09-3282/09-3299

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CITY OF EUDORA, KANSAS,

Defendant/Appellant,

v.

RURAL WATER DISTRICT #4 OF DOUGLAS COUNTY, KANSAS,

Plaintiff/Appellee.

Appeal from the United States District Court for the District of Kansas
The Honorable Judge Julie A. Robinson
Case No. 07-2463-JAR

PLAINTIFF/APPELLEE'S PETITION FOR REHEARING EN BANC OR ALTERNATIVELY, BY PANEL

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Dated October 10, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COMES NOW Plaintiff/Appellee Rural Water District No. 4, Douglas County, Kansas ("Douglas-4"), and pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure and Local Rules 35.1 and 40.1, hereby petitions for Rehearing En Banc or alternatively by panel of the Opinion/Judgment rendered herein. Exhibits 1 and 2.

I. REASONS FOR REHEARING EN BANC OR BY PANEL

The Petition for Rehearing En Banc, or alternatively by Panel, should be granted because:

1. The Panel's decision conflicts with other decisions of this Court. Consideration by the full Court (or panel reconsideration) is necessary to secure and maintain uniformity of this Court's decisions. The Panel has also overlooked or misapplied the law and/or facts relating to the following issues:

   a. The Panel's limitation of the Any Doubts/All Evidentiary Uncertainties Standard to statutory interpretation conflicts with prior decisions of this Court in *Sequoyah County RWD #7 v. Town of Muldrow*, 191 F.3d 1192 (10th Cir. 1999) and *Pittsburg County RWD #7 v. City of McAlester*, 346 F.3d 1260 (10th Cir. 2004).

   b. The Panel's ruling that the cost of fire protection is relevant in determining entitlement to 7 U.S.C. § 1926(b) protection conflicts with the prior rulings of this Court in *Rural Water Sewer and Solid*

Waste Management District #1, Logan County, Oklahoma v. City of Guthrie, __ F.3d __, 2011 WL 3000591 (10th Cir. 2011); *Sequoyah,* at p. 1204 n.10 and *Glenpool Utility Service Authority v. Creek County Rural Water District No. 2*, 956 F.2d 277 (Table Opinion (10th Cir. 1992).

2. The Panel's decision involves questions of exceptional importance and which the Panel overlooked or misapplied the law and/or facts concerning the following issues:

a. Application of the Any Doubts/All Evidentiary Uncertainties Standard in 7 U.S.C. § 1926(b) cases.

b. Whether fire protection is relevant to any issue in determining 7 U.S.C. § 1926(b) protection.

c. Whether Kansas rural water districts may accept financial assistance from the United States Department of Agriculture (USDA) without a showing of necessity.

d. Whether the USDA's collateral/security interest can be reduced or eliminated without the USDA being a party to the litigation.

e. Whether the Trial Court's jury instructions on the necessary issue erroneously limited that issue to the loan and not the USDA guarantee.

A. THE PANEL'S RULING THAT LIMITS APPLICATION OF THE ANY DOUBTS/ALL EVIDENTIARY UNCERTAINTIES STANDARD TO STATUTORY INTERPRETATION IS CONTRARY TO 10th CIRCUIT PRECEDENT

The Panel seemingly held at Footnote 4 of its Opinion, that the Any Doubts/All Evidentiary Uncertainties first articulated in *Sequoyah* is limited to statutory construction, and does not apply to factual issues.

Although the Any Doubts/All Evidentiary Uncertainties Standard ("AD/AEU Standard") does not shift the burden of proof to the appellee City here, the "AD/AEU Standard", as adopted by this Court[1] lessens Douglas-4's burden, i.e., Douglas-4 must establish entitlement to §1926(b) protection under the greater weight of the evidence standard when resolving Any Doubt and All Evidentiary Uncertainties in favor of Douglas-4. This Court, together with the 8th Circuit, have held that all factual and legal uncertainties must be resolved *in favor of* the party asserting §1926(b) protection..[2]

In *Sequoyah,* this Court noted that "Doubts about whether a water association is entitled to protection from competition under §1926(b) should be

[1] *Sequoyah County RWD No. 7 v. Town of Muldrow*, 191 F.3d 1192 and 1206 (10th Cir. 1999) and *Pittsburg County RWD No. 7 v. City of McAlester*, 358 F.3d 694, 719 (10th Cir. 2008).

