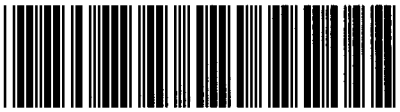

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DOCKET NO. 45702

APPLICATION OF THE 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	§	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS

CITY OF CIBOLO'S REPLY TO BRIEFS OF GREEN VALLEY SPECIAL UTILITY DISTRICT AND COMMISSION STAFF ON THRESHOLD LEGAL/POLICY ISSUES

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CITY OF CIBOLO'S REPLY TO BRIEFS OF GREEN VALLEY SPECIAL UTILITY DISTRICT AND COMMISSION STAFF ON THRESHOLD LEGAL/POLICY ISSUES

COMES NOW the City of Cibolo (the "City"), by and through its undersigned attorneys of record, and files this Reply ("Reply") to the Briefs of Green Valley Special Utility District ("District") and the Public Utility Commission ("Commission") Staff on Threshold Legal/Policy Issues in this matter, filed on June 6, 2016. According to the Commission's Order Requesting Briefing, replies are due on June 14, 2016. Thus, this Reply is timely filed. In support of its Reply, the City respectfully shows the following:

I. REPLY

A. 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 § 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 (the "Issue").

No. The Commission cannot deny the City's application (the "Application") for single sewer certificate of convenience and necessity ("CCN") certification under Texas Water Code ("TWC") § 13.255 solely on the basis that the District, the sewer CCN holder, is also a holder of a federal loan from the United States Department of Agriculture (the "USDA Loan") made under § 1926(a) of the Federal Consolidated Farm and Rural Development Act (the "Act"). The Commission, an agency of the State of Texas, does not have authority under the Texas

Constitution, TWC § 13.255, or any other statute or applicable law to evaluate and render a decision on the City's Application based upon criteria outside the bounds established by the Texas Legislature in TWC § 13.255. To this end, the application review protocol in TWC § 13.255 does not direct the Commission to consider whether the entity being decertified has a USDA Loan, or whether TWC § 13.255 is preempted by 7 U.S.C.A. § 1926(b). To conduct an independent analysis of such issues is outside the purview of the Commission; and the proper branch of government to make a determination as to whether a state law is preempted by a federal law is the judiciary. That is precisely why the District recently filed a complaint against the City in federal district court concerning alleged violations of § 1926(b).

Accordingly, the Commission, in considering this above-listed Issue, should set aside the arguments in the District's brief and instead continue to process the City's Application under TWC § 13.255, which is the policy the Commission has been implementing since receiving the authority from the Texas Legislature to regulate water and sewer CCNs. The Commission's current policy, evidenced in its action and rules, is consistent with the positions stated in the Brief of the City: that the Commission, in processing an application to transfer, modify, or decertify a water or sewer CCN, will not consider whether the entity being decertified is a debtor of a USDA Loan made under § 1926(a) of the Act. Implementing such protocol is sound policy, because the Commission, in its processing of a water and/or sewer CCN transfer or decertification application, is not the entity with jurisdiction to determine whether the CCN decertification would result in a violation of § 1926(b).

If the Commission decides that it may evaluate issues outside the bounds of TWC § 13.255 when reviewing the City's TWC § 13.255 Application, as proposed by the District in its Brief, then it is certainly premature for the Commission to determine whether 7 U.S.C.A. § 1926(b) preempts TWC § 13.255 in this case. If the Commission were to take on the role of being a fact finder and making legal determinations concerning a federal statute in this matter, then the Commission would need to (1) have rules identifying the process and criteria under which the Application would be evaluated, so that the City knows how it can meet its burden of

proof and so that the Commission has a protocol for processing the application, and (2) provide an opportunity for the City and Commission to obtain information from the District (presumably through discovery) to address any allegations by the District, thereby filling the record as to the Commission's criteria regarding the 7 U.S.C.A. § 1926(b) criteria. However, no such Commission rules exist.

Further, there are questions of fact regarding all the District's claims regarding the 7 U.S.C.A. § 1926(b) criteria concerning the Application. For example, as of the date of this filing, the District has not submitted a copy of its alleged USDA Loan, so it is unclear whether it has a qualifying loan. Since neither TWC § 13.255, 16 Tex. Admin. Code § 24.120, nor the Commission's application form for TWC § 13.255 applications require such information, the parties have not been able to fully address this question, as they would in a court of law.

As discussed in more detail herein, the District's brief attempts to confuse this straightforward separation of powers/jurisdictional aspects of the Issue by addressing topics well outside the bounds of the Commission's request for briefs, namely, whether the Application should be denied under the 7 U.S.C.A. § 1926(b) criteria; and the portion of its Brief that does discuss the Issue advocates positions that are not supported by fact or law.

1. Commission Cannot Not Deny the Application Based Upon Alleged § 1926 Preemption.

(a) Separation of Powers – Criteria for the Commission to Apply to the City's TWC § 13.255 Application

Contrary to the District's Brief, federal caselaw does not grant the Commission authority to deny the City's Application filed under TWC § 13.255. Rather, the only entity that can grant the Commission authority to take an action on an application filed under TWC § 13.255 is the Texas Legislature, and the criteria that the Texas Legislature has established and directed the Commission to apply in processing a TWC § 13.255 application is clear and unconditional:

> "The utility commission shall grant single certification to the municipality."

No other statute regarding CCN decertification applications in TWC, Chapter 13 is as clear as this law, and the City's Application should not be processed based upon other criteria not included in this statute, namely, 7 U.S.C.A. § 1926(b).

The District mistakenly spends a majority of its Brief[1] providing its interpretation of the federal court decisions and holdings of the meaning of "making service available" under 7 U.S.C.A. 1926(b), and then analyzing whether those tests have been met concerning the Application. However, the District skips over the first, most important step in the request for briefing – that is – does the Commission even have the authority to make its own independent interpretations of these federal court opinions and then make decisions on applications filed under TWC § 13.255 based upon those interpretations, outside of the protocol established by the Texas Legislature? It absolutely does not, and to do so would be a drastic change in Commission policy concerning CCN decertification applications and would ignore the intent of the Texas Legislature. The District's discussion of its opinions on federal case law is not only secondary to this first, critical constitutional law question, but it is also beyond the scope of the request for briefing.

Article 2, Section 1 of the Texas Constitution provides for the separation of powers in state government and prohibits the overlapping of power between the branches of state government.[2] Separation of powers may be violated in two ways: one branch of government assumes or is delegated a power that is more properly attached to another branch or when one branch unduly interferes with another so that the other branch cannot effectively exercise its constitutionally assigned powers.[3] Here, the District's position that the Commission may make interpretations and rulings regarding preemption by a federal law would result in the

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[1] A brief that exceeds the Commission's allowable page limit.

[2] TEX. CONST. art. II, § 1.

[3] *Tex. Comm'n on Envtl. Quality v. Abbott*, 311 S.W.3d 663, 672 (Tex. App.— Austin 2010, pet denied) (*citing Jones v. State*, 803 S.W.2d 712, 715-16 (Tex. Crim. App. 1991)).

Commission assuming a power that is more properly attached to another branch, namely, the judiciary.

The Texas Constitution explicitly vests the judicial power of the state in the courts.[4] The core of judicial power embraces the power to: (1) hear evidence; (2) decide the issues of fact raised by the pleadings; (3) decide questions of law; (4) enter a final judgment on the facts and law; and (5) execute the final judgment.[5] The essence of judicial power is thus to adjudicate upon and protect the rights of individuals and to construe and apply laws to that end.[6] In fact, the Supreme Court has long held that it is "emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."[7] Thus, not only is interpretation of laws a duty of the judiciary, fundamental preemption jurisprudence specifies that preemption is appropriately addressed by the courts in interpreting potential conflicts in law.

A state agency, on the other hand, is a creature of the legislature and only possesses powers that the legislature expressly delegates to it and those necessary for the accomplishment of its duties.[8] Texas courts refuse to imply any additional authority to an administrative agency, especially authority that would usurp the duty of another branch.[9]

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[4] TEX. CONST. art. V, § 1.

[5] *In re K.A.R.*, 171 SW.3d 705, 714-16 (Tex. App. -Houston [14th Dist.] 2005, no pet.).

[6] *Morrow v. Corbin*, 62 S.W.2d 614 (Tex. 1933).

[7] *Marbury v. Madison*, 5 U.S. 137 (1803) (explaining that "if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.")

[8] *Pub. Util. Comm'n of Texas v. GTE–SW, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *City of El Paso v. Pub. Util. Comm'n of Tex.*, 839 S.W.2d 895, 909 (Tex. App.—Austin 1992), *aff'd in part and rev'd in part on other grounds*, 883 S.W.2d 179 (Tex. 1994)). Like other state administrative agencies, the Commission "has only those powers that the Legislature expressly confers upon it," and "any implied powers that are necessary to carry out the express responsibilities given to it by the Legislature." *Pub. Util. Comm'n of Texas v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

[9] *See Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

Accordingly, the City reiterates its position that the Commission may not deny the Application under TWC § 13.255 solely on the basis that the CCN holder to be decertified holds a USDA Loan. The Commission has clear jurisdiction under TWC § 13.255 to process an application for single certification to a municipality, but it does not have authority to determine whether 7 U.S.C.A. § 1926(b) preempts state law in any particular instance. A court of general jurisdiction is the correct entity to assess and determine whether a state law is preempted by a federal law. Thus, the Commission should process the City's TWC § 13.255 application in accordance with the protocol established by the Texas Legislature in that statute (as implemented by the Commission in its rules) and allow a court to decide whether a federal statute preempts such state law, if asked.

(i) City's interpretation of the criteria to consider in an application to decertify a CCN is consistent with Texas Legislators

In this matter, the Texas Legislature has expressly given the Commission authority over the amendment of CCNs under TWC § 13.255.[10] No party has denied the Commission's authority here. However, nothing in the statute or in TWC, Chapter 13, Subchapter G, or TWC, Chapter 13, generally, implies that the Commission should consider, in processing a TWC § 13.255 application, any other law, such as 7 U.S.C.A. § 1926(b).

To this end, the Texas Legislature is clear as to what the Commission should and should not consider in processing an application to decertify a CCN holder, including when the CCN holder is a debtor of a USDA Loan. On March 24, 2015, Senators Nichols and Creighton sent the Commission a letter, providing the following interpretation of Senate Bill 573, passed by the Texas Legislature in the 82nd Legislature, in 2011, amending TWC § 13.254:

> It was and is our intention that "service" should mean the actual provision of water or sewer service to the property in question. We do not support an interpretation that merely "making service available" is providing service to a tract of land. It is our belief that the compensation portion of Section 13.254 adequately takes

[10] See, City's Brief on Threshold Legal/Policy Issues, 3-5 (June 6, 2016).

