

Control Number: 42963



Item Number: 12

Addendum StartPage: 0

House Bill (HB) 1600 and Senate Bill (SB) 567 83rd
Legislature, Regular Session, transferred the functions
relating to the economic regulation of water and sewer
utilities from the TCEQ to the PUC effective
September 1, 2014.

DYER & ASSOCIATES

Law Firm

3700 North Tenth Street, Suite 105
McAllen, Texas 78501

Sharon Almaguer

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May 31, 2002

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Ms. Holly Wise
Docket Clerk
SOAH
P. O. Box 13025
Austin, Texas 78711-3025

**Re: SOAH Docket No. 582-02-3005; TNRCC Docket No. 2002-0431-UCR;
Application of Lyford to Obtain a Water Certificate of Convenience and
Necessity in Willacy County, Texas; Application No. 33790-C**

Dear Ms. Castanuela and Ms. Wise:

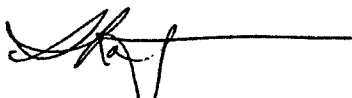
Enclosed for the TNRCC's files are the original and one (1) copy of the following pleadings:

North Alamo Water Supply Corporation's Motion to Dismiss for Lack of Jurisdiction;
North Alamo Water Supply Corporation's Brief to the Jurisdiction; and
Notice of Filing.

Please file the original among the papers of this cause and file stamp the copy and return in the envelope provided. Your assistance in this matter is appreciated.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,


Sharon Almaguer

enc.

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JUN 04 2002
TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION
UTILITIES AND DISTRICTS

12

SOAH DOCKET NO. 582-02-3005
TNRCC DOCKET NO. 2002-0431-UCR

APPLICATION OF THE CITY OF
LYFORD TO OBTAIN CCN IN
WILLACY COUNTY TEXAS;
APPLICATION NO. 33790-C

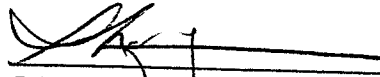
§ BEFORE THE
§ TEXAS NATURAL RESOURCE
§ CONSERVATION COMMISSION
§

NOTICE OF FILING

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

Please take notice that North Alamo Water Supply Corporation ("*North Alamo*") files the following **Affidavit of Charles Browning** with the Clerk for the State Office of Administrative Hearings in the above-referenced matters for inclusion with and to be attached to and made an integral part of **North Alamo Water Supply Corporation's Motion to Dismiss for Lack of Jurisdiction** which was filed with the Clerk for the State Office of Administrative Hearings on May 31, 2002.

Respectfully submitted,



J. W. Dyer
State Bar No. 06316020

Sharon Almaguer
State Bar No. 01108100

Evaristo Garcia, Jr.
State Bar No. 00798197

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ATTORNEYS FOR NORTH ALAMO
WATER SUPPLY CORPORATION

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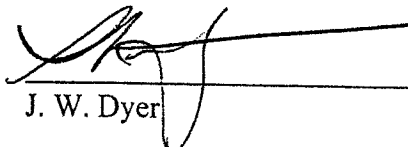
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Mr. Charles Browning
General Manager
North Alamo Water Supply Corporation
420 South Doolittle Road
Edinburg, Texas 78539



J. W. Dyer

SOAH DOCKET NO. 582-02-3005
TNRCC DOCKET NO. 2002-0431-UCR

APPLICATION OF THE CITY OF
LYFORD TO OBTAIN CCN IN
WILLACY COUNTY TEXAS;
APPLICATION NO. 33790-C

§ BEFORE THE
§
§ TEXAS NATURAL RESOURCE
§
§ CONSERVATION COMMISSION

THE STATE OF TEXAS §
§
COUNTY OF HIDALGO §

AFFIDAVIT OF CHARLES BROWNING

BEFORE ME, the undersigned authority, on this day personally appeared Charles Browning, who being by me duly sworn, upon his oath deposed and said as follows:

