IN THE SUPREME COURT OF IOWA

Case No. 20-1027

XENIA RURAL WATER DISTRICT,

Plaintiff/Appellant

vs.

CITY OF JOHNSTON, IOWA,

Defendant/Appellee

CERTIFIED QUESTIONS FROM THE HONORABLE JAMES E. GRITZNER UNITED STATES DISTRICT JUDGE Case No. 4:18-cv-00431-JEG-CFB U.S. District Court, Southern District of Iowa

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PLAINTIFF/APPELLANT'S CORRECTED FINAL OPENING BRIEF

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STATEMENT OF ISSUES

1. Whether an Iowa Code § 357A.2 rural water district, before amendments to § 357A.2(4) in 2014, had a legal right to provide water service to portions of an area described in its country (sic) board of supervisors resolution, see Iowa Code § 357A.2(1), when those portions were also within two miles of the limits of a municipality, see § 357A.2(3), and when the municipality had not waived its rights to provide water service to the area, see § 357A.2(4).

2. Whether Iowa Code § 357A.2(4), as amended by the Iowa legislature in 2014: (a) exempts a rural water district from following notice-of-intent procedures when the area the district seeks to serve is within the district's boundaries as designated in the county board of supervisors' resolution creating the water district, and/or (b) otherwise provides the rural water district a legal right to serve such areas when the municipality has not waived its rights. If so, whether the 2014 amendment to § 357A.2(4) had retroactive effect.

3. Whether an Iowa Code § 504A nonprofit corporation created in 1977 had a legal right to provide water service anywhere within the state of Iowa. If so, whether a § 504A nonprofit corporation that reincorporated (including through articles of dissolution for the § 504A entity) as a § 357A.2 rural water district in 1990 retained the legal right to provide water service anywhere within the state of Iowa (including outside its boundaries as specified in its county board of supervisors resolution and within two miles of a municipality), prior to and following the 1991 amendment to § 357A.2.

ROUTING STATEMENT

The Iowa Supreme Court has exclusive discretion and jurisdiction to answer certified questions of law. I.C.A. § 684A.1. This case should be retained and the certified questions answered by the Supreme Court because it is a case presenting substantial issues of first impression.

STATEMENT OF THE CASE

1. This case was brought by Plaintiff, Xenia Rural Water District ("Xenia"), in the U.S. District Court, S.D. Iowa ("District Court") pursuant to 42 U.S.C. § 1983 to enforce Xenia's federal rights under 7 U.S.C. § 1926(b) ("§ 1926(b)") to be the exclusive provider of public water supply services to areas near and within Johnston IA (the "Areas in Dispute"), as well as for declaratory relief under 28 U.S.C. § 2201 et seq. Appx. p. 5, Complaint and Appx. p. 23, First Amended Complaint.

2. The Defendant, City of Johnston ("Johnston") filed Counterclaims asking: (1) for Declaratory Judgment that Xenia has no right to provide water service within the Areas In Dispute, and (2) for an injunction precluding Xenia from serving the Areas In Dispute. Appx. p. 42, Defendant's Answer and Affirmative Defenses to Plaintiff's First Amended Complaint, Amended Counterclaim and Jury Demand.

3. In order to qualify for § 1926(b) protection, Xenia must establish: (1) Xenia is an "association" as contemplated by § 1926(b), (2) Xenia has a qualifying federal loan, and (3) Xenia has

provided or made service available to the Areas In Dispute. *Public Water Supply No. 3, Laclede County v. City of Lebanon*, 605 F.3d 511, 521 (8th Cir.2010). "Making service available has two components; (1) the physical ability to serve an area; and (2) the *legal right to serve an area.*" *Rural Water System No. 1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir. 2000). (Emphasis added.)

4. Xenia filed its First Motion for Partial Summary Judgment ("Xenia's First MPSJ"), seeking a declaration that Xenia is an "association," is "indebted" on a qualifying federal loan and meets the "legal right" component of the "made service available" test, leaving the issues of whether Xenia meets the "physical ability" component of the "made service available" test, damages, and appropriate equitable relief for later determination. Appx. p. 53 Xenia's First MPSJ, and Appx. p. 57, Brief in Support of Xenia's First MPSJ.

5. Johnston filed a Motion for Partial Summary Judgment ("Johnston's MPSJ") seeking a declaration that the Two-Mile Rule in I.C.A. § 357A.2 is not preempted by § 1926(b). Appx. p. 133, Johnston's Combined Response Brief to Xenia's First MPSJ

and Brief in Support of Johnston's MPSJ, and Appx. p. 165, Johnston's Combined Response to Xenia's First MPSJ and Johnston's MPSJ. Xenia's First MPSJ and Johnston's MPSJ are referenced hereinafter as the "Cross-Motions."

6. One of the critical issues addressed by the Cross-Motions was whether Xenia met the "legal right" component of the "made service available" element on which Xenia's § 1926(b) protection depends.

7. Because the Areas In Dispute[1] are within Xenia's geographical boundaries (service area) as established pursuant to I.C.A. § 357A.2 by the November 27, 1990 resolution of the Polk County Board of Supervisors ("PCBOS"), the legal right issue depends upon whether, notwithstanding the November 27, 1990 PCBOS resolution Xenia must also comply with the provisions of

[1] The "Areas In Dispute" in this case consist of: (1) the "Disputed Area" an area containing approximately 1900 acres, which includes approximately 550 acres annexed by Johnston in 2018, and approximately 1350 acres not yet annexed by Johnston within which Johnston currently does not provide water service, but has indicated an intent to do so and has interfered with Xenia's service within this area, (2) the "Encroachment Areas", where Johnston currently provides water service which includes numerous subdivisions to which Johnston commenced water service at various times between 1995 to 2018. The "Areas In Dispute" are properly reflected at Appx. p. 110 and Appx. pp. 223-224, G.B. Decl., Sts. 7 and 8.