> care of any losses for potentially or actual stranded investment on the part of the CCN holder.[11]

While this letter pertains to TWC § 13.254, the message is clear: when reviewing a CCN decertification application, the Commission should not evaluate the 7 U.S.C.A. § 1926(b) criteria. Senate Bill 573 amended TWC § 13.254, in light of the holding in the *Creedmoor-Maha Water Supply Corporation v. Texas Commission on Environmental Quality* case, establishing a new process in TWC § 13.254(a-5) enabling a landowner to remove his or her land from the water and sewer CCN under certain circumstances, as follows:

> As an alternative to decertification under Subsection (a) and expedited release under Subsection (a-1), the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area from a certificate of public convenience and necessity and is entitled to that release if the landowner's property is located in a county with a population of at least one million, a county adjacent to a county with a population of at least one million, or a county with a population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more, and not in a county that has a population of more than 45,500 and less than 47,500.[12]

Through this March 24, 2015 letter, the two Senators removed any confusion as to what the word "service" may mean in TWC § 13.254(a-5). To this end, the Senators state that the word "service" does not mean "making service available". This is a critical clarification because the term "making service available" is the phrase used by the federal courts in 7 U.S.C.A. § 1926(b) cases. Accordingly, the two Senators are confirming that the Commission should not consider the federal protocol in a TWC § 13.254(a-5) application.

Applications under TWC §§ 13.254(a-5)[13] and 13.255 are two routes to the same end result–CCN decertification; and, an application under either statute could result in the

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[11] March 24, 2015 letter from Senator Robert Nichols and Senator Brandon Creighton to the Public Utility Commission, attached hereto as Attachment 1.

[12] Tex. Water Code § 13.254(a-5)(West 2016).

[13] This could also include a CCN decertification application under TWC § 13.254(a) and (a-1).

decertification of a CCN holder that is a debtor of a USDA Loan. Here, in the City's TWC § 13.255 application, there is no confusion as in TWC § 13.254(a-5), because the issue of whether the CCN holder provides service is not considered in a TWC § 13.255 application. Instead, the Commission is directed that it "shall grant single certification to the municipality." The overarching point here is that the Texas Legislature has directed the Commission not to consider the 7 U.S.C.A. § 1926(b) criteria as part of the analysis of a CCN decertification application. There is no reason to infer any other interpretation from the Texas Legislature.

Again, it is not enough that a power be reasonably useful to the Commission in discharging its duties; the power must be either expressly conferred or necessarily implied by statute. The agency may not "exercise what is effectively a new power, or a power contradictory to the statute, on the theory that such a power is expedient for administrative purposes."[14]

(b) Case Law and Statute Cited by Commission Staff Do Not Support Commission's Consideration of Federal Preemption, and Commission Actions Indicate That It Does Not Consider Federal Preemption

The cases and statute cited by Commission Staff in support of its claim that "the Commission may deny a municipality's TWC § 13.255 application based on 1926(b)" do not support the conclusion reached by Staff or the proposition that the Commission can consider federal preemption issues. Further, Commission Staff's Brief does not directly address whether the Commission can determine preemption issues. Rather, its conclusions are based on the contentions that (a) the Commission must avoid violating federal law; and (b) Chapter 13 of the TWC gives the Commission the authority to "regulate and supervise the business of each water and sewer utility within its jurisdiction" and to "do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of this power and jurisdiction." The City respectfully disagrees with those contentions. Further, even if the Commission did take 7 U.S.C.A. § 1926(b) into consideration when it processes a TWC § 13.255, the Commission's rule implementing TWC § 13.255, both as currently written and as

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[14] *Pub. Util. Comm'n of Texas v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

proposed in the current Commission rulemaking matter for such rule, do not contain a rubric for 7 U.S.C.A. § 1926(b) that an applicant can address when processing a TWC § 13.255 application.

(i) Cited case law does not support Commission consideration of § 1926(b) elements or whether § 1926(b) preempts TWC § 13.255

While it may be difficult to argue with the general concept that the Commission should avoid violating the law, either at the federal level or the state level, there is a difference between actively violating a legal obligation under the law and saying that the Commission has jurisdiction to interpret federal law and its potential preemption of state law. This is especially true when courts that do have jurisdiction to interpret federal law or to determine preemption issues disagree over how to apply the federal law with respect to differing factual situations, as is the case with § 1926(b). No case law cited by Commission Staff or the District stands for the proposition that the Commission has authority or is required to consider the application of § 1926(b) in cases where the CCN of a federally indebted entity is at issue or is prohibited from acting under state law where a conflict with § 1926(b) is claimed.

In the first case cited by Commission Staff, *North Alamo Water Supply Corp. v. City of San Juan, Tex.*,[15] the U.S. Court of Appeals- Fifth Circuit affirmed that the district court acted appropriately in providing injunctive relief against *the city* when it prohibited the city from actually providing service within the CCN service area of a federally indebted water supply corporation. In that case, the city, apart from actively providing service within the water supply corporation's CCN, filed applications under TWC §§ 13.254 and 13.255 to try to decertify portions of the water supply corporation's CCN. But the applications were filed only after the water supply corporation had already filed a claim for injunctive relief against the city in a federal district court. The injunction issued by the federal district court, in part, required *the city* to contact the regulatory agency to withdraw its applications. No injunction of a state agency

[15] 30 F.3d 910 (5th Cir. 1996).

was at issue, and the court did not reach the question of whether the applications themselves were preempted by § 1926(b).[16]

The other cases cited by Staff are distinguishable from the Application as well. In *Ex parte Young*,[17] the main issue at question was the "proper exercise of the jurisdiction of the Federal courts, as limited and controlled by the Federal Constitution and the laws of Congress."[18] In that case, the U.S. Supreme Court decided, among other things, that the federal circuit court had jurisdiction over a matter where state legislation was claimed to violate due process and equal protection under the Constitution of the United States. Further, it was appropriate for the circuit court to issue a preliminary injunction against the Minnesota attorney general to prohibit him from enforcing the law in question pending the outcome of the case. A day after granting the preliminary injunction, the attorney general, in violation of the injunction, had taken action to enforce the state law.[19] The circuit court ended up holding the attorney general in contempt for violating the injunction. The attorney general argued that the federal court had no jurisdiction to enjoin him, as Minnesota attorney general, from performing his discretionary official duties and that the suit was also in conflict with the 11th Amendment of the U.S. Constitution.

The Court first held it was appropriate for the circuit court to exercise general jurisdiction where a Constitutional claim was at issue, and in fact, it had a duty to do so.[20] The attorney general had also argued that because the law in question did not specifically make it the duty of the attorney general to enforce the law, he had full general discretion whether to attempt its enforcement or not, and the court could not interfere to control him as attorney general in the exercise of his discretion.[21] The Supreme Court held that, while the court could not control a

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[16] *See id.* at 919.

[17] 209 U.S. 123 (1908).

[18] *Id.* at 142.

[19] *See id.* at 133.

[20] *See id.* at 143-45.

[21] *Id.* at 158.

state officer's exercise of discretion, there was no interference with his discretion under the facts of the case.[22] "[N]o affirmative action of any nature is directed, and the officer is simply prohibited from doing an act which he had no legal right to do. An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer."[23] Further, "[i]f the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."[24] Therefore, at the point that the he decided, on his own, to enforce the potentially unconstitutional law, he put himself in the jurisdiction of the federal courts, and had no claim to state sovereign immunity.

Saying the federal courts have jurisdiction to enjoin a state officer from enforcing a potentially unconstitutional law (which is not claimed here) is a far cry from saying an agency or state officer has a duty to interpret a federal statute to determine whether that statute preempts a state law. Likewise, *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*,[25] is a case about federal courts' original jurisdiction over a matter and whether the 11th Amendment of the U.S. Constitution provides immunity from suit for injunctive relief against a state regulatory commission when the suit is brought under a federal statute.[26]

The bottom line here is that rather than demanding that state actors interpret federal law or determine preemption issues, both *Ex parte Young* and *Verizon* allow *federal courts* to determine these issues and to issue injunctions to prevent state agencies or actors from enforcing

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[22] *Id.* at 159.

[23] *Id.*

[24] *Id.* at 159-160.

[25] 535 U.S. 655 (2002).

[26] *See id.* at 635-36.

or acting on state laws that those courts have determined may or will violate federal law in that particular case.

(ii) Cited TWC statutes do not support Commission consideration of § 1926(b) elements or whether § 1926(b) preempts TWC § 13.255

The main statutes that Commission Staff cites for the assertion that the "Texas Water Code authorizes the Commission to apply federal law when necessary" are TWC §§ 13.041 and 13.241. TWC § 13.041(a) provides:

> The utility commission may regulate and supervise the business of each water and sewer utility within its jurisdiction, including ratemaking and other economic regulation. The commission may regulate water and sewer utilities within its jurisdiction to ensure safe drinking water and environmental protection. The utility commission and the commission may do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction. The utility commission may consult with the commission as necessary in carrying out its duties related to the regulation of water and sewer utilities.

TWC § 13.241 provides the general guidelines for the Commission's granting and amending of CCNs. Nowhere in TWC § 13.241 does the Texas Legislature indicate that the Commission should determine whether federal law applies in any given case or that the Commission should consider the existence of federal debt on its consideration of CCN issues.

Staff, in quoting TWC § 13.041, asserts that "implicit in that which 'is necessary' is the duty to recognize and apply overarching statutory authority," and "thus, the Commission is required to acknowledge and apply federal law to its regulation of the business of the water utilities within its jurisdiction."[27] This is a tenuous claim, however. The above statute grants the Commission authority "to do all things, whether specifically designated in this chapter or implied in this chapter, necessary and convenient to the exercise of these powers and jurisdiction." Staff appears to seize on the word "implied," rather than the phrase "implied in this chapter." Nothing

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[27] Commission Staff's Response to Order Requesting Briefing on Threshold Issues at 3 (June 6, 2016).

in TWC, Chapter 13 authorizes the Commission to, or implies that it should, determine the issue of whether preemption under § 1926(b) applies. To the extent the Commission contends that the general grant of jurisdiction to the Commission in TWC § 13.041 expands the Commission's scope of authority to consider laws when processing an application under TWC § 13.255, a conflict would arise because TWC § 13.255 specifically directs that, "[t]he Commission shall grant single certification to the municipality."[28] Any analysis that could prevent the execution of that directive in TWC § 13.255 is irreconcilable with that law; and, such an interpretation violates Texas law, as the Texas Code Construction Act states that the specific provisions of TWC § 13.255 prevail over the general provision of TWC § 13.041:

> (b) if the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.[29]

In fact, if the Commission decided to put itself in the position of deciding federal preemption issues without direct statutory authority on CCN decertification applications, it will obligate itself to determine if § 1926(b) applies in cases where the Texas Legislature has expressly prohibited its application. For example, TWC § 13.254(a-6), another state statute providing for the decertification of a CCN, directly states that the "utility commission may not deny a petition received under Subsection (a-5) based on the fact that a certificate holder is a borrower under a federal loan program." If the Commission decides that it can determine that it must "avoid violating federal law," and it determines that amending a CCN when § 1926(b) is applicable contradicts federal law, then it will directly put itself in conflict with a State legislative directive.

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[28] Tex. Water Code§ 13.255(c).

[29] Tex. Gov't Code § 311.026(b) (West 2016).

(iii) Commission actions indicate that it does not support consideration of § 1926(b) elements or whether § 1926(b) preempts TWC § 13.255.

