

Water service territory dispute continues

Rural Water District No. 1, Ellsworth County (Post Rock Rural Water District) and the City of Wilson completed another chapter in their long-running dispute over water service territory. The dispute is being fought in the United States District Court for the District of Kansas and concerns the right to serve certain water customers located in Post Rock territory that was annexed by the City of Wilson.

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Federal law, 7 U.S.C. § 1926(b), protects water systems with debts payable to the USDA, or whose USDA loans were sold during the government's deficit reduction program (and, perhaps soon, those with commercial loans guaranteed by the USDA) from encroachment by competing water systems. This protection applies to users in the District's territory to whom the District is providing water service, or to whom water service has been made available.

Frequent litigation

Disputes generally arise concerning whether water service has been made available. Few cases interpreting this part of the law have been decided in Kansas, although it has been the subject of frequent litigation in other parts of the country.

One recent Kansas case is Rural Water District No. 1,

Ellsworth County, Kansas (Post Rock Rural Water District) v. City of Wilson, District of Kansas Case No. 96-1297-WEB. This case involves a battle between the City of Wilson and Post Rock over Wilson's annexation and extension of water service to certain portions of Post Rock territory.

Policies questioned

The District's policy required new customers to pay the entire cost of extending service, including line extension

duplex owners to pay \$32,000 to obtain service. An appeal followed, and the Tenth Circuit Court of Appeals ordered a retrial.

At the retrial, the district court was required to determine whether Post Rock's fees were "unreasonable, excessive, and confiscatory." If they were, then Post Rock had not "made service available" as required for § 1926(b) protection.

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and infrastructure improvements such as pumping stations. Once installed, the facilities would become the property of the District, and future customers could be added without any obligation to reimburse the party who originally paid for the improvements. In this instance, Post Rock estimated the cost of extending a line to two duplexes to be \$32,000.

The case has a complicated history, beginning with a trial in 1998. At the conclusion of that trial, the court ordered that conditioning water service by the District upon payment of unreasonable fees was not "making service available," as required for purposes of § 1926(b), and further found it unreasonable to require the

managers, board members, engineers and KRWA, as well as from Post Rock and Wilson. The result should be of interest to all rural water districts and cities in Kansas. The court drew the following conclusions from the evidence:

1. It is standard practice among rural water districts in Kansas to charge new customers the cost of extending water service to the customer's property. The cost typically includes pipe, labor, valves and easements, and sometimes includes a 10% surcharge to cover overhead expenses. These were in addition to the cost of the benefit unit in the District.

2. It is standard practice for RWD's to take into account whether it is economical to provide service to a particular

user. This includes consideration of the potential revenue to the District as well as the cost to the customer, and whether the customer can obtain cheaper service from a neighboring district or city. The fact that a cheaper source is available elsewhere is not conclusive, but when the cost of connecting a particular user results in an unusually high connection fee, it is common among districts to permit the customer to obtain service elsewhere. This is particularly true for small users (such as the duplexes in this case), whereas service to a large residential subdivision or commercial operation would more likely be retained by the District due to its prospect of substantially higher revenues to the District, and likelihood that such users can absorb and offset the higher cost of extending the water service.

3. The \$32,000 estimate for connecting the two duplexes in this case would be an exceptionally high cost for a small user (like the duplexes) to absorb.

Under all of the circumstances, the court found that Post Rock's practice resulted in fees that were excessive, unreasonable and confiscatory, and therefore the court denied Post Rock protection under § 1926(b) for service to this property and allowed the City of Wilson to provide that service. The case is not over, as Post Rock has again appealed to the Tenth Circuit Court of Appeals.

Lessons to be learned

Subject to what may yet happen on appeal, there are some lessons to be learned from the Post Rock case. The first is that, at least in Kansas, cost is a consideration in whether a water district has

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truly made service available to a potential customer within its territory so that it is entitled to § 1926(b) protection against competition. This is apparently the first case in the country in which cost has been made a consideration like this.

Secondly, assuming the accuracy of the numbers used in the Post Rock case, \$32,000, or \$8,000 per unit for line extension costs (2 duplexes times 2 units per duplex) is excessive for a small user. This contrasted sharply with the City's costs in providing service. The duplexes were located about one block from the City's water line and were easily connected to the line at a cost of about \$250. The court did not say what it would have considered a reasonable cost. It is noted that in the ten years previous, the most that Post Rock had charged to a user for extension of service had been \$12,000. Evidence from other districts at the trial had

indicated that the highest costs charged by any for the extension of service had been considerably below Post Rock's \$32,000 fee in this case, and that those instances of high extension costs had been in part because the user had no cheaper alternative available. While the court made a point of saying that availability of cheaper alternatives for water service from a competitor is not determinative of what's reasonable, it was clearly a factor.

The last chapter in this case has not yet been written. The Court of Appeals will review the District Court's decision in the next several months. While § 1926(b) is an important tool for use in preventing a USDA borrower from having its customers cherry-picked by another system or city, this protection is not without its limits.

Attorneys' Forum: March 25, 2003 . . .

The 3rd annual "Attorney's Forum" is being planned as part of the 2003 KRWA conference. KRWA members are asked to invite their attorney to attend the KRWA conference and this forum, Tuesday, March 25. Topics will focus on municipal and rural water district issues. CLE's will be provided.

Ask your attorney to mark his/her calendar to attend. A program and registration form will be mailed to each member system about January 15.