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 FINAL REPLY BRIEF

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STATEMENT OF ISSUES

The Certified Questions are:

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.

ARGUMENT

I. REPLY TO JOHNSTON'S STATEMENT OF COMMON ISSUES OF FACT AND LAW RELATED TO EACH CERTIFIED QUESTION

Johnston's assertion that Xenia seeks to wield federal law (specifically 7 U.S.C. § 1926(b) hereinafter "§ 1926(b)") as a sword to expand its water service area rather than as a shield to protect its water service area is not only untrue – the assertion is a red herring and has nothing whatsoever to do with this Court answering the Certified Questions posed to it by the federal district court. The Certified Questions all relate to interpreting state law, and specifically to determining what areas – under state law - Xenia (an I.C.A. § 504A corporation and a § 357A.2 water district) had the legal right to provide water service to at various times. The federal district court seeks answers to these questions in order to resolve the underlying federal claims. This requires the federal court to first determine what areas under state law (Iowa Code § 357A.2) Xenia has or had the legal right to serve at various times.[1]

[1] If Xenia has or had the legal right under state law to serve the areas in dispute at various times, the federal district court must

Since there are highly contested arguments by the parties regarding the "legal right" to serve issue and since there is no Iowa appellate court interpretation to aid the federal district court in determining the areas Xenia has or had the legal right to serve and since resolution of this issue is crucial to resolving the federal claims, the parties agreed, and the federal district court concurred, and has asked this Court to interpret state law on this issue.

Xenia does not seek to expand its service area, as the issues before this court are primarily, without repeating the totality of each Certified Question:

1. Whether, prior to the 2014 Amendment, did a § 357A.2 rural water district have the legal right to provide water service within two miles of a city's limits without the consent of the city. Certified Question 1, paraphrased.

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then determine whether Xenia under federal law has made service available to such areas. *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035, 1037 (8th Cir.), cert. denied, 531 U.S. 820, 121 S.Ct. 61, 148 L.Ed.2d 28 (2000).

2. Whether the 2014 Amendment to the Iowa Code § 357A.2(4) exempts a rural water district from the Two-Mile Rule contained in § 357A.2(3), when the extension of service is within the rural water district's "existing service area" under state law, including providing a definition of the phrase "existing service area" in the 2014 Amendment, and also should the 2014 Amendment be applied retroactively? Certified Question 2, paraphrased.

3. Where did an Iowa § 504A corporation have the legal right to provide water service when created in 1977, and if that § 504A corporation also obtained status as a § 357A.2 rural water district in 1990, did it retain the legal right to serve anywhere in the state, specifically within two miles of a municipality's city limits? Certified Question 3, paraphrased.

None of the Certified Questions come close to the issue of whether Xenia is seeking to use § 1926(b) to expand the areas

within which it has and has had the "legal right" to serve under state law.

The *Le-Ax*[2] and *City of Lebanon*[3] cases cited by Johnston did not hold that § 1926(b) protection only applies to the indebted association's *existing* customers. § 1926(b) protection applies to a federally indebted association's current customers and potential customers to whom the association has "made service available," i.e., has the physical ability to provide water service within a reasonable time:

> "To determine whether service was made available, many courts begin with a "pipes in the ground" or "physical ability" approach that examines whether the water association has the physical means presently to serve the area. This inquiry asks whether the association can demonstrate "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." , 191 F.3d 1192, 1203 (10th Cir.1999) (citation omitted). The Tenth Circuit has adopted this approach but has also required that the water association have the right under state law to serve the area in question. *Id*. at 1202 n. 8. The Eighth Circuit applies this same test, requiring that a water association show both that it has the physical means to serve the area and that it has a legal right to do so. *Rural Water System #1 v. City of Sioux*

[2] *Le-Ax Water Dist. v. City of Athens*, 246 F.3d 701 (6th Cir.2003).
[3] *Pub. Water Supply Dist. No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir.2010).

> *Center*, 202 F.3d 1035, 1037 (8th Cir.), cert. denied, 531 U.S. 820, 121 S.Ct. 61, 148 L.Ed.2d 28 (2000)."

Le-Ax, 346 F.3d at 706.