The Commission's rule implementing TWC § 13.255, 16 TAC § 24.120, does not contain any indication that the Commission would consider 7 U.S.C.A. § 1926(b) in processing the City's Application filed under TWC § 13.255. While 16 TAC § 24.120(b) requires the CCN holder to notify its lienholders of the TWC § 13.255 single certification process, which is not limited to a USDA Loan, the purpose of such notification is so that the lender can "provide information to the commission sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question," not so that the Commission can conduct a preemption analysis.[30]

Additionally, according to the statutory construction doctrine of *expressio unius est exclusio alteris*, the expression of this purpose implies the exclusion of all other purposes, including § 1926(b) preemption. Had the Commission intended for § 1926(b) to be considered in processing a TWC § 13.255 application, like the City's Application, such a purpose would have been specified in the regulations just as it specified the purpose of determining compensation amounts. The exclusion of § 1926(b) considerations thus implies that the Commission does not support consideration of § 1926(b) at this stage.

Further, if the Commission desired to change its policy and begin evaluating 7 U.S.C.A. § 1926(b) when processing a TWC § 13.255 application, then the Commission would need to have rules in place to establish a set of criteria. Again, no rules exist. Plus, the Commission is currently undertaking a review of its CCN rules in Docket No. 45111, and it has not proposed any amendments to 16 TAC § 24.120(b) indicating that it will start evaluating 7 U.S.C.A. § 1926(b) when processing a TWC § 13.255 application.

(c) The District Provides No Credible Basis for the Commission to Determine that the Commission Should Conduct an Analysis of

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[30] 16 TAC § 24.120(b)(2)(2016). This rule logically implements TWC § 13.255(g-1), authorizing the Commission to adopt rules governing the evaluation of the factors to be considered in determining the monetary compensation under Subsection (g). Again, this law does not authorize or direct the Commission to look at 7 U.S.C.A. § 1926(b) or perform a preemption analysis of that law.

whether 7 U.S.C.A. § 1926(b) Preempts the City's TWC § 13.255 Application.

The District's contention that the Commission should deny the Application because 7 U.S.C.A. § 1926(b) preempts TWC § 13.255, as applied to the Application, is decidedly less reasoned than Staff's, and its actions contradict its own arguments. The District simply asserts, without statutory or case law support, that "the Commission may deny a municipality's application seeking single certification solely on the basis that the utility holding the CCN is also indebted to the federal government because 7 U.S.C.A. § 1926(b) preempts TWC § 13.255."[31] The District cites no statute or case that gives the Commission the authority to determine that state law is preempted by federal law or that the Commission has the authority to apply § 1926(b) law to the facts at hand. First, the District spends some time quoting a case where the issue at hand was whether a federal court, not a state agency, should dismiss a case when a federal question was involved and whether the federal court should consider the state's policy in making its decision on an issue where the court found federal preemption applied.[32] Second, the District includes its lawsuit in *federal* court against the City as an exhibit to its Brief. The filing of such complaint undermines its entire argument that the Commission, a state agency, should be conducting the very analysis that it has asked a federal court to undertake.

(i) The Commission should not conduct an analysis of whether 7 U.S.C.A. § 1926(b) preempts TWC § 13.255, as applied to the Application.

The District failed to demonstrate that the Commission has the authority to adjudicate issues arising under 7 U.S.C.A. § 1926(b). In order to determine whether § 1926(b) preempts TWC § 13.255 entails an interpretation of a federal statute. The "ultimate touchstone" in every preemption case is the purpose of the legislature, which is often only divined through an

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[31] Green Valley Special Utility District's Brief on Threshold Legal/Policy Issues at 1 (June 6, 2016).

[32] See District's Brief on Threshold Legal/Policy Issues at 11 and its arguments under *Becker-Jiba v. City of Kaufman*, 2003 U.S. Dist. LEXIS 10334. Also, note that the Texas Water Code section cited in the District Court's opinion is misapplied. TWC § 13.181(b) applies specifically to rate regulation under that specific subchapter and not to Chapter 13 as a whole. In any case, the section prohibits conflicts with "federal rulings" and does not imply that the Commission should interpret federal law or decide preemption issues in a general way.

interpretation of statutory language and structure.[33] The Commission, however, lacks any authority under its delegated powers to interpret a federal statue. Moreover, the District failed to establish any authority that confers such jurisdiction upon any Texas state agency, including the Commission, to adjudicate such issues arising under § 1926(b).

The District suggests that *North Alamo Water Supply Corp. v. City of San Juan, Tex.* provides the Commission with the authority necessary to interpret § 1926(b).[34] However, that case only addresses the application of § 1926(b), not the Commission's – or any other state agency's – authority to interpret § 1926(b). Instead of providing any legal basis for the Commission to have authority to determine federal preemption issues, the District spends almost the entirety of its brief arguing why it thinks it meets the "service provided or made available" element of 1926(b) protection.

In actuality, the District's arguments illustrate the problems that would be created by the Commission asserting jurisdiction to decide the applicability of a federal statute. It is clear from the District's seven pages of argument on the service issue that federal courts and Texas courts are far from agreeing on how the service element of § 1926(b) is met. As the Austin Court of Appeals of Texas stated in *Creedmoor-Maha Water Supply Corp. v Texas Commission on Environmental Quality*:[35]

> The U.S. Supreme Court has not yet spoken as to the meaning or scope of "provided or made [service] available" in section 1926(b), whether this provision embodies a legal or factual component or both, and what each component would require. For further guidance, we may look to the jurisprudence of the lower federal courts. Creedmoor suggests that we should ignore cases from outside the Fifth Circuit because "we are not in the 10th Circuit[,] we are in the Fifth Circuit[;] therefore[,] the holding of Fifth Circuit should control." To the contrary, the Texas Supreme Court has instructed us that while we "may certainly draw upon the precedents of the Fifth Circuit ... in determining the applicable

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[33] *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

[34] 90 F.3d 910 (5th Cir. 1996).

[35] 307 S.W.3d 505.

> federal rule of decision, [we] are obligated to follow only higher Texas courts and the United States Supreme Court." Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex.1993) (per curiam). And absent such binding authority, as Penrod indicates, we must independently determine the applicable federal rule of decision and may draw not only upon the Fifth Circuit but "any other federal or state court" to that end. *Id.* at 296.[36]

In fact, the Texas Court of Appeals in Austin declined to follow the holding *North Alamo*, reasoning that the facts at issue in that case allowed the Fifth Circuit to decide the "providing service" issue based on actual service being provided by the water supply corporation.[37] It concluded that the protection of § 1926(b) "is 'defensive' in nature, intended 'to protect territory already served by a rural water association from municipal expansion into the rural water association's area.'"[38] In the *Creedmoor* case, however, Creedmoor came "no closer to pleading facts meeting this requirement than a bare assertion that it 'stands ready willing and able' to serve [a development] 'under the court's holdings in North Alamo' and 'under the terms of its lawful tariff, the Texas Health and Safety Code, the Texas Water Code and TCEQ Chapters 290 and 291 rules.'"[39]

The above language of the Texas Court of Appeals shows that, even if the Commission decided to consider the federal § 1926(b) issue and to determine whether it conflicts with TWC § 13.255, the Commission has no clear authority or direction on which to base its decisions. Unlike following a specific injunction to act or not to act, the Commission would be taking up questions that even the federal courts do not agree on. Even if federal courts agree on a general level that § 1926(b) could preempt a state law depending on the facts of the case, there is no agreement on how the service element of § 1926(b) can be met.

Further, in Texas, the USDA, which administers the types of loans in the Issue, has not taken the stance that § 1926(b) is an absolute protection for federally indebted CCN holders if

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[36] *Id.* at 521-22.

[37] *Id.* at 520.

[38] *Id* at 522.

[39] *Id.* at 522-23.

they are not actually providing service. As an example, see the correspondence included in Attachment 2 between a municipality and the USDA regarding this very issue. Such position demonstrates that a Commission order granting the City's Application may not conflict with the rulings of any federal regulatory body.

(ii) The District has not demonstrated that its USDA Loan is a qualifying loan.

Even if the Commission considered the § 1926(b) factors in this Application as argued by the District in its Brief, it is premature for the Commission to make a determination on such factors. As discussed in Section I.A.1., above, the Commission has not established rules as to how it interprets and would apply the § 1926(b) factors to the City's Application, and the parties have not had the opportunity to conduct discovery to obtain evidence regarding the § 1926(b) factors.

A claim under § 1926(b) contains three elements: (1) the utility is an association within the meaning of 1926(b); (2) the utility has a qualifying federal loan outstanding; and (3) the utility provided or made [service] available to the disputed area.[40]

Here, the District has not proven up all three of these elements. At this point, it is clear that the District has not pled or asserted that its sewer CCN has been pledged under its federal loan. Said another way, the District cannot establish that its USDA Loan is a qualifying loan with respect to its sewer CCN.

According to the District, whether its sewer CCN is pledged has no bearing on its protection under § 1926(b). Aside from the general absurdity of that argument, the only federal court that appears to have addressed the issue reached the opposite conclusion. In *Public Water Supply Dist. No. 3 of Laclede County, Mo. v. City of Lebanon, Mo.*,[41] attached hereto as Attachment 3, 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

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[40] *Creedmoor-Maha*, 307 S.W.3d at 519.

[41] 605 F.3d 511 (8th Cir. 2010).

whom the district has made service available but to whom a city was currently providing service.[42] Much like the District is arguing in this docket, although the USDA loan was secured to expand the district's sewer system and was secured only by its sewer revenues, the district argued that the USDA loan also triggered § 1926(b) protection with respect to its water service.[43] The 8th Circuit court viewed this argument as a question of first impression,[44] and ultimately refused to apply the districts 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 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

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

[43] *Id* at 519.

[44] *Id.*

> service here, we affirm the grant of summary judgment to the City with respect to water customers within the District's boundaries.[45]

Ultimately, if the Commission decides to consider the § 1926(b) claim, then District has not pled facts that meet all of the § 1926(b) elements. If the Commission decided that the § 1926(b) elements where sufficiently pleaded, then there would still be issues of fact regarding both the qualifying federal debt element and the element of whether service has been provided or made available element, preventing outright dismissal of the City's Application. Specifically, all that the Commission has to go on are allegations made by the District, and thus far, such allegations do not demonstrate that the District has the means to treat wastewater. Moreover, it is the City's understanding that the District does not have a wastewater treatment plant, wastewater collection facilities, or even wastewater customers. Further, the District's pending Texas Pollutant Discharge Elimination System permit that would allow the District to treat wastewater is not only protested by the City, but is also protested by the Cibolo Creek Municipal Authority, which is the TCEQ-designated governmental entity charged with developing a regional sewage system in the area of the Cibolo Creek Watershed (which includes the City of Cibolo).[46]

As such, there are currently not enough facts before the Commission to make a determination on the merits of the District's claims under either the bright line or the alternative test, if the Commission intends to apply such tests in this matter. If the Commission decides to proceed with this consideration regardless, it is thus appropriate for the City to be provided an opportunity for discovery to verify the allegations and prepare a response accordingly. However, the City reiterates that to make a determination in light of the District's Brief is well beyond the scope of the Issue.

