THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2016-001604
Circuit Court Case No. 2015-CP-13-00379

Town of McBee ..... Appellant,

v.

Alligator Rural Water & Sewer Company, Inc., Alligator Rural Water Company, Inc. ..... Defendants,

and

A.O. Smith Corporation ..... Intervenor-Defendant,

of whom

Alligator Rural Water & Sewer Company, Inc. and Alligator Rural Water Company, Inc. are the ..... Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

This appeal involves a preliminary injunction issued by the circuit court that prevents the Town of McBee from using its own wells to provide water service to its customers during the pendency of this litigation. The circuit court's injunction orders raise several issues:

1. Does 7 U.S.C. § 1926(b) prohibit the Town of McBee from using its own wells to provide water service to its own distribution customers?

2. Did the circuit court err by basing its injunction in part on a water-service contract between the Town of McBee and the Alligator Defendants that does not require the Town to purchase any minimum amount of water from the Alligator Defendants?

3. Did the circuit court err by holding that (a) the Alligator Defendants would be irreparably harmed in the absence of a preliminary injunction and (b) the Alligator Defendants did not have an adequate remedy at law, where the only harm alleged would be the loss of money?

4. Did the circuit court err by issuing a preliminary injunction without requiring the Alligator Defendants to post a bond, as directed by Rule 65(c), SCRCP?

STATEMENT OF THE CASE

I. Procedural History

This case concerns an injunction[1] issued by the circuit court in a dispute over water service rights between the Town of McBee ("McBee" or "Town") and Alligator Rural Water & Sewer Company, Inc. and Alligator Rural Water Company, Inc. (collectively "Alligator"). On June 17, 2015, McBee filed its Summons and Complaint seeking a declaratory judgment that Alligator could not directly provide water service to A.O. Smith Corporation ("A.O. Smith"). A.O. Smith operates a manufacturing facility adjacent to McBee, and it is and has been a water customer of McBee's since A.O. Smith opened this plant.

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[1] The circuit court used the term "temporary restraining order" and "temporary injunction" interchangeably in its orders. McBee contends that while phrased as a temporary restraining order, a preliminary injunction was granted.

In the Complaint, McBee alleged that its existing water service to A.O. Smith was protected under the terms of 7 U.S.C. § 1926(b), which precludes third parties from taking customers from utilities providers with outstanding USDA loans. McBee further alleged that Alligator's attempt to provide direct water service to A.O. Smith would violate that federal statute. (R. p. ___; Verified Amended Complaint.)

On July 31, 2015, the circuit court entered a consent order enjoining Alligator from providing or attempting to provide water service to A.O. Smith until resolution of this litigation. (R. p. ___; Consent Order Prohibiting Defendants from Providing Water Services to A.O. Smith while Litigation is Pending.) On August 17, 2015, Alligator filed and served its own motion for temporary restraining order, alleging that the Town's plan to produce and use the Town's own wells to provide treated water to the Town's own distribution system and customers violated the protections of 7 U.S.C. § 1926(b) with respect to Alligator. (R. p. ___; Notice of Motion and Motion for Temporary Restraining Order.)

The circuit court heard arguments on this motion on March 23, 2016. It then filed an order on April 12, 2016, granting Alligator's motion for a temporary injunction. (R. p. ___; Order Prohibiting Plaintiff from Selling Water Pumped from Its Wells while Litigation is Pending (April 12, 2016).)

That order, however, contained no discussion or findings supporting any of the elements necessary for a temporary injunction. Accordingly, on April 27, 2016, McBee filed a motion to alter or amend the judgment based on the circuit court's failure (a) to properly consider any of the three elements required to issue a preliminary injunction; and (b) to require Alligator to post the bond required by Rule 65(c), SCRCP. (R. p. ___; Motion to Alter or Amend Judgment.)