[2] *Public WSD No. 3 of Laclede County v. City of Lebanon*, 605 F.3d 511, 515 (8th Cir. 2010); *Rural Water System No. 1 v. City of Sioux Center*, 202 F.ed 1035, 1038 (8th Cir. 2000); *Sequoyah County RWD No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999); *Rural Water, Sewer and Solid Waste Management Dist. No. 1 v. City of Guthrie,* ___ F.3d __, 2011 WL 3000591, *3 (10th Cir. 2011) and *Pittsburg County RWD No. 7 v. City of McAlester*, 358 F.3d 694, 719 (10th Cir. 2008).

resolved in favor of the FmHA-indebted party seeking protection for its territory". *Sequoyah*, p. 1197. In remanding the case back to the District Court for a factual determination of whether the water district had "made service available" this Court stated:

> "As noted above, **evidentiary uncertainties** should be resolved in favor of Plaintiff, the party seeking to protect its territory on remand."

Sequoyah, p. 1206 (Emphasis Added).

Thus, this Court in *Sequoyah* held that the AD/AEU Standard is to be applied to both legal and factual issues.[3]

A review of non-§1926(b) cases establish that the "AD/AEU Standard" applies to both issues of law and fact:

> "in addition, the ACJ is required to resolve all doubts, **factual as well as legal**, in favor of the injured worker…."

Jones v. Directors Office of Winkers Corporation, 977 F.2d 1106, 1109 (7th Cir. 1992)

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[3] The All Evidentiary Uncertainties language is not a restatement of the summary judgment standard. The language concerning the "party seeking protection for its territory" discloses otherwise. This is true because "the party seeking protection" could be the summary judgment moving party, which under the summary judgment standard would require the exact opposite application i.e., in ruling on summary judgment the court reviews "the evidence in the light most favorable to the non-moving party." *Zike v. Advance America,* 646 F.3d 504, 509 (8th Cir. 2011) (Emphasis Added). By stating that Any Doubts/All Evidentiary Uncertainties must be resolved in favor the "party seeking [§ 1926(b)] protection" this Court was clearly not restating the summary judgment standard that evidence must be viewed in the light most favorable to the "non-moving party".

> "…the Act, like others similar to it, operate(s) to relieve the persons suffering (work related) misfortunes **of a part of the burden** …"
>
> * * *
>
> In implementing this policy**, all doubtful questions of fact** (are to) be resolved in favor of the insured employee."

Volpe v. Northeast Marine Terminals, 671 F.2d 697, 700-701 (2nd Cir. 1982)

The Panel's decision limiting application of the AD/AEU Standard to statutory interpretation is in conflict with *Sequoyah* and should be reconsidered En Banc or by the Panel.

B. THE PANEL OVERLOOKED OR MISAPPLIED THE LAW IN RULING THAT A KANSAS RURAL WATER DISTRICT IS NOT ENTITLED TO ACCEPT FINANCIAL ASSISTANCE FROM THE USDA ABSENT NECESSITY

The Panel's ruling at Opinion Footnote 5, that the provisions of K.S.A. § 82a-619(g) do not allow a Kansas rural water district to obtain USDA financial assistance without showing necessity, is an issue of exceptional importance to every rural water district in Kansas. The Panel's decision allows a competing municipality to challenge the validity of a USDA guarantee, after such guarantee has been granted (without joining the USDA as a party or exhausting administrative remedies), thus eliminating the § 1926(b) benefits the USDA bargained for.

The word "necessary" in K.S.A. 82a-619(g), relates to a water district's authority to cooperate with or enter into agreements with the USDA. The other provisions of § 82a-619(g) dealing with loans and guarantees ("financial and other aid"), do not require such financial assistance (e.g. guarantee), to be necessary. Accepting "financial or other aid" is distinguishable from the provision authorizing cooperation or agreements. See Ex. 5, K.S.A. 82a-619(g).