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

[46] 30 Tex. Admin. Code §§ 351.61-351.66.

Likewise, the District has not demonstrated that it is not likely to succeed on the merits of its federal claim. As a result, the District's Motion to Reconsider its Motion to Abate (which is not appropriate in the context of briefing on threshold issues) should be denied.

(iii) Complaint against the City in federal court evidences that the District does not believe the Commission can consider whether 7 U.S.C.A. § 1926(b) Preempts the City's TWC § 13.255 Application.

Fatal to its Plea to the Jurisdiction and Motion to Dismiss, and Brief in this matter, the District's Complaint filed in federal district court against the City under § 1926(b) clearly demonstrates that the District does not believe that the Commission has jurisdiction to consider and rule on the Application based upon an analysis of that federal law. As with its other filings in this matter, the District's Motion is merely attempting to slow down the Commission's processing of the City's Application. The Commission has appropriately denied them the opportunity to stall these proceedings. The District's request for the Commission to reconsider the abatement request is inappropriately filed and unnecessary, and should be either set aside or denied again.

2. Policy

The City reiterates the policy the Commission should adopt in TWC § 13.255 applications. From a policy standpoint, the Commission should consider the sufficiency and merits of the application without regard to a § 1926(b) claim. The Commission has limited jurisdiction to consider regulatory matters. The Texas Legislature has not directed the Commission, either explicitly or impliedly, to undertake an analysis of federal law and whether federal law preempts state law, and no case law supports the idea that an administrative agency should consider whether federal preemption applies in any particular case. To deny a § 13.255 application based on a § 1926(b) claim would require the Commission to engage in an analysis of both legal and factual issues that it does not have authority to consider. To allow an intervener to have a TWC § 13.255 application dismissed merely by making a claim under § 1926(b), however meritless, would mean that the intervener could gain the protections of

§ 1926(b) without actually having to prove that protection is warranted. That is exactly what the District is attempting to accomplish in this docket, as it is unlikely that the District has pled facts sufficient to meet a § 1926(b) claim (namely the issues of whether it has "qualifying federal debt" and whether it has "provided or made service available").

B. Must a municipality seeking single certification under TWC § 13.255 demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems even if the certification sought is solely to provide sewer service.

The City reiterates its arguments in Section III of its Brief on Threshold Legal/Policy Issues. Further, the City supports the arguments made by Commission Staff in Section II.B. of Commission Staff's Response to Order Requesting Briefing on Threshold Legal/Policy Issues. In the event that the Commission decides that TWC § 13.255 requires an applicant seeking only single sewer certification to demonstrate compliance with the TCEQ's minimum requirements for public drinking water systems, then the City supplements its application as follows:

1. The City asserts that it does comply with the TCEQ's minimum requirements for public drinking water systems.

2. The TCEQ has authorized the City's water system to be a public drinking water system under Title 30 Texas Administrative Code, Chapter 290. The City's public drinking water system authorization number is TX0940018.

3. The TCEQ recognizes the City's public water system as a superior water system.

4. A copy of its public drinking water system report from the TCEQ's Waterwise website is attached hereto as Attachment 4. This report evidences the City's public drinking water system authorization number and historical data thereto.

II. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the City of Cibolo respectfully requests that the Commission process and approve the Application in accordance with TWC § 13.255 and 16 TAC § 24.120, deny the District's Plea to the Jurisdiction and Motion to Dismiss, and that it be granted such further relief to which it is entitled.

Respectfully submitted,

LLOYD GOSSELINK ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5800
(512) 472-0532 (Fax)

DAVID J. KLEIN
State Bar No. 24041257
dklein@lglawfirm.com

CHRISTIE DICKENSON
State Bar No. 24037667
cdickenson@lglawfirm.com

ASHLEIGH K. ACEVEDO
State Bar No. 24097273
aacevedo@lglawfirm.com

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 14th day of June, 2016 to the parties of record.

Ashleigh K. Acevedo

Texas Legislature

March 24, 2015
Public Utility Commission of Texas
1701 N. Congress Ave.
Austin TX 78711
Fax: 512-936-7003

Re: Texas Water Code Section 13.254 (a-5)

To Whom It May Concern:

We are writing to express our interest in ctions by the Public Utility Commission of Texas ("PUCT") in issuing orders relating to Texas Water Code Section 13.254 (a-5). We are the Senate author and House sponsor of SB 573, passed by the Texas Legislature in the 82nd Legislature, in 2011.

We want the PUCT to understand clearly that the intent of the bill, and the law now codified as Sec. 13.254 (a-5), Water Code, is to permit owners of more than 25 acres of land to obtain an expedited release from a certificate of convenience and authority ("CCN") if the CCN holder is not and never has provided water or sewer service to the land owned by the petitioning landowners. The pertinent section is cited here with the operative words italicized and underlined:

> (a-5) As an alternative to decertification under Subsection (a) and expedited release under Subsection (a-1), the owner of a tract of land that is at least 25 acres and *that is not receiving water or sewer service* may petition for expedited release of the area from a certificate of public convenience and necessity and is entitled to that release if the landowner's property is located in a county with a population of at least one million, a county adjacent to a county with a population of at least one million, or a county with a population of more than 200,000 and less than 220,000 that does not contain a public or private university that had a total enrollment in the most recent fall semester of 40,000 or more, and not in a county that has a population of more than 45,500 and less than 47,500.

Texas Legislature

It was and is our intention that "service" should mean the actual provision of water or sewer service to the property in question. We do not support an interpretation that merely "making service available" is providing service to a tract of land. It is our belief that the compensation portion of Section 13.254 adequately takes care of any losses for potentially or actual stranded investment on the part of the CCN holder.

We trust that the PUCT will take our legislative intentions and desires into account when ruling on cases within this section. Thank you for your attention to this matter.

Sincerely,

Senator Robert Nichols

Senator Brandon Creighton

FILE COPY

Lloyd Gosselink
ATTORNEYS AT LAW

816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Facsimile: (512) 472-0532
www.lglawfirm.com

Mr. Norton's Direct Line: (512) 322-5884
Email: dnorton@lglawfirm.com

February 4, 2010

Mr. Michael B. Canales
Community Program Director
U.S. Department of Agriculture
Rural Development
101 S. Main, Suite 102
Temple, TX 76501

Re: City of Montgomery, Texas Water Utility Service

Dear Mr. Canales:

Thank you for meeting with the City of Montgomery City Administrator, Brant Gary and me last week. As we discussed, the City of Montgomery, a small general law city in Montgomery County, has been approached by real estate developers who are interested in obtaining water service from the City for their recently annexed property. The City, of course, would like to provide service to these new developments which are adjacent to existing water customers of the City. However, in investigating the feasibility of providing the service, it became apparent that the properties are within the existing certificate of convenience and necessity ("CCN") area of Dobbin-Plantersville Water Supply Corporation "(DPWSC"). DPWSC has claimed that the City is prohibited from providing water service to this new development because DPWSC has an outstanding loan with USDA Rural Development and is therefore protected by 7 U.S. Code Ann. § 1926(b). As you know, this section provides that water service "provided or made available through any such association shall not be curtailed or limited by inclusion of the area served...within the boundaries of any municipal corporation...or by the granting of any private franchise for similar service within such area during the term such loan...". In contrast with this federal statute, the Texas Water Code provides that the TCEQ "shall grant single certification to the municipality" to provide water service to the newly annexed area (Tex. Water Code § 13.255(c)). That state law also provides a methodology for determining the value of DPWSC's property which may be "rendered useless or valueless to the retail public utility..." and requires TCEQ to "...determine...the monetary amount that is adequate and just to compensate the retail public utility for such property" (id.).

As the City has moved forward with utilizing § 13.255 authority to provide water service to the newly annexed areas, it has been informed by DPWSC that it, and it alone, has authority to serve the area, regardless of the City's annexation. DPWSC has also informed the City that it will file a lawsuit, if necessary, to stop the City from encroaching on its CCN area, citing the existence of its USDA loan and the protection of § 1926(b) as the source of its exclusive right.

The City and the developer have both made efforts to work with DPWSC to resolve this matter, but have had no success. As a result, the City and the developer are in agreement that the best course of action is to continue to pursue the State authority under § 13.255 and are in the process of doing just that. As part of its due diligence, the City is very much interested in understanding USDA's perspective on this matter. In that regard, we would respectfully request that you provide a response to this letter which documents USDA's position. Specifically, what is USDA's position regarding the extent of 1926(b) protection as to undeveloped portions of an indebted Texas Water Supply Corporation, in light of the State law authority granted cities such as Montgomery to decertificate and provide exclusive water service to annexed areas within the indebted WSC's CCN boundary?

Again, the City thanks you for meeting with us to discuss this matter and for responding, in writing, to this important question.

Please feel free to contact me if you believe additional explanation is necessary. We look forward to your response.

Sincerely,

Duncan C. Norton
Attorney for the City of Montgomery, Texas

DCN/ry
948880_1.doc

cc: Mr. Brant Gary
Mr. Bryan Fowler

United States Department of Agriculture
Rural Development

OFFICE OF THE STATE DIRECTOR

APR 06 2010

Mr. Duncan C. Norton, P. C.
Lloyd Gosselink, Rochelle & Townsend, P. C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

RE: Dobbin-Plantersville WSC
City of Montgomery

Dear Mr. Norton,

In response to your recent visit and subsequent correspondence regarding the Agency's position on issues involving 7 USC 1926(b) and how it relates to our borrower, Dobbin-Plantersville Water Supply Corporation (DPWSC), and the request by City of Montgomery (City) to provide water service in a certificated area, we offer the following information:

1. Dobbin-Plantersville Water Supply Corporation is currently indebted to the United States of America, Rural Utilities Service.

2. DPWSC has the authority to provide domestic water service within its Certificate of Convenience and Necessity (CCN) as permitted by the Texas Commission on Environmental Quality.

3. DPWSC's CCN has been pledged for the purpose of securing indebtedness to the government. Revenues received for service provided to residents within the CCN are used to repay the regular installments to the Agency.

It is our understanding that the City wishes to provide water service to a newly annexed undeveloped area within the DPWSC's certificated area. The DPWSC, at this point, does not have the ability to provide adequate water service to the area in question without additional improvements to the area. We understand that the City has the ability to provide adequate service to the area and in fact already has infrastructure in close proximity to serve the area in question.

101 South Main Street- Federal Building, Suite 102, Temple, Texas 76501
Phone: (254) 742-9710 • Fax: (254) 742-9709 • TDD: (254) 742-9712 • Web: http://www.rurdev.usda.gov/tx

While an entity has the exclusive authority to provide water service as permitted by its CCN, and has protection from another entity providing the same type of service within its certificated area, if indebted to the Government, under 7 USC 1926(b), the Agency's position is to remain neutral when disputes are concerned. The Agency typically takes a position, when a developed area within an indebted party's CCN is under dispute and the area contains infrastructure financed by the Agency. The concern the Agency has, in that scenario, is the potential loss of revenues to the indebted party. In the event the indebted party is unable to provide adequate service in an area within its CCN, the Agency's ultimate concern is that the future customers within the area in question receive adequate water service.