The circuit court heard McBee's motion to alter or amend the judgment on May 24, 2016. It denied the motion by order dated July 12, 2016. (R. p. ___; Order Denying Plaintiff's Motion to Alter or Amend Judgment.) This appeal followed.

II. Statement of the Facts

Like many local governments, the Town of McBee operates a public water system that serves residential, commercial, and industrial customers. Prior to 1999, McBee operated all aspects of its water system. (R. p. ___; Verified Amended Complaint p. 4.) In 1999, the town council agreed to outsource operational control of the water system to Alligator, and McBee began buying wholesale water service from Alligator for McBee for sale to its customers. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee p. 1; R. p. ___; Verified Amended Complaint pp. 4–5.) In 2005, and again in 2006, McBee issued bonds to the United States Department of Agriculture, Rural Development ("USDA") to finance the refurbishing of the water mains throughout the Town and improvements to other distribution system assets. Those bonds totaled in excess of $4 million and were issued under the terms of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. §§ 1921 *et seq.* (R. p. ___; Verified Amended Complaint p. 3.) McBee pledged its water-service revenues to secure payment of these bonds. (*Id.*) That debt remains outstanding. (*Id.*)

In the ensuing years, the relationship between McBee and Alligator deteriorated. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee p. 2.) In 2008, the Town set about fully reclaiming its water system. The Town applied for a permit from the South Carolina Department of Health and Environmental Control ("DHEC") to authorize the Town to resume operational control of its water system. On June 14, 2011, DHEC issued that permit.

In order to begin producing its own water again, McBee was required to refurbish the Town's wells and associated treatment facilities which had fallen into disuse. (R. p. ___;

Verified Amended Complaint p. 7.) McBee applied to DHEC for a permit to place a new submersible pump in its main well, Well No.2, and to refurbish its water chlorination system, which permit DHEC granted on November 13, 2012. (R. pp. ___–___; DHEC Operating Permits, Water Supply Construction Permits, and Final Approvals for Wells, Exhibits to Motion to Alter or Amend Judgment.) At DHEC's request, McBee agreed to install a granulated activated carbon ("GAC") filtering system for its wells, and applied for and received a permit for this work on June 30, 2014. McBee spent approximately $480,000 of public funds for construction and modifications of its wells and the associated GAC system. (R. p. ___; Tr. of May 24, 2016 p. 9.)

Alligator did not object to any of McBee's above-described actions. Instead, it waited until the work under these permits was completed and attempted to hijack McBee's largest water customer, A.O. Smith, which accounts for approximately 60% of McBee's water revenues, and who has exclusively purchased its water from McBee since the plant was built. (R. p. ___; Verified Amended Complaint p. 3.) Alligator's tack has taken two routes.

In June of 2015, McBee came to learn that Alligator was attempting to provide water directly to A.O. Smith when it discovered a construction crew in the field building a line from Alligator's mains to A.O. Smith's meter site. Those efforts have been forestalled through a consent injunction issued by the circuit court that is not before the Court. (R. p. ___; Consent Order Prohibiting Defendants from Providing Water Services to A.O. Smith while Litigation is Pending.)

Second, Alligator claims that because it is also indebted to the USDA through a loan under 7 U.S.C. § 1926(b), McBee must continue to buy wholesale water from Alligator pursuant to the parties' 1999 contract. (R. p. ___; Ans. & Countercls. of Alligator p. 8.) However, that

contract does not require McBee to purchase any specific quantity of water from Alligator, nor is it an all-requirements contract. (R. p. ___; Water Purchase Agreement, Exhibit A to Ans. & Countercls. of Alligator, Article 1.)

Accordingly, McBee should be free as a matter of both contract and federal law to operate its now-permitted water system, free from any impediments or interference by Alligator. But the circuit court has improperly enjoined McBee from using its own wells and running its system. Because the injunction order is directly contrary to governing federal law and South Carolina's standards for issuing preliminary injunctions, and because it inexplicably fails to require Alligator to post the bond required by Rule 65(c), the Court should vacate the injunction and authorize McBee to fully operate its water system.

STANDARD OF REVIEW

While injunction orders are reviewed for an abuse of discretion, such abuse is present when the lower court commits an error of law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). In turn, questions of law, such as interpretation of statutes and whether a contract is ambiguous, are reviewed *de novo* by this Court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Additionally, because injunctions are equitable in nature, "an appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." *Denman v. City of Columbia*, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

ARGUMENT

Alligator alleges that as an association indebted under 7 U.S.C. § 1926(b), it has the exclusive right to provide water to McBee against all others sources, including McBee's own water, such that McBee should be enjoined from turning on its own water wells that it has spent approximately six years and nearly half a million dollars refurbishing and permitting. The circuit

court erred in issuing its preliminary injunction orders in two main ways. First, Alligator failed to prove any of the elements required to grant an injunction, most importantly, the likelihood of success on the merits. Second, the circuit court failed to require a bond. Each is addressed below in turn.

I. Alligator failed to prove any of the elements required to grant an injunction.

South Carolina's courts have been clear that an injunction is a "drastic remedy" that can only issue in the limited circumstance where the requesting party meets three elements: (1) it will suffer an "irreparable harm" in the absence of an injunction; (2) it is likely to succeed on the merits of the case; and (3) there is an "inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). Here, Alligator has failed to prove any of these three elements, much less all of them.

A. Alligator cannot succeed on the merits of its claims.

Alligator is not likely to win on the merits of this case because it has no right whatsoever to prevent McBee from operating its own wells to provide service to its own water customers using its own distribution system. The circuit court entirely misunderstood and misconstrued the reach of federal law on this dispositive issue.

1. Title 7, Section 1926(b) of the United States Code does not prohibit McBee from operating its own water system.

"In 1961, Congress amended legislation to allow nonprofit water associations to borrow federal funds to conserve, develop, use, and control water primarily serving rural residents." *Rural Water Dist. No. 5 Wagoner Cty., Okla. v. City of Coweta*, 949 F. Supp. 2d 1091, 1094 (N.D. Okla. 2013).[2] Since 1994, the USDA has administered such loans. *See Rural Water Sewer*

[2] The courts have construed the definition of "association" contained in 7 U.S.C. § 1926(b) to encompass municipalities as well as non-profit water companies. *See, e.g., Ross Cnty. Water Co. v. City of Chillicothe*, 666 F.3d 391, 398 (6th Cir. 2011) (non-profit, member-owned, water

& Solid Waste Mgmt. Dist. No. 1, Logan Cnty., Okla. v. City of Guthrie, 654 F.3d 1058, 1061 (10th Cir. 2011). The revenues from the associations' water service secure these loans. *Pub. Water Supply Dist. No. 3 of Laclede Cnty., Mo. v. City of Lebanon, Mo.*, 605 F.3d 511, 521 (8th Cir. 2010).

Once a loan has been granted, 7 U.S.C. § 1926(b) prohibits third-party suppliers of water from taking a customer from the provider that has outstanding USDA loans. 7 U.S.C. § 1926(b). Section 1926(b) provides:

> The service provided or made available through any such association [that is a recipient of a federal loan] 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.

Typically, cases interpreting Section 1926(b) involve situations where a municipality attempts to encroach on a federally-indebted association's area of service, with the statute clearly forbidding such an action. In the present situation, however, there is no expansion from a third-party into an area served by another; rather, a wholesale water customer seeks to use its own facilities to produce water for itself. Under no reading does Section 1926(b) prohibit a wholesale customer from producing its own water to service its own customers.

In fact, the current case mirrors the precise issue in *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 133–34 (7th Cir. 1993), *as modified on denial of reh'g* (Feb. 25, 1994). In *CSL Utilities*, Jennings Water, Inc. was a rural water association indebted pursuant to Section 1926(b). *Id.* at 132. CSL Utilities, Inc. was a private nonprofit water company. *Id.* Jennings was

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company entitled to the protections of § 1926(b)); *City of Cowan, Tenn. v. City of Winchester, Tenn.*, 121 F. Supp. 3d 795, 802–03 (E.D. Tenn. 2015) (City was an association within the meaning of the statute.).

CSL's wholesale supplier. *Id.* CSL decided to construct its own water treatment facilities. *Id.* CSL then sought a declaratory judgment that having its own supply of water, rather than purchasing all of its water from Jennings, did not violate Section 1926(b). *Id.* The court granted that declaratory relief.

The *CSL Utilities* court framed the issue exactly as it is between McBee and Alligator: "CSL concedes that construction of the water treatment facility will curtail the amount of water it purchases from Jennings. . . . The issue here is not so much the scope of the service area as it is the right of a wholesale customer serving at retail to *improve its own facilities to curtail or eliminate the need for wholesale supply.*" *Id.* at 133–34 (emphasis added).

In considering this question, the court found that "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 Jennings." *Id.* at 135 (emphasis added). It continued: "[T]here is no fair implication by which it [7 U.S.C. § 1926(b)] can be said to reach improvement by a wholesale customer of its own facilities so as to reduce the amount of water it must purchase at wholesale." *Id.* at 136. "If Congress had in mind any authorized construction or development which would reduce demand for the rural association's water, it could easily have used language broad enough to reach that broadly defined activity." *Id.* Thus, the *CSL Utilities* court found that an interpretation of Section 1926(b) to prohibit a utility from developing "its own facilities to service its existing customers more economically" would be an "extreme application" of the law—an application that the court readily rejected. *Id.* at 137.

The present situation is precisely the same; therefore, the settled law holds that Alligator cannot prevail on the merits. Alligator is a rural nonprofit water association indebted to the USDA, just like Jennings was in *CSL Utilities*. McBee is a wholesale water customer, just like

CSL Utilities. McBee seeks to use its own wells to serve all or part of its own system's demand for water, just like CSL Utilities. Based upon *CSL Utilities*, McBee has the right to do so and is not prohibited from doing so because Alligator is indebted to the USDA. Nothing in 7 U.S.C. § 1926(b) restricts McBee's right to decide how much of its own water to produce—and neither Alligator in its argument nor the circuit court in its orders have identified any authority at all to the contrary.

At the hearing on the motion to alter or amend, Alligator stated that it submitted the Water Purchase Agreement to the USDA as "collateral" for its loan, and for that reason, the law was somehow distinguished. (R. p. ___; Tr. of May 24, 2016 p. 15.) The circuit court agreed in its order, finding that the Water Purchase Agreement "was pledged as security for the loan." (R. p. ___; Order Denying Plaintiff's Motion to Alter or Amend Judgment p. 3.)

But this is no distinction, as Jennings—Alligator's parallel in the *CSL Utilities* case—also carried a debt with the USDA that it was repaying with water revenues. *See CSL Utilities*, 16 F.3d at 132 ("Jennings assumed those loans [with the predecessor agency to the USDA]—which in Geneva's case dated back to 1965—and in 1977 obtained another loan from the [USDA's predecessor] to connect and expand water treatment, storage, and distribution facilities.").

To the limited extent this could be any kind of distinguishing point, it is a distinction without a difference. For one, the USDA, of course, is not the United States Congress. It cannot rewrite federal laws or otherwise create rights for Alligator that are not contained in 7 U.S.C. § 1926(b). *See Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) ("We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

Furthermore, the USDA is not an unsophisticated entity. It was surely capable of reviewing the Water Purchase Agreement and recognizing that nothing in the contract restricts McBee from producing its own water and that nothing in the contract requires McBee to purchase all of its system's water from Alligator. If the USDA had wanted to condition its loan to Alligator on one or both of these provisions being added to the Water Purchase Agreement, it certainly could have made that position known. But there is no evidence that any such concerns were raised by the USDA or that its debt with Alligator was secured only by an interpretation of the Water Purchase Agreement that matches Alligator's self-serving and revisionist construction of the contract. Accordingly, the Court should not credit Alligator's empty attempt to distinguish this case from those discussed above that squarely rebut the circuit court's injunction orders.

