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DOCKET NO. 52090

PUBLIC UTILITY COMMISSION
MONTGOMERY COUNTY

PETITION OF REDBIRD DEVELOPMENT, LLC §
TO AMEND DOBBIN PLANTERSVILLE §
WATER SUPPLY CORPORATION'S §
CERTIFICATE OF CONVENIENCE §
AND NECESSITY IN MONGOMERY COUNTY §
BY EXPEDITED RELEASE §

BEFORE THE
PUBLIC UTILITY COMMISSION
OF TEXAS

**DOBBIN PLANTERSVILLE WATER SUPPLY CORPORATION'S
MOTION TO TAKE OFFICIAL NOTICE**

COMES NOW, Dobbin Plantersville Water Supply Corporation (Dobbin Plantersville) and files this Motion to Take Official Notice pursuant to 16 Texas Administrative Code sections 22.222 and Texas Rule of Evidence, Rule 201. In support hereof, Dobbin Plantersville respectfully shows the following:

I. PROCEDURAL BACKGROUND

On May 6, 2021, Redbird Development, LLC ("Redbird") filed with the Public Utility Commission of Texas ("PUC" or "Commission") a petition for a streamlined expedited release ("SER") of approximately 372.2 acres of Dobbin Plantersville's Certificate of Convenience and Necessity ("CCN") No. 11052 service area ("SER Property"). The Redbird development comprises at total of approximately 388.5 acres. In his May 7, 2021, Order No. 1, the administrative law judge ("ALJ") established a deadline of June 14 for Dobbin Plantersville to file a response to the petition.

In his June 9, 2021, Order No. 2, the ALJ granted Dobbin Plantersville's Motion to Intervene. The Order also granted Dobbin Plantersville's motion for an extension of its deadline until June 30 to respond to the Petition.

On June 29, Dobbin Plantersville filed a response to the petition and a motion to dismiss. On July 7, Redbird filed a response to the motion to dismiss (which was mis-named as a response

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to the Dobbin Plantersville response). On July 13, 2021, Redbird filed a supplement to its response to the motion to dismiss.

II. MOTION TO TAKE OFFICIAL NOTICE

On July 9, 2021, Dobbin Plantersville filed suit in the United States District Court for the Western District of Texas, Austin Division, in Case 1:21-cv-00612. A copy of the Original Complaint is attached as Exhibit A. The Defendants include the Commissioners of the Public Utility Commission and the Executive Director of the Public Utility Commission, in their official capacities (collectively, PUC Defendants) and Redbird Development. The Complaint is brought under 7 U.S.C. section 1926(b), 42 U.S.C. section 1983, and the U.S. Constitution, article VI, clause 2.

The lawsuit seeks a declaration that Texas Water Code section 13.2541(d) on which the decertification petition in this case relies, is preempted; a permanent injunction against Redbird from further presentation or prosecution of its decertification petition in this docket; a permanent prospective injunction against the PUC Defendants from any action on the decertification petition in this docket; and costs and damages.

III. PRAYER

WHEREFORE, PREMISES CONSIDERED, Dobbin Plantersville respectfully requests: (i) that official notice of the described federal lawsuit be taken pursuant to 16 Texas Administrative Code section 22.222 and Texas Rules of Evidence Rule 201; and (ii) all other and further relief to which it may be entitled.

Respectfully submitted,

Mary K. Sahs

MARY K. SAHS, P.C.

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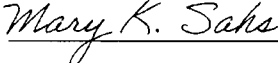
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**ATTORNEY FOR DOBBIN
PLANTERSVILLE WATER
SUPPLY CORPORATION**

CERTIFICATE OF SERVICE

Pursuant to Docket No. 50664, Second Order Suspending Rules (July 16, 2020) the undersigned hereby certifies that a copy of foregoing Dobbin Plantersville Water Supply Corporation's Motion to Take Official Notice was served on all parties of record in this proceeding on July 13, 2021 by electronic mail.



Mary K. Sahs

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

DOBBIN PLANTERSVILLE
 WATER SUPPLY CORPORATION,
 a Texas water supply corporation,

Plaintiff,

vs.