If you have any questions or comments, please contact Michael Canales, Community Programs Director, at 254-742-9789.

Sincerely,

FRANCISCO VALENTIN, JR.
State Director

cc: Dobbin-Plantersville WSC
AD Smith, Hillsboro
AD Lawrence, Huntsville
Bryan Sub-Area Office

605 F.3d 511
United States Court of Appeals,
Eighth Circuit.

PUBLIC WATER SUPPLY DISTRICT NO. 3 OF LACLEDE COUNTY, MISSOURI, Appellant,
v.
CITY OF LEBANON, Missouri, Appellee.

No. 09–2006.
|
Submitted: Jan. 12, 2010.
|
Filed: May 1 , 2010.

Synopsis

Background: Rural water district brought action against nearby city, alleging that the city was illegally providing water and sewer services to customers within the district's boundaries. The United States District Court for the Western District of Missouri granted city's motion for summary judgment, and subsequently dismissed district's state law claims, 2009 WL 982080. The district appealed.

Holdings: The Court of Appeals, Gruender, Circuit Judge, held that:

[1] city did not violate law by continuing to provide service to customers it began serving before district obtained federal loan, and

[2] statutory phrase "the service provided or made available" included only type of service financed by qualifying federal loan.

Affirmed in part, reversed in part, and remanded.

Attorneys and Law Firms

***513** Michael D. Davis, argued, Tulsa, OK, (Scott Andrew Robbins, Poplar Bluff, MO, Steven M. Harris, Tulsa, OK, on the brief), for appellant.

Steven David Soden, argued, Kansas City, MO, (Mark Douglas Harpool, Springfield, MO, Terry J. Satterlee, Matthew L. Larsen, Kansas City, MO, Peter Allen Lee, Stockton, MO, on the brief), for appellee.

***514** Before GRUENDER and SHEPHERD, Circuit Judges, and JARVEY, [1] District Judge.

Opinion

GRUENDER, Circuit Judge.

Public Water Supply District No. 3 of Laclede County, Missouri ("the District") brought this suit against nearby City of Lebanon, Missouri ("the City"), alleging that the City is illegally providing water and sewer services to customers within the District's boundaries. The District argues that the City, in providing services to these customers, violated the requirement of 7 U.S.C. § 1926(b) that "[t]he service provided or made available through [the District] shall not be curtailed or limited." Because we conclude that the District is not entitled to § 1926(b) protection for any of the disputed customers, with the possible exception of customers at one property development, we affirm in part and reverse and remand in part the district court's grant of summary judgment to the City.

I. BACKGROUND

The District was created in 1967 to provide water service to customers within boundaries established in the District's Decree of Incorporation. In 1998, the Decree of Incorporation was amended to authorize the District also to provide sewer service. On August 31, 2007, the District closed on a $2 million loan from the United States Department of Agriculture ("the USDA loan"). The USDA loan was made pursuant to 7 U.S.C. § 1926(a) and was for the purpose of extending and improving the District's sewer system. The USDA loan was secured by the District's net revenue from its sewer operations. As a federally indebted rural water association, the District became insulated from competition under 7 U.S.C. § 1926(b), which protects a rural water association's service area from certain incursions by nearby cities. Specifically, § 1926(b) states that

> [t]he 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 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.

At the time the District closed on the USDA loan, the City was already providing sewer and water services to some customers within the District's boundaries. After the District closed on the USDA loan, the City extended service to additional customers within the District's boundaries, though not to any customers whom the District was already serving.

On October 2, 2007, the District filed this suit against the City, alleging that the City violated § 1926(b) by providing sewer and water services to certain customers within the District's boundaries. The District sought injunctive relief to prevent the City from continuing to serve these customers, as well as damages from the date the District closed on the USDA loan, August 31, 2007. This dispute centers on the District's claim that, as a result of its USDA loan for sewer development, § 1926(b) entitles the District to be the exclusive sewer and water service provider ***515** for customers to whom the District has made service available but to whom the City currently provides service. These disputed customers can be divided into three sets: (1) sewer customers the City began serving before August 31, 2007; (2) water customers, regardless of when the City began providing service to them; and (3) sewer customers living in seven tracts of properties that the City began serving after August 31, 2007.[2] The district court granted the City's motion for summary judgment, holding that § 1926(b) does not entitle the District to be the exclusive service provider for any of these sets of disputed customers. The District appeals.

II. DISCUSSION

"We review a district court's grant of summary judgment *de novo,* construing the record in the light most favorable to the nonmoving party." *Irving v. Dormire,* 586 F.3d 645, 647 (8th Cir.2009). The Consolidated Farm and Rural Development Act of 1961 authorizes the USDA to issue loans "to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies." 7 U.S.C. § 1926(a)(1). We will refer to these associations as "rural districts." The qualifying federal loans made to rural districts are "to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities." *Id.* When such a loan is made, § 1926(b) protects the federally indebted rural district's service area from certain incursions by nearby cities.

[1] **[2]** We have only once before addressed the merits of a claim based on § 1926(b). *See Rural Water Sys. No. 1 v. City of Sioux Center,* 202 F.3d 1035 (8th Cir.2000). In *Sioux Center,* we noted that "any '[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the [USDA]-indebted party seeking protection for its territory.' " *Id.* at 1038 (quoting *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192, 1197 (10th Cir.1999)). Nonetheless, "[o]ur role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch." *Doe v. Dep't of Veterans Affairs,* 519 F.3d 456, 461 (8th Cir.2008). With these principles in mind, we proceed to address the District's claims with respect to each of the three sets of disputed customers.

A.

[3] **[4]** The District closed on the USDA loan on August 31, 2007. The District argues that as of August 31 the City lost its right to serve sewer customers within the District's boundaries, even though the City began serving many of those customers before the District obtained the USDA loan. The City urges us to reject the District's "continued service theory" by holding that the City's continuing to provide service to these customers does not violate § 1926(b) because the statute merely prevents cities from commencing service to new customers. Consequently, we must decide whether the timing of the City's initial provision of service to these customers ***516** is relevant to whether the City violated § 1926(b). The scope of § 1926(b) protection, which depends in part on the relevance of the timing of the City's initial provision of service, is a question of statutory interpretation, which we review de novo, *see Owner–Operator Indep. Drivers Ass'n v. United Van Lines, LLC,* 556 F.3d 690, 693 (8th Cir.2009).

"As with any question of statutory interpretation, our analysis begins with the plain language of the statute." *Jimenez*

v. Quarterman, 555 U.S. 113, 129 S.Ct. 681, 685, 172 L.Ed.2d 475 (2009). The key operative provision of § 1926(b) provides that a rural district's service "shall not be curtailed or limited." In this context, the verbs "curtail" and "limit" connote something being taken from the current holder, rather than something being retained by the holder to the exclusion of another. *See* The New Shorter Oxford English Dictionary 575, 1591 (4th ed.1993) (defining "curtail" as "[s]horten in ... extent or amount; abridge"; defining "limit" as "set bounds to; restrict"); *see also CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 135 (7th Cir.1993) ("The cases and fragments of legislative history available to us all seem to have in mind curtailment resulting *from substitution of* some third party as a water-supplier for [the rural district]." (emphasis added)). [3] Moreover, § 1926(b)'s enumerated methods of curtailing or limiting a rural district's service area—"*inclusion* of the area ... within the boundaries of any municipal corporation" or "*granting* of any private franchise for similar service"—reinforce the notion that the statute prevents a city from taking customers served by a rural district, not a city's passive continuation of service to its customers. [4] Thus, both the terms' ordinary meanings and their particular usages within the statute are inconsistent with the District's argument that it is entitled to take sewer customers whom the City started serving before the District obtained the USDA loan. These key terms suggest that a city curtails or limits service within the meaning of § 1926(b) when it initially provides service to a customer, not when it continues to do so.

Furthermore, the plain language of the statute specifically restricts its application to "*such* associations." (Emphasis added.) Giving effect to the term "such" requires that we read the statute to protect a subset of all rural districts, namely, only those rural districts that have a qualifying federal ***517** loan. Because the District claims that the timing of the City's initial provision of service is irrelevant, the District would essentially remove this limitation from the statute, forcing cities to operate in the shadow of § 1926(b), even when a nearby rural district had no qualifying federal loan. Under this scenario, cities would face the constant threat that a rural district will someday obtain a qualifying federal loan and bring suit under § 1926(b), thereby stranding the city's investment in infrastructure it had already built to serve those customers. A rural district would be insulated from competition even without a qualifying federal loan because no rational city would make such an investment under those circumstances. Thus, the "well-established principle[ ] of statutory interpretation that require[s] statutes to be construed in a manner that gives effect to all of their provisions," *United States ex rel. Eisenstein v City of New York*, 556 U.S. 928, 129 S.Ct. 2230, 2234, 173 L.Ed.2d 1255 (2009), counsels against adopting the District's continued service theory as the proper interpretation of § 1926(b). The statute's plain language suggests that the scope of protection against competition is more limited than the District's continued service theory would allow.

Additionally, § 1926(b) includes a specific timing element. In particular, it provides that service "shall not be curtailed or limited ... during the term of such loan." This phrase limits the scope of a rural district's exclusive provider status to the period during which the qualifying federal loan is outstanding. The District's argument that the City's continuing to provide service to its existing customers violates § 1926(b) effectively eliminates this phrase from the statute. Under the District's view, at any point in time a rural district can obtain a qualifying federal loan and then challenge a city's continuing to provide service, regardless of whether a city's incursion occurred "during the term of such loan." Here again, we reject the District's interpretation as inconsistent with the rule that "statutes [are] to be construed in a manner that gives effect to all of their provisions," *Eisenstein*, 129 S.Ct. at 2234. [5]

[5] Finally, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486, 126 S.Ct. 1252, 163 L.Ed.2d 1079 (2006). [6] "Congress enacted section 1926(b) to encourage rural ***518** water development and to provide greater security for [USDA] loans." *Sioux Center*, 202 F.3d at 1038. Rejecting the District's continued service theory is not inconsistent with these purposes. Again, if § 1926(b) permitted rural districts to capture customers that a city began serving before a rural district obtained a qualifying federal loan, cities would not be willing to invest in the necessary infrastructure to serve customers within a rural district's boundaries because such investments would be rendered worthless by a rural district that obtains a qualifying federal loan. Creating such a disincentive would undermine the purpose of encouraging rural utility development. Additionally, rural districts can continue to use § 1926(b) to protect their exclusive right to serve their existing customer base during the time of the qualifying federal loan, thereby ensuring the continued security of the loan. In sum, the plain language of the statute, the rule in favor of giving effect to all terms in the statute, and our analysis of the statute's purposes all confirm that the City did not violate § 1926(b) merely

by continuing to provide service to those customers it began serving before the District obtained the USDA loan.

