No. 07-2463-JAR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RURAL WATER DISTRICT NO. 4,
DOUGLAS COUNTY, KANSAS,,
Plaintiff/Counter-Claim Defendant,

v.

CITY OF EUDORA, KANSAS,
Defendant/Counter-Claim Plaintiff,

DEFENDANT CITY OF EUDORA'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50(B) OR IN THE ALTERNATIVE FOR A NEW TRIAL UNDER RULE 59

Curtis L. Tideman **KS # 13433**
David R. Frye **KS # 18133**
Jeffrey R. King **KS # 20735**
LATHROP & GAGE LLP
10851 Mastin Blvd., Suite 1000
Overland Park, KS 66210-1669
(913) 451-5100 FAX (913) 451-0875

Attorneys for Defendant

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STATEMENT OF THE NATURE OF THE MOTION

I. Douglas-4 Does Not Qualify for Any Section 1926(b) Protection.

Douglas-4's entire case rests on one allegation – that a federal loan guaranty it received on June 15, 2004 entitled it to Section 1926(b) monopoly protection in the affected area. Douglas-4 is wrong (and the Court erred in submitting this question to the jury) because Douglas-4 lacked the power under Kansas law to enter into this federal loan guaranty. Section 1926(b) provides that only a continuing federal indebtedness (not a private loan) can trigger its monopoly protection. 7 U.S.C. §1926(b). As such, Douglas-4's federal loan guaranty (not its private loan) provides its only possible basis for Section 1926(b) protection.

The Tenth Circuit is clear that a water district cannot receive Section 1926(b) protection without first obtaining the power under state law to enter into the federal indebtedness which would trigger such protection. *See, e.g., Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004). Kansas law only authorizes water districts to execute agreements resulting in federal loan guarantees when those guarantees are themselves "necessary to carry out the purposes of its organization…." K.S.A. 82a-619(g). Douglas-4 admits that "**the only motivation for this loan [guaranty] is the potential for annexation protection**…." The acquisition of Section 1926(b) annexation protection is not a purpose of Kansas rural water districts. Thus, Douglas-4 lacked the authority to execute this federal loan guaranty and the City merits judgment as a matter of law on Douglas-4's Section 1926(b) and Section 1983 claims.

II. The City Did Not Violate Section 1983 Even If Section 1926(b) Protection Applied to the Affected Area.

Regardless, the City is entitled to judgment as a matter of law on Douglas-4's Section 1983 claim because no evidence exists that the City ever violated Section 1926(b). Douglas-4

has a valid claim against the City under 42 U.S.C. §1983 only if the city violated a federal right of Douglas-4. Here, the only federal right at issue allegedly arises under Section 1926(b).

Although the City remains convinced that no protection existed, the City steadfastly refused to provide water to the disputed area before or during this litigation. Unlike Douglas-4's "threat" theory of curtailment, the City does not violate Section 1926(b) merely by asserting rights in this litigation contrary to those claimed by Douglas-4.

Douglas-4 raises no facts that could support the requisite Section 1926(b) violation. Douglas-4 bases its claim on two supposed violations of Section 1926(b): (1) the City's annexation of the affected area; and (2) the City's alleged threats and solicitations to provide water service in the affected area. The City's annexation of land within Plaintiff's political boundary is not itself a Section 1926(b) violation. *Glenpool Util. Serv. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir. 1988). As the present Court further held, "threatened harm is not enough for a [Section 1983] claim for damages as asserted by District 4…." Because Douglas-4 offered no legally sufficient evidence that the City has limited or curtailed Douglas-4's water service in the affected area, the City merits judgment as a matter of law on the Section 1983 claim.

III. Douglas-4 Was Erroneously Relieved of the Burden to Show that It Provided Water Service to the Affected Area at Reasonable Prices on the Date when Landowners First Requested Such Service.

