, or those of their political subdivisions, to administer or enforce a regulatory program"). Second, it is well-established that the federal government may "attach conditions on the receipt of federal funds" under the Spending Clause of the Constitution. *New York v. United States*, 505 U.S. 144, 167 (1992). Texas has not only elected to benefit from Section 1926(a), Texas is allegedly the largest recipient of such federal dollars, bringing the state fairly within the purview of Section 1926(b). *See Crystal Clear Special Utility Dist.*, 316 F. Supp. 3d at 978. Finally, Section 1926(b) does not force a rural area to endure an association's lack of water service. These concerns, voiced by the PUC Officials, are baked into a premise underlying Section 1926(b): the association has already "provided or made available" water service. 7 U.S.C. § 1926(b); *Green Valley*, 969 F.3d at 476, 479. This is particularly true where, as here, PUC Officials seek a not-for-cause decertification, which is not predicated on Weston's being deficient in its provision of water service. *See* Tex. Water

Code § 13.2541.

However, Weston's allegations against Honeycreek are of a different kind. Weston admits it is not seeking to enforce Section 1983, which contains an individual right of action, against Honeycreek. Instead, Weston is seeking to enforce Section 1926 "at equity"—specifically, by enjoining Honeycreek "from actually receiving water service from a utility other than Weston." Although the *Green Valley* Court recently permitted the plaintiff to enforce Section 1926 at equity, it did so in a specific context: where the plaintiff had also satisfied the *Ex parte Young* exception. *Green Valley*, 969 F.3d at 475, n. 27 ("Green Valley has a cause of action against the [PUC Officials] *at equity*, regardless of whether it can invoke §1983.") (citing *Armstrong*, 575 U.S. at 327 ("What our cases demonstrate is that, in a proper case, relief may be given in a court of equity to prevent an injurious act by a public officer.")). But the *Ex parte Young* exception does not apply to Honeycreek, which is not a "state commissioner." *Ex parte Young*, 209 U.S. at 155–156 (permitting suit to enjoin state utility commissioner from enforcing unconstitutional order because "state has no power to impart to him any immunity from responsibility to the supreme authority of the United States"). Although a plaintiff's right to enforce Section 1926 at equity *outside* of the *Ex-parte-Young* context is not necessarily foreclosed by existing precedent, such would be a "judge-made remedy" this court declines to create. *Armstrong*, 575 U.S. at 327 ("The ability to sue to enjoin unconstitutional actions by state and federal officers . . . is a judge-made remedy, and we have never held or even suggested that, in its application to state officers, it rests upon an implied right of action contained in the Supremacy Clause."). In sum, Weston has no cause of action against Honeycreek.

CONCLUSION

IT IS ORDERED that the PUC Officials' motion to dismiss (Doc. 16) is **DENIED**.

IT IS FURTHER ORDERED that Honeycreek's motion to dismiss (Doc. 18) is **GRANTED**. Honeycreek is therefore **DISMISSED WITH PREJUDICE.**

SIGNED this 24th day of June, 2022.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE