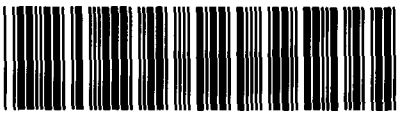

Control Number: 45702

Item Number: 151

Addendum StartPage: 0

SOAH DOCKET NO. 473-16-5296.WS
PUC DOCKET NO. 45702

APPLICATION OF CITY OF CIBOLO FOR SINGLE CERTIFICATION IN INCORPORATED AREA AND TO DECERTIFY PORTIONS OF GREEN VALLEY SPECIAL UTILITY DISTRICT'S SEWER CERTIFICATE OF CONVENIENCE AND NECESSITY IN GUADALUPE COUNTY	§ § § § § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

CITY OF CIBOLO'S RESPONSE TO
GREEN VALLEY SPECIAL UTILITY DISTRICT'S INTERIM APPEAL OF SOAH ORDER NO. 12

TO THE HONORABLE COMMISSIONERS OF THE PUBLIC UTILITY COMMISSION:

The City of Cibolo ("Cibolo") files its Response to the Interim Appeal of SOAH Order No. 12 ("Appeal") filed by Green Valley Special Utility District ("GVSUD"). The City supports the Administrative Law Judge's ("ALJ") Order No. 12, and opposes the Appeal of GVSUD, for the reasons provided herein, as follows:

I. INTRODUCTION

On March 8, 2016, Cibolo filed its application at the Public Utility Commission ("Commission") under Texas Water Code ("TWC") § 13.255 (the "Application") for single sewer certification over certain, specific tracts of land that are currently within Cibolo's corporate limits and that are also within the boundaries of GVSUD's sewer certificate of convenience and necessity ("CCN") No. 20973. On April 29, 2016, GVSUD filed a pleading in this matter, styled as a "Plea to Jurisdiction and Motion to Dismiss with Debt Listing," (the "Plea") arguing, *inter alia*, that Cibolo's Application must be dismissed for lack of jurisdiction because GVSUD holds a United States Department of Agriculture ("USDA")- Rural Development loan to finance its water system, and therefore Section 1926(b) of the Federal

Consolidated Farm and Rural Development Act bars municipal encroachment of Green Valley's sewer CCN.[1]

On May 27, 2016, the Commission requested briefing on the extent of protection under § 1926(b) and the Commission's jurisdiction to determine whether a federal statute preempts state law.[2] Specifically, the Commission sought briefing on the following issue:

> May the Commission deny a municipality's application seeking single certification under TWC § 13.255 solely on the basis that a retail public utility that holds a CCN for all or part of the requested service 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.[3]

After receiving briefing on this issue, the Commission determined in its June 30, 2016 Preliminary Order that it lacked the authority to determine whether federal law preempts the statutory scheme under TWC § 13.255, which mandates that the Commission *shall* grant single certification to a municipality applying for single certification under that provision.[4] Ultimately, the Commission stated:

> No party advocating dismissal or abatement of this proceeding cited to a decision—judicial or administrative—requiring the Commission to conduct its own inquiry and application of federal loan law in a Commission proceeding under TWC § 13.255. Moreover, the Commission has not been able to locate a provision within the Texas Water Code permitting the Commission to abdicate statutory duties regarding service-area certification based upon federal-preemption concerns. . . . Unlike the Commission, [the federal court] 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

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[1] GVSUD Plea to the Jurisdiction and Motion to Dismiss, at 2-3 (citing 7 U.S.C.A. § 1926(b)) (Apr. 29, 2016) (Docket Item 11).

[2] Order Requesting Briefing on Threshold Legal/Policy Issues, at 2 (May 27, 2016) (Docket Item 23).

[3] *Id.*

[4] Preliminary Order, at 3-4 (June 30, 2016) (Docket Item 53); TWC § 13.255(c) (emphasis added).

otherwise - the Commission must comply with the statutory duties and timelines mandated by the Legislature.[5]

Further, the Commission indicated that its decision "*regarding threshold legal and policy matters should be considered dispositive of those matters.*"[6]

Additionally, the Commission identified eight issues for this Application that should be referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing, and, naturally, ordered the decertification proceedings on such referred issues to commence at SOAH.[7] The Preliminary Order was supplemented by the Commission's Supplemental Order, which identified three additional issues for referral. At SOAH, the ALJ and parties agreed that the proceedings on the referred issues should be split into two phases: the first, to address what property, if any, of GVSUD will be rendered useless or valueless to GVSUD as a result of the decertification sought by Cibolo and related matters ("Phase One"); and the second, to address the other, simplistic remaining referred issues related to the Application, such as notice, compliance with the Texas Commission on Environmental Quality's public drinking water requirements, and administrative completeness ("Phase Two").[8]

On January 17, 2017, after a contested case hearing on the Phase One referred issues, the Commission adopted the ALJ's proposal for decision, determining that no GVSUD property would be rendered useless or valueless to GVSUD as a result of decertification and, thus, that GVSUD is not entitled to any compensation from Cibolo.[9]

Parallel to the continuation of the sewer CCN decertification proceedings on the Application at the Commission and SOAH, GVSUD, on May 27, 2016, filed a complaint in U.S.

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[5] Preliminary Order, at 4.

[6] *Id.* at 7 (emphasis added).

[7] *Id.* at 4.

[8] Supplemental Preliminary Order (July 20, 2016) (Docket Item 58).

[9] Interim Order (June 29, 2017) (Docket Item 140).

District Court for the Western District of Texas, seeking to enjoin Cibolo from obtaining single certification pursuant to TWC § 13.255.[10] The district court, however, granted Cibolo's Motion to Dismiss for failure to state a claim, holding that § 1926(b) protects only the service for which the loan was made (in this case, water service), whereas Cibolo is only seeking to decertify the wastewater CCN, which does not secure the water loan. GVSUD appealed the decision on the Motion to Dismiss to the U.S. Court of Appeals for the Fifth Circuit. On August 2, 2017, the Fifth Circuit issued an opinion interpreting the scope of the protection of § 1926(b), reversing the district court's dismissal of GVSUD's complaint and remanding the matter back to the district court for further proceedings on the merits.[11]

The Fifth Circuit opinion was issued just before the parties' pre-hearing conference at SOAH on Phase Two (the final phase) of the Application. At that time, prior to the pre-hearing conference, the parties had conferred and determined that Phase Two would not require another extended, prolonged contested case hearing; but rather that the remaining referred issues could be processed with briefing in approximately 30 days, resulting in a final determination in the decertification within a matter of two to three months.[12] On the day before the prehearing conference, GVSUD reasserted its Plea regarding the § 1926(b) issue, despite the Commission's prior, dispositive ruling, presumably in a last-ditch attempt to stall the inevitable sewer CCN decertification ("Supplemental Motion").[13]

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[10] Plaintiff's Original Complaint, *Green Valley Special Util. Dist. v. City of Cibolo*, 1:16-CV-00627 (Tex. App.—Austin, May 27, 2016).

[11] *Green Valley Special Util. Dist. v. City of Cibolo*, No. 16-51282 (5th Cir. Aug. 2, 2017) ("Fifth Circuit Opinion").

[12] SOAH Order No. 12 Memorializing Prehearing Conference; Denying Motion to Dismiss or Abate, Adopting Procedural Schedule; and Stating Record Close Date (August 14, 2017) (Docket Item 147) reflects the procedural schedule to which the parties agreed to finalize Phase Two.

[13] GVSUD's Supplemental Plea to the Jurisdiction, Motion to Dismiss, and, in the Alternative, Motion to Abate (August 9, 2017) (Docket Item 146).

At the August 10, 2017 pre-hearing conference at SOAH, the parties reached an agreed procedural schedule for Phase Two on the remaining referred issues, which merely includes the filing of agreed stipulations on most of the remaining issues and briefs on the non-stipulated issues. The ALJ memorialized those milestones and deadlines in her Order No. 12, with the record closing on September 22, 2017. Order No. 12 also memorializes the ALJ's denial of the Supplemental Motion,[14] and such decision is the basis of this Appeal. Cibolo's response to the Appeal is timely filed pursuant to 16 Tex. Admin. Code § 22.123(a)(4).

II. RESPONSE

A. The ALJ's denial of GVSUD's Supplemental Motion in Order No. 12 should be upheld by the Commission.

GVSUD's appeal of the SOAH ALJ's Order No. 12 in this matter denying the Supplemental Motion should be denied as well. The ALJ appropriately determined that the § 1926(b) claim has already been addressed by the Commission and was thus not referred to SOAH for a contested case hearing, limiting the ALJ's ability to rule on such a motion. Despite the fact that the Commission has already issued a dispositive order denying the Plea, GVSUD's Supplemental Motion is meritless. The Supplemental Motion not only recklessly urges the Commission to ignore the obvious fact that the Fifth Circuit decision is neither final nor non-appealable (and, in fact, this decision has been appealed by Cibolo), but it also overlooks the simple truth that it is a decision on a motion to dismiss, not a ruling on the merits of the entire case. The threshold condition under which the Commission has indicated it would again entertain the discussion about the § 1926(b) protection has not occurred, and, thus, the administration of Phase Two of this matter should not be delayed. GVSUD's assertions to the contrary are replete with mischaracterizations and fail to acknowledge—much less appreciate—the procedural

[14] *Id.*

nuance that precludes granting the Supplemental Motion. For the following reasons, the Supplemental Motion should be denied.

1. The substance of GVSUD's Supplemental Motion has already been addressed and appropriately denied by the Commission.

After extensive briefing that delayed the decertification proceeding for months in 2016, the Commission evaluated whether and to what extent § 1926(b) would preclude decertification of GVSUD's sewer CCN by Cibolo. The Commission determined that for both legal and policy reasons, the Commission, in processing a TWC § 13.255 application, should not and cannot make a determination that such law is pre-empted by a separate federal law (in this case, 7 U.S.C.A. § 1926).[15] A state agency has exclusive jurisdiction when the legislature has granted the agency with the sole authority to make an initial determination in a dispute.[16] The Texas Legislature only granted the Commission clear authority over the granting, amending, and decertifying of water and sewer CCNs through TWC Chapter 13, Subchapter G (in this case, TWC § 13.255); in enacting this protocol, the Legislature did not authorize or direct the Commission to deny an application if the CCN holder is merely a debtor under 7 U.S.C.A. § 1926.[17] Rather, as the Commission recognized in its Preliminary Order, the judicial branch is the correct entity to assess and determine whether a state law is preempted by a federal law.[18]

Accordingly, the Commission processed Cibolo's Application in accordance with the protocol established by the Legislature in TWC § 13.255 while allowing the courts to determine whether § 1926(b) preempted TWC § 13.255. That the court is the appropriate forum to determine whether the Commission may deny the Application on § 1926(b) grounds is reflected

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[15] Preliminary Order, at 4.

[16] *In re Entergy Corp.*, 142 S.W.3d 316, 321 (Tex. 2004).

[17] *See* TWC § 13.255.

[18] *Id.*

in the very language that GVSUD mischaracterizes in support of its Supplemental Motion: "Unlike the Commission, [the federal court] 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."[19] In short, the Commission has already determined that the Commission should not and cannot dismiss Cibolo's TWC § 13.255 Application based on the District's alleged federal claim, and making a determination on the question of whether TWC § 13.255 is preempted is not for the Commission, but rather for the Texas Legislature, in drafting the law, and the judicial branch, as to whether the law is in fact preempted.

The Commission has already ruled on the substance of the Supplemental Motion. In the event that the Commission intends to revisit this same issue, Cibolo incorporates the arguments from its May 19, June 6, and June 14, 2016 briefs in this matter. In any event, the Supplemental Motion is untimely and unnecessary, and it amounts to an abuse of the administrative process by asking the Commission to take action on a matter for which the Commission has already fully addressed.

2. Re-litigating the Supplemental Motion before the Commission is not justified as the circumstances since the Commission's initial denial of the Plea have not substantially changed and no court has ordered the Commission to make a determination on the 1926(b) claim.

Another one of the fundamental flaws in GVSUD's Supplemental Motion is that it mischaracterizes the circumstances under which the renewed Supplemental Motion was raised. GVSUD focuses exclusively on the language in the Commission's Preliminary Order indicating when the Commission might entertain the § 1926(b) argument, which could be when "a court

[19] Preliminary Order, at 4.

orders otherwise".[20] This assertion is a misrepresentation of the Preliminary Order. The Commission did not discuss whether or not dismissal was appropriate at all in that Order.[21] Rather, this quoted language is far less favorable to GVSUD than GVSUD's Supplemental Motion would suggest. The Preliminary Order only indicated that it would consider the § 1926(b) issue and whether federal law preempted TWC § 13.255 if a court ordered it to do so; the Commission knew not to delve into the § 1926(b) claim itself and whether dismissal would be appropriate.[22] In other words, the Commission said it would entertain the § 1926(b) claim if a court opined that the Commission has jurisdiction to do so.[23]

To this end, no court has ordered that the Commission must perform a federal preemption analysis. Contrary to GVSUD's misleading assertions, the Fifth Circuit opinion on Cibolo's Motion to Dismiss does not make this determination. The Fifth Circuit opinion is limited to discussing the scope of § 1926(b); it does not address the Commission's jurisdiction to determine whether § 1926(b) preempts TWC § 13.255. In fact, that question was not even before the Fifth Circuit, and thus remains unaddressed by the courts.[24] Therefore, the analysis underlying the Preliminary Order remains sound, despite GVSUD's legally unsupportable criticisms in the Supplemental Motion to the contrary.

Moreover, the Fifth Circuit opinion does not make a ruling on the merits of GVSUD's ability to use § 1926(b) to protect its sewer CCN.[25] GVSUD's urging of dismissal of the Application because "the Fifth Circuit has now made" the decision on whether GVSUD's sewer

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[20] Supplemental Motion, at 4 (citing Preliminary Order, at 4).

[21] *See* Preliminary Order.

[22] *Id.* at 4.

[23] *Id.*

[24] *See* Fifth Circuit Opinion, at 3.

[25] *See Id.*

CCN service area is protected from single certification by Cibolo,[26] is misplaced. Again, the opinion merely interprets the scope of § 1926(b) as a matter of law, denies the motion to dismiss, and remands the case back to the District Court for a hearing on the merits.[27] Thus, a decision has not been made on whether GVSUD can use § 1926(b) to protect its sewer CCN. Simply put, the merits of GVSUD's arguments in the Plea or Supplemental Motion were not resolved by the Fifth Circuit. As such, GVSUD's statements that "the Fifth Circuit has now determined that Green Valley's indebtedness under a federal rural development loan protects is CCN area from municipal encroachment under 7 U.S.C. § 1926(b)" and that "the federal preemption issue that the Commission sought to avoid earlier in this docket has been *de facto* decided" are nothing more than contrived mischaracterizations of the actual determinations made by the Fifth Circuit.[28] To be sure, the Fifth Circuit specifically remanded the case back to the District Court to fully evaluate these very statements after a full trial, subject to any further appeal of Cibolo's Motion to Dismiss the complaint as an initial matter (which again, has occurred and is ongoing).

A non-final, appealable decision on whether a complaint can be dismissed without discovery or a trial has no correlation to whether the Petitioner would prevail at trial. Even GVSUD's arguments to the contrary admit the pure speculation underlying those assertions.[29] However, the parties have yet to put on all evidence for all relevant considerations under § 1926(b), and there obviously can be no certainty on the outcome of the District Court proceedings at this time. Said another way, when GVSUD initially filed its Plea, the parties had

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[26] Supplemental Motion, at 4.

[27] Fifth Circuit Opinion, at 6-7.

[28] Supplemental Motion, at 6-7.

[29] *Id.* at 2 (indicating that GVSUD "anticipate[s] that the District Court will ultimately grant Green Valley's requested declaratory and injunctive relief", thus acknowledging that the merits of the case have not yet been addressed by the judiciary."); *id.* at 8 (indicating that GVSUD "acknowledges that its requested relief is not yet granted").

yet to put on their case in chief in the federal case, and that is still the situation today. And to consider this ruling on the Motion to Dismiss as a foregone conclusion that it will prevail at trial is mere puffing and wholly suspect at this juncture.

Therefore, the threshold that the Commission set for itself to take jurisdiction over and consider the § 1926(b) claim has not yet occurred, despite GVSUD's disingenuous insistence otherwise. In short, GVSUD is again asking the Commission to take the place of a federal court and take up jurisdiction where it has not clearly been authorized to do so. Moreover, GVSUD is asking the Commission to derail a SOAH proceeding that is nearing completion (with a key issue decided against GVSUD) on the basis of its Supplemental Motion that is clearly not yet ripe and may never be ripe for the Commission to consider. Therefore, the circumstances since the Commission's initial rejection of the § 1926(b) claim have not substantially changed and there has not been a court order directing the Commission to make a determination on the § 1926(b) claim, and thus re-litigating this matter before the Commission is not justified. For these additional reasons, the Supplemental Motion should be denied.

3. The Fifth Circuit opinion is not final and is appealable, and it has been appealed.

Regardless of the arguments in the Supplemental Motion, GVSUD's claim that the Supplemental Motion should be considered now based upon the recent opinion of the Fifth Circuit is also flawed because the Fifth Circuit opinion is not final and it is appealable. Although GVSUD acknowledges that the opinion is not yet final,[30] GVSUD recklessly fails to disclose the glaring fact that the opinion has, in fact, been appealed by Cibolo. On August 16, 2017, five days *before* GVSUD filed the Supplemental Motion, Cibolo filed a petition for rehearing en banc

[30] *Id.* at 8.

of the Fifth Circuit opinion.[31] Currently, a ruling on the motion is pending, which underscores just how uncertain it is that GVSUD will receive the relief it is seeking through the federal courts.

In any event, such certainty and finality could take years to achieve. In addition to the ongoing appeal, this case is currently ripe for the Supreme Court to grant certiorari as the Fifth Circuit's interpretation created a circuit split. The only other appellate court that addressed the scope of § 1926(b)—particularly whether its protections extended to services other than the service for which the indebtedness was undertaken—was the Eighth Circuit, which reached the opposite interpretation in a fact pattern identical to GVSUD's. In *Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.*,[32] a rural district claimed that, as a result of its USDA loan for sewer development, § 1926(b) entitled the district to be the exclusive sewer and water service provider for customers to whom the district has made service available but to whom a city was currently providing service.[33] The Eighth Circuit court viewed this argument as a question of first impression,[34] and ultimately refused to apply that district's expansive interpretation of § 1926(b):

> As before, we also look to "the whole statutory text, considering the purpose and context of the statute," Dolan, 546 U.S. at 486, 126 S.Ct. 1252, which in this case is "to encourage rural water development and to provide greater security for [USDA] loans." Sioux Center, 202 F.3d at 1038. While adopting the District's broad view of the scope of protection would undoubtedly benefit the District and other rural districts, it would not promote rural water development because other services a rural district might happen to provide are irrelevant to maintaining the necessary

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[31] Appellee's Petition for Rehearing En Banc, *Green Valley Special Util. Dist. v. City of Cibolo*, No. 16-51282 (5th Cir. Aug. 16, 2017). A copy of the petition is attached hereto as **Exhibit A**.

[32] 605 F.3d 511 (8th Cir. 2010).

[33] *Id.* at 514-15.

[34] *Id.*

> economies of scale to allow rural utility associations to remain viable and to keeping the per-user cost low for the service financed by the loan. See N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910, 915 (5th Cir.1996) (describing how Congress crafted § 1926(b) to address these issues). The District's position also is incompatible with the purpose of encouraging rural water development because expanding § 1926(b) to protect services unrelated to the qualifying federal loan would prohibit cities from providing other services to customers within a district's boundaries even when the city is perhaps better situated to do so, thereby forcing customers to remain with less desirable service providers. Turning to the second purpose, limiting the District's protection under the statute solely to the type of service being financed—sewer service in this instance—will not appreciably impact the security of the federal loan. The revenues from the District's sewer system secure the USDA loan; the District's water revenues are not collateral for the loan. The District's existing sewer customers and revenues remain protected under § 1926(b). In short, divorcing the type of service underlying a rural district's qualifying federal loan from the type of service that § 1926(b) protects would stretch the statute too far. Because we interpret "the service provided or made available" to be limited to the financed service, sewer service here, we affirm the grant of summary judgment to the City with respect to water customers within the District's boundaries.[35]

Ultimately, the Fifth Circuit opinion, if not overturned on rehearing en banc, creates a circuit split, increasing the likelihood that the Supreme Court would grant certiorari to resolve the split.

Therefore, the scope and applicability of § 1926(b) is far from decided, which is in sharp contrast to GVSUD's description of the status of the federal case. The knee-jerk reaction requested by GVSUD to a ruling that is not yet final, that has been appealed, and that if not overturned, is likely to be resolved by the Supreme Court, would be imprudent and unjustified. For the foregoing reasons, GVSUD's Supplemental Motion should be denied.

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[35] *Id.* at 520-21.

B. The ALJ's denial of GVSUD's Motion to Abate should be upheld by the Commission.

In its Supplemental Motion, GVSUD also requests, in the alternative, a Motion to Abate the proceeding at the Commission until the federal court case is final. In part, GVSUD bases this request on the fact that when abatement was first requested, the federal court case was at an early stage.[36] However, as described in the foregoing section, while the federal court case has progressed, it has only commenced the briefing on the Motion to Dismiss, which is still not final and has been appealed. In other words, a final and non-appealable decision on the entire case—after a trial—will likely be several years from now. Moreover, it is still uncertain whether the federal court case will result in the relief that GVSUD seeks, the grant of which is the only circumstance that may justify dismissing the Cibolo's Application. Because of this uncertainty, the threat of the Commission having to "unwind" its grant of single certification to Cibolo pursuant to TWC § 13.255 is speculative, at best.

It is clear that GVSUD urges the Commission to ignore the uncertainty that remains in the federal court case and the fact that a finality may not be reached for years to come in an effort to avoid a Commission decision that is adverse to GVSUD: the Phase One determination that no property of GVSUD is rendered useless or valueless as a result of decertification, and, thus, GVSUD is not entitled to compensation from Cibolo. Requesting abatement is nothing more than requesting that the Commission ignore Texas law that mandates that Cibolo shall be granted single certification (TWC § 13.255) and suspend jurisdiction on a matter that the Texas Legislature has clearly granted the Commission the authority to determine in favor of a federal court proceeding that the Commission may not ultimately be able to consider at all. Therefore, it is not in the interest of judicial economy to prolong this process for at least another year when

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[36] Supplemental Motion, at 9.

the Commission should be making a final determination on the Application within two to three months from today.

Despite the uncertainty in the outcome of the federal court case, GVSUD suggests that no significant progress has been made at the Commission on the decertification over the last 18 months and stating that "no discernible harm or prejudice to the parties" would result if Phase Two were stayed pending final resolution of the federal court proceedings.[37] This representation to the Commission is yet another instance of GVSUD's potentially damaging and material misstatements to the decision maker, and it is questionable as to whether it crosses the line of proper decorum in this proceeding. With this questionable pretext, GVSUD therefore asks the Commission to ignore the fact that the parties have been constantly engaged in this matter over the last 18 months, including having an entire contested case hearing that has been finalized through the Commission for Phase One and agreeing to a briefing schedule for Phase Two that would completely conclude the decertification within a matter of two to three months. Cibolo encourages and invites the Commission to revisit filed Items 46-150 on the Interchange to determine whether much has happened in just the past 15 months in this matter. Additionally, the Commission Staff has since made a recommendation on administrative completeness.[38] The time and resources that all parties, including the Commission, have invested in the decertification proceeding are absolutely discernible, and all would be harmed if those were disregarded so late in the game.

The Commission should refuse to acquiesce to GVSUD's unsubstantiated puffing on how the federal court case will ultimately be decided and to threats of additional litigation and deny

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[37] *Id.*

[38] Commission Staff's Recommendation on Administrative Completeness (August 24, 2017) (Docket Item 150).

the abatement request.[39] In fact, such threats demonstrate just how far GVSUD is willing to go to drag out the near complete decertification to avoid giving effect to a proper ruling of the Commission that is adverse to GVSUD: that no property of GVSUD will be rendered useless or valueless to GVSUD by Cibolo's decertification, and that GVSUD is not entitled to any compensation.

