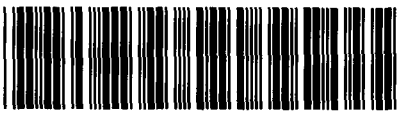

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APPLICATION OF CITY OF CIBOLO FOR SINGLE CERTIFICATION IN INCORPORATED AREA AND TO DECERTIFY PORTIONS OF GREEN VALLEY SPECIAL UTILITY DISTRICT SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GUADALUPE COUNTY	§ § § § § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

GREEN VALLEY'S SUPPLEMENTAL PLEA TO THE JURISDICTION, MOTION TO DISMISS, AND, IN THE ALTERNATIVE, MOTION TO ABATE

COMES NOW Green Valley Special Utility District ("Green Valley" or the "District") and files this Supplemental Plea to the Jurisdiction and Motion to Dismiss in this City of Cibolo ("Cibolo") TWC § 13.255 docket. In the alternative, Green Valley submits a renewed Motion to Abate. In support, Green Valley would show as follows.

I. BACKGROUND

In its June 30, 2016 Preliminary Order, the Commission addressed, *inter alia*, the following threshold issue:

> May the Commission deny a municipality's application seeking single certification under Texas Water Code (TWC) § 13.255 solely on the basis that a retail public utility that holds a CCN for all or part of the requested area is also a holder of a federal loan made under section 1926(a) of the Federal Consolidated Farm and Rural Development Act? In answering this issue, please address whether the Commission has authority to determine whether a federal statute preempts state law.[1]

The Commission determined in its Preliminary Order that, at that time, it did not have authority to determine whether federal law preempts the statutory scheme under Texas Water Code

[1] Preliminary Order (June 30, 2016) at 2.

§ 13.255.[2] Noting that "Green Valley is seeking a federal district court ruling on whether § 1926(b) of the Federal Consolidated Farm and Rural Development Act bars Cibolo from applying to this Commission for single certification to provide sewer service in a portion of Green Valley's service area", the Commission stated as follows:

> Unlike the Commission, that [federal court] forum has the authority to determine whether federal law preempts a statute enacted by the Legislature. Unless Cibolo withdraws its application here – *or a court orders otherwise* – the Commission must comply with the statutory duties and timelines mandated by the Legislature."[3]

Since the Commission's ruling, a number of events have transpired in the federal court proceeding referenced by the Commission in its Preliminary Order. Most notably, on August 2, 2017, the United States Court of Appeals for the Fifth Circuit issued an opinion reversing the United States District Court for the Western District of Texas's dismissal of Green Valley's federal complaint and remanding to the lower court for further proceedings consistent with the Fifth Circuit's decision.[4]

Green Valley anticipates that the District Court will grant Green Valley's requested declaratory and injunctive relief and thus prohibit Cibolo from further prosecution of its Application in this TWC § 13.255 proceeding and submits that dismissal is now appropriate. At the very least, prudence would dictate that this proceeding be abated while the federal proceedings are concluded.

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[2] *Id.* at 4.

[3] *Id.* (emphasis added).

[4] *Green Valley Special Util. Dist. v. City of Cibolo*, Cause No. 16-51282 in the United States Court of Appeals for the Fifth Circuit (Aug. 2, 2017). A copy of the Fifth Circuit's decision is attached hereto as **Exhibit A**.

II. SUPPLEMENTAL PLEA TO THE JURISDICTION AND MOTION TO DISMISS

In light of the Fifth Circuit's decision last week, Green Valley respectfully re-urges that this proceeding be dismissed for lack of jurisdiction. The Fifth Circuit decision confirms that Green Valley's federal indebtedness under a United States Department of Agriculture Rural Development loan renders Green Valley's CCN area "sacrosanct" and federally protected from municipal encroachment under 7 U.S.C. § 1926(b).[5]

