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.

FINAL BRIEF OF RESPONDENTS

RECEIVED
JAN 10 2017
SC Court of Appeals

William O. Spencer, Jr., Esquire
Post Office Box 190 – 301 West Main Street
Chesterfield, SC 29709
Phone: 843.623.2144
Email: Spencerlaw@shtc.net

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

I. Factual Background 1

II. Procedural History 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The circuit court did not abuse its discretion in entering a preliminary injunction to preserve the status quo. 10

A. The circuit court correctly determined Alligator would suffer irreparable harm if it did not enter a preliminary injunction. 11

B. Alligator has demonstrated a likelihood of success on the merits 12

C. Alligator lacks an adequate remedy at law. 18

II. The circuit court correctly refused to require Alligator to post a bond 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Adams Cty. Water Ass'n, Inc. v. City of Natchez, 2013 WL 3762658 (S.D. Miss. July 16, 2013) 18

City of Columbia v. Pic–A–Flick Video, Inc., 340 S.C. 278, 531 S.E.2d 518 (2000) 11

City of Cuba v. City of Canton, 2011 Ill. App. (3d) 110066-U (Ill. Ct. App. 2011) 17

City of Madison v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987) 14

CSL Utilities, Inc. v. Jennings Water, Inc., 16 F.3d 130 (7th Cir. 1993) 14, 15

Cty. of Richland v. Simpkins, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002) 9

Dist. No. 5 Wagoner Cty. v. City of Coweta, ___ F. Supp. 3d ___, 2016 WL 4289915 (W.D. Okla. Aug. 15, 2016) 11

Helsel v. City of North Myrtle Beach, 307 S.C. 29, 413 S.E.2d 824 (1992) 13

Levine v. Spartanburg Reg'l Servs. Dist., Inc., 367 S.C.458, 626 S.E.2d 38 (Ct. App. 2005) 11, 12

Miss. Rural Water Ass'n, Inc. v. Miss. Pub. Serv. Comm'n, 2014 WL 12540566 (S.D. Miss. Dec. 9, 2014) 18

N. Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996) 11, 12, 13, 19

Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 694 S.E.2d 15 (2010) 9, 10

Rural Water Dist. No. 4 v. City of Eudora, 2009 WL 2878450 (D. Kan. Sept. 2, 2009) 11

Rural Water v. City of Guthrie, 2016 WL 126877 (W.D. Okla. Jan. 11, 2016) 18

Stevens Aviation, Inc. v. DynCorp. Int'l, LLC, 407 S.C. 407, 756 S.E.2d 148 (2014) 17

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) 10

STATUTES

7 U.S.C. § 1926(b) .... passim

Consol. Farm & Rural Dev. Act of 1961, 7 U.S.C. § 1921, *et seq.* 2

S.C. Code Ann. § 15-78-10, *et seq.* (2005 & Supp. 2015) 20

S.C. Code Ann. § 15-78-30(h) 21
S.C. Code Ann. § 15-78-40 21
S.C. Code Ann. § 33-36-10, *et seq* (2006 & Supp. 2015) 1, 19
S.C. Code Ann. § 36-2-306 (2003) 16
S.C. Code Ann. § 5-31-1910 (2004) 14
S.C. Code Ann. § 56-3-780 (2006) 20
S.C. Code Ann. Title 33, Ch. 36 (Note) (2006) 20, 21

RULES

Rule 65(c), SCRCP .... passim

TREATISES

77a C.J.S. *Sales* § 303 17

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Respondent Alligator Rural Water & Sewer Company, Inc., formerly known as Alligator Rural Water Company, Inc. ("Alligator"), is a corporation not-for-profit, created pursuant to S.C. Code Ann. § 33-36-10, *et seq* (2006 & Supp. 2015). (R. p. 94 (Alligator Ans. to Am. Compl. ¶ 81).) Since 1987, Alligator has operated a public water supply and distribution system throughout a large area of Chesterfield County, South Carolina, including the rural McBee area and outside the Town's corporate boundaries. (R. p. 96 (Alligator Ans. To Am. Compl. ¶ 94).)