For these reasons, it is not in the interest of judicial economy to prolong this process at when we are within merely a few months of finalizing Phase Two of the decertification. As such, GVSUD's Motion to Abate should be denied.

III. CONCLUSION AND PRAYER

The City of Cibolo hereby respectfully requests: (1) that the Public Utility Commission uphold State Office of Administrative Hearings Order No. 12's denial of Green Valley Special Utility District's Plea to the Jurisdiction and Motion to Dismiss and enter an order denying the Plea and Motion; (2) that the Public Utility Commission uphold the State Office of Administrative Hearings Order No. 12's denial of Green Valley Special Utility District's Motion to Abate and enter an order denying said Motion; and (3) for all other and further relief to which Cibolo is justly entitled.

[39] Supplemental Motion, at 9.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF CIBOLO

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was transmitted by fax, hand-delivery and/or regular, first class mail on this 28th day of August, 2017 to the parties of record in accordance with 16 Texas Administrative Code § 22.74.

David J. Klein

No. 16-51282

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREEN VALLEY SPECIAL UTILITY DISTRICT,
Plaintiff - Appellant,

v.

CITY OF CIBOLO, TEXAS,
Defendant – Appellee,

On Appeal from the United States District Court
For the Western District of Texas, Austin Division
Case No. 1:16-cv-00627-SS
Honorable Sam Sparks

APPELLEE'S PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

5th Cir. R. 35.2.1

Fifth Circuit Court of Appeals Case No. 16-51282
Green Valley Special Utility Dist. v. City of Cibolo, Texas

The undersigned counsel of record certifies that the following persons and entities as described in Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Appellee: City of Cibolo, Texas	**Attorney for Appellee:** Lowell F. Denton DENTON NAVARRO ROCHA BERNAL & ZECH, P.C. San Antonio, Texas
Appellant: Green Valley Special Utility District	**Attorneys for Appellant:** G. Alan Waldrop Paul M. Terrill, III Ryan D. V. Greene TERRILL & WALDROP Austin, Texas Mark H. Zeppa LAW OFFICES OF MARK H. ZEPPA, PC Austin, Texas

DATED: August 16, 2017

/s/ Lowell F. Denton
Lowell F. Denton
Attorney of Record for Appellee

STATEMENT REGARDING EN BANC REVIEW
5th Cir. R. 35.2.2

The question presented by this Petition satisfies the criteria of Federal Rule of Appellate Procedure 35(b)(1). FED. R. APP. P. 35(b)(1); *see also* 5TH CIR. L. R. 35.1. Specifically, this proceeding involves a question of exceptional importance for several reasons, not the least of which is that "it involves an issue on which the Panel decision conflicts" with the decision of the Eighth Circuit Court of Appeals. *See Public Water Supply Dist. No. 3. v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2010); *see also* FED. R. APP. P. 35(b)(1)(B). The Panel itself acknowledged that its holding diverged from the Eighth Circuit's construction of the statute at issue, 7 U.S.C. § 1926(b). *Green Valley Special Util. Dist. v. City of Cibolo, Tex.*, ___ F.3d ___, No. 16-51282 at 4 (5th Cir., Aug. 2, 2017) ["Slip Op."].

The Eighth Circuit held that the protections of § 1926(b) do not extend to services that are neither financed by nor guarantee the federal loan permitted by § 1926(a). *Public Water Supply*, 605 F.3d at 521. Congress later confirmed this interpretation by amending § 1926, with no changes to subsection b. The Panel, however, broke from the reasoning employed by the only other Federal Appellate Court to have construed § 1926(b), disregarded canons of statutory construction, overlooked the presumption that the Eighth Circuit correctly interpreted subsection b, and held that the section's protections extend to *any* service provided by a utility

association who obtains such a loan, not just the service financed by it. (Slip Op. at 7).

The Panel admittedly addressed an issue of first impression in this Circuit and acknowledged that the case presented a "tight question" of statutory construction. (Slip Op. at 3). The Court has previously granted en banc rehearing to address federal questions of first impression. *See, e.g., New Orleans Depot Servs., Inc. v. Director, Officer of Worker's Compensation Programs*, 718 F.3d 384 (5th Cir. 2013). It should do so here, especially where the Panel diverged from the Eighth Circuit's holding, ignored the Court's admonition to construe a provision's text in the context of the statute as a whole on an admittedly close question. *See, e.g., United States v. Marshall*, 798 F.3d 296, 308-09 (5th Cir. 2015). In addition, the Panel failed to consider the presumption that the Eighth Circuit correctly interpreted the statute, based on subsequent Congressional amendment.

Without the intervention of the full Court, this Opinion will remain the law in this Circuit unless and until the Supreme Court intervenes to resolve the conflict. *See Jacobs v. National Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). In the meantime, utility associations in Texas, Louisiana, and Mississippi will enjoy a monopoly with respect to services that no federal loan funded and that do not guarantee repayment of that loan. That is not what Congress intended.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

Federal Regulations

Other Authorities

ISSUE MERITING EN BANC CONSIDERATION

The anti-competitive protections contained in 7 U.S.C. § 1926(b) extend expressly and only to "*the* service" provided or made available by the association who obtains a loan under the terms of § 1926 (a). Congress placed those protections within the larger statutory context of federally-guaranteed loans for such services, and they exist only when an association procures such a loan. Given that courts must construe a provision's plain language in the context of the statute as a whole and apply the presumption that Congress is aware of court decisions construing statutes, did the Panel err in: (1) rejecting Congress' intent; (2) dismissing the Eighth Circuit's holding that the protections in § 1926(b) cover only those services that are funded by or guarantee repayment of the federal loan; (3) overlooking the fact that Congress amended § 1926 after the Eighth Circuit's holding, leaving subsection b intact; and (4) extending those protections beyond the framework of § 1926 to any and all services provided by or made available by an association, so long as an association has such an outstanding loan?