PETER LAKE, WILL MCADAMS,
 and LORI COBOS, in their official
 capacities as Commissioners of the
 PUBLIC UTILITY COMMISSION OF TEXAS;
 THOMAS GLEESON, in his official capacity
 as Executive Director of the PUBLIC UTILITY
 COMMISSION OF TEXAS; SIG MAGNOLIA LP,
 a Texas limited partnership, and
 REDBIRD DEVELOPMENT, LLC
 a Texas limited liability company,

Defendants.

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Civil Action No.: 1-21-cv-00612

Jury Trial Demanded

PLAINTIFF'S ORIGINAL COMPLAINT

COMES NOW Dobbin Plantersville Water Supply Corporation (“DP”), and for its Original Complaint against Defendants Peter Lake, Will McAdams and Lori Cobos, in their official capacities as Commissioners of the Public Utility Commission of Texas (“Commissioners”); Thomas Gleeson, in his official capacity as Executive Director of the Public Utility Commission of Texas (“Gleeson”); SIG Magnolia LP, a Texas limited partnership (“SIG”); and Redbird Development, LLC, a Texas limited liability company (“Redbird”), respectfully states and alleges as follows:

EXHIBIT A

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 continue to occur, in this judicial district.

PARTIES

3. DP is a Texas water supply corporation formed pursuant to Texas Water Code Chapter 67. DP furnishes water service to areas in Montgomery County and parts of Grimes County, Texas. DP is an “association” as that term is used in 7 U.S.C. § 1926(a). DP is indebted on two loans made by the United States Department of Agriculture (“USDA”) that qualify DP for the protections afforded by § 1926(b). DP holds the federal right to be the exclusive water service provider within any area for which DP has the legal right to provide water service and has provided or has made water service available (can provide water service within a reasonable period of time), which includes the land described in the Decertification Petitions referenced below. *See Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 465 (5th

Cir. 2020) (“We hold that a utility 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.”).

DP moves the District Court to take judicial notice of the Decertification Petitions pursuant to Federal Rule of Evidence 201, and all other matters filed in said actions pending before the Public Utility Commission of Texas in Dockets 51979¹ and 52090.²

4. 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 implementing state laws relating to the use and conservation of natural resources, environmental protection, and water service. The Commissioners may be served with process by serving each at the William B. Travis Building, 1701 N. Congress Ave. 7th Floor, Austin, TX 78701.

5. Defendant Gleeson, in his official capacity as Executive Director of the PUC, is named as a Defendant solely with respect to his official capacity as Executive Director of the PUC. Gleeson may be served with process at the William B. Travis Building, 1701 N. Congress Ave. 7th Floor, Austin, TX 78701.

¹ *Petition by Sig Magnolia LP for Expedited Release from Water CCN No. 11052 Held by Dobbin Plantersville Water Supply Corporation*, Docket No. 51979 (Tex. Pub. Util. Comm’n April 5, 2021).

² *Petition by Redbird Development, LLC for Expedited Release from Water CCN No. 11052 Held by Dobbin Plantersville Water Supply Corporation*, Docket No. 52090 (Tex. Pub. Util. Comm’n May 6, 2021).

6. Defendant SIG is a Texas limited partnership, authorized to conduct business in the State of Texas. SIG may be served with process on its registered service agent: Daniel K. Signorelli, 1400 Woodloch Forest Dr., Suite 200, The Woodlands, TX 77380 USA.

7. Defendant Redbird is a Texas limited liability company. Redbird may be served with process on its registered service agent: Ronnie Matthews, 5910 FM 2920, Suite C, Spring, TX 77388 USA.

DEFENDANTS' VIOLATIONS OF § 1926(b)

8. The Commissioners routinely disregard the federal protections that § 1926(b) afford water districts. On March 27, 2019, judgment was entered against the Commissioners:

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.**

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). This ruling by the District Court

was later vacated and remanded by the Fifth Circuit for reconsideration in light of *Green Valley*. However, the reasoning and analysis in *Crystal Clear* remain persuasive.

