CAUSE NO. CV45943

CITY OF SULPHUR SPRINGS, *Plaintiff*, v. LUMINANT MINING COMPANY, LLC; LUMINANT GENERATION COMPANY, LLC; VISTRA CORP., and MATTHEW GOERING *Defendant*.	§ § § § § § § § §	IN THE DISTRICT COURT 62ND JUDICIAL DISTRICT OF HOPKINS COUNTY, TEXAS

STATE OF TEXAS BRIEF IN AMICUS CURIAE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW The State of Texas, ("the State") and files this brief as Amicus Curia in support of Plaintiff City of Sulfur Springs' ("the City") Original Petition.

I. <u>INTRODUCTION</u>

Luminant Mining Company, LLC, Luminant Generation Company, LLC, and Vistra Corp., collectively referred to herein as the "Luminant Defendants," seek to extort a Texas home run municipality out of millions of dollars based on a clause inserted into a deed.

The Luminant Defendants were in the business of mining to produce energy before they went into bankruptcy in 2014 after several years of declining profitability. In an attempt to salvage some income, the Luminant Defendants signed a letter of intent ("LOI") to transfer almost 5,000 acres in Sulphur Springs (the "Tract") to the City. The LOI affirmed that the Luminant Defendants supported "reclamation activities and changes of land use that result in beneficial land use by the general public." *See Plaintiff's Original Petition* at Exhibit A.

The parties executed a Development Agreement and closed on November 22, 2019. The Development Agreement noted the City sought to "flexibly" develop the Tract to be "competitive in attracting industry and business. *See Plaintiff's Original Petition* at Exhibit B. The Development Agreement further noted that the City sought to reclaim the Tract for "agricultural and/or industrial and commercial standards." *Id.* The Luminant Defendants represented that they will not transfer the Tract "except as expressly stipulated in [the Development Agreement]." *Id.* No where in either the Development Agreement or the First Amended Development Agreement did the Luminant Defendants inform Sulphur Springs that it sought to encumber the Tract with a restrictive covenant. In fact, the Development Agreement stated *the exact opposite*: "Luminant Shall deliver a special warranty deed… conveying *fee simply* title to the [Tract], free and clear of any liens or other encumbrances, subject only to the Permitted Exceptions."[1] *Id.* The Development Agreement was supposed to run with the land and was meant to survive closing. *Id.*

At closing, the Luminant Defendants executed a gift deed for the Tract (the "Deed"). Despite the parties' negotiations and the express terms of the Development Agreement, the Luminant Defendants included an overbroad, perpetual restrictive covenant preventing the City from producing, generating, or storing commercial energy on the Tract:

> [Sulphur Springs] covenants that the [Tract] will not be sued for the commercial production, commercial generation or commercial storage of electricity in any form, nor will it be used for the siting of a commercial power station or energy storage facility of any kind. This covenant restricting any use of the [Tract] to commercially generate, produce or store electricity or to otherwise site a power station or energy storage facility, in any form or of any kind, shall be a covenant running with, touching, and encumbering the Property, binding upon the Grantee and all successors in interest or title, transferees, vendees, lessees, mortgagees, and assigns who are owners and/or users of the Property.

[1] The "Permitted Exceptions" were outlined just above the quoted language, and were limited to: a) The standard printed exception for standby fees, taxes, and assessments; b) Utility easements; c) All easements and restrictions of record, and any easements shown on the survey; d) Reservations or exceptions otherwise permitted by this Agreement or as may be approved by the City in writing; e) the standard printed exception as to discrepancies, conflicts, or shortages in area or boundary lines, encroachments or protrusions, or overlapping improvements; and f) The Permits, and any other encumbrances to the Land being held to satisfy Luminant's reclamation obligations.

This restriction contradicts the terms of the parties' arms-length transaction. The Deed and the Development Agreement are necessarily at odds.

After closing, the City annexed the Tract. The Luminant Defendants allowed the City to develop the land for several years and praised its efforts to bring industry to northeast Texas. The City expended valuable resources in collaboration with the Texas Railroad Commission, the US Army Corp of Engineers, and the Texas Department of Transportation to fulfill its obligations under the Development Agreement. The development efforts bore fruit, and the City entered into a contract with a private corporation to build data centers on the Tract. The State has previously voiced its commitment to bringing data centers such as these to Texas, and Sulphur Springs was the latest to bring that commitment to realization.[2] These data centers require tremendous amounts of power, and Sulphur Springs intended to construct a power plant on the site to provide power to the centers. However, the Luminant Defendants pulled the proverbial rug from underneath the City, blocking the build and demanding hundreds of millions of dollars to release the restriction—a restriction for which the City never contracted.