1. "My name is Charles Browning. I am over the age of twenty-one years, I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.
2. "North Alamo Water Supply Corporation is a non-profit water supply corporation, organized and operating under Article 1434a, TEX. REV. CIV. STAT., and the general provisions of the Texas Non-Profit Corporation, Act, Article 1396-1.01, et seq. North Alamo Water Supply Corporation ("*North Alamo*") is governed by an elected Board of Directors. The Board of Directors determines the policies of North Alamo, and I, in turn, implement these policies as General Manager. As General Manager, it is among my duties to supervise the application for government grants and loans for construction of North Alamo's water and sewer system and to oversee the administration of the use of the proceeds and repayment of the loans. I have served as General Manager of North Alamo Water Supply Corporation since March 28, 1998.

3. "North Alamo is in the business of supplying potable water service within an area of service defined by Texas Natural Resource Conservation Commission Certificate of Convenience and Necessity No. 10553 for water, a copy of which may be found in the official records of the Texas Natural Resource Conservation Commission.

4. "Included in my duties as General Manager for North Alamo is the responsibility to serve as custodian of the records of the Corporation. As custodian, I am familiar with the records of North Alamo.

5. "I am generally familiar with the matters involved in an application by the City of Lyford ("*Lyford*") to obtain a Certificate of Convenience and Necessity ("*CCN*") for areas within portions of CCN No. 10553 issued to North Alamo.

6. "My understanding is that CCN No. 10553 grants North Alamo the right to provide potable water service to every customer location within the area described in this CCN No. 10553 and further, that CCN No. 10553 requires North Alamo to provide such service. In reliance upon this certificated right and obligation, North Alamo has invested hundreds of thousands of dollars in capital improvements to provide water service to existing and future customer locations within the area described under CCN No. 10553.

7. "North Alamo has financed the construction and operation of its water system through a series of loans and grants from the United States Department of Agriculture -- Farmers Home Administration and its successor, Rural Economic Community Development ("*FmHA*"). These loans remain in force as of the date of this affidavit, and North Alamo continues to be obligated to repay the federal government under the terms and conditions of the loan instruments.

8. "The loan obligations of North Alamo to the FmHA total in excess of \$9,500,000.00 and monthly payments totaling \$70,411.00 are required under the terms of the loans. Under the terms of these loans, it is estimated that North Alamo Water Supply Corporation's indebtedness to the FmHA will not be satisfied prior to September 1, 2038.

9. "North Alamo makes its payments to the federal government out of system revenues. The system revenues are generated by rates and charges assessed to all customers of the North Alamo utility system. The entirety of the North Alamo water system facilities and the revenues generated from all of North Alamo's water utility customers are pledged to the eventual repayment of all debts owing the FmHA."

Further, Affiant sayeth not.

Charles Browning
Charles Browning, Affiant

21st day of May 2002, to certify which, witness my hand and seal of office.

Marie Trober-Canady
Notary Public - State of Texas

My Commission Expires:

Jul 11, 2003

SOAH DOCKET NO. 582-02-3005
TNRCC DOCKET NO. 2002-0431-UCR

APPLICATION OF THE CITY OF
LYFORD TO OBTAIN CCN IN
WILLACY COUNTY TEXAS;
APPLICATION NO. 33790-C

§ BEFORE THE
§
§ TEXAS NATURAL RESOURCE
§
§ CONSERVATION COMMISSION

**NORTH ALAMO WATER SUPPLY CORPORATION'S
MOTION TO DISMISS FOR LACK OF JURISDICTION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

North Alamo Water Supply Corporation ("*North Alamo*"), asks the State Office of Administrative Hearings for the Texas Natural Resource Conservation Commission to dismiss the above-entitled and numbered application of the City of Lyford ("*Lyford*") for lack of jurisdiction.

A. Introduction

1. The City of Lyford ("*Lyford*") has filed an application to obtain a Certificate of Convenience and Necessity ("*CCN*") for water and sewer and to decertify portions of CCN No. 10553 issued to North Alamo.