If the power to enter into "necessary" agreements includes the power to "accept financial or other aid", then the phrase "and to accept financial or other aid which the secretary of the United States department of agriculture is empowered to give…" would be superfluous. The second clause of subsection (g) would add nothing to the power granted in the first clause.

The Panel rejected this interpretation based on its finding that § 1926 (7 U.S.C. § 1921 et seq.) which replaced the specific statutory sections listed within K.S.A. 82a-619(g) [16 U.S.C.A., Sections 590r, 590s, 590x-1, 590x-9 and 590x-3…] did not constitute an amendment to the federal statutes, noting that "…nor do we consider Congress's repeal of § 590r et seq. and replacement with a radically different statutory scheme in § 1926 an amendment to the repealed sections. Compare 7 U.S.C. § 1926(b) (providing annexation protection for qualifying loans), with 16 U.S.C. § 590x-3 (no protection from annexation)." Opinion, fn. 5.

The history of the statutes in question disclose that the federal statutes cited in K.S.A. 82a-619(g) (16 USCA § 590r et seq.) were in fact amended by 7 U.S.C. § 1921 et seq:

> "The subject matter of the former section 590r to 590x-y of this title is covered by section 1921 et seq. of Title 7, Agriculture."
>
> * * *
>
> Repeal of sections effective one hundred and twenty days after Aug. 8, 1961, or such earlier date as the provisions of section 1921 et seq. of Title 7, Agriculture, are made effective by regulations of Secretary of Agriculture, see section 341(a) of Pub.L. 87-128, set out as a note under section 1921 of Title 7.

Ex. 6, 16 USCA §§ 590r et seq. , Historical and Statutory Notes.

The Panel's finding that the repeal of § 590r et seq. and replacement with 7 U.S.C. § 1921 et seq., is not an amendment is in conflict with the legislative record concerning this change:

> A new provision has been **added** to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

Ex. 3, S.Rep. 87-566, 1961 USCCAN 2243, at 2309 (Emphasis Added).

The words "new provision has been added" demonstrate an amendment to the existing statutes. The legislative history (1961 USCCAN 2243, at 2309) explains in detail the changes (amendments) to the repealed statutory provisions and the reasons for such amendments. 7 U.S.C. § 1921 et seq., are the amended statutory provisions contemplated by the Kansas statute.

The Court should find there is no "necessary" requirement in K.S.A. 82a-619(g) for Douglas-4 to "accept financial or other aid" (loan guarantee) from the USDA made pursuant 7 U.S.C. § 1921, et. seq.,

C. THE GUARANTEE AND §1926(b) PROTECTION ARE NECESSARY AS A MATTER OF LAW

Congress, when it enacted §1926(b), made the determination that the protection provided by §1926(b) was to promote the public health, welfare and convenience by encouraging the development of rural water systems. S. Rep. 87-566, 1961 U.S.C. C.A.N. 2243, 2309, 1961 WL 4746 (Leg. Hist.)

The Courts have likewise found §1926(b) promotes a public interest:

> "The Court finds that the purposes of 7 U.S.C. § 1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid-both purposes aimed at promoting the public interest-rather than merely to protect the private interest of a rural water association."

Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F.Supp. 421 (S.D. Ind. 1988), aff., 895 F.2d 311 (7th Cir. 1989). See also Pittsburg County Rural Water District No. 7 v. City of McAlester, 346 F.3d 1260, 1277 (10th Cir. 2003).

The concept of providing exclusive service areas to promote rural utilities is well recognized as beneficial to the "public welfare, health and convenience". See *Public Service Company of Oklahoma v. Caddo Electric Cooperative*, 479 P.2d 572 (Okla. 1971), noting that granting an exclusive franchise or monopoly to protect a utility from competition prevented wasteful duplication, kept costs to the customer low and that such protection was needed as a matter of public interest and necessity to encourage development of rural electric systems. *Caddo Electric*, p. 578-579.

Kansas also recognizes that in the area of public utilities, protection from competition is beneficial. *General Communications System v. State Corporation Commission*, 216 Kan. 410, 421, 532 P.2d 1341, 1350 (1975).

