

Chapter 2

Making Service Available. How Much Is Enough?

The federal circuits are in disagreement about what is required to satisfy the “made service available” requirement of §1926(b).¹ The Fifth Circuit in *North Alamo Water Supply Corp. v. City of San Juan, Texas*, 90 F.3d 910 (5th Cir. 1996) concluded that the existence of a “legal duty” (not to be confused with a “legal right”) is the legal equivalent of making service available. The *North Alamo* case was heavily dependent on the law of Texas. North Alamo Water Supply Corporation had obtained a “Certificate of Convenience and Necessity”. The certificate obligated North Alamo to provide water service within a specified area.² This obligation was deemed the legal equivalent of “making service available” under §1926(b). It is important to note that in *North Alamo*, the district court who heard the evidence at trial, also concluded that (1) North Alamo was currently providing water service to subdivisions adjacent to the disputed area; (2) North Alamo had lines and adequate facilities to provide service to the disputed areas; and (3) North Alamo had not refused service to anyone who had requested service in their certificated area.

¹Quoted from *Sequoyah* at 1201.

²An interesting issue occurred in the *North Alamo* case. There was an attempt by the encroaching city of San Juan to “decertify” portions of the area certificated to North Alamo and have them re-certified in the city’s name. The propriety of whether San Juan would be permitted to accomplish a de-certification was never actually resolved by the Court. San Juan and North Alamo entered into an agreed preliminary injunction that included notification to the certifying Texas State commission to take no further action. Whether such decertification efforts (or de-annexation) is preempted by federal law was not resolved by the 5th Circuit. In *Pittsburg County Rural Water District No. 7 v. City of McAlester*, the district court in an unpublished decision concluded that de-annexation (method to remove territory from a water district in Oklahoma) was the type of action by local government that preemption was intended to prevent. See **1997 WL 835210 (E.D.Okla.)** The trial court in the *Pitt-7* case was subsequently reversed by the 10th Circuit on other issues but not on the preemption issue.

In *Sequoyah* the 10th Circuit found that water districts in Oklahoma were not obligated (did not have a legal duty) to provide water service. The Court went on to say that the existence of such a duty (were one to exist) though relevant to the “made service available” inquiry, was not, standing alone, sufficient to meet the “made service available” requirement of §1926(b).

The 10th Circuit adopted the reasoning of the 4th Circuit in the *Bell Arthur* case, that “inherent in the concept of providing service or making service available is the *capability* of providing service or *at a minimum, of providing service within a reasonable time*”. The “test” thus boils down to whether the indebted water district has proximate and adequate “pipes in the ground” with which it has served or can serve the disputed customers within a reasonable time.

Stated another way, a water district meets the “pipes in the ground” test by demonstrating that it has adequate facilities within or adjacent to the disputed area to provide service to the disputed area within a reasonable time *after a request for service is made*. This test is applied on a “customer by customer” basis. If there is doubt whether service is being made available (or can be made available within a reasonable time after a request for service is made), the doubt is resolved in favor of the water district. I interpret the phrase “after a request for service is made” to mean a request that has actually been made to “someone”, not necessarily to the water district. For example, in the frequent circumstance where a developer has applied to a city for water service (and has not applied for service to the water district) we determine whether the water district could have (within a reasonable amount of time) extended lines or improved its facilities elsewhere to be able to provide water in a reasonable amount of time.

Proving the delivery capability of a water district five or even ten years in the past involves gathering a great amount of records and gaining the assistance of qualified engineers to establish the

requisite capability. The test is not whether the water district has the capability to serve a particular customer “now” (at the time of enforcing §1926(b)). Usually the circumstances at the time of suit are that the city has already taken customers or developments and all lines/facilities are already built. The test is whether at the time the customer/developer submitted the original application to the city for water service, could the water district have provide service within a reasonable amount of time.

Frequently I hear water districts state that “we could have never provided service” to the developer. My usual response is “Why not? If the developer is going to pay all (or a significant amount of) the cost of the line extension and a reasonable assessment for improvements to infrastructure - what prevents the water district from charging reasonable fees³ and providing service just a municipalities do? Cities have been extracting huge fees and other concessions from developers and industrial customers in order to provide water, sewer and other city services. Water districts are no different and can charge based on formulas developed by municipalities, and other water providers.

It is important to keep in mind, that the test here, is not comparing who can provide service the cheapest, but simply whether the water district can provide service for reasonable (non-confiscatory) charges. Those charges can be significantly larger than what the neighboring city charges and still satisfy §1926(b) standards. §1926(b) does not involve a “race” to see who can get the biggest pipe with the most water to the customer first, nor an auction to see who can deliver service the cheapest. It is an objective standard involving (1) what numerous other comparable

³How much a water district can charge customers or developers/industry for system improvements to facilitate water delivery is a separate issue dealt with later in this book.

systems charge for line extensions and other related fees (2) what are the usual and customary lead times for construction and (3) what requirements of the water consumer directly relate to needed improvements to satisfy those requirements. What constitutes a reasonable time for planning and construction is widely variable based on past experience. A developer must allow a water district the same reasonable “lead time” to put facilities in place as it would require of a (theoretical) city who was an equal distance away.