Le-Ax held that an indebted association could not use § 1926(b) to extend service *beyond its state law boundaries*:

> "We also take care to point out that Le-Ax's boundaries are clearly defined by state law; we do not consider here a case where the state has not defined the boundaries of its water districts or associations.
>
> We hasten to point out that we are not leaving Le-Ax in a difficult position. The current users and **service area** of Le-Ax are still sacrosanct under § 1926(b)."

Le-Ax, 346 F.3d at 710 (Emphasis added).

> "We thus apply the well-established test for determining whether a rural district is entitled to protection under § 1926(b). to qualify for protection, an entity must: (1) be an "association" under the statute, (2) have a qualifying federal loan, and (3) have provided or made service available to the disputed area. *See, e.g., Sequoyah County*, 191 F.3d at 1197.
>
> * * *
>
> "Making service available has two components: (1) the physical ability to serve an area; and (2) the legal right to serve an area." *Sioux Center*, 202 F.3d at 1037.
>
> * * *
>
> Under the "pipes in the ground" test used in water service cases, courts examine "whether a water association

> 'has adequate facilities within or adjacent to the area to provide service to the area *within a reasonable amount of time* after a request for service is made.'"

City of Lebanon, 605 F.3d at 521 and 523. (Emphasis added.)

The Eighth Circuit has likewise determined that § 1926(b) protection is not limited to existing customers, but includes any prospective customer the USDA indebted association has the legal right to serve under state law, at the time of its first indebtedness to the USDA and which the indebted association has "made service available" under federal law, i.e., has facilities from which service can be extended within a reasonable time. *City of Lebanon*, 605 F.3d at 523.

Contrary to Johnston's position, state law does not determine Xenia's (a USDA indebted association's) "protected service area" under § 1926(b). State law does determine where a federally indebted association like Xenia has the "legal right" to provide service as of the date of Xenia's first indebtedness to the USDA. Any state law which would take away that "legal right" after the date of the USDA indebtedness, is preempted by the federal statute. *Rural Water System #1 v. City of Sioux Center*, 967 F.Supp. 1483,

1529-1530 (N.D. Iowa, 1997). *See also Pittsburg County RWD No. 7 v. City of McCalester*, 358 F.3d 694, 715-716 (10th Cir.2004).

Johnston acknowledges this in the last paragraph at p. 19 of its Brief where it states: "However, this situation arises only where a district becomes indebted to the federal government, obtains the legal right to serve an area under state law, and the state subsequently enacts a statute defining the district's service area. *Id*." Johnston's Proof Brief, pp. 19-20.

Xenia claims that its legal right to serve within two (2) miles of Johnston was impermissibly curtailed by the 1987 amendment to Iowa Code § 357A.2 which created the Two Mile Rule because Xenia, in 1987 and continually thereafter, was a federally indebted rural water association (and had been since 1982) and federally indebted rural water associations were not subject to the Two Mile Rule in 1987. *Rural Water System #1 v. City of Sioux Center*, 967 F.Supp. 1483, 1529-1530 (N.D. Iowa, 1997) and Iowa Code § 357A.2 as amended effective July 1, 2014. Xenia also claims that a rural water district's legal right to serve within two (2) miles of a municipality was assured by the 2014 Amendment to Iowa Code

§ 357A.2 which provides that the Two Mile Rule does not apply to Xenia's "existing district or association service areas" insofar as Xenia's "existing district or association service areas" were established (after public notice and hearing) by resolution of the Polk County Board of Supervisors ("PCBOS") in 1990.

The only matter before this Court is the federal district court's request that this Court interpret state law Iowa Code § 357A.2, and determine under what circumstances a § 504A corporation and/or a § 357A.2 rural water district has or had the "legal right" to provide water service within two miles of a municipality's city limits under Iowa state law. This issue is to be determined in relation to a § 504A nonprofit corporation as of 1977 (Certified Question Three) and as to both a § 357A water district and a § 504A nonprofit corporation, both prior to the 2014 Amendment and after the 2014 Amendment. Other issues include whether Xenia's dual status as a § 504A non-profit corporation and a § 357A rural water district exempt it from the restrictions of the Two Mile

Rule and whether a rural water district created in 1990 was precluded under § 357A.2 from providing water service within two miles of a municipality's city limits.

II. CERTIFIED QUESTION ONE

Johnston's argument that prior to the 2014 Amendment, a rural water district lacked the legal right to serve within two miles of a municipality's city limits ignores the fact that the Two-Mile Rule was not adopted until 1987. Furthermore, because Xenia first became indebted to the USDA in 1982, the real question is whether a § 504A corporation was free to provide water service within two miles of a municipality's city limits in 1982 (the year in which Xenia first became federally indebted).

Johnston's assertion that even after the 2014 Amendment, a rural water district does not have the "legal right" to serve within two miles of a city's limits, is incorrect and addressed in detail in the arguments relating to Certified Question Two, which asks that question.

Johnston's persistent argument that there is "no federal statute, or regulation" that defines "made service available," disregards the Appellate Court rulings which have defined very well, what is needed to meet the "made service available" test, i.e., the USDA indebted association must have the "legal right" under state law to serve the area at the time of its indebtedness, and must have facilities from which service could be provided within a reasonable time. *City of Lebanon*, 605 F.3d at 521 and 523.

Johnston's statement that "courts have routinely looked to state law as defining an association's protected service area under § 1926(b)" is also incorrect. The courts have routinely looked to state law only to determine the "legal right" component of the "made service available" test, and such determination is made at the time the association first became indebted to the USDA.[4]

[4] Johnston's arguments relating to federal law, are confusing and should not be addressed herein as the Certified Questions deal with state law, and specifically whether Xenia (a rural water district and/or § 504A nonprofit corporation) had the legal right to serve within two miles of a municipality's city limits at various times related to the federal case.

Sioux Center, 967 F.Supp. at 1529 and *Pittsburg County*, 358 F.3d at 715.

Johnston's comments concerning prior agreements at footnote 2 of Johnston's Brief, are irrelevant to the issues presented by the Certified Questions. These questions call for the Court to address legal issues concerning the interpretation of Iowa state law, i.e., the parties by their conduct cannot change state law.

A. DEVELOPMENT OF THE TWO-MILE RULE

Xenia was a § 504A nonprofit corporation between 1977 and 1990 and obtained dual status as both a § 504A nonprofit corporation and a § 357A rural water district by virtue of the PCBOS November 27, 1990 resolution establishing the boundaries of Xenia as a rural water district. The PCBOS November 27, 1990 resolution, however, had no impact on determining Xenia's boundaries as a § 504A nonprofit corporation nor did it terminate Xenia's continued existence as a 504A nonprofit corporation. *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035, 1038 (8th Cir.2000).

B. XENIA'S ORGANIZATIONAL STRUCTURE AND IOWA LAW DID NOT SUBJECT XENIA TO THE TWO-MILE RULE

Johnston's argument here misleads the Court concerning Xenia's position. The Certified Questions address different time periods, i.e., before the 2014 Amendment, after the 2014 Amendment and the legal right to serve in 1977 (and in 1982 when Xenia first became indebted to the USDA).

Johnston conflates Xenia's arguments relating to different time periods and different Certified Questions leading to non-sensical and illogical legal analysis. A clear example is at p. 26 of Johnston's brief where Johnston addresses the issue presented by Certified Question One (which deals with the time period before the 2014 Amendment) by referencing Xenia's arguments relating to the period after the 2014 Amendment (Certified Question Two) and how the phrase "existing service area" should be defined. The issue of the effect of the 2014 Amendment is dealt with in Xenia's Opening Brief at Argument IV, discussing the effect of the 2014 Amendment and below in response to Johnston's Argument to Certified Question Two. Xenia's arguments relating to Certified

Question Two, are that the 2014 Amendment removes application of the Two-Mile Rule when a rural water district is extending service within its "existing service area" to new customers and that under § 357A.2, "existing service area" is the rural water district's service area/boundaries as established by the County Board of Supervisors (CBOS).

Johnston's footnote 3 stating that Xenia and amici claim that 7 U.S.C. § 1926(b) "must be read so that [there] *sic* are no limits on rural water service providers" is simply not true. Xenia and amici acknowledge that there are limits but where ambiguity exists regarding a rural water district's or rural water association's service territory, the federal courts have uniformly held that such ambiguity must be resolved in favor of the rural water district / rural water association. *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 203 F.3d 1035, 1038 (8th Cir 2000) (citing *Sequoyah Cnty .Rural Waster District No. 7 , v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999). The federal courts have also uniformly held that 7 U.S.C. § 1926(b) must be liberally interpreted to protect a rural water district's / rural water association's service area from

curtailment / encroachment by a municipality through annexation or other means. *Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 915 (5th Cir. 1996).

As an example, an ambiguity here is determining the scope and application of the following language that was added to 357A.2(4)(a.) in 2014, to wit: "*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.*" Johnston argues this language does not exempt Xenia (a § 357A.2 rural water district and § 504A nonprofit corporation) from complying with the "notice of intent to serve" requirements of 357A.2(3). Xenia and amici contend that the better and more logical / harmonized interpretation of 357A.2(4)(a.) as amended in 2014 is that it gives the CBOS the authority to define a rural water district's service area; and 357A.2 as amended in 2014 clarifies that cities like Johnston cannot prevent rural water districts like Xenia from extending service to new customers within its existing

service areas even if the extension comes within two (2) miles of the city limits.

This interpretation avoids conflict with federal law, gives effect to the CBOS resolution which legally defines a rural water district's service area (i.e. "area to be served") and avoids the confusion created by the federal district court's initial interpretation that a rural water district's service area is not coterminous with the service area as described by the CBOS resolution creating the rural water district. Indeed, if a § 357A rural water district's service area is not coterminous with the service area as described by the CBOS resolution then it will be left to the Courts to undertake the complicated analysis of maps, pipes, correspondence and other evidence to define, on a case by case basis, what a rural water district's service area is – wholly ignoring the clear legislative intent that a rural water district's "existing service area" is defined by the CBOS resolution establishing the rural water district and is not defined by the Two Mile Rule.

C. XENIA'S 1982 LOAN PROTECTS ITS "LEGAL RIGHT" TO SERVE BECAUSE THIS "LEGAL RIGHT" EXISTED IN 1982

As discussed above, the issues presented here include determining where Xenia (a § 504A corporation and/or § 357A.2 water district) had the "legal right" to provide water service at various times, including 1977 and including before and after the 2014 Amendment to § 357A.2.

Johnston's statement that "…because none of the areas in dispute in this litigation were part of Xenia's existing service area at the time it first became indebted to the federal government in 1982…" is made in reliance upon the federal district court's finding that because Xenia had not actually extended service to the customers within those areas prior to the adoption of the Two Mile Rule, misses the point. The question in relation to Xenia's 1982 USDA Loan, is what areas did Xenia, a § 504A corporation, have the "legal right" to serve when it became federally indebted in 1982 (and not the fact question of whether Xenia was actually serving such areas). This issue is addressed in the arguments relating to Certified Question Three.

Also, the application of federal preemption is not before this Court. Johnston's repeated statements that: "….no federal statute

or regulation defines 'made service available' within the meaning of § 1926(b)" and "[c]ourts have routinely looked to state law as defining an association's protected service area under § 1926(b)…" does not make it's argument true, and is in fact false.[5]

Johnston's statement that "Xenia was no longer a § 504A corporation" when it obtained status as a § 357A.2 rural water district in 1990 (Johnston's Brief p. 30), is not correct and is inconsistent with the findings of the Eighth Circuit. *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035, 1038 (8th Cir.2000).

In summary, Certified Question Three addresses where Xenia (a § 504A corporation) had the legal right to serve when originally created in 1977, which will also answer the question of

[5] Under the "Pipes In The Ground Test" [as adopted by the Eighth Circuit in *PWSD No. 3 v. City of Lebanon*, 605 F.3d 511 (8th Cir. 2000)] state law is only important to determine if the association had the legal right to sell water to a given customer. The "Pipes In The Ground Test" requires that the association have the legal right to sell water to the customer/area under state law and the physical ability to provide service. 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).

whether Xenia had the legal right to serve at the time of its first indebtedness to the USDA in 1982. See Arguments relating to Certified Question Three.

D. JOHNSTON'S WAIVER ARGUMENT

Johnston's response here is confusing. Certified Question One concerns the issues of whether a rural water district, prior to the 2014 Amendment, had the legal right to serve within two miles of a municipality's city limits without the consent of the municipality. Xenia's argument is that there are indeed ways a rural water district could obtain the legal right to serve within two miles of a municipality's city limits without consent of the city – such as by the city failing to meet the requirements of the statute.[6] This is a valid issue under Certified Question One. Xenia does not ask the Court to determine fact issues of whether Johnston failed to meet the requirements placed on it by § 357A.2, only to find that

[6] For example, before the 2014 amendment to § 357A.2, a City had four (4) years in which to provide service to an area within two (2) miles of the City the City reserved to itself the right to serve after receiving notice the rural water district intended to serve the area - failing which the rural water district could serve the area without further notice to or approval of the City. Iowa Code § 357A.2 pre-2014.

the statute provides exceptions to the application of the Two-Mile Rule.

III. CERTIFIED QUESTION TWO

Certified Question Two asks this Court to determine 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, does the 2014 amendment to § 357A.2(4) have retroactive effect?

Xenia argues that the answer to both questions is yes. Johnston's response is that Xenia has made a "bold attempt to rearrange and add a couple of words to the statute" implying that Xenia has misstated or misquoted the statute. This is false.

Indeed to interpret the 2014 amendment as Johnston argues:

a. would nullify the meaning of the "shall not apply" directive and read out of the statute specifically what the Legislature has said.

b. fails to give full effect to the plain language of the amendment which allows notice free service extensions to new customers within existing district service areas or existing district agreements – thus making it clear that "agreements" with a municipality are only half the story and that an agreement with a municipality is not needed to serve within a § 357A rural water district's or § 504A corporation's (Xenia's) existing CBOS defined service area.

c. fails to give meaning to the Legislature's intent when it stated that the notice of intent to serve within 2 miles of a municipality "shall not apply" to situations where a § 357A rural water district or § 504A corporation (Xenia) is extending service to new customers within its existing service area.

The 2014 Amendment states in part:

> "This subsection **shall not apply** in the case of a district or association **extending service to new cus-**

> **tomers** or improving existing facilities **within existing district or association service areas** or existing district or association agreements."
>
> (Emphasis added.)

Xenia argues that the phrase "….within existing district or association service area," i.e., "existing service area," means and should be defined as the district's service area or boundaries as determined by the PCBOS resolution. See Xenia's Opening Brief at Argument IV-A.

Johnston asserts that Xenia's argument is undermined by the fact that the 1990 PCBOS Resolution does not use the phrase "existing service area," which was adopted in the 2014 Amendment. Johnston's argument ignores the obvious and is not in accord with statutory construction principles insofar as it does not harmonize the statutory language of § 357A.2(2.)(a.) which required that the persons seeking incorporation of a rural water district to identify the "area to be served" and with the CBOS resolution identifying Xenia's service area by township, section and range). It is not logical to suggest that a § 357A rural water district's "existing service area" is something different from the area

described by the CBOS resolution creating the water district. Johnston points to no statutory language that supports an opposite conclusion – because none exists.

Xenia's argument is that when a CBOS creates a rural water district, pursuant to Iowa law, the CBOS must establish the boundaries or service area of that water district. This is true because Iowa law requires that when creating a rural water district the Petition must show that:

> 1. A petition may at any time be filed with the auditor requesting the supervisors to incorporate and organize a district **encompassing an area**, not then included in any other district, in a county or in two or more adjacent counties for the purpose of providing an adequate supply of water for residents of the area who are not served by the water mains of any city water system.
>
> * * *
>
> 2. 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**, and shall state:
> a. The **location of the area, describing such area to be served** or specifying the area by an attached map.

§ 357A.2(1) and (2) (Emphasis added).

Iowa law requires a public hearing concerning the petition and that notice of such hearing must contain in part "the location

of the area designated by the petitioners for incorporation in the proposed district, as described or shown by the original petition." I.C.A. § 357A.4(1).

Iowa law also requires the CBOS designate the boundary of the district:

> "If the supervisors find that required notice of the hearing has been given and that the proposed district is reasonably necessary for the public health, convenience, and comfort of the residents, or may be of benefit in providing fire protection, they shall make an order establishing the district as a political subdivision **designating its boundary** and identifying it by name or number. The order shall be published in the same newspaper which published the notice of hearing."

I.C.A. § 357A.6 (Emphasis added).

Xenia maintains that the area included in the newly created district, is in fact the "existing service area" referenced in § 357A.2(4).

Johnston's argument that the Resolution creating Xenia says nothing about water service beyond invoking Iowa Code § 357A.2, (by which Xenia was permitted to seek to provide water service if its plan to do so would fall within two miles of a city such as Johnston (Johnston's Brief p. 35)), is completely off base. Certified

Question Two seeks clarification of the application of § 357A.2 after the 2014 Amendment.