It is evident from this analysis that both the U.S. Congress as well as the Kansas legislature have deemed protection from competition, (e.g. § 1926(b)), "necessary". The Court should find as a matter of law that the protection provided by §1926(b) is "necessary".

D. THE JURY HELD THE LOAN *AND* THE GUARANTEE WERE NECESSARY

The Panel improperly found that the jury instruction on the "necessary" issue was in error because it instructed the jury that the guaranteed loan, rather than the underlying guarantee, must be "necessary".

The District Court did not limit the necessary element to the loan itself, but instructed the jury that if the guarantee agreement (cooperation with the USDA) was solely for the purpose of obtaining § 1926(b) protection, the jury "must enter a judgment in favor of Eudora":

> Douglas-4 did not have the power under Kansas law to cooperate with and enter into agreements with the Federal Government for the sole purpose of securing federal protection under 7 U.S.C. 1926(b). If obtaining federal protection under 7 U.S.C. 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora.

7A1649, Jury Instruction No. 17, Ex. 4 attached.

The jury was thus presented the questions of: (1) whether the loan was necessary and (2) whether the guarantee was obtained solely for the purpose of § 1926(b) protection, i.e., was the guarantee necessary. The jury answered yes to these questions. See Ex. 5, Verdict Form, Question 1, 7A1666. The jury answered yes to the question "Did Douglas-4 have the power under Kansas law to cooperate with and enter into agreements with the federal government"?

E. BASED ON THE JURY'S FINDINGS THE GUARANTEE WAS NECESSARY AS A MATTER OF LAW

The Panel held that the guarantee itself must be "necessary", but stated it was not going so far as to require evidence that the loan would not have been made but for the guarantee.

> This does not mean that Douglas-4's cooperation with the USDA must be "absolutely necessary", i.e., that it could not receive financing without the guarantee.

Ex. 1, Opinion, p. 17.

The jury found that the loan and Douglas-4's cooperation with the USDA was necessary. See Argument IV above. The evidence presented at trial discloses that the guarantee was in fact "absolutely necessary" because the USDA, by its own regulations, requires the lender to certify that the lender would not make the loan without the USDA guaranty.

The Conditional Commitment For Guarantee states that the USDA will grant the Guarantee only if the conditions and requirements specified in its regulations are met. Addendum – Trial Exhibits – Vol. I, p. 187.

The applicable regulation provides:

> " The Loan Note Guarantee will not be issued until: (a) The lender certifies that:
>
> (13) The lender would not make the loan without an Agency guarantee."
>
> 7 CFR § 1779.63; See also 7 CFR § 1779.20

Therefore, the USDA made a determination that the guarantee was in fact "absolutely necessary" as defined by the Panel, i.e., that the loan would not have been made without the guarantee. The Court should find as a matter of law that the guarantee was necessary in this case.

F. THE NECESSARY DEFENSE IS BARRED AS A DISCRETIONARY DECISION OF DOUGLAS-4

The language in K.S.A. 82a-619(g) relied on by the Panel is "cooperate with and enter into agreements….necessary to carry out the purpose of its organization." That phrase is nearly identical to the phrase appearing in the Kansas eminent domain statute [K.S.A. § 26-504(2)] which requires as a condition to eminent domain that "the taking is necessary to the lawful corporate purposes of the Plaintiff."

Kansas case law discloses it is for the condemning authority to determine whether the taking is necessary to its "lawful corporate purposes":

> A Kansas public utility possessing the power of eminent domain is vested with reasonable discretion to determine the necessity for the taking of land for its lawful corporate purposes. The public utility's discretion will not be disturbed on judicial review unless fraud, bad faith, or an abuse of discretion is shown.

Shuck v. Rural Telephone Service Co., Inc. 286 Kan. 19, 25, 180 P.3d 571, 576-577 (2008). See also *Steele v. Missouri Pacific Railroad Company*, 232 Kan. at 861.