Until 1999, Appellant Town of McBee ("the Town") operated its own water supply and distribution system, using water drawn from the Town's two wells. (R. p. 62 (Am. Compl. ¶ 25).) For years, the Town's water system had failed to comply with water quality standards established by the South Carolina Department of Health and Environmental Control ("SCDHEC"). (R. p. 189 (Aff. of Glenn C. Odom ("Odom Aff."), at 1).) In 1999, SCDHEC warned the Town that if it failed to bring its water system into compliance, the Town would begin incurring substantial monthly fees. (*Id.*)

To avoid such liability, the Town asked Alligator to assume responsibility for the operation and maintenance of the Town's water supply

system. Thus, since 1999, Alligator has served as the Town's wholesaler, supplying all of the water required by the Town to serve its retail customers inside and outside the Town's corporate limits. (R. p. 190 (Odom Aff., at 2).)

In order to provide the Town the water supply it needed to adequately serve its customers, Alligator had to engage in a number of expensive infrastructure projects, such as installing new wells, pumps, and pump stations, as well as running water lines connecting Alligator's water system to the Town's. (R. pp. 189-190 (Odom Aff., at 1-2).) Alligator financed these projects, in part, with a $674,500 loan from the United States Department of Agriculture/Rural Development ("USDA/RD"), under the auspices of the Consolidated Farm and Rural Development Act of 1961 ("Rural Development Act"), 7 U.S.C. § 1921, *et seq*. (R. p. 190 (Odom Aff., at 2).)

As a condition of making the loan to Alligator, USDA/RD required Alligator and the Town to enter into a 40-year Water Purchase Agreement. (R. p. 190(Odom Aff., at 2).) The Water Purchase Agreement requires Alligator to sell, and the Town to purchase, "water ... in such quantity as may be required by" the Town, subject to certain maximum limits. (R. p. 42 (Water Purchase Agreement, at 1).) The Water Purchase Agreement was pledged as security for USDA/RD's initial loan to Alligator in 1999 (R. p. 44

(Water Purchase Agreement Art. III, § 9), and has been pledged as security for every subsequent loan Alligator has obtained from USDA/RD. (R. p. 190 (Odom Aff., at 2).)

Since 1999, and as required by the Water Purchase Agreement, the Town has purchased all of its water at wholesale from Alligator, which it then re-sells to its retail customers. The Town is Alligator's second-largest customer, accounting for some $6,000 in revenue each month. (R. p. 190 (Odom Aff., at 2).) This revenue stream is critical to Alligator's ability to make its regular loan payments to USDA/RD. Without this revenue stream, Alligator would be unable to meet its repayment obligations to USDA/RD. (*Id.*)

II. PROCEDURAL HISTORY

The Town initiated the underlying litigation in June 2015 by filing a declaratory judgment action against Alligator in the Court of Common Pleas for Chesterfield County. (R. pp. 17-25 (Compl.).) The Town alleged that Alligator intended to begin providing water service to the Town's largest customer, A.O. Smith Corporation ("A.O. Smith").

A.O. Smith has a facility in Chesterfield County, outside the Town's corporate limits, where it manufactures water heaters and boilers and designs and tests new products. (R. pp. 52-53 (Countercl. of

Intervenor/Defendant A.O. Smith ("A.O. Smith Countercl.") ¶ 1).) The Town began supplying water to A.O. Smith in 1979, pursuant to a 30-year "non-annexation agreement."[1] (R. p. 53 (A.O. Smith Countercl. ¶ 3).) Although the agreement expired in 2009, A.O. Smith continued to receive water from the town as a non-contractual, at-will customer. (*Id.*)

Over the course of several years, A.O. Smith grew increasingly concerned about the Town's ability to supply the amount of water needed for operations at the Chesterfield County facility, including in particular the fire-suppression system. (R. pp. 54-55 (A.O. Smith Countercl. ¶¶ 8-11).) In 2015, these concerns prompted A.O. Smith to make a business decision to obtain water from Alligator rather than from the Town. (R. p. 54 (A.O. Smith Countercl. ¶ 8).) The Town's complaint alleges that it filed suit after learning of Alligator's intention to provide water service directly to A.O. Smith. (R. p. 19 (Compl. ¶ 13).)