Johnston's argument concerning § 357A.13 (Johnston's Brief pp. 35-36) is wrong. Xenia's reference to § 357A.13 addresses how the Two-Mile Rule would continue to apply after the 2014 Amendment, to areas not within the existing service area of a district as established by the CBOS, but rather beyond the rural water district's existing service area as established by the CBOS, *and* within two miles of a city. The point being that a rural water district is not precluded from providing water service outside the areas designated by the CBOS as provided by § 357A.13, which constitutes the area Xenia argues is *beyond* the district's "existing service area." Thus, Xenia was demonstrating that Xenia's proposed interpretation does not render the Two-Mile Rule superfluous, i.e., it applies when a rural water district seeks to extend water service to new customers beyond its "existing service area" (CBOS established boundaries) and within two miles of the city limits of a municipality.

Indeed, it is Johnston's proposed interpretation of the 2014 Amendment which would render the Amendment superfluous. The 2014 Amendment provides that: "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 to the Two Mile Rule 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.

If, as argued by Johnston, this new provision does not eliminate the application of the Two-Mile Rule, and the Two-Mile Rule continues to apply within a rural water district's "existing service area," the 2014 Amendment would have no application. Johnston fails to provide any viable application of this language if it is not applied as Xenia contends.

Johnston's contention that Xenia's arguments are flawed from the outset because Xenia does not apply its arguments to the

facts of this case, is likewise wrong. This Court is not being asked to apply specific facts, but rather to interpret how § 357A.2 should be applied in all respects, as a matter of law.

Contrary to Johnston's contentions, the 2014 Amendments to § 357A.2 help minimize conflicts with federal law and curtailment issues. Contending - as Johnston does - that a rural water district's "area to be served" as stated in its incorporation petition and as described in the CBOS order creating the rural water district, does not mean the same as the rural water district's "existing or association service areas" as that phrase is used in the 2014 amendment to § 357A.2 is illogical and does not avoid federal preemption issues.

Xenia's proposed interpretation gives effect to the CBOS resolution which legally defines a § 357A rural water district's service area and avoids the confusion created by the federal district court's interpretation that under Iowa state law, a rural water district's service area is not coterminous with the service area as described by the CBOS resolution creating the rural water district.

Indeed, if a rural water district's service area is not coterminous with the service area as described by the CBOS resolution creating the water district then it will be left to the Courts to undertake the complicated analysis of maps, pipes, correspondence and other evidence to divine on a case by case what a rural water district's service area is – wholly ignoring the clear legislative intent that a rural water district's service are is defined by the CBOS resolution establishing the rural water district.

The interpretation that a § 357A rural water district's "existing service area" is the area established by the CBOS also is consistent with the fact that the service area of a rural water district like Xenia is not defined by the Two Mile Rule as established by § 357A.3 (which contains no reference to "service area" whatsoever); but instead a rural water district's service area is defined by § 357A.1 and § 357A.2 which state that the CBOS determines the "area to be served" (or stated another way, the CBOS determines the a rural water district's "service area").

This interpretation provides certainty for rural water districts and cities alike as to the geographic boundaries of each and eliminates the need for complicated analysis to determine such.

A. THE 2014 AMENDMENT SHOULD BE APPLIED RETROACTIVELY

As outlined by Xenia's Opening Brief, 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).

Johnston admits that the 2014 Amendment constitutes a procedural change because it acknowledges that it modifies "the way a rural water district must present its notice to serve," to-wit:

> "Because the 2014 Amendment does not merely *change the way a rural water district must present its notice* to serve and has no indicia of retroactive effect, the amendment cannot be applied retroactively."

Johnston's Brief at p. 41 (emphasis added).

Johnston does not address Xenia's argument that the 2014 Amendment was intended to clarify the initial intent of the statute,

and thus the 2014 Amendment should be applied retroactively. Xenia's Opening Brief at Argument IV(B), pp. 39-40.

IV. CERTIFIED QUESTION THREE

The issue here is not whether Xenia (a § 504A corporation) was physically providing water service to the areas in dispute within two miles of a municipality's city limits. The question here is whether a § 504A corporation created in 1977 had the "legal right" to provide water service within such areas.

Xenia does claim that its 1982 federal loan precludes the state or anyone else from taking away its "legal right" to serve as it existed at the time of its first federal indebtedness in 1982. However, this is not an issue before this Court. The issue here is where did a § 504A nonprofit corporation have the "legal right" to operate (provide water service) when it was created in 1977.