After looking into this deception further, the City found out that the Luminant Defendants included this clause into almost 150 deeds across eighteen different counties. Several other deeds transferred property to other government entities, including McLennan County, the Town of Sunnyvale, Rusk County, the Texas Parks & Wildlife Department, and Titus County.[3]

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[2] *See* Seth Bodine and Sydney Asher, DALLAS BUS. J., *Gov. Abbot: Texas poised for massive AI data center boom beyond $500B Stargate Project* (Sept. 24, 2024), https://www.bizjournals.com/dallas/news/2025/09/24/greg-abbott-stargate-investments-ai-datta-centers.html.

[3] The State requests the Court take judicial notice of the following duly recorded deeds: 2018030047, in the McLennon County Real Property Records; 2018030048, in the McLennon County Real Property Records; 2.0211E+12, in the Dallas County Real Property Records; #00244253, in the Rusk County Real Property Records; 24-1487, in the Mitchell County Real Property Records; 20251433, in the Titus County Real Property Records.

II. ARGUMENTS AND AUTHORITIES

The State files this Amicus brief in support of the City of Sulphur Springs. The decision to hear an amicus curia is wholly within the trial court's discretion. *Connor v. McCormick*, Cause No. 03-18-00813-CV, 2020 Tex. App. LEXIS 120 at * 14 (Tex. App.—Austin Jan. 9, 2020, pet. denied) (citing *Jackson v. Birk*, 84 S.W.2d 332, 332 (Tex. App.—Fort Worth 1935, no writ). A court may entertain suggestions from an amicus curia who makes suggestions to the court about questions apparent from the record in the case. *Id* (citations omitted). The State files this brief to support the City's claims that the restrictions are against public policy, are designed to govern state action, and seek to impermissibly enrich the Luminant Defendants to the tune of almost fifteen billion dollars.[4]

A. Contractual clauses, including restrictive covenants, that stifle governmental powers are void against public policy.

The restrictive covenant in the Deed should not be enforced as it is against public policy. Covenants restricting the free use of land are disfavored with courts. *Wilmoth v. Wilcox*, 734 S.W.2d 656, 657 (Tex. 1987). Restrictive covenants must be construed strictly against the party seeking enforcement. *Id. See also Reagan Nat'l Adver. of Austin v. Capital Outdoors,* 96 S.W.3d 490, 493 (Tex. App.—Austin 2002, pet. granted, judgmn't vacated w.r.m) ("Doubts about the meaning of a covenant should be resolved against the party seeking to enforce it and in favor of the unrestricted use of land"). Restrictive covenants are subject to the rules of contract construction. *Pilarcik v. Emmons*, 966 S.W.2d 474, 478 (Tex. 1998). This includes whether a contract is void against public policy. *See City of Corpus Christi v. Taylor*, 126 S.W.3d 712, 719 (Tex. App.—Corpus Christi 2004, pet. withdrawn). A contract is void against public policy when it is injurious to the interest of the public or contravenes an interest

[4] Based on the Luminant Defendants representations, each deed has a similar restriction. If each restriction is worth $100,000,000.00 to the Luminant Defendants, than the total value of these restrictions is estimated $15 billion. These restrictions were not listed on the Luminant Defendants bankruptcy filings.

of society. *Inland Container Corp. v. Atlantic C.L.R. Co.*, 266 F.2d 857, 861 (5th Cir. 1959). Courts will look at state statute and judicial decisions to determine public policy. *Stubbs v. Ortega*, 977 S.W.2d 718, 722 (Tex. App.—Fort Worth 1998, pet. denied). Previous judicial decisions note that these types of restrictions are unenforceable against governmental entities, particularly when analyzing restrictive covenants that would prevent public works projects.

1. <u>Texas courts have viewed restrictive covenants against governmental entities with skepticism.</u>

A municipality may not enter into a contractual provision which limits its free exercise of governmental and police powers. *Taylor,* 126 S.W.3d at 719. The court in *Taylor* found a provision in a contract that did limit the free exercise of the City of Corpus Christi's governmental powers as void against public policy. *Id.* Similarly, restrictive covenants like the one in the Deed have been found to be unenforceable. *Wynne v. City of Houston,* 281 S.W. 544 (Tex.1926) ("the covenants in the dedication and in the deeds cannot be construed as intended to in any wise limit or affect the police power of the State acting through the city"); *Deep E. Tex. Regional Mental Health Mental Retardation Servs. v. Kinnear,* 877 S.W.2d 550, 560 (Tex. App.—Beaumont 1994, no writ) (holding restrictive covenants inapplicable when state institution was looking to construct a community home because the covenants must "yield to the exercise of the state's legitimate police power); *City of River Oaks v. Moore*, 272 S.W.2d 389, 392 (Tex. App.—Fort Worth 1954, writ ref'd n.r.e) (city had authority to use property in contravention of deed restrictions because they were "not binding on the state or subdivision thereof").