In its complaint, the Town sought a declaratory judgment that the Rural Development Act prohibited Alligator from providing water service to A.O. Smith. *See* 7 U.S.C. § 1926(b). Section 1926(b) protects a rural water

[1] A.O. Smith's Chesterfield County facility is situated outside, and is not contiguous to, the Town's corporate limits. (R. p. 33 (A.O. Smith Countercl. ¶ 4).)

association that is indebted to USDA/RD[2] from curtailment or limitation of its service area as a result of "inclusion of the [service area] within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service," or by the imposition of new or additional licensing or permitting requirements. *Id.* The Town contended that § 1926(b) prohibited Alligator from providing water service to A.O. Smith.

Along with its complaint, the Town moved for entry of a temporary restraining order, asking the circuit court to maintain the status quo by enjoining Alligator from providing water service to A.O. Smith until the litigation had been resolved. (R. pp. 155-156 (Mot. for TRO).) Alligator consented to entry of a preliminary injunction, and did not ask that the Town be required to post a bond. The circuit court entered a consent order temporarily enjoining Alligator from providing water service to A.O. Smith on July 31, 2015. (R. p. 3 (Consent Order (July 31, 2015).)

Thereafter, Alligator answered the complaint and countersued, alleging that the Town planned to re-open its wells and seeking, *inter alia*, a declaratory judgment that the Town's continued water service to A.O. Smith

---

[2] The Town became indebted to USDA/RD in 2005 (R. p. 193 (Affidavit of John Campolong ("Campolong Aff.") ¶ 7).)

would curtail or limit Alligator's service, in violation of § 1926(b). (R. p. 34 (Alligator Ans. to Compl. ¶ 54(c).) Just as the Town had done, Alligator asked the circuit court to preserve the status quo by entering a preliminary injunction prohibiting the Town from servicing its customers using water obtained from any source other than Alligator. (R. pp. 159-160 (Mot. for TRO).) Although Alligator had consented to the Town's request for a preliminary injunction, the Town vigorously opposed Alligator's request and demanded payment of a $150,000 bond.

The circuit court conducted a hearing on Alligator's motion on March 23, 2016.[3] Subsequently, the court granted Alligator's request for a preliminary injunction against the Town, reasoning in part:

> I find that [the Town] has purchased all of its potable water from Alligator since 1999 and I further find that Alligator will suffer immediate and irreparable injury, loss, and/or damages unless [the Town] is restrained from taking actions to obtain water from any source other than continuing to purchase the same from Alligator until a full and final resolution of the present litigation.

(R. p. 11 (Order of Apr. 7, 2015).)

---

[3] In February 2016, A.O. Smith moved to intervene in the litigation as a matter of right. (R. p. 161 (Mot. to Intervene).) The circuit court granted this motion. (R. p. 6 (Order (Mar. 29, 2016).) A.O. Smith is not a party to this appeal.

The Town timely moved for reconsideration, arguing that Alligator had not satisfied the test for entry of a preliminary injunction and, alternatively, that under Rule 65(c), SCRCP, Alligator should be required to post a bond. (R. pp. 244-251 (Mot. to Alter or Amend).)

The circuit court conducted a hearing on May 24, 2016, (R. pp. 135-153 (Tr. of Hr'g (May 24, 2016)), and on July 12, 2016, it denied the Town's motion for reconsideration. The court's order carefully reviewed the facts in view of the standard for granting a preliminary injunction, ultimately concluding that a preliminary injunction was necessary "to preserve the status quo and avoid possible irreparable injury to [Alligator] pending a full hearing on the merits." (R. p. 10 (Order (July 12, 2016), at 2).) Further, the circuit court ruled that Alligator was not required to post a bond under Rule 65(c). (R. p. 14 (Order (July 12, 2016) at 6)); *see* Rule 65(c), SCRCP ("No such security shall be required of the State or an officer or agency thereof.").

The Town timely appealed.[4]

[4] While this appeal is pending, the parties are proceeding with litigation of the merits.

SUMMARY OF ARGUMENT

By the time the Town started this litigation in June 2015, the parties had been operating under the Water Purchasing Agreement for almost 16 years. Under the existing arrangement, required by the federal government as a precondition of USDA/RD's loan to Alligator, the Town purchases water from Alligator and resells it to its customers. This arrangement ensures that both Alligator and the Town have stable revenue streams to support their respective loan-repayment obligations to USDA/RD.