I.C.A. § 357A.2(3) (referenced in the briefing as the "Two-Mile Rule") before it (Xenia) has the exclusive right under § 1926(b) to provide water service to that part of the Areas In Dispute that is within two miles of Johnston's 1990 city limits.

8. On March 19, 2020, the District Court entered its Order relating to the Cross-Motions for partial summary judgment. Appx. p. 324.

9. The District Court's Order finds that the Two-Mile Rule precludes Xenia from extending water service to new customers within two miles of the Johnston 1990 city limits. Appx. pp. 338-339 and 352-353.

10. The District's Court Order also finds that Johnston admitted at the hearing on partial summary judgment that Xenia has rights to the Areas In Dispute beyond two miles from Johnston's 1990 city limits and holding that Xenia has a legal right to provide water service to the portions of the Areas In Dispute beyond the Two-Mile Rule range. Appx. pp. 350-351.

11. Xenia filed a Motion for Reconsideration (Appx. p. 412) asking that the District Court reconsider its rulings concerning

the interpretation and application of various state law issues on which there is no controlling Iowa precedent.

12. Upon review of Xenia's Motion for Reconsideration, the District Court determined that it would be appropriate to certify the Iowa state law questions to the Iowa Supreme Court and entered its Order On Certified Questions of State Law. Appx. p. 539.

STATEMENT OF FACTS

A. COURT STATEMENT OF FACTS – XENIA'S COMMENTS IN FOOTNOTES

Johnston is a municipality that operates its own water supply system. Xenia is a rural water provider operating in Polk County, Iowa, among other locations in Iowa. On May 18, 1982, Xenia borrowed $3,200,000 from the United States Department of Agriculture (USDA) and has borrowed additional funds many times since then. Xenia first incorporated in 1977 under Iowa Code Chapter 504A as a nonprofit corporation titled Xenia Rural Water Association. On October 30, 1990, Xenia petitioned the Polk County Board of Supervisors (PCBOS) for conversion to a rural water district under Iowa Code Chapter 357A, and the PCBOS

granted the petition in a November 27, 1990 resolution. The resolution stated, in relevant part:

> BE IT FURTHER RESOLVED that it is the order of the Polk County Board of Supervisors that the district whose boundary includes the area in Polk County described as follows be and hereby is established as the Xenia Rural Water District with all of the rights, powers and duties specified in Chapter 357A of the code of Iowa, as amended:
>
> All of the following sections in Polk County except that portion lying within the boundary of any incorporated city on the date hereof:
>
> 1. The North ½ of Sections 1, 2, and 3, all of Sections 4 through 9, Sections 16 through 20, and Sections 29, 30, 31, 32, and that part of Section 33 west of Saylorville Lake all in Township 81 North Range 25 West.
>
> 2. All of that part of Sections in Township 80 North Range 25 West lying westerly of Saylorville Lake.

Appx. p. 93.

There are two sets of service areas subject to the present suit, which Xenia refers to as "Encroachment Areas" and a "Disputed Area." The Encroachment Areas and Disputed Area together comprise what Xenia calls the "areas in dispute." The parties agree that the areas in dispute are within the boundaries described in the PCBOS resolution. Some portions of the areas in dispute are

within two miles of Johnston's city limits, but some are not. Johnston has provided water service to portions of the Encroachment Areas since at least 1995 and continues to do so.[2] The Disputed Area contains approximately 1900 acres, including approximately 550 acres annexed by Johnston in 2018 and approximately 1350 acres over which Johnston intends to annex.

In early 2018, Xenia and Johnston began negotiations relating to a request for water services from the United States Navy for a facility it was building in the Disputed Area. The negotiations led to an April 4, 2018 Interim Agreement, which stated, in relevant part, "Section 357A.2 of the [Iowa] Code provides that Xenia may not provide services within two miles of the limits of Johnston unless Johnston has approved a new water system plan." Appx. p. 123. The agreement was signed by the Mayor and City Clerk of Johnston and the Chair and Secretary of Xenia. The area Johnston intended to annex included sections both within and over two

[2] It should be clarified that Johnston began service to new customers and developments in this area at different times between 1995 through 2018.

miles from Johnston, although the parties dispute the exact portions. Negotiations broke down around September 2018 after Johnston offered to pay Xenia approximately $1.58 million for its rights to the area over two miles from Johnston's city limits.[3]

B. XENIA'S STATEMENT OF FACTS

1. Xenia was originally organized as an Iowa not for profit corporation pursuant to Chapter 504A of the 1977 Code of Iowa. Appx. p. 86, Declaration of Gary Benjamin (hereafter "G.B. Decl."), St. 3 and Appx. p. 91, Xenia's Articles of Incorporation.

2. On October 30, 1990, Xenia filed a Petition with the County Board of Supervisors of each county in which Xenia was operating (including Polk County) seeking to have the Chapter 504A non-profit corporation also qualified as a rural water district with established boundaries under the provisions of I.C.A. § 357A.1 et seq. Appx. p. 86, G.B. Decl., St. 4 and Appx. p. 93, Petition for Incorporation under I.C.A. § 357.A(2).

[3] The negotiations and approval of the Interim Agreement do not relate to and are not relevant to answering questions of law provided by the Certified Questions.

3. On November 27, 1990, the PCBOS passed a resolution (after notice to Johnston and others and after public hearing and without any objections by Johnston or others) designating Xenia as a rural water district for the purpose of providing an adequate supply of water for residents who were not served by the water mains of any city water system (I.C.A. § 357A.2) and defining the geographical boundaries of Xenia's service territory ("Xenia Territory"). Appx. p. 98, PCBOS Resolution designating Xenia as a rural water district, Appx. p. 99, a map depicting the water service territory exclusively reserved to Xenia by the 1990 PCBOS Resolution and Appx. p. 86, G.B. Decl., St. 5.