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Plaintiff-Appellant Green Valley Special Utility District ("GVSUD") filed its Original Complaint against Defendant-Appellee City of Cibolo, Texas ("Cibolo" or "City") alleging Cibolo is attempting to illegally provide wastewater service to customers within GVSUD's certificated district. (ROA 60-61). GVSUD has a loan

to fund its water service from the United States Department of Agriculture ("USDA") under 7 U.S.C § 1926, which is secured by revenues from that same water service (ROA 60). However, there is no federal loan associated with GVSUD's wastewater service. (ROA 60, 687-69).

During the proceeding below, Cibolo filed a Motion to Dismiss For Failure to State a Claim under Rule 12(b)(6) claiming GVSUD failed to allege that it was providing a service covered by a USDA loan. (ROA 14). The district court granted Cibolo's Motion. (ROA 49). The district court then allowed GVSUD to amend its Original Complaint to allege which service—water or wastewater—was funded by the USDA loan. (ROA 49).

GVSUD then filed its First Amended Complaint, specifying that only its water service was funded by the USDA loan. (ROA 60). Cibolo filed its Second Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6) asserting that since GVSUD's USDA loan did not fund its wastewater service, the wastewater service is not protected by § 1926(b). (ROA 67-69). The district court granted Cibolo's Second Motion and dismissed GVSUD's claims. (ROA 117).

GVSUD appealed, (ROA 118), and the case was briefed and argued to the Panel. In its briefing. Cibolo argued § 1926(b)'s protections are limited to the service funded by the USDA loan. GVSUD, on the other hand, argued that the

statute's protections apply to any of its services, not just the service funded by the USDA loan.

The Panel ignored the presumptively correct statutory interpretation by the Eight Circuit and failed to apply proper statutory construction principles.

STATEMENT OF FACTS

GVSUD is a special utility district created pursuant to Texas Water Code Chapter 65. (ROA.62). Cibolo is a suburban City Northeast of San Antonio, near U.S. Interstate Highway 35. Cibolo is a home-rule municipal corporation organized in accordance with Texas law. (ROA.62). GVSUD's boundaries fall within portions of Cibolo, and within the Texas counties of Guadalupe, Comal, and Bexar.

At the time of suit, GVSUD possessed *two distinct* state issued Certificates of Convenience and Necessity ("CCN"). (ROA.63). CCN No. 10646 is applicable to its ***water*** utility service area and CCN No. 20973 is applicable to its ***wastewater*** utility service area. (ROA.63).

On March 8, 2016, Cibolo filed an application with the Public Utility Commission of Texas ("PUCT") for single certification as the wastewater service provider for an area within its City limits, which overlaps a portion of GVSUD's *wastewater* utility service area, and sought to decertify GVSUD as the wastewater utility service provider. (ROA.63-64). Cibolo's application is specifically limited to wastewater only and does not disturb or touch upon GVSUD's water utility

service. (ROA 59-60). GVSUD's water utility service, water utility service area as certificated in CCN No. 10646, and any federal debt connected thereto, is simply not legally relevant to or connected with this wastewater utility matter. (ROA 68-69).

In 2003, thirteen years prior to this dispute, GVSUD obtained and used loan proceeds from the United States Department of Agriculture, Rural Development ("USDA") to invest in *water utility* infrastructure to serve water utility customers. (ROA.63). Such service results in water utility revenue, and the loan proceeds were secured by water utility revenue only. No pleading claims that the loan or the debt, by its stated terms, is tied to any wastewater facilities, service, or revenues.

In May 2016, GVSUD filed this suit seeking injunctive and declaratory relief asserting that Cibolo's application to the PUCT violated 7 U.S.C. § 1926(b). (ROA.5). The district court dismissed GVSUD's First Amended Complaint in response to Cibolo's Motion to Dismiss. (ROA 117). However, the Panel reversed and remanded the district court's judgement of dismissal. Cibolo now brings this Petition for Rehearing En Banc.

ARGUMENT AND AUTHORITIES

I. En Banc Rehearing is Necessary to Address and Resolve the Circuit Split Created by the Panel Decision.

With the Panel's ruling, there is now a conflict regarding the interpretation of the phrase "the service provided or made available" in 7 U.S.C. § 1926(b) between

this Court and the Eighth Circuit. The Panel however, should have never created a split. It did not adhere to the canons of statutory interpretation, especially in a matter of admittedly "tight construction." It did not apply the presumption; that the Eighth Circuit correctly construed the statute and it did not understand the sole purpose of subsection (b)—to protect services financed or guaranteed by a federal loan. The En Banc Court needs to properly interpret § 1926(b), understanding its purpose, applying the canons of statutory construction and knowing that Congress accepted the Eighth Circuit's interpretation of it in this exact context.

A. Governing Principles of Statutory Construction Require Adherence to Plain Language in Context.

"When interpreting statutes, [courts] begin with the plain language used by the drafters." *United States v. Uvalle-Patricio*, 478 F.3d 699, 703 (5th Cir. 2007) (internal quotation marks and citation omitted). The plain language of the statute controls. *In re Universal Seismic Assocs.*, 288 F.3d 205, 207-08 (5th Cir. 2002). Courts "do not . . . construe statutory phrases in isolation; [they] read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984). Indeed, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989).

Section 1926(b) states:

> 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 bases of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). Unfortunately, the statute does not define the term or words "the service," but it does connect it to the "term of such loan." This key reason, in conjunction with other principles of statutory construction, show that the Eighth Circuit's decision is correct.

In its analysis of the statute, the Eighth Circuit concluded that § 1926(b)'s "isolated use of the term "service," without explanation, provides little insight into the interpretative question before [the court]." *Public Water Supply Dist. No. 3. v. City of Lebanon*, 605 F.3d 511, 520 (8th Cir. 2010). But that Court coupled its analysis of the "the service" with the context of loan funding, and the overall statutory purpose. It recognized the balance involving cities and federally financed rural water associations in its opinion.

The Panel, in focusing on 1926(b) text, sacrificed the statutes' larger context. In doing so, it broke from the reasoning and the holding of the only other Appellate

Court to have confronted the construction issue presented in this context. It also ignored subsequent Congressional history.