When the Town filed suit to challenge Alligator's right to serve directly the Town's largest water customer, A.O. Smith, Alligator readily consented to entry of a preliminary injunction that preserved the status quo until the matter could be resolved on the merits. It is unfortunate that with the shoe on the other foot, the Town has elected to vigorously oppose Alligator's mirror-image request for preservation of the status quo through entry of a preliminary injunction, and to demand that Alligator, a non-profit entity performing a vital governmental function, post a six-figure bond.

The circuit court did not abuse its discretion by enjoining the Town from operating its water system (and eliminating itself as a critical source of Alligator's revenue) until the merits of the dispute can be resolved. Collectively, the two preliminary injunctions entered by the circuit court

maintain the longstanding arrangement between Alligator and the Town, safeguarding the financial stability of both, and protecting USDA/RD's interest in receiving payment on outstanding loans, until such time as the court can decide the merits of the parties' disputes. (R. pp. 7-8 (Order (Apr. 7, 2016), at 1-2).) *Accord Cty. of Richland v. Simpkins*, 348 S.C. 664, 671, 560 S.E.2d 902, 905 (Ct. App. 2002) (recognizing "the inherent purpose behind the equitable remedy of an injunction: *to preserve the status quo*" (emphasis added)), *modified on other grounds by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010).

The record amply supports the circuit court's findings as to the prerequisites for entry of a preliminary injunction. As discussed below, the circuit court correctly determined that Alligator was likely to suffer irreparable harm in the absence of a preliminary injunction; that Alligator was likely to succeed on the merits of its claim under § 1926(b); and that Alligator had no adequate remedy at law. Moreover, the circuit court properly recognized the public's interest in a preliminary injunction, noting that an immediate cessation of water purchases by the Town "would inevitably cause Alligator to default on its Rural Development loan that would, in turn, jeopardize Alligator's ability to continue operating its entire water system and would ultimately impact Alligator's remaining

customers." (R. p. 13 (Order (July 12, 2016), at 5).) Accordingly, this Court should affirm.

The circuit court also correctly ruled that Alligator is exempt from posting a bond under Rule 65(c). Alligator is a corporation not-for-profit formed for the public purpose of performing the governmental function of providing water service to the residents of Chesterfield County. Alligator thus fits comfortably within the letter and the spirit of the exemption for "the State or ... an officer or agency thereof." Rule 65(c).

For these reasons, this Court should affirm.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING A PRELIMINARY INJUNCTION TO PRESERVE THE STATUS QUO.

"The sole purpose of a temporary injunction is to preserve the status quo and thus avoid possible irreparable injury to a party pending litigation." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). Consequently, "[a] preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs.*, 387 S.C. at 586–87, 694 S.E.2d at 17.

This Court's review of the circuit court's decision is deferential. "The granting of temporary injunctive relief is within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *See id.* at 282, 531 S.E.2d at 521.

A. The circuit court correctly determined Alligator would suffer irreparable harm if it did not enter a preliminary injunction.

"Whether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C.458, 465, 626 S.E.2d 38, 42 (Ct. App. 2005) (internal quotation marks omitted). Numerous courts have concluded that a threatened violation of § 1926(b) is an irreparable harm justifying preliminary or permanent injunctive relief. *See, e.g., Dist. No. 5 Wagoner Cty. v. City of Coweta*, ___ F. Supp. 3d ___, 2016 WL 4289915, at *6 (W.D. Okla. Aug. 15, 2016); *Rural Water Dist. No. 4 v. City of Eudora*, 2009 WL 2878450, at *1 (D. Kan. Sept. 2, 2009); *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 917 (5th Cir. 1996).

The circuit court's finding of irreparable injury comports with Congress's purposes in enacting § 1926(b). Congress's goals were twofold: (1) to protect the ability of rural water associations to repay federal loans by ensuring their financial stability, and (2) "to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost." *N. Alamo Water Supply*, 90 F.3d at 915. In light of these purposes, it is clear why the harm faced by Alligator was irreparable: financial stability, once undermined, is likely difficult (if not impossible) to regain and has repercussions far beyond the fiscal impact on Alligator itself.