2. The Texas Natural Resource Conservation Commission ("*TNRCC*") lacks jurisdiction over Lyford's applications; and should, therefore, dismiss the applications.

B. Argument & Authorities

3. A plea to the jurisdiction is proper in this instance in that the applications show on their face that the TNRCC does not have subject matter jurisdiction. *See, e.g. Bybee v. Fireman's Fund Ins. Co.*, 331 S.W. 2d 910,917 (Tex. 1960). In this matter, it is clear from the application filed by Lyford that the TNRCC does not have jurisdiction because Lyford's application seeks to decertify portions of North Alamo's CCN service areas. North Alamo has financed the construction and operation of their retail water and wastewater systems through loans and grants secured by the

FmHA, as authorized under 7 U.S.C. § 1926(b). This federal debt remains in force and North Alamo continues to be obligated to repay the federal government. Therefore, Lyford is barred by federal law from pursuing its applications before the TNRCC to the extent said applications would result in decertification of North Alamo or would otherwise interfere with North Alamo's rights to provide retail water and/or sewer services. The jurisdiction of the TNRCC to grant or deny Lyford's application which includes any portion of North Alamo's CCN areas are preempted by 7 U.S.C. §1926(b), which limits the State's authority to curtail or limit the service provided by a utility during the term of repayment of a federal loan.

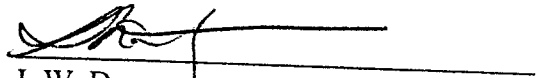
C. Conclusion

4. Because it is clear from the pleadings that the TNRCC does not have jurisdiction to hear Lyford's application, the application should be dismissed.

D. Prayer

5. For these reasons, North Alamo asks the TNRCC to dismiss Lyford's application to obtain a Certificate of Convenience and Necessity for water and sewer and to decertify portions of CCN No. 10553 issued to North Alamo.

Respectfully submitted,



J. W. Dyer
State Bar No. 06316020

Sharon Almaguer
State Bar No. 01108100

Evaristo Garcia, Jr.
State Bar No. 00798197

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**ATTORNEYS FOR NORTH ALAMO
WATER SUPPLY CORPORATION**

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing North Alamo Water Supply Corporation's Motion to Dismiss for Lack of Jurisdiction has been served on May 31, 2002, to the following in the manner indicated:

By depositing same in an official depository under the care and custody of the United States Postal Service, properly addressed and postage prepaid:

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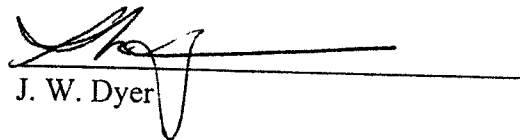
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J. W. Dyer

SOAH DOCKET NO. 582-02-3005
TNRCC DOCKET NO. 2002-0431-UCR

APPLICATION OF THE CITY OF LYFORD TO OBTAIN CCN IN WILLACY COUNTY TEXAS;
APPLICATION NO. 33790-C

§ BEFORE THE
§ TEXAS NATURAL RESOURCE
§ CONSERVATION COMMISSION
§

ORDER GRANTING NORTH ALAMO WATER SUPPLY CORPORATION'S MOTION TO DISMISS FOR LACK OF JURISDICTION

On the _____ day of _____, 2002, the Texas Natural Resource Conservation Commission considered North Alamo Water Supply Corporation's motion to dismiss for lack of jurisdiction. After considering the motion and applications on file, and after a hearing on the motion, the Commission:

GRANTS the motion and dismisses the City of Lyford's application to obtain Certificate of Convenience and Necessity and to decertify portions of CCN No. 10553 and 20645 issued to North Alamo.

SIGNED this _____ day of _____, 2002.