2. Title 7, Section 1926(b) does not allow Alligator to encroach on the Town's rights to serve A.O. Smith.

As to A. O. Smith, the situation is entirely different. According to A.O. Smith's own pleadings, the Town's water lines that are at issue have been in place since at least 1979 and have been used to supply A.O. Smith's facility with water since at least that time. (R. p. ___; Ans. & Countercls. of A.O. Smith Corp. at 8–9.) The Alligator Defendants did not even exist at that time. (R. p. ___; Ans. & Countercls. of Alligator at 8 (explaining that the Alligator Defendants were first incorporated in 1987).) And the Alligator Defendants submitted an affidavit stating that they did not borrow money from Rural Development until 2001. (R. p. ___; Affidavit of Glenn C. Odom p. 2.)

The courts have referred to 7 U.S.C. § 1926(b) as a shield that a USDA-financed supplier can use to prevent third parties from taking its customers. "[T]he goal of the statute is only to protect territory already being served by a rural water association from municipal expansion into the rural water association's area." *Le-Ax Water Dist. v. City of Athens, Ohio*, 346 F.3d 701, 708

(6th Cir. 2003). It "can be used only as a shield to defend against invasion rather than a sword to wage one." *Id.* at 707.

At the March 23 hearing, Alligator argued that Section 1926(b) allows it to serve A.O. Smith. (R. p. ___; Tr. of March 23, 2016 p. 5-6.) However, such an argument is again misconstruing the law, as it uses Section 1926(b) as a "sword" rather than as a "shield." A.O. Smith is in the territory the Town serves pursuant to its own USDA loans, and Section 1926(b) in fact protects McBee from Alligator's attempts to poach service to A.O. Smith.

Because the Town's continuous water service to A.O. Smith predates the Alligator Defendants' (1) existence and (2) indebtedness to the federal government, the Alligator Defendants are not entitled to any protection under 7 U.S.C. § 1926(b) as a matter of law. *See, e.g., N. Ohio Rural Water v. Erie County Bd. of County Comm'rs*, 347 F. Supp. 2d 511, 515 (N.D. Ohio 2004) ("Plaintiff is not protected by 7 U.S.C. § 1926(b) because it was not indebted to the USDA until after Erie County installed lines, which is the determinative date for § 1926(b) protection.").[3]

3. The Water Purchase Agreement does not require McBee to take all of its water supply from Alligator.

Similarly, but alternatively, Alligator also contends that the Water Purchase Agreement mandates that McBee take all of its water from Alligator, thus prohibiting McBee from supplying its own water. (R. p. ___; Affidavit of Glenn C. Odom p. 2.) This contention is simply untrue.

It is well-established that the "cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v.*

[3] The *Erie* decision is grounded in the logic of the Sixth Circuit's decision in *Le-Ax Water District v. City of Athens*, 346 F.3d 701 (6th Cir. 2003). The Fourth Circuit expressly adopted the *Le-Ax* analysis as its own in *Chesapeake Ranch Water Co. v. Board of Commissioners of Calvert County*, 401 F.3d 274, 281 (4th Cir. 2005).

Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). If the contract is unambiguous, "the language alone determines the contract's force and effect." *Id.*

Here, in relevant part, the Water Purchase Agreement provides:

> ARTICLE 1. THE SELLER HEREBY AGREES:
>
> 1. Quality and Quantity. To furnish PURCHASER at the point of delivery, during the term of this Agreement or any renewal or extension thereof, potable treated water meeting applicable purity standards of the South Carolina Department of Health and Environmental Control (SCDHEC) in such quantity as may be required by PURCHASER, subject to the following demands:
>
> a. A maximum instantaneous demand of 350 gallons per minute.
>
> b. A maximum daily demand of 500,000 gallons.