4. Johnston is an Iowa Municipality which also operates a public water supply system. Appx. p. 23, First Amended Complaint, St. 4, Appx. p. 42, Johnston's Answer, St. 4 and Appx. p. 87, G.B. Decl. St. 6.

5. Xenia, as a non-profit corporation and as a rural water district, was and is duly empowered to contract indebtedness and borrow funds, including the right to borrow funds from the United States Department of Agriculture ("USDA"). Iowa Code Chapter

504A as in effect in 1982, the date of Xenia's first USDA Loan, I.C.A. § 357A.11 (7), (8) and (9).

6. On May 18, 1982, Xenia borrowed $3,200,000 from the USDA, pursuant to and in accordance with 7 U.S.C. § 1926, (the "1982 USDA Loan"). Appx. p. 100, 1982 USDA Loan Docs and Appx. p. 87, G.B. Decl., St. 8.

7. Xenia borrowed additional funds from the USDA over the years as summarized by Appx. p. 111 and has been continuously indebted to the USDA from May 18, 1982 through today. Appx. p. 87, G.B. Decl., St. 9 and Appx. p. 111, USDA Loan History.

8. The "Areas In Dispute,"[4] the "Encroachment Areas" and the "Disputed Area" are all located within the Xenia Territory.

[4] The "Areas In Dispute" in this case consists of: (1) the "Disputed Area" an area containing approximately 1900 acres, which includes approximately 550 acres annexed by Johnston in 2018, and approximately 1350 acres not yet annexed by Johnston within which Johnston currently does not provide water service, but has indicated an intent to do so and has interfered with Xenia's service within this area, (2) the "Encroachment Areas", where Johnston currently provides water service which includes numerous subdivisions to which Johnston commenced water service at various times between 1995 to 2018. The "Areas In Dispute" is properly reflected at Appx. p. 110, and Appx. pp. 223-224, G.B. Decl. Sts. 7 and 8.

Appx. p. 110, Map of Xenia Territory showing Encroachment Areas and Disputed Area and Appx. p. 88, G.B. Decl., St. 10.

9. Johnston has been, since at least 1995, and has continued thereafter without interruption, providing water service within the Xenia Territory to an ever expanding base of water customers located within the Encroachment Areas, connecting such customers from 1995 through 2018 to the Johnston water system. Appx. p. 112, Subdivision List and Appx. p. 88, G.B. Decl., St. 11.

ARGUMENT

I. ERROR PRESERVATION STATEMENT

This matter is before the Court pursuant to questions of Iowa law certified to this Court by the United States District Court for the Southern District of Iowa, in accordance with the provisions of Iowa Code §§ 684A.1 and 684A.2.

II. SCOPE AND STANDARD OF REVIEW

"It is within….[the] discretion [of the Supreme Court of Iowa] to answer certified questions from a United States district court. Iowa Code §684A.1 (stating the court "may" answer a certified question). "We may answer a question certified to us when: (1) a

proper court certified the question, (2) the question involves a matter of Iowa law, (3) the question "may be determinative of the cause…pending in the certifying court," and (4) it appears to the certifying court that there is no controlling Iowa precedent." *Life Investors Ins. Co. of America v. Estate of Corrado*, 838 N.W.2d 640, 643 (Iowa 2013).

III. CERTIFIED QUESTION ONE

Whether an Iowa Code § 357A.2 rural water district, before amendments to § 357A.2(4) in 2014, had a legal right to provide water service to portions of an area described in its country (sic) board of supervisors resolution, see Iowa Code § 357A.2(1), when those portions were also within two miles of the limits of a municipality, see § 357A.2(3), and when the municipality had not waived its rights to provide water service to the area, see § 357A.2(4).

Xenia contends that under Iowa Code § 357A.2, prior to the 2014 Amendment, an Iowa rural water district had a legal right to serve areas within its County Board of Supervisors ("CBOS") designated service area ("CBOS Service Area") and within two miles of a municipality without compliance with the notice procedure provided in § 357A.2(4), *because the 2014 Amendment should be applied retroactively*. See Argument IV(B) below.

Xenia also contends that it had the legal right to provide water service within two miles of the city limits of Johnston, because Xenia obtained that legal right when it was created as a § 504A non-profit corporation in 1977, and held that legal right when it first became indebted to the USDA in 1982 before the enactment of the Two-Mile Rule in 1987. The "legal right" prong of the "made service available" requirement is determined by state law at the time the association first became indebted and any state law which would purportedly take away that right after such date is preempted by federal law. *Rural Water System #1 v. City of Sioux Center*, 967 F.Supp. 1483, 1529 (N.D. Iowa, 1997). See also *Pittsburg County Rural Water District No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004).

The District Court recognized that the legal right component is determined as of the date Xenia first became indebted, finding:

> *"In short, the court held that when a rural water provider assumes a qualifying loan, it receives § 1926(b) protection based in part on its legal rights as defined by state law at that time, but any subsequent attempt to shrink that protected service area during the lifetime of the loan is preempted.* This Court is fully in agreement with Judge Bennett's analysis.

Appx. p. 336, District Court's Order. (Emphasis added.)

Thus, it is Xenia's position that the legal right issue must be determined as of the date of its first USDA Loan in 1982, before the Two-Mile Rule was enacted.

Xenia further contends that if the Two-Mile Rule does apply, a rural water district could obtain the legal right to serve certain areas within two miles of the city limits of a municipality under the provisions of § 357A.2(4) before the 2014 Amendment.