The District Court entered the following Orders and Declarations in *Crystal Clear*:

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 I LLC*, 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, 2019 WL 243777 at *2 (emphasis added).

9. Prior to the District 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 report and recommendation to the District 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 Spec. Util. Dist. v. Walker*, No. 1:17-CV-254-LY, 2019 WL 2453777 (W.D. Tex. Mar. 27, 2019).

The Commissioners persistently disregard federal law and continue to ignore the protections afforded by § 1926(b) to qualifying associations including DP. Despite being adequately warned in *Crystal Clear*, the Commissioners continue disregarding federal law and continue to consider actions such as the Decertification Petitions that are preempted by § 1926(b) and void. Once the protections of § 1926(b) have attached, removal of territory from a USDA indebted water supply corporation is barred by § 1926(b) even if fair market value is paid for the territory sought to be released/decertified. See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816

F.2d 1057, 1060 (5th Cir. 1987) (“Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs.”); *see also Pittsburg Cty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 716 (10th Cir. 2004) (“There is thus preemption of any local or state law that purports to take away from an indebted rural water association any territory for which the association is entitled to invoke the protection of § 1926(b).”).

10. On April 5, 2021, Defendant SIG filed, pursuant to Tex. Water Code § 13.2541, its Petition with the PUC (Docket No. 51979) seeking a decertification (release) of property purportedly owned by Defendant SIG, which is situated within DP’s Certificate of Convenience and Necessity (“CCN”) No. 11052. SIG’s Petition to decertify/remove/release a part of DP’s CCN is a form of interference or taking prohibited by DP’s federal rights under § 1926(b) and is a violation of § 1926(b). SIG seeks to remove territory for which DP has made water service available; such removal would reduce the customer pool for DP within DP’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. .**

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

All land SIG seeks to decertify is situated within DP’s CCN 11052.

11. On May 6, 2021, Defendant Redbird filed, pursuant to Tex. Water Code § 13.2541, its Petition with the PUC (Docket No. 52090) seeking a decertification (release) from a part of DP's CCN 11052 of property purportedly owned by Defendant Redbird. Redbird's Petition to decertify/remove/release a part of DP's CCN is a form of interference or taking prohibited by DP's federal rights under § 1926(b) and is a violation of § 1926(b) because Redbird is seeking to remove territory for which DP has made water service available in accord with *Green Valley*, and by so doing, would reduce the customer pool for DP within DP's protected service area. *City of Eudora*, 659 F.3d at 985.

12. Defendants SIG and Redbird knew or should have known that the Texas statutes that their respective Petitions for Decertification depend on are unconstitutional and void, because they are preempted by § 1926(b).

13. Defendants Commissioners and Gleeson knew or should have known that petitions for decertification filed with the PUC pursuant to Tex. Water Code § 13.2541 against an entity such as DP, that is entitled to the protections of § 1926(b), are premised on Texas statutes that are void and unenforceable.

14. Despite clear notice sent to their counsel, the PUC Commissioners have failed to dismiss the SIG and Redbird Decertification Petitions, and the Commissioners are actively considering those Petitions in violation of § 1926(b).

15. DP is indebted on two loans made by the USDA. ("Loans"). These Loans qualify the borrower (DP) for § 1926(b) protection. Each loan is a "such loan" within the contemplation of § 1926(b). *See El Oso Water Supply Corp. v. City of Karnes City*,

Tex., No. SA-10-CA-0819-OLG, 2011 WL 9155609, at *5 (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-OG, 2012 WL 4747680 (W.D. Tex. Apr. 11, 2012) (“In affording a water utility the protection of § 1926(b), federal courts have identified three requirements that a water utility must establish: (1) that the utility is an ‘association’ within the meaning of § 1926; (2) that the utility has a qualifying federal loan outstanding; and (3) that the utility ‘provided or made [service] available’ to the disputed area..”).

16. The Decertification Petitions each admit that the property for which decertification is sought is within CCN 11052, granted to DP by the State of Texas.

