

July 2009 MPT

1. The test materials include an interoffice memorandum from the City Attorney for the City of Bluewater (City), a preliminary research memorandum from Rhonda Hostetler, a demand letter from the attorneys for Turquoise Water Supply Corporation (TWS), an article from the *Bluewater Tribune*, and a Draft Service Plan for the Annexed Area. The library consists of portions of statutes from the Consolidated Farm and Rural Development Act, the Franklin Code, and the full text of two cases, *Fountain Water Supply (Fountain)* and *Klein Water Company (Klein)*. The interoffice memorandum requests that the examinee draft a letter responding to TWS' attorneys' demand letter by addressing: (1) each of TWS' contentions; and (2) persuasively setting forth the City's position that the City has the exclusive right to provide water and sewer services to the Acadia Estates subdivision.

2. General observations: Most examinees followed the call of the question by drafting a letter. The test can generally be divided into two sections. The first section discusses why TWS does not have an exclusive right to provide water and sewer services to the new subdivision. The second section discusses why the City was not barred by state law from providing such services there, and why the City is authorized, and has the exclusive right, to provide the services. Many of the examinees chose to blend the arguments for and against each side rather than organize the letter based on the rights of the individual parties.

3. The first issue involves whether TWS can claim a federally protected right under Section 1926(b). This involves the three part test set forth in the *Fountain* and *Klein* cases. The three parts relate to whether TWS: (1) is an "association" under the Act; (2) has an outstanding federal loan, and (3) has provided service or made service available to the disputed area (also known as the 'pipes-in-the-ground' test). Many examinees discussed only the third factor. The more complete letters specifically set forth relevant facts establishing that TWS has met the first two parts.

The third part has a two prong test that requires TWS to prove it has: (1) the legal right under state law to serve the area; and (2) the physical ability to serve the area. The more complete papers identified and discussed each prong.

It should be noted that to establish its exclusive right to serve the area, the City is required to meet the same three part test under Section 1926(b). Many examinees engaged in this analysis for the City's claim at some point in the letter. The more complete letters specifically addressed each of the three requirements.

4. The discussion regarding TWS' legal right to serve the area requires an analysis related to TWS's status as a Certificate of Convenience and Necessity (CCN) holder. Most examinees identified that TWS is required to obtain a CCN for Acadia estates before serving the area. The more complete letters, after identifying this requirement, addressed and analyzed four issues: (a) TWS has a CCN for an area within El Dorado County; (b) this CCN does not cover the Acadia Estates area; (c) TWS has only applied for an amendment to the existing CCN, and an application alone does not provide TWS the right to serve the new area; (d) it is unlikely that

TWS will be able to obtain an amendment to the CCN because TWS is not capable of providing "continuous and adequate service" as required by Section 457. This analysis would result in the examinee determining that TWS does not currently have the legal right to serve the area and is unlikely to acquire this right.

5. The second prong, the 'pipes-in-the-ground' test, requires an analysis of TWS' current ability to provide service. Three facts related to TWS's ability to provide service include: (1) TWS's nearest lines are 3 miles away; (2) TWS's pipes are only 6" when the subdivision requires 12"; and (3) it will take TWS approximately two years to complete its expansion. The more complete letters factually compared these factors with the facts and holdings in *Glenpool* and *Klein*, (which discuss the need to have existing lines within or adjacent to the disputed area or to be able to provide service within a reasonable time period, and conclude that existing lines more than a mile away are too far to be considered "within or adjacent to" the disputed area, and that 12 months to construct new lines is too long to be considered "within a reasonable time") and reached the conclusion that TWS did not have existing lines in the area and could not provide service within a reasonable time. Many examinees used non-persuasive generalized terms to suggest TWS did not meet the requirements, and failed to provide the specific factual information supporting the City's position on the claim of TWS.

6. Analysis of the City's argument also involves a discussion of the two prong test set forth above in the *Fountain* and *Klein* cases. Regarding the City's legal right to provide services, the stronger letters addressed TWS's claims that Sections 450(b) and 675 preclude the City from providing service. Such letters addressed the fact that TWS is not a CCN holder for the disputed area and, therefore, not entitled to protection, and that Section 675 specifically authorizes a City's expansion into an adjacent territory as long as the territory is not served by a holder of a CCN. This foregoing analysis would result in the examinee determining that the City has the legal right to serve the area.

As for the 'pipes-in-the-ground' test, a basic analysis for the City's position would include a discussion that: (1) the City's lines are a quarter mile from the new subdivision; the City's lines are already 12" in diameter; and (3) the City can provide service within a few months. Many examinees did not provide factual information supporting the City's position that it would have exclusive rights.

7. The more complete letters compared the City's legal right and ability to provide services with TWS's legal right and ability to provide services. By conducting this comparison, an examinee should have expressly concluded that the City possesses the exclusive right to provide service to the Acadia subdivision.