B. In *Pub. Water Supply*, the Eight Circuit Properly held the § 1926(b)'s Protections are Limited to the Service (or Services) Funded by a Federal Loan.

In *Public Water Supply* the Court focused on the singularity and plurality of the words "service" and "services" in § 1926(b). It recognized that Congress employed both the terms "service" and "services" § 1926(a). In doing so, the Eighth Circuit determined that Congress distinguished between a single "service" and multiple types of "services." *Pub. Water Supply*, 605 F.3d 511, 520. However, that opinion ties the service to the loan, which is the proper statutory reading.

The Panel opinion notes that the singularity of the term "service" in § 1926(b) is not determinative, because its protections should apply to more than one service if an association has more than one service financed or guaranteed by a federal loan. (Slip Op. at 5). Cibolo agrees with that construction, but it does not dictate the result that multiple services are protected from competition, when there is no "loan." When there is no loan. That would make the integral reference to the "term of the loan" meaningless. The restrictive article "the" limits the meaning of the term "service" to the service funded or guaranteed by a federal loan.

1. Again, the Context is Key.

The reason § 1926(b) exists is to protect federal loans. Congress added § 1926(b) to § 1926 "to assist in protecting the territory served by such an association against *competitive facilities.*" S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 2243, 2309 (emphasis added). Without a § 1926 federal loan, there is no reason for § 1926(b)'s protection.

The statutory context supports the conclusion that Congress intended § 1926(b)'s protection to apply to a specific kind of service—the service related to the federal debt. Section 1926(b) protects associations from two distinct activities: "(1) the inclusion of the area served by such association within the boundaries of any municipal corporation or other public body and (2) the granting of any private franchise for *similar service* within such area during the term of such loan." *See* 7 U.S.C. § 1926(b) (emphasis added). The use of "similar service" in the second prohibition establishes the protection extends only to the variety of service provided or made available by services funded by federal debt. It would be unharmonious and yield an absurd result if a different utility franchise, competing with the association protected under § 1926(b), could provide a *dissimilar service* in the service area, but a municipality could not do so within its own city limits.

2. The Definite Article Ties Service to the Loan.

Specifically, Congress limited the term "service" to the funded or guaranteed service (or services) by preceding it with the definite article "the." The exact language of the relevant phrase in § 1926(b) states "[t]he service provided or made available . . . ." 7 U.S.C. § 1926(b). By preceding the word "service" with the definite article "the," as opposed to the more general or broadening "a," "an," or "any," Congress made clear that it understood § 1926(b)'s protections to be limited to the specific kind of service provided or made available. *See Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("Because Congress used the definite article 'the,' we conclude that . . . there is only one order subject to the requirements."). Indeed, "[i]t 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.'" *See e.g., Warner-Lambert Corp. v. Apotex Corp.*, 316 F.3d 1348, 1356 (Fed. Cir. 2003) (reference to "the" use of a drug is reference to an FDA-approved use, not to "a" use or "any" use). Congress employed the definite article "the" to restrict the meaning of service to the service (or services) funded or guaranteed by a federal loan, not to broaden it.

3. The Regulations also Support this Construction.

The limited protection of § 1926(b) also is supported inferentially by USDA regulations.[1] One such regulation sets forth service area requirements and focuses on just the type of service funded by the federal loan. If any "inequities exist within the applicants service are for *the same type of service proposed* (i.e., water or waste disposal) such inequities will be remedied by the applicant prior to loan or grant approval or included as part of the project." 7 C.F.R. § 1780.11(b) (emphasis added). And another regulation explains that § 1926(b) was enacted to protect the utility service area of the association "from loss of users due to actions or activities of other entities in the service area of *the Agency financed system*." 7 C.F.R. § 1782.14(a) (emphasis added). The regulations focus only on the financed system. Any other service of an association is of no concern and should not fall within § 1926(b)'s protection.

C. The Eighth Circuit's Interpretation is Presumed Correct Because Congress Amended § 1926 after the Eighth Circuit's Holding, with no Change to Subsection (b).

Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute, when it reenacts that law without change. *Lorillard v. Pons*, 434 U.S. 575, 580, (1978).

[1] In *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir.1987), this Court relied on FMmHA regulations to inferentially support the Court's interpretation of § 1926(b). 816 F.2d at 1060 ("Our interpretation of § 1926(b) is also inferentially supported by FmHA regulations . . . .").

The Eighth Circuit issued its holding in *Public Water* Supply in 2010. In 2014, Congress amended § 1926. Pub. L. 113-79, Title VI, § 6001 to 6006, 6012(b), Feb. 7, 2014, 128 Stat. 841, 845. Congress, however, left subsection (b) intact. *See id.*

By not amending subsection b when it amended § 1926 in 2014, Congress is presumed to have adopted the Eighth Circuit's interpretation of § 1926(b). Based on Congress' approval of this interpretation, this Court should adopt the Eighth Circuit's holding as well.

II. In Light of the Foregoing, the Panel had no Basis to break with the Eighth Circuit and Congress' Presumptive Approval.

A. The Panel Framed the Question of Interpretation to the City's Disadvantage.

The Panel identified three construction arguments for the term "service"—two that favored GVSUD and one that favored the City. This is despite the fact that there can only be two interpretations—one that ties the service (or services) to a federal loan and one that does not.

The Panel's three possible constructions of the term "service" are:

1) a noun that refers to a combined water-and-sewer service;
2) 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) a noun that refers to a specific service made available by a federally indebted utility and financed through the federal program.

(Slip Op. at 4). The Panel stated GVSUD favored the first two interpretations and Cibolo favored the third. *Id.* The Panel stated it found it troubling that the "statute does not include any language limiting 'service' to those services that have received federal financing." (Slip Op. at 4-5). The Panel, however, did not explain how the statute included language that broadened the term "service" into "a" or "any" service.

B. The Panel, Contrary to the Eighth Circuit, Failed to Give Effect to the Phrase "the service" in Context.

The Panel dismissed Congress' use of the article "the" in the term "the service provided or made available." (Slip Op. at 5). It stated there are two reasons why the use of the article was not decisive. "First, it is consistent with "service" referring to an integrated water-and-sewer service." (Slip Op. at 5).