Johnston again ignores the legal question presented by this Certified Question Three, i.e., did a § 504A corporation have the legal right to serve within two miles of city limits in 1977. Instead, Johnston argues that because Xenia has never served any of the areas in dispute in the federal court, it does not or did not have the

"legal right" to provide service under state law. That is not an issue here, because whether Xenia (a § 504A nonprofit corporation) is actually providing service, has no effect on whether it had the "legal right" to serve under state law.

Johnston argues there would have been restrictions on where a § 504A nonprofit corporation like Xenia had the legal right to serve, but such argument is devoid of any reference to what those limits are or might have been. Johnston does not reference any specific provision that would restrict such legal right (specifically within two miles of a municipality's city limits) and thus, Johnston's argument must be summarily rejected. Indeed, the Two-Mile Rule was not adopted until 1987, and therefore, no restriction existed in 1977 or in 1982. Furthermore, the Two-Mile Rule did not apply to a § 504A nonprofit corporation until the 2014 Amendment. *City of Sioux Center*, 202 F.3d at 1038.

Johnston's argument that Xenia did not retain dual states as a § 504A nonprofit corporation and as a § 357A rural water district because Xenia as a § 504A nonprofit corporation was dissolved in 1991, is not supportable. Xenia's submission to the Iowa Secretary

of State did not result in its dissolution and the submission was defective on its face. This is due to the fact that the articles do not reflect a vote by the Board of Directors authorizing the dissolution. See I.C.A. § 504.1402 as it existed in 1991, requiring approval by both the board and the members. "Defective" articles were filed, and the relief sought was never granted. The Court can take judicial notice that the Secretary of State lists Xenia as inactive, not dissolved.

Johnston's reliance on § 357A.20(2)(b) is misplaced as Xenia obtained dual status in 1990, and the dissolution provision relied on by Johnston was not enacted until 1991, and was not made retroactive. *Rural Water System #1 v. City of Sioux Center*, 202 F.3d 1035 (8th Cir.2000) was discussing non-profits re-incorporated after the 1991 amendment. Thus, Xenia continues to have dual status.

When Xenia obtained dual status as both a rural water district and a 504A corporation in 1990, the notice/approval provision of § 357A.2(4) had not been enacted as it was not added to § 357A.2 until 1993. At the time

Xenia obtained dual status in 1990, the Two-Mile Rule did not apply to Xenia the non-profit corporation,[7] nor to Xenia the rural water district, because the statute merely provided:

> Water service, 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 504A unless the city has approved a new water service plan submitted by the district. If the new water service plan is not approved by the city, *the plan may be subject to arbitration*.

I.C.A. § 357A.8. (Emphasis added.)

This was not a provision which precluded a rural water district from providing water service, but conditioned such service only upon approval of the "plan" for service by the city and if the city failed to approve the plan, the "plan" was subject to arbitration. There was no provision that if the city rejected the plan, the city could provide service and the water district could not. The city could not preclude the water district from providing service merely because the city wanted to serve the area, but could require the water district's service complied with certain standards. Thus, under the 1990 version of § 357A.2, the water district retained the "legal right" to provide service within two miles of a municipality's city limits, subject only to the city

[7] *Rural Water Sys. No. 1 v. City of Sioux Center*, 202 F.3d 1035, 1038 (8th Cir.2000).

approving the manner of service. Thus, when Xenia obtained dual status, or was created as a § 357A rural water district as argued by Johnston, Xenia retained or continued to have the "legal right" to provide water service within two miles of Johnston's city limits.

SUMMARY

The answers to the Certified Questions have far reaching impacts on Xenia and all rural water districts in Iowa. These interpretations of state law should avoid conflict with federal law. Federal and Iowa state law recognize that rural water districts provide essential community services. See *Pittsburg County RWD #7 v. City of McAlester*, 358 F.3d 694, 711 (10th Cir.2004), holding that equitable doctrines cannot be applied to block the application of a statute enacted to protect the public interest, and 7 U.S.C. § 1926(b) [§ 1926(b)] was passed to promote the public interest.

CONCLUSION

Based upon the arguments presented, the Court should answer each of the Certified Questions "yes" as requested in the Conclusion to Xenia's Opening Brief at pp. 47-49.

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.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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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 Reply Proof 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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