(R. p. ___; Water Purchase Agreement, Exhibit A to Ans. & Countercls. of Alligator, Article 1.)

Nowhere in the Agreement is there a requirement that McBee purchase *all* of its water from Alligator. Nor is there even a requirement that McBee purchase *any* of its water from Alligator. Nor is there anything in the contract prohibiting McBee from producing some or all of its water itself. The contract simply provides that if McBee seeks to purchase water from Alligator, then Alligator will supply that water at an agreed-upon price.

Contracts providing that all of a quantity to be taken from the supplier, appropriately referred to as "all requirements contracts," are well known in the utility business and are not difficult to draft. They explicitly state that the purchaser shall purchase *all* of a certain utility product from the seller. *See, e.g.*, *Prairie Land Elec. Co-op., Inc. v. Kan. Elec. Power Co-op., Inc.*, 323 P.3d 1270, 1271 (Kan. 2014) ("General. [Sunflower] shall sell and deliver to [Prairie Land] and *[Prairie Land] shall purchase and receive from [Sunflower] all electric power and energy which [Prairie Land] shall require for the operation of [Prairie Land's] system . . . .*") (emphasis and brackets supplied by the *Prairie Land* court); *U.S. v. Coosa Valley Elec. Coop., Inc.*, No. CIV.A. 85-C-0515-S, 1986 WL 11270, at *5 (N.D. Ala. Feb. 5, 1986) ("The contract expressly provides that Coosa Valley is required to purchase all of its power requirements from

AEC: 'General. Supplier shall sell and deliver to Consumer and Consumer shall purchase and receive from Supplier *all* electric power and energy which Consumer shall require to the extent that Supplier shall have power and energy available.'") (emphasis added).

Here, there is simply nothing in the Water Purchase Agreement requiring McBee to purchase all of its water from Alligator. Alligator has not identified any such language, nor did the circuit court. Because a plain reading of the Agreement does not support Alligator's assertion or the circuit court's orders, the Court should reject any reliance on the Water Purchase Agreement as a barrier to McBee producing its own water to serve its own customers.

4. Conclusion

Both of Alligator's potential claims on the merits are spurious. The Seventh Circuit aptly summarized the fatal defect in Alligator's arguments when it rejected the same position in *CSL Utilities*:

> If we were to construe the statute [7 U.S.C. § 1926(b)] as broadly as Jennings demands, we would be precluding any development by water utilities of their own water resources as long as a government loan were outstanding to their wholesale supplier. Such an onerous restriction could freeze any self-development for many decades. Jennings' interpretation seems to us to be an extraordinary restrictive and anticompetitive reading—one that simply cannot find support in the language of the statute.

16 F.3d at 137. Accordingly, there is no reasonable likelihood that Alligator will win this matter on the merits, and it was improper to grant an injunction on these facts.

B. Even if Alligator's position somehow has any merit, an injunction remains improper because Alligator has an adequate remedy at law.

Second, even if Alligator's analysis on the merits is somehow correct—which it is not—Alligator still cannot meet the elements needed to sustain a preliminary injunction because it has an adequate remedy at law. The only issue is whether or not Alligator will produce the water McBee distributes during this time or whether McBee will produce that water itself. All that

Alligator stands to lose is the net marginal revenue from its service to McBee, an amount which is easily quantifiable using McBee's utility service records and Alligator's cost of water.

