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*.	)	

REPLY BRIEF IN SUPPORT OF GOVERNMENT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

The Court has before it the government's motion for judgment denying the affirmative defenses of mootness and state action immunity pleaded by the defendants. The government respectfully submits this reply brief as its response to certain points that the defendants raised on brief to buttress those defenses.

We will show that, as a matter of law, neither defendants' disclaimer of an intent to repeat their wrongdoing in the future nor the rights of adjoining rural water districts moots this case. We will further show that the Oklahoma legislature did not authorize the defendants to suppress competition by adopting and implementing the all-or-none utility policy at issue in this case. Their mootness and state action immunity defenses should accordingly be ruled out on the basis of the pleadings.

As a matter of law, mere voluntary abandonment and disclaimer of an intent to resume does not moot a government enforcement action

The defendants acknowledge the settled principle that their voluntary cessation of conduct violative of the antitrust laws does not moot a government enforcement action. Indeed, the Supreme Court nearly a century ago held that the public has a vital interest in having the legality of challenged practices authoritatively settled. *See United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309-10, 41 L. Ed. 1007 (1897). As the government's motion papers point out, courts should not leave wrongdoers free to return to their old ways. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 21 L. Ed. 2d 344 (1968). Only an exceptional case, where "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," might be defended on mootness grounds. *Id.*

The affidavit of H.E. Zimmerman, Jr., exhibited to the defendants' brief in opposition, does not raise a triable issue. *See id.* (appellees' own statement "standing alone, cannot satisfy the heavy burden"); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 97 L. Ed.1303 (1953) (mere disclaimer of an intention to resume challenged conduct "does not suffice to make a case moot"). Indeed, Mr. Zimmerman confirms that the defendants discontinued tying electric utility service to water/sewer utility service on account of the

government's investigation of the practice in order "to avoid government intervention and to eliminate future complaints." As the Court pointed out in *United States v. Parke, Davis & Co.*, 362 U.S. 29, 48, 4 L. Ed. 2d 505 (1960), "if the investigation would prompt Parke Davis to discontinue its efforts, even more so would the litigation which ensued." The public has a right to the protection of a judicial decree to ensure that the wrongs will not recur.

Future extension of water/sewer utility service by the defendants is not barred by law

Going beyond their pleadings, the defendants also argue that the case is moot because future expansion of their water/sewer system is purportedly blocked by the exclusive rights of rural water districts serving the areas surrounding Stilwell's current municipal boundaries. But, even if this Court accepts the defendants's claim that Stilwell's current corporate limits have everywhere butted up against rural water district service areas, expansion of Stilwell's water/sewer utility services is not confined to those limits. The defendants remain free in the future, as paragraph 9 of their answer to the complaint indicates they have done in the past, to take over the lines and customers of a rural water district with the affected district's agreement "where such arrangement is to the mutual benefit of the parties."

All of the precedents on which the defendants rely involved municipal extensions opposed by the federally financed water districts affected; none

stand for the proposition that Stilwell is barred from extending municipal lines to serve customers in an adjoining rural water district's service area through agreement with the district. Indeed, the Tenth Circuit explicitly pointed out that a rural water district's rights are qualified by, among other things, a municipality's ability to purchase water district facilities in accordance with applicable regulations. *See Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989), citing *City of Madison v. Bear Creek Water Ass'n*, 816 F.2d 1057, 1060 (5th Cir. 1987). Because impossibility of future municipal water/sewer system expansion — the premise of their mootness defense — is baseless, the defense collapses and must be rejected.

Legislative authorization for municipal expropriation does not immunize the municipality's anticompetitive conduct

The defendants argue that, because Stilwell is authorized to take over the facilities and customers of a cooperative serving annexed areas (upon compliance with applicable procedures and payment of just compensation), they are empowered to use whatever other tactics suit their interests in suppressing free and open competition. That position is flatly wrong.