At minimum, the City merits a new trial on the Section 1926(b) and Section 1983 claims because this Court erroneously placed the burden of proof on the City (not Douglas-4) to show the confiscatory nature of Douglas-4's pre-annexation water service costs under *Post Rock*. In *Sequoyah County,* the Tenth Circuit required water districts to prove that they had "made service available" to obtain Section 1926(b) protection over a territory. In *Post Rock*, the Court held that

a water district has not satisfied the "made service available" test unless it provides such service at non-confiscatory rates. Because Douglas-4 bears the burden to show it "made service available," it must also bear the burden of proof under the *Post Rock* test. Given that: (a) Douglas-4 provide no evidence to support the reasonableness of its pre-annexation prices; and (b) the City provided evidence of Douglas-4's confiscatory pricing from Douglas-4's own comments and pricing survey, this improper burden of proof allocation at minimum warrants a new trial.

QUESTIONS PRESENTED

- Is the City entitled to judgment as a matter of law on all or some of the claims presented by Douglas-4?
- In the alternative, is the City entitled to a new trial on all or some of the claims presented by Douglas-4 in which this Court: (a) properly instructs the jury that Douglas-4 must prove that its federal loan guaranty was "necessary" under K.S.A. 82a-619(g); (b) properly instructs the jury that Douglas-4 bears the burden of showing that its water prices at the time Doug Garber first requested water in the affected area were non-confiscatory; and (c) excludes from evidence all letters from the City's attorneys and testimony regarding the former City Administrator's comments to Doug Garber on the potential for de-annexation?

ARGUMENTS AND AUTHORITIES

I. Douglas-4 Lacked the Power under K.S.A. 82a-619(g) to Obtain the Federal Loan Guaranty – the Sole Basis for Its Alleged Section 1926(b) Protection.

A. Douglas-4's Federal Loan Guaranty (not the Loan Itself) Provides the Only Possible Basis for Section 1926(b) Protection.

Douglas-4 cannot preserve any of its favorable jury verdicts because Douglas-4 lacked the authority under Kansas law to enter into the federal loan guaranty – the basis for all of its

causes of action. Douglas-4's claims share one vital component – an allegation that its federal loan guarantee provided protection from competition under 7 U.S.C. §1926(b). If this allegation is wrong, Douglas-4's entire case must fail.

Douglas-4 cannot receive Section 1926(b) monopoly protection without a legally authorized federal loan guaranty. The Tenth Circuit has clearly stated that "to receive the protection against competition provided by §1926(b) a water association must (1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999). Douglas-4 executed two loans to finance the Project: (a) a $1 million loan with KDHE and (b) a $250,000 loan with First State Bank & Trust. Neither of these loans is a continuing federal debt and, therefore, neither can support Douglas-4's alleged Section 1926(b) protection.

As Douglas-4 admits, therefore, the federal loan guaranty of the First State Bank & Trust loan provides the only possible source of Section 1926(b) protection. Furthermore, this Court held that Douglas-4 had a continuing federal debt solely because it could "show that it has a loan guaranteed by the federal government…." Thus, Douglas-4's federal loan guaranty provides the only possible basis for the "federal indebtedness" needed to obtain Section 1926(b) protection.

This federal loan guaranty is likewise essential for Douglas-4's Section 1983 claim. To present an actionable claim under 42 U.S.C §1983, Douglas-4 "must establish that [it was] deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). Section 1983 does not create an actionable federal right itself, thus

Douglas-4 must prove that the City violated a separate federal right. *Baker v McCollan*, 443 U.S. 137, 144 n.3 (1979).

Here, Douglas-4 has placed only one federal right in question, its alleged right to monopoly protection for its water service under Section 1926(b). Consequently, without Section 1926(b) monopoly protection, Douglas-4's Section 1983 claim would collapse for lack of a violated federal right. Because the federal loan guaranty is essential to Douglas-4's Section 1926(b) claim, Douglas-4's entire case rests on its power to enter into the federal loan guaranty.

B. The Federal Loan Guaranty Can Trigger Section 1926(b) Protection only if Douglas-4 Had the Power under Kansas Law to Enter Into the Agreement to Obtain it.

Douglas-4 cannot sustain its causes of action because it lacked the power under Kansas law to obtain the federal loan guaranty. The mere existence of a federal debt does not satisfy the "continuing indebtedness" requirement of Section 1926(b). *Sequoyah County*, 191 F.3d at 1198. Instead, as the Tenth Circuit held in *Sequoyah County*, state law must also authorize the water district to incur the triggering federal indebtedness. *Id.* (citing *Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc.*, 103 F.3d 38, 41 (6th Cir. 1996)).

This requirement derives from a basic and inviolate legal tenet – a state subdivision, such as a city or a rural water district, possesses only those powers vested in it by state statute. *Koppel v. Fairway*, 371 P.2d 113, 115 (Kan. 1962); *Rural Water Dist. No. 1 v. City of Wilson*, 243 F.3d 1263, 1273 (10th Cir. 2001("*Post Rock"*) ("[B]ecause political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state."); *Fairbanks, Morse & Co. v. Wagoner*, 86 F.2d 288, 289 (10th Cir. 1936) (finding that "subdivisions must have express authority" from the state in order to act). Thus, a water district

can obligate the state to the burdens of Section 1926(b) protection only with the state's consent. *Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694 (10th Cir. 2004).

As the Tenth Circuit expressed in *Pittsburg County*, "[t]he requirements of §1926 flow, not from legislative or executive fiat, but from the entry by a water district - a state subdivision - into an agreement to borrow money from the federal government." *Id.* By refusing to authorize such triggering indebtedness, states were "ultimately free to reject both the conditions and the funding, no matter how hard that choice may be." *Id.* Thus, to obtain Section 1926(b) protection, Kansas law must have authorized Douglas-4 to execute the agreement to obtain the federal loan guaranty.

C. K.S.A. 82a-619(g) Allows a Water District to Execute an Agreement with the Federal Government only if the Contract Is "Necessary to Carry out the Purposes of Its Organization"

Kansas law prohibits rural water districts such as Douglas-4 from securing federal loan guarantees that are not necessary to their statutory purposes. K.S.A. 82a-614 establishes the over-riding purpose of rural water districts by requiring the district's initial petition to include the fact "that the lands within such boundaries are without an adequate water supply." Although the statutory language seems clear, this is apparently an issue of first impression under Kansas law.

Nonetheless, an examination of statutory language, case law from other jurisdictions, and the public policy underlying Kansas water districts shows that Douglas-4 acted entirely outside its authority by obtaining its federal loan guaranty for the purpose of serving water where an adequate supply already exists. The power of Kansas water districts to acquire loans derives from K.S.A. 82a-619, which authorizes water districts to "acquire loans for the financing of up to 95% of the cost of the construction or purchase of any project or projects **necessary to carry out**

the purposes for which such district was organized. . . ." K.S.A. 82a-619(h) (emphasis added).

The necessity of the Project loan itself is not at issue. Douglas-4 did not receive a federal loan. Its only potentially triggering federal indebtedness is a federal loan guaranty. The dispositive question, therefore, is not the one posed by this Court – whether Plaintiff had the authority to obtain the underlying loan. Rather, the dispositive question is whether Kansas law authorized Douglas-4 to enter into an agreement to obtain the federal loan guaranty solely to serve areas with an existing water supply. As such, K.S.A. 82a-619(h) is inapposite here.

Instead, Douglas-4's only possible statutory authority for its federal loan guaranty is K.S.A. 82a-619(g), which allows a rural water district to "cooperate with and **enter into agreements** with the secretary of the United States department of agriculture or the secretary's duly authorized representative **necessary to carry out the purposes of its organization**…." K.S.A. 82a-619(g) (emphasis added). Thus, Kansas law authorized the federal loan guaranty only if its execution was "necessary to carry out the purposes of [Douglas-4's] organization…." *Id.* This reading of Kansas law follows *Pittsburg County*, which recognized that states, by limiting water district powers, are "ultimately free to reject both the conditions and the funding [of federal loans], no matter how hard that choice may be." *Pittsburg County*, 358 F.3d at 718.