ADMINISTRATIVE LAW JUDGE

APPROVED AND ENTRY REQUESTED:

J. W. Dyer

SOAH DOCKET NO. 582-02-3005
TNRCC DOCKET NO. 2002-0431-UCR

APPLICATION OF THE CITY OF
LYFORD TO OBTAIN CCN IN
WILLACY COUNTY TEXAS;
APPLICATION NO. 33790-C

§ BEFORE THE
§
§ TEXAS NATURAL RESOURCE
§
§ CONSERVATION COMMISSION

NORTH ALAMO WATER SUPPLY
CORPORATION'S BRIEF ON JURISDICTION

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW, North Alamo Water Supply Corporation ("*North Alamo*") and files this its brief on the issue of the jurisdiction of the Texas Natural Resource Conservation Commission ("*TNRCC*") to grant or deny the application of the City of Lyford ("*Lyford*") to obtain a Certificate of Convenience and Necessity ("*CCN*") and to decertify portions of CCN No. 10553 issued to North Alamo.

North Alamo asserts that the TNRCC lacks jurisdiction over the application to decertify North Alamo from serving part of the areas they now serve and to certify this area to Lyford, and in support hereof shows the TNRCC as follows:

I.
BACKGROUND

North Alamo is a member-owned non-profit water supply corporation created under, and operating pursuant to, the provisions of article 1434a, TEX. REV. CIV. STAT. (West 1980, Vernon Supp. 1996). North Alamo was issued CCN No. 10533 for water.

North Alamo has financed the construction and operation of its retail water and wastewater systems through loans and grants secured by the FmHA, as authorized under 7 U.S.C. § 1926(b). This federal debt remains in force and North Alamo continues to be obligated to repay the federal

government. Therefore, the City of Lyford is barred by federal law from pursuing its applications before the TNRCC to the extent said applications would result in decertification of North Alamo or would otherwise interfere with North Alamo's rights to provide retail water services. The federal debt held by North Alamo operates as a bar, and Lyford is precluded under 7 U.S.C. § 1926(b) from taking any action antithetical to North Alamo's service rights. Lyford, through its application, is attempting to obtain authorization to provide water service to portions of North Alamo's certificated area and North Alamo's future customer base would be affected by any decertification of the proposed areas.

II. JURISDICTIONAL ARGUMENT

The Rural Development Insurance Fund, established under Section 309A of the Consolidated Farm and Rural Development Act, was established to provide low-interest loans to associations for rural development projects, including water and wastewater distribution and collection systems. Many non-profit water supply corporations have been financed by these loans from the United States Department of Agriculture -- Farmers Home Administration and its successor, Rural Economic Community Development ("*FmHA*").

Accordingly, federal courts have uniformly barred any state and local regulatory action because 7 U.S.C. § 1926(b) insulates non-profit water supply corporations indebted to the FmHA from any decertification or municipal encroachment upon their rights to provide water utility services. North Alamo Water Supply Corporation v. City of San Juan, Texas, 90 F. 3d 910 (5th Cir. 1996), *cert. denied* (U.S. Dec. 9, 1996) (No. 96-668). The language of the statute is clear and unambiguous. Title 7 U.S.C. § 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 an 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.

North Alamo, 90 F.3d at 915.

The, FmHA loan repayment can effectively be ensured only through extending the "guarantee . . . [of] a customer base" to a utility. The Fifth Circuit Court of Appeals made this clear, first in Bear Creek and subsequently in North Alamo, by thoroughly examining the legislative history behind 7 U.S.C. § 1926(b):

This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309. 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.

North Alamo, 90 F.3d at 916; Bear Creek, 816 F.2d at 1060.