B. Alligator has demonstrated a likelihood of success on the merits.

"When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present a fair question ... as to the existence of such a right." *Levine*, 367 S.C. at 465, 626 S.E.2d at 42 (internal quotation marks omitted). The court's ruling on a motion for injunctive relief "should not be based on the merits except insofar as the merits may assist the trial court in determining whether a prima facie case has been made." *Id.* at 465-66, 626 S.E.2d at 42. "Once a prima facie showing has been made entitling the [movant] to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the

case on the merits." *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

Alligator has made at least a prima facie case that the Town's operation of its own wells would violate § 1926(b). As the circuit court noted, Alligator's right to protection under § 1926(b) arises ultimately out of the Town's 1999 decision to shut down its wells and purchase its water from Alligator pursuant to the 40-year Water Purchase Agreement. (R. p. 10 (Order (July 12, 2016)), at 2.) In order to fulfill its end of the bargain, Alligator made substantial infrastructure improvements—digging wells, running water lines, installing boosters and a pump station—at great expense. (*Id.*) These improvements were financed, in part, by a $674,500 loan from USDA/RD. To provide security for the Alligator's indebtedness, USDA/RD required the Town to enter into the Water Purchase Agreement, thereby committing itself to purchasing its water from Alligator for a period of 40 years.

The Town seeks to disrupt this longstanding, federally mandated arrangement, and to imperil Alligator's financial stability, by pumping and selling water from its own refurbished wells. But, "[t]he service area of a federally indebted water association is sacrosanct." *N. Alamo Water Supply*, 90 F.3d at 915. Section 1926(b) "indicates a congressional mandate that local

governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060-61 (5th Cir. 1987). In this case, the encroachment takes the form of the Town removing itself as Alligator's second-largest customer.

The Town argues that producing its own water cannot possibly violate § 1926(b), and as support for this position it relies on the Seventh Circuit's analysis in *CSL Utilities, Inc. v. Jennings Water, Inc.*, 16 F.3d 130 (7th Cir. 1993). At first glance, *CSL Utilities* bears a superficial resemblance to this case, in that it involved a dispute between a water association (Jennings Water) and a wholesale customer (CSL Utilities) that wished to lower its costs by pumping its own water. *See id.* at 132. The similarities end there, however.

First, the wholesale customer in *CSL* was a private utility company that existed to serve a single subdivision—not, as in this case, a municipality obliged (and entitled) to provide water service to all persons within, or contiguous to, the Town's borders.[5] The text of § 1926(b) makes clear that

[5] *See* S.C. Code Ann. § 5-31-1910 (2004) (authorizing cities and towns to provide water and electrical service to "any person without the corporate limits of such city or town but contiguous thereto"). As noted previously,

Congress was particularly concerned with the ability of a municipality to use its police power to undermine the financial stability of a rural water association—for example, by annexing property within the association's territory. *See* 7 U.S.C. § 1926(b). Nothing in *CSL* indicates that CSL Utilities had any ability to expand its territory or impose other burdens on Jennings Water.

Second, and more critically, it does not appear that there was any formal contractual agreement between Jennings Water and CSL Utilities—or, if such an agreement existed, that it served as security for Jennings Water's federal loan. That is a critical difference from this case. In this case, USDA/RD required Alligator and the Town to enter into the Water Purchase Agreement and to pledge that agreement as security for Alligator's federal indebtedness. (R. p. 190 (Odom Aff., at 2); R. p. 44 (Water Purchase Agreement Art. III, § 9).) It is thus plain that the continuing existence of the revenue stream from the Town's water purchases is a critical part of the loan arrangement between Alligator and the federal government.

The Town entered into the Water Purchase Agreement with its eyes wide open. Not only did it make the deliberate choice to shut down its wells

---

A.O. Smith's Chesterfield County facility is not contiguous to the Town's corporate limits. *See supra* n. 1.

and accept Alligator as its sole water supplier, it also entered into the Water Purchase Agreement knowing that Alligator and USDA/RD relied on the Town continuing to purchase all of its water from Alligator for the entire 40-year duration of the contract.

The Town protests that the Water Purchase Agreement cannot be a requirements contract because it does not explicitly require the Town to purchase "all" of its water from Alligator. Appellant's Br. at 10 (maintaining that "nothing in the [Water Purchase Agreement] requires [the Town] to purchase all of its system's water from Alligator"); *see id.* at 11-13 (arguing that the Water Purchase Agreement is not a requirements contract). The Town is simply wrong.