Through K.S.A. 82a-619(g), Kansas followed the Tenth Circuit's guidance. The Kansas Legislature exercised its statutory authority (as recognized by *Pittsburg County*) to limit a water district's ability to impose Section 1926(b) monopoly protection on the state. Specifically, Kansas prohibited water districts with adequate and cheaper financing from using unnecessary federal loan guarantees to obtain Section 1926(b) protection. Instead, as expressed in *Pittsburg County*, Kansas limited the acceptance of federal loan guarantees to "capital-starved rural water

associations [who need] preferable loan terms from the federal government" to carry out their statutorily-permitted purposes. *Id.* Thus, the clear statutory language of K.S.A. 82a-619(g) and Tenth Circuit precedent both support a finding that, unless **the federal loan guaranty** was "necessary to carry out [its] purposes[,]" Douglas-4 lacked the statutory authority to obtain its loan guaranty. *See also Public Water Supply District No. 3 of Laclede Cty. v. City of Lebanon*, Case No. 07-3351, *8-9 (W.D. Mo. 2008) (holding that *de minimus* loans cannot trigger Section 1926(b) protection because they would "choke all alternative service options for potential customers" and create "a sword [for water districts] to obtain customers not falling under the statute's protection"); ELIZABETH DIETZMANN, *When Are 7 U.S.C.A. 1926(b) Cases Justified*, THE KANSAS LIFELINE (Nov. 2005), at 35 (decrying the use of federal loan guarantees solely to obtain Section 1926(b) protection as contrary to public policy and "a warped use of federal monies at best").

D. Douglas-4 Lacked the Authority to Obtain the Federal Loan Guaranty Because the Guaranty Was Not "Necessary to Carry out the Purposes of Its Organization"

1. Douglas-4 Bears the Burden to Show that It Had Authority under K.S.A. 82a-619 to Enter into the Federal Loan Guaranty

Douglas-4 has the burden to show that Kansas law under K.S.A. 82a-619(g) authorized the agreement required to obtain its federal loan guaranty. A water district must pass the two-part *Sequoyah County* test to obtain Section 1926(b) protection. Under this test, the water district bears the burden of proving that it "(1) ha[s] a continuing indebtedness to the FmHA and (2) ha[s] provided or made available service to the disputed area." *Sequoyah County*, 191 F.3d at 1196-97.

Douglas-4's authority for the federal loan guaranty under K.S.A. 82a-619 is part of the *Sequoyah County* test. To satisfy part one of this test – the "continuing indebtedness"

requirement – Kansas law must authorize Douglas-4 to incur the triggering loan guaranty. *See id.* at 1198 (citing *Scioto County*, 103 F.3d at 41) (finding that a water district would not trigger Section 1926(b) protections unless its action was authorized under state law). To carry its burden to show that it "ha[s] a continuing indebtedness to the FmHA[,]" Douglas-4 must prove that Kansas law empowered it to enter into the only possible federal indebtedness, the loan guaranty. *Id.* Thus, showing that K.S.A. 82a-619(g) authorized its federal loan guaranty is part of Douglas-4's burden of proof to show that it meets the "continuing indebtedness" requirement for Section 1926(b) protection.

2. Douglas-4's Power to Execute the Private Loan Is Immaterial Because Only the Guaranty Can Trigger Section 1926(b) Protection.

Finally, this Court and Douglas-4 have erred as a matter of law because only Douglas-4's authority to enter into the federal loan guaranty, not the underlying private loan, affects its ability to obtain Section 1926(b) protection. This Court ruled on summary judgment that Kansas law must authorize Douglas-4's private loan, not its federal loan guaranty, for it to obtain Section 1926(b) protection. It also instructed the jury in the same manner.

This legal conclusion is wrong. A water district cannot receive Section 1926(b) protection unless state law authorizes it to incur the **triggering federal indebtedness**. *Sequoyah County*, 191 F.3d at 1198. Douglas-4's loan with First State Bank & Trust is a private loan. A private loan cannot trigger Section 1926(b) protection. *Id.* Accordingly, Douglas-4 acknowledged that the federal loan guaranty provides Douglas-4's only possible basis for Section 1926(b) protection. Thus, under *Sequoyah County*, Douglas-4 must have Kansas law authority for its federal loan guaranty, not the underlying private loan, to obtain Section 1926(b) protection.

This mistake alone merits judgment as a matter of law for the City on all claims. At trial, this Court recognized that Douglas-4 did not execute the loan "guarantee for something other than monopoly protection…." This Court also instructed the jury that "if obtaining federal protection under 7 U.S.C. 1926(b) was Douglas-4's only purpose for cooperating with and/or entering into agreement with the Federal Government, you must enter judgment in favor of Eudora." Thus, applying the "necessary" requirement to the federal loan guaranty (instead of the private loan) would mandate judgment for the City on all counts.