The Supreme Court has repeatedly admonished that state action immunity, like other implied repeals of the antitrust laws, is disfavored and will

not be presumed or broadly interpreted. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635-36, 119 L. Ed. 2d 410 (1992); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-99, 55 L. Ed. 2d 364 (1978). A municipality or other political subdivision claiming the immunity must establish that the conduct at issue implements state policy. It "must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40, 85 L. Ed. 24 (1985). Defendants are accordingly obliged to show this Court that the Oklahoma legislature both (1) authorized them to engage in the tying conduct alleged to violate the Sherman Act and (2) thereby intended to suppress competition. *See Allright Colorado, Inc. v. City & County of Denver*, 937 F.2d 1502, 1506-07 (10th Cir. 1991) (collecting cases), *cert. denied*, 502 U.S. 983 (1992). These requirements assure that states "accept political responsibility for actions they intend to undertake" and permit states to "regulate their economies in many ways not inconsistent with the antitrust laws" without inadvertently providing immunity. *See Ticor*, *supra* at 635-37.

Controlling precedent focuses the analysis on whether the ***conduct at issue*** is authorized, and the conduct at issue here is not expropriation. Rather, this action arises out of the all-or-none utility policy adopted and implemented by the defendants. Stilwell's lawful exercise of its expropriation

powers under Oklahoma law is nowhere challenged in the government's complaint; nor has the government asked this Court to enjoin the city's exercise of those powers. It is thus immaterial that anticompetitive results would be a foreseeable consequence of expropriation. Stilwell's expropriation authority is no defense to the different course of action chosen by the defendants — a course of conduct outlawed by the Sherman Act.

No provision of Oklahoma law has been cited by the defendants as authorizing Stilwell to leverage its water/sewer market power in the course of competing for new electric utility service customers. The relevant statutory scheme in effect since 1961 — OKLA. STAT. ANN., tit. 18, 437.2(k) (West 1986 & Supp. 1996) in particular — is not merely silent on the matter of retail electric utility service competition in annexed areas, but explicitly preserves an incumbent cooperative's right "to continue and extend the furnishing of electric energy or the construction and operation of electric facilities ***without obtaining the consent, franchise, license, permit or other authority of* [*the annexing*] *city, town, or village***, subject to compliance with lawful [local safety requirements and payment of local taxes]." (Emphasis added).[1] By expressly

1. Contrary to the explicit language of Section 437.2(k) authorizing a cooperative to "extend the furnishing of electric energy" in annexed areas, the defendants at page 17 of their brief advance the unsupported contention that annexation invested Stilwell "with the exclusive right to such territory subject only to permitting Ozarks to continue serving their existing customers."

denying cities these traditional incidents of governmental authority to control a cooperative serving annexed areas, the Oklahoma legislature left no room to infer that they could instead suppress competition through action condemned by the antitrust laws.

Indeed, the defendants concede that the legislature "did contemplate that cities would have the right to compete in the cooperative's previously certified territory." (Defendants' brief at p. 19). They go on to insist, however, that the authority to compete contemplated by the legislature included conduct outlawed by the Sherman Act — "that cities would compete with their sewer/water facilities tied to their electrical service." (*Id*.). This argument turns the state action doctrine on its head. Suppression of competition is the antithesis — not the logical result — of authorization to compete.

The defendants fare no better by insisting that they were authorized to bundle their separate utility services into a packaged offering, which they claim is more efficient and attractive to consumers.[2] Again, they have lost

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2. The consumer preference justification offered by the defendants for their all-or-none utility policy is specious, indeed belied by their own course of conduct. If customers overwhelmingly prefer to purchase utility services in a package (as compared to buying separate services from separate providers), why did the defendants formally adopt the policy and go so far as to padlock water valves and put "teeth" in it by denying building permits to those preferring an alternative electric service provider?

their focus on the challenged conduct — adopting and implementing an all-or-none policy that ***requires*** purchasers to take the package to receive any of its constituents. The government has neither alleged that the defendants violated the Sherman Act by offering all of their separate utility services as a package, in addition to the individual service offerings, nor sought to enjoin package offers in the future. The vice inherent in a tying arrangement is not that a supplier merely offers multiple products as a package. Antitrust law concerns arise when the products are available only in the package, which denies consumers the freedom to choose among the competing suppliers of each product on the merits. The all-or-none policy, which unreasonably interferes with consumer decision-making, fundamentally deviates from a lawful "all-or-some" policy that would allow any customer to select every utility service offered by the defendants if that is what the customer desires or, if another electric utility service provider is preferred, to make that selection without surrendering the opportunity to obtain municipal water/ sewer service.

Conclusion

For the reasons stated above and in the government's opening brief, the mootness and state action immunity defenses should be ruled out at the pleading stage.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served by overnight courier to counsel of record for defendants:

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this 2nd day of October, 1996.

Daniel C. Kaufman