§ 357A.2(4) has time limits within which a municipality must respond to a notice of intent to serve issued by a rural water district. A municipality's failure to timely respond grants the water district the legal right to provide water service. If the municipality elects to provide water service, the municipality must provide water service within a specified time after receipt of the water district's notice. Failure by the municipality to provide water service within that time, results in the rural water district having the legal right to provide water service. (See Appx. p. 328.)

Iowa Code § 357A.2(4) for the period 1995 through 2013, states in pertinent part that a rural water district may give notice

of intent to provide water service to a new area within two miles of a municipality's city limits, to which: (1) the city has 90 days to respond (180 days if city requests more information), (2) if there is no timely response from the city, the "district may serve", (3) the city must extend service within 4 years after receipt of the notice, and (4) failure by the city to provide service within four (4) years automatically allows the rural water district to provide service thereafter to the area identified in the notice.

The current version of Iowa Code § 357A.2(4) states:

(4)(c). "*If the city fails to respond* to the water plan within seventy-five days of receipt of the plan, *the district or association may provide service in the area designated in the plan*." (Emphasis added.)

d. (1) In responding to the plan, the city *may affirmatively waive* its right to provide water service within the areas designated for water service by the rural water district, or the city may reserve the right to provide water service in some or all of the areas which the district or association intends to serve.

(b) If the city reserves the right to provide water service within some or all of the areas which the district or association intends to serve, the *city shall provide service within three years* of receipt of the water plan submitted under paragraph "a".

(4)(d)(2)(c): If the city reserving the right to provide service fails to provide service within three years of receipt of the water plan submitted under paragraph "a", *the city waives its right to provide water service…*" (Emphasis added.)

Thus, a rural water district, even if the 2014 Amendment is not applied retroactively, would obtain the legal right to serve within two miles of the city limits of a municipality under the Notice of Intent Procedure.

The answer to this question under state law (ignoring federal preemption) should be:

Yes, an Iowa Code § 357A.2 rural water district, before amendments to § 357A.2(4) in 2014, had a legal right to provide water service to portions of an area described in its county board of supervisors resolution, see Iowa Code § 357A.2(1), when those portions were also within two miles of the limits of a municipality, see § 357A.2(3), and when the municipality had not waived its rights to provide water service to the area, see § 357A.2(4). Specific to this case, at the time Xenia obtained its 1982 USDA loan, the Two-Mile Rule did not exist, and thus, Xenia had the legal right to serve all areas in question within two (2) miles of Johnston's city limits. Furthermore, a rural water district also could obtain the legal right to serve within two miles of a municipality's city limits, either by the municipality consenting to the rural water district providing such service or by failing to meet the deadlines for the municipality to respond to the rural water district's notice of intent to serve, or by failing to provide water service within the time allowed by § 357A.2(4). Or, Yes, because the 2014 Amendment to the statute must be applied retroactively.

IV. CERTIFIED QUESTION TWO

Whether Iowa Code § 357A.2(4), as amended by the Iowa legislature in 2014: (a) exempts a rural water district from following notice-of-intent procedures when the area the district seeks to serve is within the district's boundaries as designated in the county board of supervisors' resolution

creating the water district, and/or (b) otherwise provides the rural water district a legal right to serve such areas when the municipality has not waived its rights. If so, whether the 2014 amendment to § 357A.2(4) had retroactive effect.

A. THE 2014 AMENDMENT EXEMPTS A RURAL WATER DISTRICT FROM THE NOTICE-OF-INTENT PROCEDURES AS TO AREAS WITHIN ITS CBOS SERVICE AREA

The Iowa rules for statutory construction provide: (1) the Court must attempt to give effect to the general assembly's intent in enacting the law; (2) generally this intent is gleaned from the language of the statute; (3) the Court will not search for meaning beyond the express terms of a statute; (4) words are given their ordinary and common meaning based on the context in which they are used; (5) various provisions of a statute must be read in conjunction; (6) statutes should be read to avoid rendering any portion of the statute superfluous. *Ferezy v. Wells Fargo Bank*, 755 F.Supp. 1010, 1014 and *Thomas v. Iowa Pub. Emps. Ret.Sys.*, 715 N.W.2d, 7, 15 (Iowa 2006).

Iowa Code § 357A.1, *et seq*. governs the creation and operations of a rural water district. § 357A.2 provides for the creation

of a rural water district by filing a petition with the appropriate CBOS to create an *area* to be served by the district:

"A petition may at any time be filed with the auditor requesting the supervisors to incorporate and organize a district *encompassing an area…*" (Emphasis added)."

* * *

The petition shall be signed by the owners of at least thirty percent of all real property lying within the outside perimeter of the *area designated for inclusion* in the proposed district. (Emphasis Added)

§ 357A.2(1) and (2) (Emphasis Added).

Once this "area" has been determined and approved by the CBOS, the "area" becomes the rural water district's *existing service area* under § 357A.2.

There are limitations however, providing that the rural water district cannot serve within its existing service area established by the CBOS, as to those areas "within two miles of the limits of a city…., *except as provided in this section*" (the "Two-Mile Rule"). § 357A.2(3). (Emphasis added.) The phrase "this section" in § 357A.2(3) refers to all of § 357A.2. The exceptions to the Two-Mile Rule are contained in § 357A.2 subsection 4 [§ 357A.2(4)].

In 2013, before the 2014 Amendment, § 357A.2 provided in subsection 3 [§ 357A.2(3)] that:

> Water services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter or chapter 504 *except as provided in this section*.

§ 357A.2(3) 2013 Version (Emphasis Added).

In 2013, the exceptions to § 357A.2(3)'s "Two-Mile Rule" were contained in § 357A.2 subsection 4 [§ 357A.2(4)] providing that a rural water district could provide water service within two miles of city limits, if the water district provided a notice of intent to serve such area, and if the city agreed or waived its rights to serve, failed to timely respond to the notice of intent, or failed to provide timely water service. The "Notice of Intent Procedure." § 357A.2(4) 2013 Version.