Other circuits have also addressed this question, though in cases presenting somewhat different facts. Analyzing § 1926(b)'s "curtailed" and "limited" language in a similar manner, the Sixth Circuit distinguishes between "offensive" and "defensive" uses of § 1926(b). *See Le-Ax Water Dist. v. City of Athens,* 346 F.3d 701, 708 (6th Cir.2003) ("The statute's use of phrases like 'curtailed' and 'limited' to describe the municipality's interference with the rural water association suggests that a rural water association must already be providing service to an area before the protections of § 1926(b) apply."). In *Le-Ax,* the Sixth Circuit rejected a rural water district's attempt to use § 1926(b) to become the exclusive service provider for a new development that it had not previously served. *Id.* The Sixth Circuit adopted a categorical rule prohibiting rural districts from making "offensive" use of § 1926(b) by "seeking to use the statute to foist an incursion of its own on users ... that it has never served or made agreements to serve." *Id.* at 707. In contrast, the *Le-Ax* court read § 1926(b) to authorize "defensive" uses, allowing rural districts to "use the statute to protect [their] users or territory from municipal incursion." *Id.*

We recognize that the Tenth Circuit has addressed this question twice before and taken a contrary approach, albeit without much discussion of the issue. *See Pittsburg County Rural Water Dist. No. 7 v. City of McAlester,* 358 F.3d 694 (10th Cir.2004); *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow,* 191 F.3d 1192 (10th Cir.1999). Both *Pittsburg County* and *Sequoyah County* involved rural water districts that were previously federally indebted, but both districts later paid off their qualifying federal loans. Without active loans, § 1926(b) protection did not apply, and nearby cities began providing water service to customers within the rural water districts. After the cities started providing service to these customers, the rural water districts acquired new qualifying federal loans under § 1926(a), restoring their § 1926(b) protection. In both cases, the Tenth Circuit held that the districts could sue to reclaim the customers that the cities began serving during the time between the districts' periods of federal indebtedness. On this view, "all § 1926 claims based on service by [a city] to customers within the limitations period were not otherwise barred by the fact that [the city] was serving those customers prior to the [subsequent] loan." *Pittsburg County,* 358 F.3d at 713; *see also id.* ("The fact that a municipality had ***519** provided service to those properties prior to the [qualifying federal] loan was no bar in *Sequoyah* to claims arising out of a city's service during the period of indebtedness.").

None of these cases is precisely analogous to this case. In *Le-Ax,* the rural district brought suit over customers outside the association's boundaries, while here the customers are within the District's boundaries.[7] And unlike the rural districts in *Pittsburg County* and *Sequoyah County,* the District never had a qualifying federal loan before August 31, 2007, and thus never had § 1926(b) protection with respect to customers the City served before that date. Nonetheless, neither of those distinctions affects our analysis of this issue. To the extent there is a conflict between these cases, we find the Sixth Circuit's distinction between offensive and defensive uses of § 1926(b) in *Le-ax* to be more persuasive and consistent with our reading of the statute. Section 1926(b) provides a shield, not a sword. Because we conclude that the City's continuing to provide service to customers it began serving before the District obtained the USDA loan does not violate § 1926(b), we affirm the district court's grant of summary judgment with respect to this set of customers.

B.

[6] **[7]** The District next challenges the City's right to provide water service to customers within the District's boundaries. Although the USDA loan was secured to expand the District's sewer system and was secured only by its sewer revenues, the District argues that the USDA loan also triggers § 1926(b) protection with respect to its water service. We must determine whether "[t]he service provided or made available" under § 1926(b) refers solely to the service for which a qualifying federal loan was obtained and which provides the collateral for the loan, as the City argues, or to all services that a rural district provides, as the District would have us hold. This appears to be a question of first impression.[8] As another question of statutory interpretation, we review the issue de novo. *See Owner–Operator Indep. Drivers Ass'n,* 556 F.3d at 693.

We again begin with the plain language of the statute, *Jimenez,* 129 S.Ct. at 685, which refers to "[t]he service provided or made available." Both parties argue that the plain language supports their position, and each accuses the other of reading additional terms into the statute. The District claims that adopting the City's interpretation would change the phrase "the service" into "the financed service," adding a restrictive term to the statute. The City argues that adopting

the District's interpretation would add an expansive term to the statute, changing "the service" into "all services." These arguments underscore the ambiguity in the phrase "the service provided or made available." The term "service," standing alone, reasonably may ***520** be read to refer to a single type of service or to multiple types of service. Thus, § 1926(b)'s isolated use of the term "service," without explanation, provides little insight into the interpretive question before us.

[8] However, "[w]e do not ... construe statutory phrases in isolation; we read statutes as a whole." *United States v. Morton,* 467 U.S. 822, 828, 104 S.Ct. 2769, 81 L.Ed.2d 680 (1984). Notably, § 1926(a) repeatedly employs both the terms "service" and "services." In doing so, Congress distinguished between a single "service" and multiple types of "services." *Compare* 7 U.S.C. § 1926(a)(4)(B) ("The term 'project' shall include facilities providing central *service* ...."), *and* 7 U.S.C. § 1926(a)(20)(E) ("[T]he Secretary may make grants to State agencies for use by regulatory commissions in states with rural communities without local broadband *service* "), *with* 7 U.S.C. § 1926(a)(11)(B)(i) (directing the Secretary of Agriculture to consider "the extent to which the applicant provides development *services,*" which include training, establishing business centers, and analyzing business opportunities), *and* 7 U.S.C. § 1926(a)(20)(E) (describing grants to "cable operators that establish common carrier facilities and *services* "), *and* 7 U.S.C. § 1926(a)(23) (describing grants "to local governments to improve the infrastructure, *services,* and business development capabilities of local governments") (emphasis added throughout). In § 1926(b), Congress used only the singular term "service." Read *in pari materia* with 7 U.S.C. § 1926(a), Congress's pattern of using the singular to refer to a single type of service while using the plural to refer to a collection of multiple types of services is decisive. Because § 1926(b) employs the singular term, we conclude that "the service provided or made available" is best interpreted to include only the type of service financed by the qualifying federal loan. [9]

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 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 ***521** 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.

C.

[9] **[10]** The District also challenges the City's provision of sewer service to customers at seven tracts of properties that the City did not begin serving until after the District closed on the USDA loan. This challenge represents a more typical § 1926(b) claim in that it involves both customers who were not served until after the District obtained the USDA loan and the same type of service financed by the loan. We thus apply the well-established test for determining whether a rural district is entitled to protection under § 1926(b). To qualify for protection, an entity must: (1) be an "association" under the statute, (2) have a qualifying federal loan, and (3) have provided or made service available to the disputed area. *See, e.g., Sequoyah County,* 191 F.3d at 1197. With respect to the customers at these seven tracts, the first two requirements are not in dispute. "Making service available has two components: (1) the physical ability to serve an area; and (2) the legal right to serve an area." *Sioux Center,* 202 F.3d at 1037. Because the district court granted the

City's motion for summary judgment, we view the evidence concerning the District's physical abilities and legal rights in the light most favorable to the District. *See Irving v. Dormire,* 586 F.3d 645, 647 (8th Cir.2009)

In 1998, the District amended its Decree of Incorporation to authorize providing sewer service in addition to the water service it was already providing. The District claims that, at that time, it began designing and constructing a wastewater treatment facility. However, the District did not secure an operating permit that would allow for discharge of wastewater from that facility until May 30, 2008. By then, the City had already begun serving all of the disputed customers, with the exception of those in one tract known as Castle Rock.

1. Castle Rock

The City does not dispute that the District had the legal right to serve Castle Rock; rather, it challenges whether the District had the physical ability to serve these customers. Although the District had completed its wastewater treatment facility and obtained an operating permit for the facility at the time the City began serving Castle Rock, the District did not propose using this facility to provide service to customers at Castle Rock. Instead, the District proposed having Castle Rock's developer, Becky Burk, construct a new stand-alone treatment facility to serve those customers. This separate facility would treat wastewater using above-ground recirculating sand filters or biomedia filters. The District does not provide much detail about this proposal, though it appears that individual septic systems would also need to be installed at each house. Indeed, the parties dispute even basic objective facts, such as the visual impact the facility would have on the surrounding development. Nonetheless, the ***522** District's expert averred that the facility, in whatever form it would take, would cost Burk approximately $360,000 and take approximately one year to construct.

Burk averred that the District's proposal of forcing her to build a stand-alone treatment facility was unacceptable. Burk intended Castle Rock to be an "upper-end" development, and she insisted that her customers would not tolerate the individual septic systems involved in the District's proposal. In fact, Burk claimed that she would not have developed Castle Rock had she known that the District's proposed method of providing sewer service would be forced on her. The district court accepted Burk's testimony and held that because the District's proposal would not "reasonably conform to the ideals and standards a developer or customer in a similar situation would expect," the District had not made service available within the meaning of § 1926(b). As a result, the district court granted the City's motion for summary judgment with respect to Castle Rock.

[11] [12] [13] The district court misapplied the "made service available" test by improperly focusing on the preferences of the potential recipient of the service. The statute protects a rural district's service wherever it has been "made available," without restricting the methods of providing that service. The district court cited no authority for the proposition that courts should give dispositive effect to "the ideals and standards a developer or customer in a similar situation would expect." And we can find no support for that proposition either in the text of § 1926(b) or in the cases interpreting the statute. Although courts have recognized that a rural district's proposed method of providing service, if unreasonably costly or unreasonably delayed, can constitute a constructive denial of service, *see Rural Water District No. 1 v. City of Wilson,* 243 F.3d 1263, 1271 (10th Cir.2001), allowing recipients' preferences to restrict the acceptable methods through which a rural district can provide service would significantly dilute § 1926(b)'s protections.[10] We recognize that § 1926(b) can impose burdens on recipients, since granting rural districts an exclusive right to serve certain recipients also prevents recipients from choosing other service providers. This, however, is the choice Congress made in enacting the statute, and it is not the role of the courts to upset such policy decisions. *See Integrity Floorcovering, Inc. v. Broan–Nutone, LLC,* 521 F.3d 914, 918–19 (8th Cir.2008). Consistent with the statutory text, the proper inquiry is whether the District had "made service available." Typically, a rural district has discretion to determine the method of providing service, even if it conflicts with a potential recipient's stated preferences.[11] We therefore reverse the district court's ruling that the District's proposed method of providing service is insufficient under § 1926(b) because it does not conform to the "ideals and standards a reasonable developer or customer would expect."

***523 [14]** We decline to decide, in the first instance, whether the District's skeletal proposal is sufficient to satisfy the "made service available" test for the purposes of surviving summary judgment. Under the "pipes in the ground" test used in water service cases, courts examine "whether a water association 'has adequate facilities within or adjacent to the area to provide service to the area within a reasonable amount of time after a request for service is made.' " *Sequoyah County,* 191 F.3d at 1202 (quoting *Bell Arthur,* 173 F.3d at 526). Here, the District argues that it has "adequate facilities"

in place, despite the fact that its proposal involves no existing facilities. We have not found any cases where a rural district has satisfied the "physical ability to serve" requirement in the absence of any facilities whatsoever. *Cf. Lexington–S. Elkhorn Water Dist. v. City of Wilmore,* 93 F.3d 230, 238 (6th Cir.1996) ("[A]n association's ability to serve is predicated *on the existence of facilities* within or adjacent to a disputed property." (emphasis added)). However, given the lack of factual development about the District's current infrastructure or its physical ability to provide service to Castle Rock, we remand to the district court for further proceedings concerning whether the District had "made service available" to Castle Rock.