This reasoning is undermined by the fact that there is nothing in § 1926 that refers to an integrated water-and-sewer service or a combined water-and-sewer service or any other similarly titled service. These terms are totally absent from the statute. The terms "water" and "wastewater" are used categorically and singularly throughout the statute – not as a combination of two or more services. *See, e.g.,* 7 U.S.C. § 1926(a)(2) ("Water, wastewater disposal, and wastewater facility grants."); 7 U.S.C. § 1926 (a)(2)(B) ("Revolving funds for financing water and wastewater projects."); 7 U.S.C. § 1926 (a)(2)(B)(i) ("proposed water and wastewater projects . . . existing water and wastewater systems"); 7 U.S.C. § 1926 (a)(2)(B)(ii) ("existing

water and wastewater systems"); 7 U.S.C. § 1926 (a)(14) ("Rural water and wastewater technical assistance and training programs"); 7 U.S.C. § 1926 (a)(22) ("Rural water and wastewater circuit rider programs"); and 7 U.S.C. § 1926 (a)(22)(A) ("a national rural water and wastewater circuit rider program").

GVSUD invented the term integrated water-and-sewer service as a way to persuade this Court that the provision of these two services is essentially the provision of one protected service. The statute has no provisions concerning an integrated or combined service. Expanding the meaning of the term "the service" to boot strap a service unrelated to a qualifying federal loan is not proper statutory construction.

The Panel's second reason to disregard the article "the" was "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 services, only one of them would be able to receive § 1926(b)'s protection." (Slip Op. at 5).

As Cibolo acknowledges above, the term "service" can be read in the plural if more than one service is funded by a qualifying federal loan. However, the focus is on Congress' use of the definite article "the" restricting the meaning of "service" to the service (or services) funded or guaranteed by a federal loan, not the singularity or plurality of the term "service."

C. The Panel Failed to Recognize how Congress' Policy Behind 1926(b) Support Interpreting "the service" to Mean "the funded service (or services)."

1. This Court first interpreted § 1926 and its purposes in *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.* and then again in *North Alamo Water Supply Corp. v. City of San Juan.* Neither of those cases sought protection of a rural association service that was not federally funded. *City of Madison* involved a city seeking to condemn an association's water facilities funded by federal loans. *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057 (5th Cir.1987). And *North Alamo* concerned a city curtailing water service of an association when that water service was made available by a federal loan. *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910 (5th Cir. 1996). Neither of these prior cases are inconsistent with the statutory construction or Confessional purpose analysis of the Eighth Circuit in it *Public Water Supply* opinion. In fact, the Eighth Circuit cited out of circuit this Court's decision in *North Alamo. Public Water Supply,* 605 F.3d 511, 520

In *City of Madison,* this Court stated the purposes of § 1926 are "(1) to encourage rural water development by expanding the number of potential users of *such* systems, 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*, 816 F.2d 1057, 1060. Section 1926(b) was

created to protect any curtailment or limitation by a municipality that "undermined Congress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts." *City of Madison,* 816 F.2d 1057, 1059 & 1060. Yet the Panel opinion ignores the essential connection to a federal loan, recognized in *City of Madison.*

2. In contrast, *Public Water Supply* from the Eighth Circuit, the statutory purpose and policy under facts like those here. *Public Water Supply* involved a plaintiff water district claiming the USDA loan for its sewer service also protected it water service, the same arguments that GVSUD makes here. The Eighth Circuit concluded that "[t]he District's existing sewer customers and revenues remain protected under § 1926(b)." *See Public Water Supply*, 605 F.3d 511, 519, 521. Limiting the protections to just the federally financed service will not appreciably impact the security of the loan. *See Public Water Supply*, 605 F.3d 511, 520-521. Based on the foregoing, the Eighth Circuit determined that limiting § 1926(b)'s protections actually furthered the purposes of the statute – "to encourage rural water development and to provide greater security for [USDA] loans." *See Public Water Supply*, 605 F.3d 511, 520.

If § 1926(b)'s protections include services unrelated to a federal loan, as the Panel's interpretation will now allow, § 1926(b) will "prohibit cities from providing other services to customers within a district's boundaries even when the city is

perhaps better situated to do so, thereby forcing customers to remain with a less desirable service provider," or a provider who provides no service at all as in the case here. *See Public Water Supply*, 605 F.3d 511, 520. In short, "divorcing the type of service underlying a rural district's qualifying federal loan from the type of service that § 1926(b) protects would stretch the statute too far." *See Public Water Supply*, 605 F.3d 511, 521.

Here, § 1926's purposes still will be furthered by limiting § 1926(b)'s protections to GVSUD's water utility. GVSUD can expand its water service to other areas within its water CCN, thus allowing it to earn more water revenues to pay its USDA loan and benefit from potential customers in populated areas (improving its per-user costs of the water system). As required by this Court, GVSUD's water service area will remain "sacrosanct." GVSUD will be as financially viable and the USDA loan will be as secured as when GVSUD first obtained the Federal Loan in 2003.

GVSUD is not satisfied with the uncontested protection of its federally financed water system, it wants to use § 1926(b) as a sword to prevent rural wastewater development by Cibolo when it has no federal loan development or enhancement of that service. This violates the proper statutory construction of § 1926(b).

CONCLUSION

Appellee City of Cibolo, Texas therefore respectfully requests that the Court grant its petition for rehearing *en banc* in order for the Court to construe § 1926(b) in the context of the statute, apply the presumption that the Eighth Circuit correctly interpreted the statute, and affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of August 2017, the foregoing petition has been electronically filed in the office of the Clerk for the United States Court of Appeals for the Fifth Circuit, and upon agreement by counsel, a true and correct copy of this brief has been electronically served on the following individual, with no paper copies to follow by First Class U.S. mail:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2), excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f0, this document contains 3,895 words.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in proportionally spaced typeface using Microsoft Word Docx Version 2013 in 14-point size Times New Roman typefacc.

Signed on this the 16th day of August 2017.

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APPENDIX: PANEL OPINION

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.

No. 16-51282

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.

No. 16-51282

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.