Green Valley (1) is an "association" within the meaning of § 1926; (2) has a qualifying federal loan outstanding; and (3) has made service available to the disputed area sought by the City. In reaching its determination to reverse the lower court's dismissal of Green Valley's complaint, the Fifth Circuit noted that Cibolo did not dispute either that Green Valley was an association or that it had a qualifying federal loan,[6] thus satisfying the first two of the three prerequisites to § 1926 protection.[7] The Fifth Circuit's decision squarely addressed the third prong: whether Green Valley has made service available to the disputed area. On this issue, the Fifth Circuit decision has now specifically rejected Cibolo's theory that Green Valley is not protected by § 1926(b) because its loan was secured by and funded only Green Valley's water service and not its sewer service.[8] The Fifth Circuit held that a CCN holder's duty under Texas law to provide continuous and adequate service satisfies the third prong and that § 1926(b)

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[5] Green Valley incorporates herein by reference for all purposes its April 29, 2016 Plea to the Jurisdiction and Motion to Dismiss. Green Valley further incorporates herein by reference for all purposes in June 6, 2016 Initial Brief on Threshold Legal/Policy Issues and its June 14, 2016 Reply Brief on Threshold Legal/Policy Issues.

[6] **Exhibit A** at 3-4 (citing *North Alamo Water Supply Corp. v. City of San Juan*, 90 F3d 910, 915-916 (5th Cir. 1996) (per curiam)).

[7] *North Alamo*, 90 F.3d at 915-916.

[8] **Exhibit A** at 8 ("We decline the city's invitation to read adjectives into § 1926(b).").

protection is not limited to the specific service, *i.e.*, water or sewer service, funded by the federal loan.[9]

The Commission recognized in its Preliminary Order that dismissal would be appropriate if "a court orders otherwise."[10] Green Valley respectfully submits that the Fifth Circuit decision satisfies the Commission's pre-condition to dismissal and Cibolo's Application must now be dismissed for lack of jurisdiction. Green Valley no longer needs to ask the ALJ or Commission to make the decision that Green Valley is protected from Cibolo's encroachment by § 1926(b). Rather, the Fifth Circuit's decision now stands for this proposition. Green Valley merely asks that the ALJ and the Commission *follow* the law.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, states: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[11] There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress.[12] Further, the Tenth Circuit has held, "There is . . . 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)."[13]

Cibolo's Application is basically a request for this Commission to grant authority for and facilitate prohibited encroachment on Green Valley's certificated sewer service area, thwarting the federal § 1926(b) interests in financially secure associations. The Fifth Circuit's decision

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[9] *Id.* at 3, 7.

[10] Preliminary Order at 4.

[11] U.S. CONST. art. VI, cl. 2.

[12] *In re Grand Jury Proceedings*, 607 F. Supp. 2d at 806 (citing *Rose v. Arkansas State Police*, 479 U.S. 1, 4, 107 S. Ct. 334, 93 L. Ed 2d 183 (1986))

[13] *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 715-716 (10th Cir. 2004) (citations omitted).

rejecting the very argument Cibolo made in briefing in this proceeding renders the Commission's decision here an easy one. Moreover, the Texas Water Code explicitly recognizes federal supremacy where it provides that "[a] rule or order of the regulatory authority may not conflict with the rulings of any federal regulatory body."[14] Because the Fifth Circuit has now specifically found that § 1926(b) is applicable to Green Valley's provision of sewer service, the presiding ALJ and the Commission must follow federal law and dismiss Cibolo's application. This new decision should be viewed as sufficient to satisfy the federal "order" requirement set forth by the Commission earlier in this docket that § 1926(b) protection does in fact attach to the decertification property Cibolo seeks from Green Valley.[15]

III. MOTION TO ABATE IN THE ALTERNATIVE

While Green Valley anticipates the granting of its requested relief on remand to the federal district court, it acknowledges that the federal court proceeding resulting in the Fifth Circuit's August 2, 2017 decision has not yet resulted in a final order granting Green Valley's declarative and injunctive relief. Thus, in the alternative to its plea to the jurisdiction and motion to dismiss, Green Valley renews its request that this proceeding be abated pending final judgment in the federal district court proceeding. Any other approach at this juncture would result in a tremendous waste of resources for all involved and could quite possibly lead to further litigation involving the parties and the Commission.

While the Commission previously denied Green Valley's request to abate this docket pending resolution of the federal complaint,[16] the federal court proceedings were then at a very early stage. Moreover, the Commission's reliance in its Preliminary Order on its statutory

[14] TWC § 13.181(b).