3. Douglas-4 Admitted that the Only Purpose of Its Federal Loan Guaranty Was to Obtain Section 1926(b) Monopoly Protection.

Douglas-4, through its Administrator, admitted that the federal loan guaranty was unnecessary for its purpose, but executed only in an effort to obtain Section 1926(b) monopoly protection. On May 6, 2003, Administrator Schultz wrote a memorandum to Douglas-4's Board members discussing financing options for the Project. *See* May 6 Schultz Memo to the Douglas-4 Board. As Schultz told his board members, Douglas-4 was able to secure "financing of [the entire] $1.25 million from the KDHE revolving loan fund at a fixed interest rate of 4.08% over 20 years."

Despite these favorable terms, the KDHE loan did not satisfy Douglas-4. Schultz noted with dismay that "KDHE loans do not provide the [water] districts with any protection against annexation by cities." Schultz encouraged the Douglas-4 Board to seek such monopoly protection, noting that "progressive districts like ours, who border on cities like Wichita and Kansas City, have begun to investigate getting private loans guaranteed by Rural Development."

For the sole purpose of trying to obtain Section 1926(b) protection, therefore, Schultz recommended that Douglas-4 "take about $250,000 of the loan from a bank [backed by a federal loan guaranty]… and about $1 million from KDHE as planned." Schultz further noted, in a

section of the memorandum entitled "What's the point?", that "[t]he point of doing this loan would be to gain negotiating leverage" through Section 1926(b) protection. He further admitted that "**[t]he only reason I can think of that anyone would do a guaranteed loan from Rural Development is for annexation protection.**" *Id.* (emphasis added). Schultz concluded by conceding to the Douglas-4 Board members that "[r]eally, **the only motivation for this loan is the potential for annexation protection**…." *Id.* (emphasis added). Thus, Douglas-4's own Administrator admits that the sole purpose of its federal loan guaranty was an effort to obtain Section 1926(b) protection.

4. Obtaining Section 1926(b) Protection Is Not a Necessary Purpose for Executing a Federal Loan Guaranty under K.S.A. 82a-619(g).

Given this uncontested fact, Douglas-4 lacked the power under K.S.A. 82a-619(g) to execute its federal loan guaranty. Obtaining Section 1926(b) monopoly protection is not a statutory purpose of Douglas-4. Kansas statutes specifically enumerate the purposes for rural water districts. They may facilitate: "the construction and maintenance of ponds or reservoirs or pipelines or wells or check dams or pumping installation, or any other facility for water storage, transportation or utilization, or… the construction and maintenance of any combination of said projects [that are] necessary for the improvement of the community…." K.S.A. 82a-614. As discussed above, a rural water district cannot even be created unless the lands in question are "without an adequate water supply." K.S.A. 82a-614. Besides restating these statutory purposes, Douglas-4's by-laws also provide that its purpose is "[t]o acquire water and water rights and to build and acquire pipelines and other facilities, and to operate the same for the purpose of furnishing water for domestic, garden, livestock and other purposes to owners and occupants of land located within the District, and others as authorized by these Bylaws."

These lists exclude monopoly protection from Douglas-4's purposes. Section 1926(b) protection does not facilitate new or cheaper water service "to owners and occupants of land located within the District," nor does it help Douglas-4 "build and acquire pipelines and other facilities." In fact, Douglas-4's effort to acquire Section 1926(b) protection actually increased the cost and hassle of its infrastructure project and increased the expense of water service to residents in the affected area. *See supra* at 8-9.

The Court previously agreed with this conclusion. Specifically, it held that "entering into an agreement with the federal government solely for §1926(b) protection is not necessary to the purposes of the water district, to promote the public health, convenience and welfare." *See* Doc. 256 at p.34. *See also* Doc. 330 at p.6 ("[A] water district cannot show that a loan is necessary if the sole purpose of the loan was to obtain monopoly protection under 7 U.S.C. §1926(b)…."). Because obtaining Section 1926(b) monopoly protection is not one of Douglas-4's purposes, it lacked the power to enter into the federal guaranty under K.S.A. 82a-619(g).

5. The Federal Guaranty Was Completely Unnecessary Because Douglas-4 Had Another Less Expensive Non-Guaranteed Loan Available to It.