2. The Pre–Permit Customers

In its motion for partial summary judgment, the City only challenged the District's legal right to serve the remaining six tracts, not whether the District had the physical ability to serve these customers. The City argued, and the district court held, that because the District lacked an operating permit for its wastewater treatment facility, the District lacked the legal right to serve those tracts. The District argued that the lack of an operating permit did not prevent it from providing service, but only from discharging wastewater. The District presented alternative methods for temporarily dealing with the wastewater while the permit application was pending, including holding the wastewater until the District could obtain the necessary permit.

The District has taken a different position on appeal. In an effort to side-step the district court's adverse ruling, the District has abandoned its original proposal to provide service to these customers using its existing treatment facility. *See* Appellant's Br. at 45 ("The sewer facility ... for which an [o]perating [p]ermit was obtained in May 2008[ ] is not the facility through which [the District] proposed to provide sewer service to the [d]isputed [c]ustomers."); *id.* at 48 ("[The District] did not propose to serve the [p]re-permit customers with these facilities.").

While it is not entirely clear what proposal the District seeks to substitute for its original plan, the District seems to suggest that it could provide service to these six tracts in a manner similar to its proposal for Castle Rock: forcing developers or customers to construct individual treatment facilities for the tracts of properties. Not only was this new proposal not meaningfully raised before the district court, but the record is almost entirely devoid of evidence regarding the factual details of the District's proposal to make service available, such as the expected cost and time required to build the facilities.[12] In ***524** response to the City's claim that the District is raising this proposal for the first time on appeal, the District has identified only one sentence in its motions before the district court that even arguably introduces the new proposal. *See* Reply Br. at 26–27 ("One of the ways [the District] has and can provide sewer service is for the developer to construct collection and treatment facilities utilizing recirculating sand filters or bio-media filters designed to meet the needs of the proposed development." (quoting Resp. to Mot. for Partial Summ. J. at 15, Dec. 31, 2008)).

[15] **[16]** **[17]** The District's approach to this issue is precisely the type of sandbagging we have frequently criticized. Our well-established rule is that "[a]bsent exceptional circumstances, we cannot consider issues not raised in the district court." *Shanklin v. Fitzgerald,* 397 F.3d 596, 601 (8th Cir.2005).

> The rationale for the rule is twofold. First, the record on appeal generally would not contain the findings necessary to an evaluation of the validity of an appellant's arguments. Second, there is an inherent injustice in allowing an appellant to raise an issue for the first time on appeal. A litigant should not be surprised on appeal by a final decision there of issues upon which they had no opportunity to introduce evidence. A contrary rule could encourage a party to "sandbag" at the district court level, only then to play his "ace in the hole" before the appellate court.

Von Kerssenbrock Praschma v. Saunders, 121 F.3d 373, 376 (8th Cir.1997) (quoting *Stafford v. Ford Motor Co.,* 790 F.2d 702, 706 (8th Cir.1986)). Both rationales are implicated here. The paucity of evidence regarding the nature, cost, and reasonableness of the District's newly proposed facilities for each development would frustrate our analysis of this proposal raised for the first time on appeal. Nor should the District be allowed to avoid the district court's adverse ruling by changing horses midstream. The District opposed the City's partial summary judgment motion focusing exclusively on whether the operating permit for its wastewater treatment facility was necessary to "make service available" and merely proposed temporary solutions for providing service until that

permit was issued. Notwithstanding the one vague sentence noted above, the District's new proposal of constructing stand-alone facilities for each property was not meaningfully presented to the district court. "The district courts cannot be expected to consider matters that the parties have not expressly called to their attention, even when such matters arguably are within the scope of the issues that the parties have raised." *Stafford,* 790 F.2d at 706; *see also United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs."). We therefore decline to entertain the District's new proposal. Having abandoned its previous proposal, the District is left with no support for its claim that it had made service available to the customers at these six tracts of properties. As a result, we affirm the district court's grant of summary judgment to the City with respect to those customers.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment with respect to all of the challenged customers other than those at Castle Rock. With respect to Castle Rock, we remand for consideration of whether the District had "made service available," without considering ***525** the recipient's preferred methods of receiving service. [13]

All Citations

605 F.3d 511

Footnotes

1 The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa, sitting by designation.

2 For simplicity we use the term "tracts of properties" to refer to these seven clusters of properties, which variously consist of neighborhood developments, nearby groups of residences, and individual residences.

3 The legislative history is consistent with such a reading. Subsection (b) was added to § 1926 in 1961 "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise *be developed* with the expansion of the boundaries of municipal and other public bodies into an area *served by* the rural system." S. Rep. 87–566, 1961 U.S.C.C.A N. 2243, 2309 (emphasis added).

4 Section 1926(b) could be read to prohibit a city from curtailing or limiting a rural district's service only by these enumerated methods. While the City has neither altered its boundaries since the District obtained the USDA loan nor granted any franchise for service in the area, the district court held that § 1926(b) is not limited to those two types of incursions. Instead, the district court held that § 1926(b) also protects rural districts against other types of incursions that do not involve a boundary change or franchise grant. *See Pub Water Supply Dist. No. 3 v. City of Lebanon,* No. 07–cv–3351, slip op. at 5 (W.D. Mo. June 26, 2008) ("While the City's reliance on the statutory language has some appeal, the remaining provisions of § 1926(b) and the broad application of the statute by the federal courts do not support such a literal reading."). On appeal, the City does not challenge the district court's holding on this issue. We assume for the purposes of this appeal that § 1926(b) protects the District against the City's provision of service, regardless of whether this alleged curtailment or limitation involved the City changing its boundaries or granting a franchise.

5 Although the District has not argued so, we note that a strict grammatical reading of the statute might suggest that the phrase "during the term of such loan" modifies only the "granting of any private franchise," which it immediately follows, rather than the earlier phrase "shall not be curtailed or limited." However, given the other statutory language we have already discussed and the purposes of the statute discussed below, we decline to adopt this narrower reading. *See Crandon v. United States,* 494 U S. 152, 158, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"). Moreover, even under this alternative reading of the statute, the District's continued service theory would nullify the limiting phrase, "during the term of such loan," at least as it pertains to the granting of a franchise.

6 With respect both to the sewer customers served before the District closed on the USDA loan and to water customers, the District argues that the question whether a particular interpretation furthers the policy goals of § 1926(b) is a question of fact, precluding summary judgment. We reject this argument. The underlying question remains one of statutory interpretation, a pure question of law. *See Chandris, Inc v Latsis,* 515 U S. 347, 369, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) ("Because statutory terms are at issue, their interpretation is a question of law....").

7 In Ohio, rural water districts are not confined to providing service solely within their established boundaries. Ohio Rev.Code Ann § 6119 01(A).

8 Other courts have addressed the related question whether § 1926(b) protection is limited to customers receiving service from the particular project being financed by the qualifying federal loan or whether it extends to all customers receiving the type of service financed by the loan. *See Sequoyah County,* 191 F.3d at 1198 n 5; *Bell Arthur Water Corp. v. Greenville Utils. Comm'n,* 173 F.3d 517, 524 (4th Cir.1999) ("We can find no statutory support for the ... position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan.") We need not address this issue, since the District's argument focuses only on protection for other types of services, not other projects or areas receiving the same type of service.

9 In this case, the USDA loan was both for improvements to the District's sewer system and was secured by sewer revenues. Therefore, 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. Here, the loan was not made to finance a water project, nor did the District's water revenues secure the loan.

10 The district court correctly held that the reasonableness of imposing the $360,000 cost on the developer depends on disputed issues of fact, and is therefore unsuitable for resolution at the summary judgment stage

11 Of course, a rural district does not have unlimited discretion; a rural district has not "made service available" if the rural district's method of providing service amounts to a constructive denial of service. For instance, failing to provide a type of service that is generally accepted in the industry, failing to comply with state law requirements such as health and sanitation codes, or providing unreasonably costly or delayed service each might amount to such a constructive denial of service.

12 In the same affidavit in which the District's expert estimated the cost and construction time for a stand-alone treatment facility to serve Castle Rock, the expert averred that a similar facility for Ostrich Lake, one of the remaining six tracts, would cost $160,000. Other than attaching the affidavit to its response to the City's motion for summary judgment, the District presented no meaningful argument regarding this new proposal to the district court. There is no evidence regarding facilities for the other five tracts.

13 The District also argues that the district court erred in dismissing its state law claims without prejudice. The district court did so after finding that Missouri state courts have exclusive jurisdiction over these claims and, alternatively, that it was exercising its discretion to decline supplemental jurisdiction, in part because the state law issues were "novel and complex." *See* 28 U S.C. § 1367(c)(1). The District states that it does not challenge the district court's alternative rationale. "We sit to review judgments, not opinions," so the District's disagreement with only one of two alternative reasons for the dismissal of its state law claims leaves us with no reason to decide the question. *See United States v. Dugan,* 912 F.2d 942, 944 (8th Cir.1990). Because the District does not challenge the district court's discretionary decision not to exercise supplemental jurisdiction over the claims, we affirm the dismissal of these claims.

End of Document

Attachment 4

Central Registry

The Customer Name displayed may be different than the Customer Name associated to the Additional IDs related to the customer. This name may be different due to ownership changes, legal name changes, or other administrative changes.

Detail of: **Public Water System/Supply Registration 0940018**
For: **CITY OF CIBOLO** (RN101278455)
FM 78 4 MILES E OF FM1604
Registration Status: **ACTIVE**
Held by: **City of Cibolo (CN600705719)** View 'Issued To' History
RESPONSIBLE PARTY
Mailing Address: Not on file

Related Information:

Emergency Response Events
Other Incidents
Investigations
Notice of Violations
Drinking Water Watch Information

There is no information related to this Registration in the following categories:

Commissioners' Actions
Correspondence Tracking
Effective Enforcement Orders
Criminal Convictions
Proposed Enforcement Orders
Complaints
Discharges
Emission Events
Fish Kills
Periodic Reports

Site Associated with This Customer					Compliance History for Customer at this Site (If no Site appears in thesame row, this is the Customer's overall compliance history.)			
Customer Name	City or Nearest City	County	TCEQ Region	Related Numbers	Rating	Classification	Date Rated	Date Posted
CITY OF CIBOLO	N/A	N/A	N/A	▪ N/A	0	UNCLASSIFIED	09/01/2015	11/15/2015

What's a "site"?

A "site" (sometimes called a "regulated entity") is any person or thing that is of environmental interest to the TCEQ. At a "site", one or more regulatory activities of interest to us occur or have occurred in the past. Some examples of sites are:

- Industrial plants, such as the Exxon Baytown Facility
- Small businesses, such as Texaco Gas Station #200 or Elroy's Dry Cleaning & Laundry
- Public facilities, such as the City of Austin's Hornsby Bend Wastewater Treatment Plant

What's a "customer"?