After the 2014 Amendment, § 357A.2(3) read:

> 3. Water services, other than water services provided as of April 1, 1987, shall not be provided *within two miles* of the limits of a city by a rural water district incorporated under this chapter *except as provided in this section*. Except as otherwise provided in this chapter, a rural water association shall not provide water services within two miles of a city, other than water services provided as of July 1, 2014. (Emphasis added.)

Before and after the 2014 Amendment, the exceptions to the requirements of § 357A.2(3)'s Two-Mile Rule were found and continued to be found in § 357A.2(4). After the 2014 Amendment, the provisions of Subsection 4 continued the exception provided by the Notice of Intent Procedure, but included a new exception: "This subsection *shall not apply* in the case of a district or association *extending service to new customers* or improving existing facilities within existing district or association service areas or existing district or association agreements." (Emphasis added.) This new exclusion granted a rural water district the legal right to extend service to new customers situated within the water district's *existing service area*, as established by the appropriate CBOS, without the necessity of following the Notice of Intent Procedure.

In interpreting the 2014 Amendment, the District Court held that the new exception added to § 357A.2(4) does not apply to the Two-Mile Rule found in § 357A.2(3), and that even if it did apply, the areas within the Two-Mile Rule were not within Xenia's "existing service area," because Xenia was not actually serving such areas, i.e., that a rural water district's "existing service area" is

not its CBOS Service Area, but rather only areas within the rural water district's CBOS Service Area where the rural water district was physically providing water service. Upon Xenia's Motion for Reconsideration, these issues were certified to this Court to determine the effect of the 2014 Amendment.

1. The Exception Added To § 357A.2(4) Applies To The Two-Mile Rule Contained In § 357A.2(3)

The District Court stated at Appx. p. 343: "The amended language states it only applies to "[t]his subsection," Iowa Code § 357A.2(4)(a), indicating that the amended language *is not meant to apply to the other subsections of § 357A.2*, including subsection 3's two mile rule." (Emphasis added.)

This statement by the District Court overlooks the purpose of § 357A.2(4) which even before the 2014 Amendment constituted an obvious exception to the Two-Mile Rule contained in § 357A.2(3), by allowing a rural water district to serve within two miles of a municipality's city limits (as the city limits existed at the time of the creation of the rural water district) if the rural water district followed the Notice of Intent Procedure by issuing a notice of intent to serve and the municipality agreed or consented

to such water service, or if the municipality failed to meet the time requirements provided by § 357A.2(4). The 2014 Amendment eliminated the requirement that a rural water district follow the Notice of Intent Procedure, if the area the rural water district intends to serve by extending its water delivery system to *new* customers, is within the water district's "existing service area."

Applying the District Court's interpretation would mean that the Notice of Intent Procedure would not be available for a rural water district to obtain the right to provide service if the area it seeks to serve is already in its "existing service area," which would lead to an absurd result. Thus, the only time the Notice of Intent Procedure would apply would be when a rural water district seeks to serve an area outside its "existing service area" as established by the CBOS (permitted under I.C.A. § 357A.13) and is also within two miles of a municipality's city limits. The only logical interpretation is that the 2014 Amendment did not preclude a rural water district from utilizing the Notice of Intent Procedure to obtain the legal right to serve within its existing service area, but limited the application of the Two-Mile Rule to those instances

when the area to be served is beyond the water district's "existing service area."

The District Court's interpretation is plain error, because it overlooks the language in § 357A.2(3) itself, which states: "[W]ater services, other than water services provided as of April 1, 1987, shall not be provided within two miles of the limits of a city by a rural water district incorporated under this chapter *except as provided in this section*." Thus, § 357A.2(3)'s Two-Mile Rule incorporates all exceptions found in all *sub*sections of § 357A.2, including § 357A.2(4)(a). To interpret § 357A.2(4)(a) as inapplicable to § 357A.2(3) would be to render the language in § 357A.2(3) that states "*except as provided in this section,"* and the language added by the 2014 Amendment to § 357A.2(4), meaningless. Such interpretation would violate Iowa's rules of statutory construction namely "we will not read a statute so that any provision will be rendered superfluous." *Thomas v. Iowa Pub. Employment Ret. Sys.*, 715 N.W.2d 7, 15 (Iowa 2006).

The District Court's Order, Appx. p. 343 states: "The Iowa legislature did not intend to abrogate subsection 3's two mile rule

by placing the relevant amended language in the middle of the *next subsection* in the statute." (Emphasis added.) Xenia respectfully disagrees. The Iowa legislature clearly intended for there to be "exceptions" to the Two-Mile Rule, when the legislature used the language "*except as provided in this section"* in § 357A.2(3). By using the words "in this section" rather than "in this *sub*section" in § 357A.2(3), the legislature intended for all exceptions in all *sub*sections of § 357A.2 to apply to the Two-Mile Rule found in § 357A.2(3).

Indeed, contrary to Johnston's position and the District Court's findings, the exceptions to § 357A.2(3)'s Two-Mile Rule, have been historically found in § 357A.2(4). In 2013, before the 2014 Amendment, the exceptions to § 357A.2(3)'s Two-Mile Rule, were contained within § 357A.2(4) describing the circumstances by which a rural water district could serve within two miles of a municipality's city limits by:

1. giving notice of an intent to serve a new area within two miles;

2. then if one of the following events occur, the water district can serve that new area: (a) the city fails to respond to the water district's notice of intent within ninety (90) days of receipt, (b) city waives its right to serve and consents to the water district providing water service, or (c) if the city reserves its right to serve, but fails to provide such service within four (4) years of receipt of the water district's plan.