The circuit court stated that a monetary award would be inadequate because of the "slow pace of this case." (R. p. ___; Order Denying Plaintiff's Motion to Alter or Amend Judgment p. 5-6.) Whether the case is slow or fast, there is nothing on the record to indicate that McBee is not creditworthy. As a municipality, it has general taxing power, as well as the power to set its utility rates. It may issue municipal bonds to cover debts where cash is not otherwise available to meet its obligations, and taxation to repay these bonds is not limited by Act 388 of 2006. *See* S.C. Const. art. X, § 14; 2006 South Carolina Laws Act 388 (H.B. 4449). McBee's credit with Alligator is established and apparently not objectionable to Alligator inasmuch as Alligator presently bills McBee approximately $75,000 per year for water supplies, and there is no evidence that McBee does not pay this amount.

The ability to recover money damages is a classic "adequate remedy at law" that precludes the issuance of an injunction. *See, e.g.*, *Scratch Golf Co.*, 361 S.C. at 122, 603 S.E.2d at 908 (holding that a preliminary injunction was improper because the law provided a mechanism for the plaintiff to recover the damages it sought). Under no analysis can Alligator satisfy the "inadequate remedy at law" requirement for issuing a preliminary injunction.

C. Alligator would not suffer any irreparable harm.

By this same token, any potential harm that Alligator may suffer by allowing McBee to operate its own wells to serve its own customers would be "reparable" through a monetary award.

Because Alligator has failed to prove any of the three elements, much less all of them, the circuit court erred in granting Alligator a preliminary injunction. This Court should vacate that

order and, instead, declare that McBee has the right to immediately begin operating its wells and servicing its customers with that water, as permitted by 7 U.S.C. § 1926(b).

II. The circuit court erred in finding that Alligator is not required to post a bond as required by Rule 65(c), SCRCP.

In addition to improperly analyzing all three criteria for issuing a preliminary injunction, the circuit court erred by not requiring Alligator to post a bond as security for the injunction. Rule 65(c), SCRCP, expressly and unambiguously requires such a bond:

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

At the March 23, 2016 hearing, McBee argued that if the circuit court issued an injunction favorable to Alligator, then Alligator should be required to post a bond of $150,000. (R. p. ___; Tr. of March 23, 2016 p. 12.) The Town has already spent approximately $250,000[4] of its own funds to put its wells back in service, which the South Carolina Department of Health and Environmental Control have approved for operation. (R. p. ___; Town of McBee's Public Water System Operating Permit, Exhibit A to Motion to Alter or Amend Judgment.) The Town will incur an additional expense of approximately $75,000 per year to provide water to its customers if its now-approved and ready-to-operate wells are forced to remain inoperable during this litigation. (R. p. ___; Tr. of March 23, 2016 p. 12.) Thus, McBee's request for a $150,000 bond is a reasonable estimate of the damages that it will suffer over the course of this litigation due to an improperly-issued injunction. There is no contrary evidence on the record.

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[4] Grant funds represent the difference between the $250,000 that the Town has spent of its own funds and the total cost of $480,000. (R. p. ___; Tr. of May 24, 2016 p. 9.)

Moreover, a bond is particularly important here in light of Alligator's precarious financial condition. (R. pp. ___–___; Affidavit of John Campolong, Mayor of Town of McBee and accompanying exhibits (providing report of the accounting firm of Sheheen, Hancock and Godwin, LLP analyzing Alligator's finances).)

Despite the requirements of Rule 65 and McBee's evidentiary presentation, the circuit court did not require Alligator to post a bond as security for the injunction. Failing to require the posting of a bond to accompany an injunction is reversible error. *See, e.g.*, *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 50, 674 S.E.2d 505, 508 (Ct. App. 2009) ("[B]ecause Rule 65(c), SCRCP, requires the trial court to order Respondents to post a bond before issuing the temporary injunction, and no bond was ordered in this case, we remand this case for the trial court to amend the order of injunction to require execution of a sufficient bond.").

So, too, is the imposition of a nominal bond. *See, e.g.*, *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007) ("The circuit court's order requiring only a nominal security bond does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper.").