[15] Preliminary Order (June 30, 2016) at 2-4.

[16] Order No. 5 Denying Motion to Abate and Establishing a Deadline (June 3, 2016).

mandate to follow the deadlines set forth in TWC § 13.255 as grounds for denying Green Valley's previous requests for relief[17] now rings somewhat hollow given that this proceeding was initiated by Cibolo in March 2016. The fact is that getting the type of federal court order the Commission contemplated earlier in this docket takes time. Green Valley has not stopped its efforts despite the Commission's decision to move this docket forward. Last week's decision bolsters Green Valley's position that Cibolo's application is unlawful as previously asserted. The presiding ALJ and Commission should not continue moving this docket toward a final order that would likely require unwinding to the detriment of all involved.

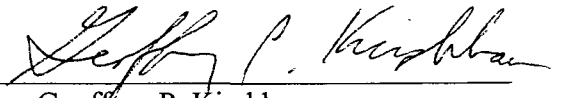
Given that no additional harm will inure to the parties, judicial economy would favor reconsideration of Green Valley's request to abate this docket if it is not dismissed in light of the changed circumstances presented by the Fifth Circuit's recent decision discussed herein. Abatement is particularly appropriate because the final decision in the federal court confirming that § 1926(b) preempts TWC § 13.255 will be binding not only on Green Valley and Cibolo, the parties to that litigation, but on the Commission and its officials.

IV. CONCLUSION AND PRAYER

Green Valley Special Utility District hereby respectfully moves: (1) that the proceeding be dismissed for lack of jurisdiction; (2) that, in the alternative, this proceeding be abated pending a final decision in the federal court proceeding described herein; and (3) for all other and further relief to which Green Valley is justly entitled at law or in equity.

[17] Preliminary Order at 4 ("...the Commission must comply with the statutory duties and timelines mandated by the Legislature.").

Respectfully submitted,

By: 

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ATTORNEYS FOR GREEN VALLEY SPECIAL UTILITY DISTRICT

CERTIFICATE OF SERVICE

I hereby CERTIFY that on August 9, 2017, a true and complete copy of the above was sent by the method indicated to counsel of record at the following addresses in accordance with P.U.C. PROC. R. 22.74:

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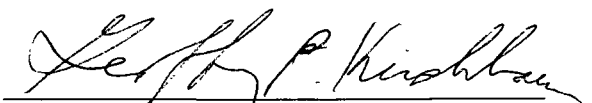

Geoffrey P. Kirshbaum

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-51282

United States Court of Appeals
Fifth Circuit
FILED
August 2, 2017
Lyle W. Cayce
Clerk

GREEN VALLEY SPECIAL UTILITY DISTRICT,

Plaintiff–Appellant,

versus

CITY OF CIBOLO, TEXAS,

Defendant–Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before HIGGINBOTHAM, SMITH, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Green Valley Special Utility District ("Green Valley") seeks an injunction, claiming that 7 U.S.C. § 1926(b) prohibits the City of Cibolo from encroaching on its sewer service. Because the district court's interpretation is inconsistent with the statute's plain language, we reverse and remand its dismissal of the complaint.

I.

The Public Utility Commission of Texas ("PUC") issues certificates of convenience and necessity ("CCNs"), which give holders the exclusive right to provide water or sewer service within particular service areas.[1] Green Valley is a special utility district[2] with a service area encompassing parts of Guadalupe, Comal, and Bexar Counties. Green Valley holds two CCNs: one for water service and one for sewer service. In 2003, Green Valley obtained a $584,000 loan from the United States to fund its water service. That loan, which remains outstanding, is secured by Green Valley's water utility revenues.

The city is a municipality located in Guadalupe and Bexar Counties. In March 2016, it applied for a CCN to provide sewer service to all of Cibolo, including portions within Green Valley's service area. Granting the application would require the PUC to strip Green Valley of the right to provide sewer service to those areas of Cibolo currently within Green Valley's service area. The application is for sewer service only; if granted, it would not disturb Green Valley's water service.