See § 357A.2(4), 2013 Version.

Thus, in 2014 when the Iowa Legislature elected to make a new exception to the Two-Mile Rule, the logical placement for the new exception was in § 357A.2(4), where the exceptions had historically been found.

The District Court's Order Appx. p. 344 states: "Under Xenia's reading of the amended language, the two mile rule would not apply within a rural water district's boundaries as established by its county supervisors' resolution. If so, it is unclear when the two mile rule would ever apply." § 357A.2(4)(a) uses the term "*new* area," which means and refers to areas not already designated by

the rural water district's CBOS Service Area. Thus, the Two-Mile Rule would continue to apply to "new areas," outside the rural water district's "existing service area" established by the CBOS and within two miles of a municipality. The District Court overlooked the fact that Xenia has the power to sell water outside its "existing service area" pursuant to I.C.A. § 357A.13.

2. The Definition of "Existing Service Area"

The 2014 Amendment as discussed above, exempts a rural water district from the Notice of Intent Procedure if the area to be served is within the rural water district's "existing service area." Because a rural water district's "existing service area" is established by the CBOS at the time the rural water district is created under the provisions of the same Chapter of the Iowa Code in question (§ 357A.1 et seq.), the reference to "existing service area" in § 357A.2(4) must be interpreted as the rural water district's service area established by the CBOS.

The District Court first comments that the 2014 Amendment does not refer to a rural water district's service area as established by the County Board of Supervisors, but rather "refers to a rural

water district 'extending service' or 'improving' facilities within 'existing . . . service areas or . . . agreements.' Iowa Code § 357A.2(4)(a)." Appx. p. 342. The District Court then sets forth its own interpretation of the phrase "existing service areas" as being something other than the geographical boundaries/service area set aside for a rural water district by the CBOS, finding that "existing service areas" means areas/customers which the water district had previously served:

> The ordinary meaning of extending service and improving existing facilities within existing service areas suggests that the amended language *does not contemplate a rural water district expanding its provision of water service to areas which it previously did not serve.*

Appx. p. 342 (Emphasis Added).

The District Court's effort to define "existing service areas" as areas previously served (past tense) overlooks the plain language of the 2014 Amendment that a district is not required to follow the Notice of Intent Procedure if the § 357A.2 rural water district is "extending service to *new* customers." These terms, given their ordinary meaning, indicate that the district may extend, i.e., expand service beyond areas and customers it previously

served, to new areas and customers within its "existing service areas." The only reasonable interpretation of this reference to the "existing service areas" of a rural water district is its boundary/service area, which under Iowa law, is established by the CBOS pursuant to the same statute at § 357A.2(1).

I.C.A. § 357A.2 provides for the creation of a rural water district by filing a petition with the CBOS, to create an *area* to be served by the district:

> "A petition may at any time be filed with the auditor requesting the supervisors to incorporate and organize a district *encompassing an area*…" (Emphasis added)."
>
> * * *
>
> The petition shall be signed by the owners of at least thirty percent of all real property lying within the outside perimeter of the *area designated for inclusion* in the proposed district. (Emphasis Added)

§ 357A.2(1) and (2) (Emphasis Added).

Once this "area" has been determined and approved by the CBOS, the "area" becomes the rural water district's *existing service area* under § 357A.2. The correct interpretation of "extending

service" in § 357A.2(4)(a) is to provide service to areas not previously served, but which are within the *existing service area* designated by the CBOS.

The District Court's definition of a rural water district's *existing service area* being something less than its service area as established by the CBOS is error. This is particularly true in light of the establishment of Xenia's boundaries/service area by the CBOS finding in part that it is "necessary" to establish Xenia to serve the area to be included within its boundaries "for the public health, convenience, fire protection and comfort of the residents" of that area. Appx. p. 98. Indeed, such finding was and is a requirement by statute when the CBOS grants an entity rural water district status. § 357A.6.

The District Court's definition is made even more perplexing by the following statement:

> Although the amended language permits a rural water district to extend service within its *existing* service area, it does nothing to change the boundaries or definition of its legal rights to service.

Appx. p. 342 (Court's MPSJ Order p. 19).

Xenia does not contend that a rural water district is allowed to "change its boundaries" as the district's boundaries are established by the CBOS. However, the 2014 Amendment does expand the district's legal right to provide water service by eliminating application of the Two-Mile Rule as it relates to a rural water district's "existing service area" which is not limited to existing customers, but rather extends to new customers. § 357A.2.

Refusing to accept the service area as established by the CBOS as a rural water district's "existing service area" under state law, creates uncertainty. There are limited options as to what the term "existing service area" means in the 2014 Amendment, such as: (1) the CBOS specified service area, or (2) a service area as defined by some distance or time to provide service to new customers, or (3) a service area defined by existing water customers (which makes no sense because the 2014 Amendment references "new customers").

The Court may take judicial notice of the fact that water districts and municipalities have the capability to serve areas, even when they have no physical pipes in the ground within such areas,

since it would be foolish to spend public money to extend pipes to areas for which there has been no request for service, and no customers to help pay for those water lines. The Eighth Circuit has long recognized this concept in relation to § 1926(b) cases holding that areas/customers which can be served within a "reasonable time" are included in the indebted association's service area for purposes of § 1926(b). *City of Lebanon*, 605 F.3d at 523.

Utilizing the CBOS established "service area" provides certainty for the city planner and the rural water district eliminating the need to determine whether the new customer must be within one block, one mile or ten miles from a currently (physically) served area, or that the area must be served within a specific period of time, such as one month, 12 months or three years (whatever a reasonable time is determined to be under the circumstances) to be within a rural water district's "existing service area."