17. DP is entitled to § 1926(b) protection because (1) DP is an association within the meaning of § 1926; (2) DP has the legal right and duty under CCN 11052 to provide water service to the properties described in the SIG and Redbird Decertification Petitions; (3) DP is indebted on two qualifying Loans made by the USDA; and (4) DP has “made service available” because of its nearby facilities/infrastructure maintained by DP (facilities on/within or immediately adjacent to the properties described in the Decertification Petitions) and DP’s physical ability to provide water service immediately or within a reasonable period of time to said properties. Specifically, DP has (1) adequate facilities to provide water service to the areas specified in the Decertification Petitions within a reasonable time after a request for service is made; and (2) the legal right to provide water service. *Green Valley Spec. Util. Dist.*, 969 F.3d at 477. DP has water facilities that are either

within or immediately adjacent to the SIG property sought to be decertified and DP has water facilities (pipeline and water treatment plant) within 700 feet of the Redbird property sought to be decertified.

18. DP's "territory" for which DP has the *legal right* and duty under its CCN 11052 to provide water service under Texas law, includes land identified in the Decertification Petitions. This legal right cannot be diminished or altered once DP becomes indebted on a loan made 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.** 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."

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) (internal citations omitted).

Defendants SIG and Redbird are attempting to diminish or alter DP's territory through their Decertification Petitions, all of which violates and is prohibited by § 1926(b).

19. Any doubts whether DP is entitled to the protections of § 1926(b) must be resolved in DP's favor. DP'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 913³ 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., 2011 WL 9155609, at *5.

Count 1

Violation of 42 U.S.C. § 1983 (and at Equity) – Commissioners and Gleeson

20. **DP 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.” *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) (quoting *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 322 (5th Cir. 2008)). *See also Green Valley* 969 F.3d at 471 (“And second, the Ex parte Young exception ‘permits

³ *North Alamo* has been overruled on other grounds by *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460 (5th Cir. 2020).

suits for prospective ... relief against state officials acting in violation of federal law.”).

21. DP incorporates all allegations above.

22. In order to state a cause of action under 42 U.S.C. § 1983, DP must allege only that some person has threatened to deprive or 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).

23. DP has a federal right under § 1926(b) to be protected from any curtailment or limitation of its right to sell water within DP’s territory.

24. Actions of the Commissioners and Gleeson constitute an attempt to deprive DP of its § 1926(b) federal rights.

25. The actions of the Commissioners and Gleeson are conducted under color of state law by virtue of their statutory power to decertify land situated within the boundaries of DP’s CCN for which DP has made water service available, as the term “made water service available” has been interpreted by the Fifth Circuit and other Federal Circuit Courts of Appeal, after DP became indebted on a loan which qualified DP for § 1926(b) protection.

26. DP suffered or is in immediate jeopardy of suffering loss and damage as a result of the wrongful acts of the Commissioners and Gleeson in connection with the Decertification Petitions.

27. DP is a proper party plaintiff for a claim presented under 42 U.S.C. § 1983, and the Defendants Commissioners and Gleeson are also proper parties,

despite the decision in *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976). *Birchfield* has been implicitly overruled by *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 475 (see footnote 26) (5th Cir. 2020). DP is enforcing its federal *statutory* rights here, not constitutional rights. *Birchfield* is also not applicable here because DP is a water supply corporation. In addition, even if *Birchfield* remains operative which DP denies, DP has a cause of action against the Commissioners and Gleeson in equity under § 1926(b). *Green Valley, supra* at 475. (“Ultimately, however, we need not decide whether to pull the PUC Officials back from the precipice. *Birchfield* stands as no obstacle to having this case proceed against the PUC Officials, because Green Valley has a cause of action against them at equity, regardless of whether it can invoke § 1983.”).

Count 2

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

28. **DP seeks only prospective injunctive relief against Gleeson.**

29. DP incorporates by reference all allegations above.

30. 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).