Just recently, this Court again stated that an injunction issued without a bond violated Rule 65. *Spartanburg Buddhist Ctr. of S.C. v. Ork*, Op. No. 5427 (S.C. Ct. App. dated July 13, 2016) (Shearouse Adv. Sh. No. 28 at 77–78). Further, this Court reiterated that the requirement for a bond was to be interpreted "strictly." *Id.*

At the hearing on the motion to alter or amend, Alligator argued that it was not required to post a bond because it is—in Alligator's own words—"the State of South Carolina." (R. p. ___; Tr. of May 24, 2016 p. 14.) In making this incredible argument, Alligator relied on

language in Rule 65(c), SCRCP that exempts security for injunction in a limited circumstance: "No such security shall be required of the State or of an officer or agency thereof."

Alligator claims to be the "State" because it is a "corporation not-for-profit," and pursuant to the Editor's Note to Chapter 36 of Title 33, a corporation not-for-profit is authorized to provide local governmental functions and must be treated like a special purpose district.

However, this same Editor's Note goes on to state that corporations not-for-profit "must be treated like special purpose districts *for purposes of Chapter 78 of Title 15, Chapter 56 of Title 12, and Sections 56-3-780 and 58-31-30(23) of the 1976 Code*." S.C. General Assembly Act 404, § 1(B) (2000) (reprinted as Editor's Note in preface to Chapter 36 of Title 33) (emphasis added). These four cited purposes are the South Carolina Tort Claims Act, the Setoff Debt Collection Act, a statute regarding license plates for vehicles the State operates, and a statute regarding Public Service Authority powers.

The South Carolina Rules of Civil Procedures are not among these limited areas in which a nonprofit corporation "may be treated like special purpose districts." If the General Assembly intended to exempt nonprofit corporations from Rule 65(c)'s security requirement, it would have specifically said so, just as it specifically identified the other provisions from which a corporation not-for-profit is exempted. *See Rainey v. Haley*, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting *Hodges v. Rainey*, 341 S.C. 79, 553 S.E.2d 578 (2000))).

Alligator is undeniably not the State of South Carolina. Alligator is not subject to the Freedom of Information Act. Its decisionmakers are not elected by the citizenry. It does not have the authority to tax. It does not have the authority to pass legislation. Moreover, the self-dealing

between Alligator and its principal, Mr. Odom, would be highly improper, if not illegal, if Alligator were treated as a governmental body. (R. pp. ___–___; Affidavit of John Campolong, Mayor of Town of McBee and accompanying exhibits (providing report of the accounting firm of Sheheen, Hancock and Godwin, LLP analyzing Alligator's finances).)

Alligator's argument on this issue finds no support in law or logic, and the circuit court's acceptance of this argument was in error. Accordingly, the circuit court erred in holding that Alligator is not required to post a bond as required by Rule 65(c), SCRCP. Its ruling should be reversed on this additional basis.

CONCLUSION

For the reasons stated herein, the circuit court erred in issuing the temporary restraining order because Alligator failed to prove any of the elements required to grant a temporary restraining order, most importantly, the likelihood of success on the merits, and because the court failed to require a bond.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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October 17, 2016

PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice, LLP, attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same to the following address(es):

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October 17, 2016

The South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings
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Re: Town of McBee, South Carolina v. Alligator Rural Water & Sewer Company, Inc., Alligator Rural Water Company, Inc.
Appellate Case No. 2016-001604

Dear Ms. Kitchings:

Enclosed for filing for the case captioned above, please find the Initial Brief of Appellant, Appellant's Designation of Matter, Appellant's Motion for Expedited Appeal (and 6 copies) and our check in the amount of $25. Please file the originals and return a clocked copy via our courier.

With kind regards, I remain

Very truly yours,

WOMBLE CARLYLE SANDRIDGE & RICE
A Limited Liability Partnership

Belton T. Zeigler

BTZ/tm
Enclosure

cc: William O. Spencer, Jr.
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