It is only by fully extending the statutory protections provided by § 1926(b) to safeguard service rights both to existing and to future users (i.e., the "customer base") that "the cost per user is decreased and the [federal] loans are more secure". Id.; see also North Shelby Water Company

v. Shelbyville Municipal Water and Sewer Commission, 803 F. Supp. 15 (E.D. Ky. 1992).¹

In Glenpool Utility Services Districts v. Creek County Rural Water District No. 2, 861 F.2d 1211 (10th Cir. 1988), the Tenth Circuit Court of Appeals upheld the validity of 7 U.S.C § 1926(b) and prohibited water service competition with a water district by municipalities and other political subdivisions as long as the water district continued to hold federal debt, despite an Oklahoma state constitutional prohibition against grants of exclusive rights and privileges. The Glenpool court agreed "with the Fifth Circuit that section 1926(b) indicates a congressional mandate that local governments not encroach upon the services provided by [federally indebted water] associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means."

MUNICIPALITY IS BARRED

Any attempt by a municipality to extend retail water utility service is prohibited when the exercise would result in competition with a rural water utility holding federal debt. City utilities are therefore enjoined from any expansion of water services within the geographical confines or territory of such rural water utilities. North Alamo, 90 F.3d at 917. *See also*, Rural Water District No. 3 v. Owasso Utility Authority, 530 F. Supp. 818 (N.D. Okla. 1979). Title 7 U.S.C. § 1926(b) "... should be applied broadly to protect rural water associations indebted to FmHA from competition from expanding municipal systems." Jennings Water, Inc. v. City of North Vernon, Inc., 682 F. Supp. 421, 425 (S.D. Inc. 1988). Similarly, in Moore Bayou Water Association, Inc. v. Town of Jonestown, Mississippi, the federal court held that the applicability of 7 U.S.C. § 1926(b) is not conditioned on

¹ As the Fifth Circuit Court of Appeals noted, the legislative history of 7 U.S.C. § 1926(b) is clear that the protection against municipal encroachment is expressly designed to better secure financing for rural water supply systems thereby extending "to the community [the] benefits of a safe and adequate supply of running household water." North Alamo, 90 F.3d at 96; Bear Creek, 816 F.2d at 1060.

a finding that a given encroachment will significantly impair the association's ability to repay its FmHA loan; rather, it is only the threat of competition which triggers the bar. 628 F. Supp. 1367 (N.D. Miss. 1986).

In Jennings, the court emphasized that a state regulatory agency's findings cannot override the application of a federal statute. Jennings, supra, 682 F.2d at 425. Furthermore, like the courts in Bear Creek and Moore Bayou, the Jennings court would "... not read into the statute conditional language or exceptions that are not there."

The statute is unequivocal - it prohibits any curtailment or limitation of the service provided by a rural association by municipal expansion, and its applicability does not hinge on whether specific customers or areas were listed on or deleted from the loan forms or on the financial impact of the service decrease on the rural association.

Id.

Caselaw clearly holds that § 1926(b) should be broadly construed to prevent municipal encroachment on a nonprofit water supply corporation's service area. North Shelby Water Company v. Shelbyville Municipal Water and Sewer Commission, 803 F. Supp. 15, 21 (E.D. Ky. 1992).

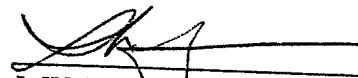
FMHA LOANS

North Alamo has obtained Rural Development Fund loans through the FmHA to finance the development and construction of their water distribution and wastewater facilities throughout their certificated areas. These loans have not been fully repaid and a significant outstanding balance remains owed by North Alamo.

**III.
CONCLUSION**

The jurisdiction of the TNRCC to grant or deny Lyford's application which include any portion of North Alamo's CCN area is preempted by 7 U.S.C. §1926(b), which limits the State's authority to curtail or limit the service provided by a utility during the term of repayment of a federal loan.

Respectfully submitted,



J. W. Dyer
State Bar No. 06316020

Sharon Almaguer
State Bar No. 01108100

Evaristo Garcia, Jr.
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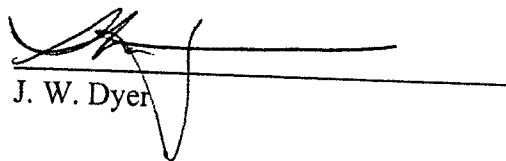
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420 South Doolittle Road
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J. W. Dyer