These authorities establish that the decision concerning what is "necessary" is left to the discretion of the rural water district (Douglas-4) and is not to be overturned absent fraud, bad faith or abuse of discretion. The City did not allege or claim Douglas-4's actions fall into any of those three categories.

In rejecting this standard of deference, the Panel stated: "it is unclear how the use of the word "necessity" for a "public need" would apply by analogy to the exercise of powers reserved to water districts for at least the incidental benefit of protection from competition". Ex. 1, Opinion, p. 16.

The Panel's finding in this regard is in conflict with this Court's holdings that § 1926(b) is a "public policy" statute, necessary to protect rural water districts and their ability to repay their debt and provide services to their customers. *Sequoyah*, p. 1196; RWD #1, *Ellsworth County v. City of Wilson*, 243 F.3d 1263, 1269 (10th Cir. 2001) and *Pittsburg County RWD #7 v. City of McAlester*, 358 F.3d at pp. 714-715.

G. THE CITY'S NECESSARY DEFENSE IS BARRED BECAUSE THE USDA AND BANK ARE INDISPENSABLE PARTIES

The Panel failed to address the issue of whether the USDA and/or Bank are indispensable parties to any litigation which seeks to remove part of their collateral. One of the purposes of §1926(b) is "to provide greater security for and thereby increase the likelihood of repayment of FmHA loans". *RWD #1, Ellsworth County v. City of Wilson*, 243 F.3d 1203, 1269 (10th Cir. 2001). The Kansas Supreme Court has held that "the United States [is] an indispensable party where its security interest in property is imperiled by pending litigation." *Shawnee Hills Mobile Homes, Inc. v. Rural Water Dist. No. 6*, 217 Kan. 421, 427, 537 P.2d 210 (1975).

H. THE PANEL'S RULING CONCERNING FIRE PROTECTION IS IN CONFLICT WITH THE PRIOR RULINGS OF THIS COURT

Because an indebted association is not required to provide water for fire protection in order to obtain § 1926(b) protection, it is error to include the cost of fire protection to determine if the cost of service "made available" by the association (potable water), is "unreasonable, excessive and confiscatory".

This Court recently held that whether an indebted association can provide fire protection is irrelevant to the question of whether the association has made service available for the purposes of § 1926(b). *Rural Water, Sewer and Solid Waste Management District No. 1 v. City of Guthrie*, __ F.3d __, 2011 WL 3000591, *6 (10th Cir. 2011).

The cost of service analysis adopted in *RWD #1, Ellsworth County v. City of Wilson,* 243 F.3d 1263 (10th Cir. 2001) looks solely at the cost of the "service provided or made available", i.e., the service for which § 1926(b) protection is sought. The *Ellsworth* analysis does not allow a party to create an additional requirement that the indebted association must also provide water for fire protection. To allow the cost of fire protection to be considered within the "unreasonable, excessive and confiscatory" analysis, presumes the indebted association must also provide water for fire protection, which is contradictory to this Court's decisions in *Sequoyah* and *Ellsworth*.

The Panel's decision concerning the cost of water for fire protection (Ex. 1, Opinion, pp. 20-23) suggests that if a rural water district offers fire protection service the cost of such service may be included in determining whether the cost of potable water service is unreasonable, excessive and confiscatory.

Because §1926(b) protection does not extend to fire protection services, but rather is limited to domestic/potable water service[4], the cost of fire protection services cannot be relevant unless: (1) the indebted association seeks § 1926(b) protection for fire protection service, or (2) the indebted association refuses to provide potable water service unless the customer also obtains fire protection service.

PRAYER

For the reasons above, Douglas-4 prays the Court will grant its Petition for Rehearing En Banc, or in the alternative, for a Panel Rehearing.

Respectfully Submitted,

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[4] *Sequoyah*, at p. 1204n.10; *Glenpool Utility Service Authority v. Creek County RWD No. 2*, 956 F.2d 277 (Table Opinion (10th Cir. 1992).

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CERTIFICATE OF SERVICE

I, hereby certify that I electronically filed the foregoing with the Clerk of the court for the United States of Appeals for the Tenth Circuit by using the appellate CM/ECF system on October 10, 2011.

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