Section 1926 is the statute governing the U.S. Department of Agriculture's water and sewer utility loan program. Green Valley claims that the application violates § 1926(b), which prohibits municipalities from encroaching on services provided by utilities with outstanding loans:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to

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[1] *See* TEX. WATER CODE § 13.242(a) (setting forth the general requirement that utilities obtain CCNs before providing water or sewer service).

[2] *See id.* § 65.011 (providing for the creation of special utility districts).

> 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.

§ 1926(b).

In May 2016, Green Valley sued for injunctive and declaratory relief, alleging that § 1926(b) protects both its sewer and water service from municipal encroachment. The city moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), claiming that § 1926(b)'s protection extends only to services secured by an association's federal loan—in this case, only Green Valley's water service. The district court dismissed though rejecting the city's interpretation of the statute. It found that "§ 1926(b) protects only the service for which the loan was made—the funded service—regardless of what secures the loan." The court gave Green Valley an opportunity to amend its complaint to specify which of its services are funded by federal loan proceeds.

In August 2016, Green Valley filed an amended complaint in which it explained that the federal loan funded only its water service and elaborated on its earlier theories for why § 1926(b) should be interpreted to prohibit municipalities from encroaching on any services made available by federally indebted utilities. The city filed a second motion to dismiss, which the court granted.

II.

This is a tight question of statutory interpretation. Section 1926(b) prohibits the curtailment or limitation of "[t]he service provided or made available through any such association." § 1926(b). Where a CCN imposes a duty on a utility to provide a service, that utility has "provided or made available" that service under § 1926(b),[3] and both sides agree that Green Valley qualifies as

[3] *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915–16 (5th Cir. 1996) (per curiam).

an "association." The dispute is over the meaning of "service," which the statute does not define. Green Valley claims that § 1926(b)'s protection extends to any service made available by a federally indebted utility. The district court decided, to the contrary, that § 1926(b) applies only to services that are funded by federal loans. We have never considered a case with these facts, though we have held that § 1926(b) "should be liberally interpreted to protect [federally] indebted rural water associations from municipal encroachment."[4] The only circuit that has considered this issue found that § 1926(b) applies only to "the type of service financed by the qualifying federal loan."[5]

"When interpreting statutes, we begin with the plain language used by the drafters."[6] The plain language of § 1926(b) is dispositive.

The statute refers to "[t]he service provided or made available through any such association." The parties urge us to read "service" in one of the following three ways: (1) as a noun that refers to a combined water-and-sewer service; (2) as a noun that refers to a specific service—either a water service or a sewer service—made available by a federally indebted utility; or (3) as a noun that refers to a specific service made available by a federally indebted utility and financed through the federal loan program. Green Valley favors the first two readings; the city, the district court, and the Eighth Circuit adopt the third. The trouble with the third reading is that the statute does not include any language limiting "service" to those services that have received federal

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[4] *Id.* at 915.

[5] *See Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511, 520 (8th Cir. 2010). The court did not clarify what it meant by "financed," explaining that "we need not decide whether it is the type of service which provides the collateral for the loan or the type of service for which the loan was made that is entitled to protection." *See id.* at 520 n.9.

[6] *United States v. Uvalle-Patricio*, 478 F.3d 699, 703 (5th Cir. 2007) (quoting *United States v. Williams*, 400 F.3d 277, 281 n.2 (5th Cir. 2005)).

financing. The statute refers just to "[t]he service." *See* § 1926(b).

Under either of the first two readings, Green Valley wins. If "service" encompasses what Green Valley describes as its "integrated" water-and-sewer service, then § 1926(b) protects its sewer service from municipal encroachment.[7] If "service" refers to a specific service made available by a federally indebted utility, it must encompass Green Valley's sewer service, which is a "service provided or made available" by a federally indebted utility.

The city claims that Congress's use of the definite article "the" before "service," combined with the use of the singular form of the noun, implies that the statute is referring to a specific service—the service "provided or made available by the federal debt."[8] We disagree.