The Water Purchase Agreement provides that Alligator agrees

> to furnish [the Town] at the point of delivery, during the term of this Agreement and any renewal or extension thereof, potable treated water ... ***in such quantity as may be required by [the Town],*** subject to the following [maximum amounts].

(R. p. 42 (Water Purchase Agreement Art. I, § 1 (emphasis added)).) The emphasized language establishes, as a matter of South Carolina law, that the Water Purchase Agreement as a requirements contract. The relevant statutory provision is S.C. Code Ann. § 36-2-306 (2003), which provides, "A [contract] term which measures the quantity by ... the requirements of the

buyer means such ***actual ... requirements*** as may occur in good faith." (emphasis added); *accord Stevens Aviation, Inc. v. DynCorp. Int'l, LLC*, 407 S.C. 407, 415-16, 756 S.E.2d 148, 152 (2014) (holding that South Carolina recognizes and enforces requirements contracts). As our Supreme Court explained in *Stevens Aviation*, a contract that is phrased in terms of the buyer's requirements and without stating a minimum quantity is *necessarily* a requirements contract, under which the buyer is obliged to purchase *all* of its requirements from the seller. *Id.* Otherwise, the buyer's promise would be illusory and there would be no enforceable contract at all. *See id.* Indeed, the Illinois Court of Appeals has construed language identical to that quoted above and has held that it created a requirements contract. *See City of Cuba v. City of Canton*, 2011 Ill. App. (3d) 110066-U, at *3-4 (Ill. Ct. App. 2011).

Since the Water Purchase Agreement is a requirements contract, the Town is not entitled to abandon its obligations simply because it can produce its own water more cheaply than it can buy water from Alligator. Under long-settled common law, "[a]n essential element of a requirements contract is the promise of a buyer to purchase *exclusively* from the seller ... the buyer's *entire requirements*." 77a C.J.S. *Sales* § 303 (emphasis added). Thus, the Town producing would constitute not only a breach of the Water Purchase Agreement, but also a curtailment or limitation prohibited by

§ 1926(b). Consequently, Alligator has shown a likelihood of success on the merits.

C. Alligator lacks an adequate remedy at law.

The Town further contends that even if operating its wells would violate Alligator's rights under § 1926(b), injunctive relief is not necessary because Alligator has a remedy at law in the form of an award of damages. Appllant's Br. at 13-14. But, courts applying § 1926(b) have recognized that a threatened violation of § 1926(b) creates "a significant risk of harm ... that cannot be cured by monetary damages." *Rural Water v. City of Guthrie*, 2016 WL 126877, at *2 (W.D. Okla. Jan. 11, 2016); *see also Miss. Rural Water Ass'n, Inc. v. Miss. Pub. Serv. Comm'n*, 2014 WL 12540566, at *3 (S.D. Miss. Dec. 9, 2014) ("[T]he Congressional mandate of § 1926(b) is designed to protect the financial security of the members of [an indebted association]; protect their financial viability to pay off their USDA loans; and to protect their ability to take on new customers/members, thereby decreasing the per user cost of the water system. Thus, any action by the MPSC that opposes or violates § 1926(b) and its mandates results in irreparable harm to [the association's] members." (citation omitted)). For this reason, "[p]reliminary injunctions are routinely sought and granted in § 1926(b) suits." *Adams Cty. Water Ass'n, Inc. v. City of Natchez*, 2013 WL 3762658, at *3 (S.D. Miss. July 16, 2013); *see*

also N. Alamo Water Supply, 90 F.3d at 917 (noting that "an injunction has been the principal tool employed by the Courts" in enforcing § 1926(b)).

II. THE CIRCUIT COURT CORRECTLY REFUSED TO REQUIRE ALLIGATOR TO POST A BOND

Rule 65(c), SCRCP, provides, in relevant part that

> 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. *No such security shall be required of the State or of an officer or agency thereof.*

(emphasis added). The Town argues that the circuit court erred in ruling that Alligator is entitled to the benefit of the exemption set out in the last sentence quoted above. To the contrary, the circuit court's ruling was correct and should be affirmed.

Alligator is a particular type of corporate entity: a corporation not-for-profit funded, in part, by loans under the Rural Development Act. *See* S.C. Code Ann. § 33-36-10. In enacting § 33-36-10, the General Assembly found

> that corporations not-for-profit established pursuant to this chapter have been authorized to provide the *local governmental* function[] *of water service* ... Corporations not-for-profit *exist for a public purpose*, and the General Assembly declares that corporations not-for-profit *must be treated like special purpose districts* for [certain] purposes ...