The Attorney General, interpreting *Wynne, Kinnear, Moore,* and others, has issued guidance to other state agencies facing restrictive covenants. Op. Tex. Att'y Gen. No. GA-0249 (2004), *available at* https://www.texasattorneygeneral.gov/opinions/greg-abbott/ga-0249. Texas Southern University ("TSU") purchased condemned property with the intention of building student housing. *Id.* The plat was in a subdivision, subject to multiple restrictive covenants. *Id.* TSU sought guidance from the Attorney General as to whether it was subject to said restrictions. *Id.* The opinion letter confirmed that TSU could not be held to the covenants. *Id.* The opinion has been cited as persuasive authority and in guidance to government attorneys across Texas. *See Westside Ventures, Ltd. v. Houston Community College System Distr., et al*, Cause No. 4:19-CV-02928, 2019 WL 13212910 (S.D. Tex. Sept. 13, 2019); Andrew Wipke & Jennifer Fox, *Deed it right: the essentials of deed drafting for Texas counties*, TEX. DISTRICT. & COUNTY ATT'Y ASS'N., (Jan.-Feb. 2025), https://www.tdcaa.com/journal/deed-it-right-the-essentials-of-deed-drafting-for-texas-counties/.

Much like the provisions in *Taylor, Wynne*, *Kinnear*, and *Moore*, the restriction at issue seeks to limit Sulphur Spring's government powers. It cannot bring lucrative business, jobs, and industry to Sulphur Springs—an industry that Texas is vehemently seeking to strengthen—because the Luminant Defendants seek to enforce a covert restrictive covenant or force Sulphur Springs to pay a hefty ransom. Government attorneys across the state have agreed for over two decades—restrictive covenants cannot be enforced against governmental entities.

Even further, Texas courts have been wary of contracts that would eliminate any sort of competition to build public works projects. *Flanders v. Wood*, 83 Tex. 277 (1892). In *Flanders*, the court examined an agreement between several architects who submitted competitive bids to construct a courthouse in Wilbarger County. *Id.* They agreed that, if one were to receive the bid, the others would return to other projects but still receive a third of the profits from the project. *Id.* While the contract at issue in *Flanders* was found not to have the effect of stifling competition, the *Flanders* court noted that a contract made "to prevent rivalry between parties in their bids for [a public works project] would be void against public policy." *Id.* Here, the covenant acts as a restriction on a public works project. The language prevents a government entity from producing, generating, or storing electricity. Power plants are considered government works. *See Duke Power Co. v. Greenwood County,* 91 F.2d 665, 674-75 (4th Cir. 1937) (the Administrator of Public Works, as created by the National Industrial Recovery Act can authorize the construction of municipal power plants).

Sulphur Springs entered into a good faith partnership with the Luminant Defendants with the understanding that Sulphur Springs was in the best position to develop the Tract. Now that the Tract has become profitable, the Luminant Defendants seek to take that away. The Court cannot allow such underhandedness and should find the restrictive covenant void against public policy.

B. The widespread use of these restrictive covenants is creating an illegal energy monopoly.

Sulphur Springs' Petition also asserts potential anticompetitive conduct by Luminant relating to deed restrictions. The Texas Free Enterprise and Antitrust Act of 1983 ("TFEAA") prohibits, among other things, contracts, combinations, or conspiracies in restraint of trade, as well as monopolization and attempted monopolization. Tex. Bus. & Com. Code §§ 15.05(a), (b). Specifically, Sulphur Springs asserts that the restrictive covenants Luminant has imposed, both on the land parcel in Sulphur Springs and on "hundreds" of parcels elsewhere in the State, harm competition for energy generation and, therefore, violate the TFEAA. Sulphur Springs further alleges that those restrictions are not reasonable in scope—indeed, the at-issue restriction appears to be perpetual. *See Plaintiff's Original Petition* at Exhibit B.

Texas, the Fifth Circuit, and courts elsewhere have recognized that similar restrictions can violate antitrust laws. *E.g.*, *Woods Exploration & Prod. Co. v. Alum. Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971) (monopoly power over oil-producing land in Appling Field); *Commonwealth of Kentucky v. Marathon Petroleum Co.*, 191 F. Supp. 3d 694, 702 (W.D. Ky. 2016) ("[T]he Court finds it to be plausible that deed restrictions on a significant number of retail locations would harm overall competition."); *see Marsh United States, Inc. v. Cook,* 354 S.W.3d 764, 771 (Tex. 2011) (discussing noncompetes generally).

Sulphur Springs has alleged a pattern of restricting land with the potential for energy generation, with the effect of harming competition for energy generation generally, which would necessarily have the impact of increasing costs for both Sulphur Springs and Texas consumers generally. Evaluating the competitive effects of Luminant's deed restrictions as well as the harm to

Texans generally is a fact-intensive matter that will require extensive discovery.[5] As such, early dismissal of this issue is inappropriate.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State respectfully requests the Court accept this brief in amicus and adopt its recommendations.

Respectfully submitted,

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[5] The Antitrust Division of the Office of the Texas Attorney General has opened an investigation into this question.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed via CM/ECF electronic filing on November 3, 2025, which will send electronic notice of filing to all parties in this matter.

/s/ Stephanie A. Criscione Houser /s/
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