The presence of a definite article can affect a statute's meaning.[9] But, for two reasons, Congress's use of "the" in § 1926(b) is not decisive. First, it is consistent with "service" referring to an integrated water-and-sewer service. Second, if "service" refers to a specific service, it must be possible to read it as referring to more than one service. Otherwise, if an association received federal loans for both its water and sewer service, only one of them would be able to receive § 1926(b)'s protection. If "service" refers to a specific service but can be used iteratively, then both Green Valley's water and sewer service can be examples of "[t]he service made available through any such association." Thus, the use of "the" in § 1926(b) is consistent with all three readings of "service."

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[7] Green Valley notes that its water and sewer services share employees, a board of directors, a general manager, and an operating account.

[8] The city's claims track the Eighth Circuit's reasoning in *Public Water Supply*, 605 F.3d at 519–21.

[9] *See, e.g., Brooks v. Zabka*, 168 Colo. 265, 269 (1969) ("It is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'").

Congress used both "service" and "services" throughout § 1926. The city claims that if Congress wanted to safeguard all services made available by a federally indebted utility, it would have used "services," not "service," in § 1926(b). But though "each part or section of a statute should be construed in connection with every other part or section to produce a harmonious whole,"[10] it is not evident what conclusions we can draw from Congress's various uses of "service" and "services" in § 1926. The statute uses "service" seven times outside § 1926(b): three times as part of a proper noun,[11] twice as a verb ("service the loan"),[12] once as an apparently countable noun,[13] and once as an apparently uncountable noun.[14] The statute refers to "services" four times, but none of those references is obviously describing water or sewer services: The word is used twice to refer to broadband services,[15] once to refer to "small-scale extension services" for water and sewer projects,[16] and once to refer to "services . . . of local governments and local economic development organizations."[17] None of this sheds much light on the meaning of "service" in § 1926(b).

The city points out that § 1926(b) prohibits "the granting of any private franchise for *similar service* within such area during the term of such loan." § 1926(b) (emphasis added). It urges the court to read that prohibition in

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[10] *Uvalle-Patricio*, 478 F.3d at 703 (quoting *Williams*, 400 F.3d at 281 n.2).

[11] *See* 7 U.S.C. § 1926(a)(9) ("Public Health Service Act"); *id.* § 1926(a)(13) ("Soil Conservation Service"); *id.* § 1926(a)(22)(A)(ii) ("Rural Utilities Service").

[12] *See id.* § 1926(a)(24)(B)(i); *id.* § 1926(a)(24)(B)(ii).

[13] *See id.* § 1926(a)(20)(E) ("local broadband service").

[14] *See id.* § 1926(a)(4)(B) (defining "project" to "include facilities providing central service or facilities serving individual properties, or both.").

[15] *See id.* § 1926(a)(20)(E) (referring to "common carrier facilities and services" and "affordable broadband services").

[16] *See id.* § 1926(a)(2)(B)(i)(II).

[17] *See id.* § 1926(a)(23)(A).

tandem with the prohibition on municipal encroachment on federally indebted utilities' service areas. The city claims that "similar service" should be understood to refer to a similar variety of a specific service—that is, a water service is similar to another water service, and a sewer service is similar to another sewer service—and claims that the "similar service" requirement must apply to municipalities as well as to private entities. But that logic assumes that "service" refers to the federally financed service. If "service" refers to any service made available by a federally indebted utility, then "similar service" refers to any services that are similar to those provided by the utility.

Section 1926(b) has two purposes: "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations . . . by protecting them from the expansion of nearby cities and towns."[18] Green Valley's interpretation is consistent with those purposes. A utility that is protected from municipal encroachment will be able to achieve greater economies of scale, thereby decreasing its per-user costs, and will be less vulnerable to financial disruptions than would a utility that is not protected from municipal encroachment.

It is possible that Congress intended to limit § 1926(b)'s protection to services directly financed by a federal loan. Such a policy would provide federally indebted utilities with substantial benefits while, at the same time, allowing other service providers to compete with federally indebted utilities in the provision of non-federally financed services. But § 1926(b)'s plain language does not limit the statute's protection to services that have received federal financing.

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[18] *N. Alamo*, 90 F.3d at 915.

III.

We decline the city's invitation to read adjectives into § 1926(b). The judgment of dismissal is REVERSED and REMANDED.[19]

[19] Because both of the readings of "service" that Green Valley favors are consistent with the plain language of the statute, we do not decide which one to adopt.