A "customer" owns, operates, is responsible for, or is affiliated with a regulated entity. Examples include:

- Major industrial corporations, such as Exxon USA, Exxon Inc, or Texaco Inc
- Small businesses, such as Karl Redmond dba Karl's Kleaners, which owns several dry-cleaner locations
- Governmental bodies, such as the City of Austin, the United States Air Force, or a municipal utility district
- Individuals, such as Karl A. Redmond, owner of Karl Redmond dba Karl's Kleaners

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Get a list of compliance histories
Learn more about compliance histories
Questions? E-mail comphist@tceq.texas.gov

Return to search form

Attachment 4

Central Registry

The Customer Name displayed may be different than the Customer Name associated to the Additional IDs related to the customer. This name may be different due to ownership changes, legal name changes, or other administrative changes.

Detail of: **Public Water System/Supply Registration 0940018**
For: **CITY OF CIBOLO** (RN101278455)
FM 78 4 MILES E OF FM1604
Registration Status: **ACTIVE**
Held by: **City of Cibolo (CN600705719)** View 'Issued To' History
RESPONSIBLE PARTY
Mailing Address: Not on file

Public Water System/Supply Other Incidents at CITY OF CIBOLO

Tracking Number	Began	Ended	Type	Status
221844	10/12/2015	10/13/2015	BOIL WATER NOTICE (BWN)	CLOSED

Attachment 4

Central Registry

The Customer Name displayed may be different than the Customer Name associated to the Additional IDs related to the customer. This name may be different due to ownership changes, legal name changes, or other administrative changes

Detail of: **Public Water System/Supply Registration 0940018**
For: **CITY OF CIBOLO** (RN101278455)
FM 78 4 MILES E OF FM1604
Registration Status: **ACTIVE**
Held by: **City of Cibolo (CN600705719)** View Issued To History
RESPONSIBLE PARTY
Mailing Address: Not on file

Notice of Violations **Current TCEQ Rules**

NOV Date	Status	Citation/Requirement Provision	Allegation	Classification	Self Reporting Indicator
06/29/2011	RESOLVED	30 TAC Chapter 290, SubChapter D 290.46(f)(3)(B)(v) (Not applicable to CH)	Failure to record colorimeter accuracy checks.	MINOR	NO
06/29/2011	RESOLVED	30 TAC Chapter 290, SubChapter D 290.46(n)(2) (Not applicable to CH)	Failure to provide an updated distribution map.	MINOR	NO
06/29/2011	RESOLVED	30 TAC Chapter 290, SubChapter F 290.121(a) (Not applicable to CH)	Failure to provide the water system with a Monitoring Plan.	MODERATE	NO

Attachment 4

Texas Commission on Environmental Quality	Office of Water	Public Drinking Water Section
County Map of TX	Water System Search	Office of Compliance and Enforcement

Water System Detail Information

Water System No	TX0940018	System Type	C
Water System Name	CITY OF CIBOLO	Primary Source Type	SWP
Principal County Served	GUADALUPE	System Status	A
Principal City Served		Activity Date	01-01-1913
Population	17470	System Recognition	SUPERIOR

Water System Contacts

Type	Contact	Communication	
		Phone Type	Value
AC - Administrative Contact	DUNN, ALLEN PO BOX 826 CIBOLO, TX 78108-0826	BUS - Business	210-658-9900

Sources of Water

Name	Type	Activity	Availability
SW FROM CRWA LAKE DUNLAP WTP	CC	A	P
GW FROM CRWA WELLS RANCH	CC	A	P
SW FROM GREEN VALLEY SUD	CC	A	E

Source Water Percentages

Surface Water	0	Surface Water Purchased	0
Ground Water	0	Ground Water Purchased	0
Ground Water UDI	0	Ground Water UDI Purchased	0

Water Purchases

Water System \ Treatment Status
TX0940018 buys from CRWA LAKE DUNLAP WTP - TX0940091 / who is providing Treated and Filtered Water
TX0940018 buys from CRWA WELLS RANCH - TX0940096 / who is providing Treated, not Filtered Water

Buyers of Water

Water System / Population / Availability (blank, (S)easonal, (E)mergency, (I)nterim, (P)ermanent, (O)ther
No Buyers

Total Population Served - 17470
Total Population Served included ALL active connections, including emergency

Annual Operating Period(s)

Effective Begin Date	Effective End Date	Start Month/Day	End Month/Day	Type	Population
08-07-2014	No End Date	1/1	12/31	R	17470

Service Connections

Type	Count	Meter Type	Meter Size
RS	5823	ML	0

Attachment 4

Service Area	
Code	Name
R	RESIDENTIAL AREA

Regulating Agencies	
Name	Alias/Inspector
TX COMMISSION ON ENVIRONMENTAL QUALITY	TCEQ

Water System Historical Names
Historical Name(s)

System Certification Requirements		
Certification Name	Code	Begin Date

WS Flow Rates		
Type	Quantity	UOM
MDD - Maximum Daily Demand	2.513	MGD
PPRC - Provided Production Capacity	4.449	MGD
PSPC - Provided Service Pump Capacity	2.7	MGD
ADU - Average Daily Usage	1.432	MGD

WS Measures		
Type	Quantity	UOM
TSTC - Total Storage Capacity	3.75	MG
TPTC - Total Pressure Tank Capacity	2.75	MG

WS Indicators		
Type	Value	Date
DBP2 - Stage2 DBPR Schedule Category	1 - 1	04-01-2012
MDDD - Maximum Daily Demand Date	MDDD - Maximum Daily Demand Date	08-26-2013
POWN - Previous Ownership Type Code This is the WUD ownership code	MUN - Municipality	
PRFT - Status as a For or Non Profit Entity	NON - Non Profit	
SSWP - State Source Water Program	YES - Yes	08-31-2013
SSWP - State Source Water Program	NO - No	06-22-2009
XCON - Cross Connection control Program Ranking	ADQTF - Adequate	

Attachment 4

Texas Commission on Environmental Quality	Office of Water	Public Drinking Water Section
County Map of TX	Water System Search	Office of Compliance and Enforcement

Water System Detail Information

Water System No	TX0940018	Federal Type	C
Water System Name	CITY OF CIBOLO	Federal Source	SWP
Principal County Served	GUADALUPE	System Status	A
Principal City Served		Activity Date	01-01-1913

Water System Facilities

Facility ID No.	Facility Name	Type	Status/Reason	Availability	Aerial View
P0940018A	SW FROM GREEN VALLEY SUD	CC	A	F	
P0940018B	SW FROM CRWA LAKE DUNLAP WTP	CC	A	P	
P0940018C	GW FROM CRWA WELLS RANCH	CC	A	P	
DS01	DISTRIBUTION SYSTEM	DS	A	P	
PI 0001	CIBOLO VALLEY DR - 625 GPM - SP	PF	A	P	
PI 0002	CIBOLO VALLEY DR - 625 GPM - SP	PF	A	P	
PI 0003	CIBOLO VALLEY DR - 625 GPM - SP	PF	A	P	
LP001	ON FM 78 0.4 MI W OF CR 317, MARION	SS	A	P	
ST2986	CIBOLO VALLEY DR - 1.0 MG - ST	ST	A	P	
ST2987	CIBOLO VALLEY DR - 1.25 MG - EL	ST	A	P	
ST2988	FM 1103 & CR 380 - 1.5 MG - EL	ST	A	P	

Water System Facility Flows

Supplying Facility ID No.	Supplying Facility Name	Receiving Facility ID No.	Receiving Facility Name
SS - LP001	ON FM 78 0.4 MI W OF CR 317, MARION	DS - DS01	DISTRIBUTION SYSTEM
CC - P0940018A	SW FROM GREEN VALLEY SUD	SS - LP001	ON FM 78 0.4 MI W OF CR 317, MARION
CC - P0940018B	SW FROM CRWA LAKE DUNLAP WTP	SS - LP001	ON FM 78 0.4 MI W OF CR 317, MARION
CC - P0940018C	GW FROM CRWA WELLS RANCH	SS - LP001	ON FM 78 0.4 MI W OF CR 317, MARION

Attachment 4

Texas Commission on Environmental Quality	Office of Water	Public Drinking Water Section
County Map of TX	Water System Search	Office of Compliance and Enforcement

Water System Detail Information			
Water System No	TX0940018	Federal Type	C
Water System Name	CITY OF CIBOLO	Federal Source	SWP
Principal County Served	GUADALUPE	System Status	A
Principal City Served		Activity Date	01-01-1913

Water System Sampling Points

Facility ID	Facility Name	Fac Type Code	Smpl Pt ID Type Code Status	Location	Designations	
					Type	Begin/End Date
DS01	DISTRIBUTION SYSTEM	DS	ASB-01 - DS - A	237 CORDERO DR		
DS01	DISTRIBUTION SYSTEM	DS	DBP1-01 - DS - A	200 DEER MESA		
DS01	DISTRIBUTION SYSTEM	DS	DBP1-02 - DS - A	100 EVENING BREEZE		
DS01	DISTRIBUTION SYSTEM	DS	DBP2-01 - DS - A	124 INDUSTRIAL, CIBOLO, TX		
DS01	DISTRIBUTION SYSTEM	DS	DBP2-02 - DS - A	650 FM 78, CIBOLO TX		
DS01	DISTRIBUTION SYSTEM	DS	DBP2-03 - DS - A	200 DEER MESA, CIBOLO, TX		
DS01	DISTRIBUTION SYSTEM	DS	DBP2-04 DS A	113 SIOUX CIR, CIBOLO, TX		
DS01	DISTRIBUTION SYSTEM	DS	DSTCRRP - DS - A	REPEAT TCR SAMPLE		
DS01	DISTRIBUTION SYSTEM	DS	DSTCRRT - DS - A	ROUTINE TCR SAMPLE		
DS01	DISTRIBUTION SYSTEM	DS	DSTCRSP - DS - A	SPECIAL TCR SAMPLE		
DS01	DISTRIBUTION SYSTEM	DS	DSTWQP - DS - A	TCR SAMPLE POINT		
DS01	DISTRIBUTION SYSTEM	DS	IDSE-01 - DS - A	1- 113 SIOUX CIR		
DS01	DISTRIBUTION SYSTEM	DS	IDSF-02 - DS - A	2- 124 INDUSTRIAL		
DS01	DISTRIBUTION SYSTEM	DS	IDSL-03 - DS - A	3- 111 INDIAN BLANKET		
DS01	DISTRIBUTION SYSTEM	DS	IDSE-04 - DS - A	650 FM 78		
DS01	DISTRIBUTION SYSTEM	DS	LCR001 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR002 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR003 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR004 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR005 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR006 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR007 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR008 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR009 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR010 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR011 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR012 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR013 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR014 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR015 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR016 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR017 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR018 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR019 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR020 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR021 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR022 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR023 - DS - A			
DS01	DISTRIBUTION SYSTEM	DS	LCR024 - DS - A			