S.C. Code Ann. Title 33, Ch. 36 (Note) (2006) (emphasis added). The General Assembly specifically declared that a corporation not-for-profit should be treated like a special purpose district for purposes of, *inter alia*,

- The Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (2005 & Supp. 2015), which grants "the State, its political subdivisions, and employees" immunity from tort liability;
- S.C. Code Ann. § 56-3-780 (2006), authorizing permanent license plates for vehicles used by "the State and its political subdivisions";
- entitlement to participate in the State retirement system and the State health system.

See S.C. Code Ann. Title 33, Ch. 36 (Note). The common thread running through all of these provisions is that they pertain to *state agencies, officials, and employees.* It could not be clearer that the General Assembly intended that corporations not-for-profit and their employees should be treated as *state* agencies and *state* employees in a broad range of contexts.

The Town maintains that Alligator cannot benefit from Rule 65(c)'s exemption for state officers and agencies because Rule 65(c) is not listed with the other provisions cited by the General Assembly. *See* Appellant's Br. at 17. This argument ignores the General Assembly's admonition that "[t]his act must be construed liberally. The enumeration of any object, purposes, power, manner, method or thing *does not exclude like or similar* objects, purposes, powers, manners, methods, or things." S.C. Code Ann. Title 33,

Ch. 36 (Note) (emphasis added). Thus, it is clear that the General Assembly's failure to list the Rule 65(c) exemption does not preclude Alligator from receiving the benefit of the exemption.

In fact, there is every reason why Alligator *should* be given the benefit of the exemption. As already noted, Alligator is a not-for-profit entity filling a role traditionally occupied by government, namely, the provision of water. Special purpose districts are plainly state entities. The Tort Claims Act confers immunity on "[t]he State, an agency, a political subdivision, and a governmental entity," S.C. Code Ann. § 15-78-40, and defines "political subdivisions" as including "special purpose districts *of the State*." S.C. Code Ann. § 15-78-30(h) (emphasis added). It is simply illogical (and contrary to the General Assembly's instruction to construe the act liberally) to conclude that Alligator is a state entity for purposes of tort immunity, but not for purposes of Rule 65(c).

The circuit court's ruling on this point should be affirmed.

CONCLUSION

Alligator has received more than $20 million in loans from USDA/RD to establish and maintain a water system with sufficient capacity to serve the Town, A.O. Smith, and numerous other customers across a broad swath of Chesterfield County. In 1999, the Town knowingly chose to become

Alligator's customer and, by entering into the Water Purchase Agreement, accepted the obligation to support Alligator's ability to repay its federal loans by purchasing its water from Alligator for a period of 40 years.

Seventeen years later—less than halfway through the contract term—the Town has decided that it wants to operate its own water system again, and to stop buying water from Alligator. Such a move would have potentially far-reaching effects, not just on Alligator's ability to repay its loan to USDA/RD, but also on the daily lives of citizens across Chesterfield County who depend on Alligator to provide safe, clean drinking water. Moreover, there is a strong argument that § 1926(b) forbids the Town from reneging on its obligations under the Water Purchase Agreement. Under these circumstances, the circuit court did not abuse its discretion in entering a preliminary injunction for the purpose of preserving the status quo. Accordingly, Alligator respectfully asks this Court to affirm.

William O. Spencer

William O. Spencer, Jr., Esquire by KES
Post Office Box 190 – 301 West Main Street
Chesterfield, SC 29709
Phone: 843.623.2144
Email: spencerlaw@shtc.net

Attorney for Respondents

January 6, 2017
Chesterfield, South Carolina

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.

CERTIFICATION OF COMPLIANCE

Undersigned counsel hereby certifies that the foregoing Final Brief of Respondents complies with Rule 210(c), SCACR.

William O. Spencer by LES

William O. Spencer, Jr., Esquire
Post Office Box 190
301 West Main Street
Chesterfield, SC 29709
Phone: 843.623.2144
Email: Spencerlaw@shtc.net

Attorney for Respondents

RECEIVED
JAN 10 2017
SC Court of Appeals