If the District Court's interpretation of "existing service area" is used here, (as opposed to the service area established by the CBOS) the Court must establish when and how the "existing

service area" is determined, such as a reasonable period of time following a legitimate request for water service, which is the standard in § 1926(b) cases. *Id.*

B. THE 2014 AMENDMENT SHOULD BE APPLIED RETROACTIVELY

There are two (2) bases for applying an amendment retroactively: (1) it is an effort to clarify the initial intent, *Langford v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501 (1994), or (2) it is a change to procedural law. *Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575 (Iowa 2009).

Iowa reviews a statutory change to determine if it is [a] a "Substantive Law" - one that creates, defines and regulates rights or [b] a "Procedural Law" which establishes a practice method, procedure or legal machinery by which substantive law is enforced or made effective or [c] a "Remedial Law" - one that intends to offer a private remedy to a person injured by a wrongful act. *Anderson Financial Services, LLC v. Miller*, 769 N.W.2d 575 (Iowa, 2009). The 2014 Amendment was a Procedural Law change. Under § 357A.2 before the 2014 Amendment, a rural water district was not

precluded from providing water service within two miles of a municipality's limits, but rather was required to follow the Notice Procedure under that statute as discussed above. The 2014 Amendment modified the "procedure" creating a new exception to the existing procedure of sending a notice and submission of a plan, by allowing the rural water district to extend service within two miles of a municipality, (without sending a notice or plan to the municipality) so long as the extension of water service, is within the existing service area of the rural water district.

The 2014 Amendment also clarified that the Two-Mile Rule was never intended to preclude a district from extending service within its existing boundaries/service area, which under Iowa law, is established by the CBOS. § 357A.2. Thus, the 2014 Amendment was an effort to clarify the initial intent, correcting the uncertainty in the wording which should be applied retroactively. *Langford v. USI Film Products*, 511 U.S. 244, 273, 114 S.Ct. 1483, 1501 (1994).

V. CERTIFIED QUESTION THREE

Whether an Iowa Code § 504A nonprofit corporation created in 1977 had a legal right to provide water service anywhere within the state of Iowa. If so, whether a § 504A nonprofit corporation that reincorporated (including through

articles of dissolution for the § 504A entity) as a § 357A.2 rural water district in 1990 retained the legal right to provide water service anywhere within the state of Iowa (including outside its boundaries as specified in its county board of supervisors resolution and within two miles of a municipality), prior to and following the 1991 amendment to § 357A.2.[5]

The District Court recognized that the Two-Mile Rule did not apply to Xenia (a 504A nonprofit corporation) in 1982, not only because it was not enacted until 1987, but also because it did not apply to a 504A non-profit water corporation like Xenia at the time it was enacted in 1987. (Appx. p. 357). See also *City of Sioux Ctr.,* 202 F.3d at 1038. Indeed, the Two-Mile Rule was not made applicable to a 504A non-profit corporation until the 2014 Amendment. Although the District Court found the Two-Mile Rule did not apply to a 504A non-profit corporation (Xenia) from 1977 through at least 1982, the Court held that the statute began to apply when the 504A non-profit corporation (Xenia) attained dual status as a rural water district: "The two mile rule, then, only began to apply

[5] The Court should take judicial notice that Xenia, the § 504A nonprofit corporation, is listed as "inactive" by the Iowa Secretary of State as opposed to "dissolved." This appears to be accurate because the elements required for articles of dissolution require a vote by the board of directors which does not appear to have occurred. I.C.A. §§ 504.1402 and 1403.

to Xenia in 1990, when Xenia reorganized as a rural water district under § 357A." Appx. p. 337.

A. AN IOWA CODE § 504A NONPROFIT CORPORATION CREATED IN 1977 HAD THE LEGAL RIGHT TO PROVIDE WATER SERVICE ANYWHERE WITHIN THE STATE OF IOWA – THERE WAS NO TWO-MILE RULE.

A § 504A nonprofit corporation, just as any other corporation created under Iowa law, unless some specific restriction applies, is free to conduct business anywhere in the state. The District Court and Johnston have not cited to any such restriction on a nonprofit corporation. § 504A of the 1988 Code of Iowa provides in pertinent part:

Each corporation, unless otherwise stated in its articles of incorporation, shall have power.

4. To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated.

10. To conduct its affairs, carry on its operations, and have offices and exercise the powers granted by this chapter in any state, territory, district, or possession of the United States, or in any foreign country.

16. To have and exercise all powers necessary or convenient to affect any or all of the purposes for which the corporation is organized.

I.C.A. § 504A, setting forth the powers of a 504A corporation.

The current version the Iowa Code, provides in pertinent part:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession on its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs, including without limitation, all of the following powers.

4. Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located.

10. Conduct its activities, locate offices, and exercise the powers granted by this chapter in or out of this state.

16. Carry on a business.

18. Do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

I.C.A. § 504A.302.

Thus, there is and was no restriction concerning where a 504A non-profit corporation may conduct business (provide water service) in the State of Iowa.

The District Court erred in relying on the fact that Xenia did not begin to provide actual water service to the Areas In Dispute until 1993, i.e., did not actually extend water service lines to (and presumably within) the Areas In Dispute until 1993. The District

Court found that Xenia had no "legal right" to serve these areas because it was not *actually providing water service* until 1993 (Appx. p. 338), even though Xenia had not received any request for such service. By doing so the District Court incorrectly addressed the "legal right" component, relying on the fact Xenia had not yet extended service to these areas. Whether Xenia had actually extended service is not the issue presented by the Motions for Partial Summary Judgment, which addressed only the issue of whether Xenia had the "legal right" to provide water service, the physical ability component being specifically reserved for later determination. There is no requirement under Iowa law that a 504A nonprofit corporation must be physically serving an area to have the legal right to serve such area. To hold otherwise would be putting the cart before the horse.

