

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)

v.)

Case No. CIV 96-196 B

CITY OF STILWELL, OKLAHOMA,)
ET AL.,)
)
Defendants.)

BRIEF SUPPORTING GOVERNMENT'S TO REOPEN SUSPENDED CASE

On October 15, 1996, the Government moved for modification of the procedural schedule, on account of a Tenth Circuit order granting rehearing *en banc* in *Systemcare, Inc. v. Wang Laboratories Corp.* (10th Cir. No. 95-1032). By *Order* entered November 4, 1996, this Court instead administratively closed the case and indefinitely suspended the then-existing procedural schedule, pending notification by the parties of the decision on rehearing in *Systemcare*. That decision — a copy of which is attached — was filed on June 24, 1997, and the government has accordingly moved this Court to reopen and enter a new scheduling order.

The government instituted this action against the City of Stilwell and its Area Development Authority on April 25, 1996, seeking injunctive relief against the all-or-none utility policy they had adopted and implemented under which they refused to provide water and sewer services unless the customer also

agreed to purchase city-supplied electric service. The complaint charges that this course of conduct is a tying arrangement outlawed by Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. Thereafter, on May 29, 1996, the *Systemcare* panel issued its decision (reported at 85 F. 3d 465), affirming summary judgment in a private antitrust action. The panel held that a tying arrangement imposed by a single entity does not meet the concerted action element of Section 1, even where embodied in an agreement between the seller imposing the tie and its customers. *See* 85 F.3d at 470. The panel decision thus undermined one of the legal theories underlying the Government's case.

The Tenth Circuit's unanimous *en banc* opinion vacates the panel decision and overrules the circuit precedent on which the panel based its decision—

On September 6, 1996, we granted Systemcare's request for rehearing en banc to consider "whether a contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act, 15 U.S.C. § 1, or whether satisfaction of that element requires evidence of a contract, combination, or conspiracy involving a third party to force agreement on a buyer." Today we hold that a contract between a buyer and seller satisfies the concerted action element of section 1 of the Sherman Act where the seller coerces a buyer's acquiescence in a tying arrangement. Accordingly, we overrule *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641 (10th Cir. 1992), and *McKenzie v. Mercy Hospital*, 854 F.2d 365 (10th Cir. 1988), to the extent that these cases are inconsistent with today's holding.

Slip op. at 1. *Systemcare* thus restores Section 1 as a basis for the Government's claim against the defendants here.

The Government accordingly moves for and order reopening the case and setting a new procedural schedule.

Respectfully submitted,

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