The simple solution to these somewhat vague standards, is to plan far ahead. Water districts must plan and anticipate the needs of residential developers and industrial customers. Water districts must make their presence known and play an active role in community development, just as other utilities do, such as providers of electricity, gas or sewer. Water districts must invest in themselves by extending their lines as far as practicable, and securing the maximum water available for long term future needs. This also requires planning for delivery. Having lines in the ground is not enough - water districts must have an adequate water supply coupled with lines of sufficient size to deliver required volumes at requisite pressure. Doing so will readily satisfy the burden of proof of making service available. It must be remembered that federally indebted water districts have an affirmative duty to make service available to all applicants in their service area who can be legally and feasibly served.

In the *Bell Arthur Water Corporation v. Greenville Utilities Commission*, 173 F.3d 517 (4th Cir. 1999) the Court observed: “While it is true that the Ironwood development was to be a phased development and therefore would not need the full water service at the beginning, Bell Arthur put forth no evidence that it would have had an adequate capacity within a reasonable amount of time to meet the Developer’s schedule.” The Court in *Bell Arthur* was quite critical of the federally

indebted water district. The Court said: “...after Bell Arthur formally agreed in May 1995 to provide water service to Ironwood, it took no meaningful steps at that time or within a reasonable time thereafter to undertake construction of a new pipeline.” Needless to say, Bell Arthur lost its suit to enforce its §1926(b) rights and perhaps justifiably so based on the Court’s view of the evidence.

Although the 10th Circuit allows water districts remarkable leeway in proving that the water district has made service available (or will make service available within a reasonable period of time) from a tactical stand point, it is best for the water district to be proactive by making its facilities close enough and adequate enough that no reasonable person would conclude that service could not be provided within a reasonable period of time. Strategically, a water district must anticipate encroachment, and build its legal case (in the form of construction of adequate pipes in the ground, and excess water capacity) so that encroachers will not be encouraged to invade the territory. If they do invade, a water districts chances of winning in court, gaining a damage award against the encroacher, including an assessment for attorney fees, interest, court costs are greatly improved. In at least one case, the remedy awarded to the water district also included surrender of some of the city’s lines and facilities.

Making service available means domestic water service. It does not mean “fire protection”. §1926(b) was not enacted to supply fire protection. A water district’s capacity to provide fire protection is irrelevant to its entitlement to protection from competition under §1926(b). This issue arises in nearly every case since cities frequently want to use the emotional issue of fire protection to claim that the water district is not making service available because it cannot provide sufficient “fire flow” to meet some regulation (usually the city’s own regulation). In the recent 2001 jury trial of *Salem Water v. City of Benton and City of Bryant* (E.D. Arkansas) the federal trial judge ordered the

two defendant cities to make no mention of the issue of fire flow or fire protection in the presence of the jury. Despite this directive from the court, the city presented one witness in full fire chief regalia simply to testify regarding a pressure test at one point on a water line. The same evidence could have been presented by a civil engineer (of which there were several who testified) dressed in a business suit. This strategy to subconsciously infuse the issue of fire protection (as well as all other defenses raised by the cities in the two week jury trial) failed, as the jury rendered a verdict in favor of the water district as to each development and customer in dispute.

CONCLUSION

How close must a water district's line be to meet the test? In the *Sequoyah* case, the 10th Circuit observed that certain of the water district's water lines "ran *across* the property of certain customers" in dispute. The 10th Circuit agreed with the water district that this degree of proximity was "certainly sufficient". Remarkably, the federal trial judge who considered the very same evidence originally had concluded that despite this evidence of proximity, service was "not" being made available and ruled against the water district. (The 10th Circuit reversed the trial court and remanded the case for trial. The Town of Muldrow settled with the water district thereafter.) In the *Pitt-7 v. City of McAlester* (E.D. Okla) case, the trial court concluded that service had not been made available, at least in part, on the basis that the water district was going to charge the customer for the cost of line extensions. Here again, the 10th Circuit reversed the trial court, finding that such charges were not per se unreasonable, and in fact certainly not unheard of with respect to new developments⁴.

⁴This issue of what fees and costs must be paid by water customers is dealt with in a

subsequent chapter.

The 10th Circuit uses a “customer by customer” analysis. Each particular customer is studied separately to determine whether service has been made available or could have been made available within a reasonable time after a request for service was made. This presents some heavy evidentiary burdens on water districts to thoroughly document the circumstances involved for each customer. Adequate evidence requires extensive engineering data. In the *Salem v. Benton/Bryant* case, each customer (or development) in dispute was analyzed separately and different engineering plans were developed to show how water could have been supplied (1) in the “date” order in which those customers applied for service to the encroaching cities and (2) in the order that made the best sense, to accomplish a transfer of service from the city to the water district and lessening of costs as of the time of trial. The trial court in that case is presently considering equitable remedies to be awarded to Salem Water to accomplish a transfer of service. A significant number of large real estate developments were involved as well as industrial customers.

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