B. A § 504A NONPROFIT CORPORATION THAT REINCORPORATED AS A § 357A.2 RURAL WATER DISTRICT IN 1990 RETAINED ITS LEGAL RIGHT TO PROVIDE WATER SERVICE ANYWHERE WITHIN THE STATE

Xenia, a 504A nonprofit corporation, was granted water district status by the PCBOS in 1990. This did nothing more than grant Xenia (a 504A nonprofit corporation) "dual status" as *both* a

504A nonprofit corporation and a rural water district under § 357A.2.

Such "dual status" was recognized in *City of Sioux Ctr.*, 202 F.3d at 1038 which held:

"This section [§ 357*A*.20] allows a rural water corporation organized under chapter 504A to reincorporate under chapter 357A. See Iowa Code § 357A.20 (1994). Under the 1987 version of the section, *a water provider could be both a 504A corporation and a 357A water district after reincorporation*." (Emphasis added.)

Although the 1987 version of § 357A.20 was amended in 1991 to provide for the dissolution of the 504A entity after reincorporation as a rural water district, the 1991 amended version of § 357A.20 *was not made retroactive*. Thus, a 504A nonprofit corporation, which gained dual status in 1990 before the 1991 Amendment was adopted, has retained its dual status thereafter.

Although the District Court was critical of Xenia's argument that Xenia (a 504A nonprofit corporation) could provide water service literally anywhere, there is no law or facts to suggest that when a 504A nonprofit corporation also became certified as a rural water district in 1990, that the resulting entity, dual status or oth-

erwise, did not already have the legal right to provide water service *within the boundaries specified for the water district by the* PCBOS *in 1990*. There is no factual dispute that Xenia in 1987 (before § 357A.2(3)'s Two-Mile Rule was adopted) was already providing water service within the area described in the PCBOS 1990 resolution, and had pledged its infrastructure, revenue and right to sell water in that area, to secure its 1982 USDA loan.

C. XENIA THE 504A ENTITY DID NOT CEASE TO EXIST WHEN XENIA WAS REORGANIZED AS A WATER DISTRICT

The District Court's Order at Appx. p. 345 states: "Even if Xenia had the legal ability to provide water service everywhere in Iowa when it was a nonprofit, Xenia did not retain that right upon reorganization." The District Court's statement here is reliant on language in Iowa Code § 357A.20(2)(b), *which is part of the 1991 amendment*. A 504A corporation which was also granted rural water district status in 1990, gained such status as a rural water district before the amended language in § 357A.20 was adopted. The new 1991 language provided: "Upon filing of the notice, the nonprofit corporation *shall cease to exist as a chapter 504A entity and*

all assets and liabilities of the nonprofit corporation become the assets and liabilities of the newly organized district…." (Emphasis added.)

The 1991 version of § 357A.20 was not made retroactive. Thus, a 504A corporation, formed as a rural water district in 1990, continued thereafter as a "dual status" entity. *City of Sioux Ctr.*, 202 F.3d at 1038. ("Under the 1987 version of the section, a water provider *could be both a 504A corporation and a 357A water district after reincorporation*.")

CONCLUSION

For the reasons expressed above, the Court should answer the certified questions as follows:

Certified Question One:

Yes, (assuming the 2014 Amendment is not retroactive) an Iowa Code § 357A.2 rural water district, before amendments to § 357A.2(4) in 2014, had a legal right to provide water service to portions of an area described in its county board of supervisors resolution, see Iowa Code § 357A.2(1), when those portions were also within two miles of the limits of a municipality, see § 357A.2(3), and when the municipality had not waived its rights to provide water service to the area, see § 357A.2(4) because:

1. Specific to this case, at the time Xenia obtained its 1982 USDA loan, the Two-Mile Rule did not exist, and thus, Xenia had the legal right to serve all areas in question.

2. Xenia having dual status as a 504A non-profit corporation and as a rural water district, retained the legal right to serve the areas in dispute.

3. Furthermore, a rural water district could obtain the legal right either by the municipality consenting to the rural water district providing such service or by failing to meet the deadlines for the municipality to respond to the rural water district's notice of intent to serve, or by failing to provide water service within the time allowed by § 357A.2(4).

Or, yes, because the 2014 Amendment to the statute must be applied retroactively

Certified Question Two:

Yes, Iowa Code § 357A.2(4), as amended by the Iowa legislature in 2014: (a) exempts a rural water district from following notice-of-intent procedures when the area the district seeks to serve is within the district's boundaries as designated in the county board of supervisors' resolution creating the water district, regardless of whether the municipality has waived or not waived its rights. Furthermore, the 2014 amendment to § 357A.2(4) has retroactive effect.

Certified Question Three:

Yes, an Iowa Code § 504A nonprofit corporation created in 1977 had a legal right to provide water service anywhere within the state of Iowa. Furthermore, a § 504A nonprofit corporation that reincorporated as a § 357A.2 rural water district in 1990 retained the legal right to provide water service anywhere within the state of Iowa (including outside its boundaries as specified in its county board of supervisors resolution and within two miles of a municipality), prior to and following the 1991 amendment to § 357A.2.

REQUEST FOR ORAL ARGUMENT

Appellant Xenia requests to be heard on oral argument.

Respectfully submitted,

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CERTIFICATE OF COST

It is hereby certified that the amount actually paid for printing or duplicating paper copies of briefs in final form required by Iowa Rules of Appellate Procedure was $0.00. Not applicable to this Proof Brief.

/s/ Steven M. Harris
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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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/s/ Steven M. Harris
Signature

Date: November 10, 2020

CERTIFICATE OF SERVICE

I, Steven M. Harris hereby certify that on the 10th day of November, 2020 I served Plaintiff's/Appellant's Final Opening Brief on all other parties to this appeal by emailing one copy thereof to the following counsel for the parties at the following addresses:

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