31. There exists an actual case or controversy between DP and all of the Defendants concerning the Commissioners or Gleeson’s authority to decertify (release) a portion of DP’s CCN, namely to remove the land described in the Decertification Petitions from DP’s territory (its CCN) to allow SIG and Redbird to

obtain water service from another competitive entity. Water sales by a neighboring municipality or other entity formed to provide water service to the land described in the Decertification Petitions is strictly prohibited by § 1926(b). The Decertification Petitions are directly prohibited and are contemplated/intended to negatively affect DP's rights under §1926(b) to be the exclusive water service provider to the land specified in the Decertification Petitions.

32. Section 1926(b) prohibits decertification (release or taking) of any portion of DP's CCN if the decertification would (1) function to limit or curtail the water service provided or made available by DP, (2) allow competition within DP's CCN, (3) function to impair the collateral pledged to secure the Loans, (4) deprive the USDA of its rights in the collateral, or (5) deprive the rights enjoyed by DP's customers. Decertification of DP's territory/CCN is prohibited under the Fifth Circuit's "bright-line" rule. *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d at 1059 (5th Cir. 1987). The threatened decertification violates DP's § 1926(b) rights and any order issued by the PUC or Commissioners shall null and void. DP is obligated to initiate this action to prevent violations of § 1926(b), pursuant to 7 C.F.R. § 1782.14(b).⁴

33. Texas Water Code Section Section 13.2541(d), previously numbered as 13.254 (a-6),) states : "The utility commission may not deny a petition based on the fact that a certificate holder is a borrower under a federal loan program." Tex. Water

⁴ "(b) Responsibility for initiating action in response to those actions prohibited by 7 U.S.C. 1926(b) rests with the borrower." 7 C.F.R. § 1782.14.

Code § 13.2541(d). This statutory language is void because it violates the Supremacy Clause. The Commissioners were parties to *Crystal Clear*, and were provided specific notice that the Commissioners had no choice but to recognize and obey federal law. *Crystal Clear*, 2019 WL 2453777 at *5.

34. Regardless of whether the Texas Water Code 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).

35. The Texas Water Code section 13.2541(d) is unconstitutional for the reason that it interferes with DP's rights under § 1926(b). Any action by the Commissioners or Gleeson to decertify or remove portions of DP's CCN would frustrate an important federal statutory scheme intended to promote rural development (7 U.S.C. § 1926) and to accomplish the congressional purposes of § 1926(b).⁵

36. Texas Water Code section 13.2541(d) upon which the Decertification Petitions are premised must be declared preempted, void, and unconstitutional

⁵ "This history indicates two congressional purposes behind § 1926: 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." *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d at 1060 (5th Cir. 1987) (emphasis added).

because this statute is in direct conflict with the purposes and objectives of § 1926(b). As a result, the Commissioners and Gleeson have no authority to act upon the Decertification Petitions relative to DP's territory or CCN, and SIG and Redbird have no lawful right to pursue their Decertification Petitions under a void statute.

37. DP has suffered damages in the form of legal expense associated with resisting the Decertification Petitions before the PUC in a sum not less than \$10,000. DP seeks damages solely against SIG and Redbird, and not against the Commissioners or Gleeson.

Count 3

Injunctive Relief – All Defendants

38. DP incorporates by reference all allegations above.

39. DP 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 – DP demands a jury trial as to all issues triable by jury.

PRAYER

DP prays the Court grant the following relief:

1. The Court enter a declaration that Texas Water Code section 13.2541(d) on which the Decertification Petitions rely is preempted to the same extent and in the same manner as described in *Crystal Clear*;

2. The Court enter a permanent injunction against Defendants SIG and Redbird from the further presentation or prosecution of the pending Decertification Petitions;

3. The Court enter a permanent prospective injunction against Defendant Commissioners and Defendant Gleeson from any further consideration, or granting relief under the Decertification Petitions, and if any relief is granted by these Defendants, permanently enjoining these Defendants from any enforcement of any order issued granting the Decertification Petitions or implementing action in furtherance of decertification;

4. The Court award damages, attorney fees, and costs of this action as may be permitted by federal law against Defendants SIG and Redbird only; and

5. The Court grant such other and additional relief to which DP demonstrates it is entitled.

Respectfully submitted,

ALLENSWORTH AND PORTER, L.L.P.

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By: /s/ Will W. Allensworth

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