The more burdensome terms of the $250,000 federally guaranteed loan, especially when compared to the low-cost financing offered by KDHE, further illustrates that Douglas-4 executed the federal loan guaranty solely as a ploy to obtain Section 1926(b) protection. As Schultz conceded, the federal guaranty increased Douglas-4's financing costs for the Project, while creating additional administrative burdens. *See* May 6 Schultz Memo to the Douglas-4 Board. Specifically, he admitted that "[t]he interest rate [under the federal guaranty] will be higher than the KDHE rate because the KDHE loans are subsidized by the State and by the EPA." *Id.* at 3.

He also noted that the federal guaranty caused Douglas-4 to incur "$5000 to 10,000 for loan closing costs and professional fees in excess of the amount needed for the KDHE loan." *Id.*

These costs are not the only burdens needlessly born by Douglas-4 for using the federal guaranty. Schultz further acknowledged, by using the federal guaranty, "we will be putting ourselves through another round of stress at the tail end of a long process, when we could be enjoying the fact that **we have our financing in place**, we have great bids, and that our contractor is ready to break ground on one of the best projects our District has ever undertaken." *Id.* (emphasis added).

Schultz justifies these added costs and hassle for one reason, "the potential for annexation protection…." *Id.* "If it costs [Douglas-4] a little more in fees and interest rates, but saves hundreds of thousands of dollars down the road by allowing us to negotiate on even par with the cities [through Section 1926(b) protection], it will pay off handsomely." *Id.* at 4.

The City acknowledges that the Project itself was done to further Douglas-4's purpose. Nor does the City object to Douglas-4 obtaining the best possible loan for the Project itself. What the City strongly asserts, and what Schultz's own statements prove, is that Douglas-4's federal guaranty was unnecessary and actually harmful to the completion of the Project. Because Douglas-4 admitted that the "potential for [Section 1926(b)] annexation protection" was its "only motivation for this loan" guaranty, Douglas-4 lacked the authority under K.S.A. 82a-619(g) to enter into the federal guaranty.

E. In the Alternative, the City Merits a New Trial Because the Erroneous Use of "Loan" Instead of "Loan Guaranty" in the Jury Instructions Greatly Harmed the City's Case.

The previous arguments illustrate that the City merits judgment in its favor on all remaining claims because Douglas-4 lacked the authority under K.S.A. 82a-619(g) to execute its

federal guaranty. If the Court believes that material fact questions preclude judgment for the City, however, a new trial is still required because this Court's incorrect jury instruction that applied K.S.A. 82a-619(g) to the loan (not the underlying loan guaranty) is a legal error that materially harmed the City. This error allowed Douglas-4 to argue that it had the necessary statutory authority so long as the "loan" was necessary. Since it was easy to argue that the loan proceeds were necessary, the jury was given the misimpression that Douglas-4 had statutory authority even though the triggering guaranty was entirely unnecessary.

The City has discussed extensively how: (a) the loan guaranty (not the private loan) is the only possible trigger for Section 1926(b) protection; and (b) that guaranty was not "necessary to carry out the purposes of [Douglas-4's] organization…." By contrast, it is unquestioned that Douglas-4 needed a loan (though not necessarily the one from First State Bank and Trust) to complete the Project – an undertaking which clearly fell within Douglas-4's purpose. Thus, by incorrectly instructing the jury regarding K.S.A. 82a-619(g), the Court committed a harmful legal error that (at minimum) requires a new trial on Douglas-4's Section 1926(b) and Section 1983 claims.

II. Douglas-4's Section 1983 Claim Must Fail Because There Is No Evidence Of A 7 U.S.C. §1926(b) Violation.

A. Douglas-4 Has No Section 1983 Claim Unless the City Actually Limited or Curtailed Water Service to an Area with Section 1926(b) Protection.

Douglas-4's Section 1983 claim also merits rejection because, even if Douglas-4 qualified for protection under 7 U.S.C. §1926(b), the City did not violate these Section 1926(b) rights. As discussed previously, Section 1926(b) provides the only possible basis for Douglas-4's Section 1983 claim. *Supra* at 5-6.

In relevant part, Section 1926(b) requires that "[t]he service provided or made available through [a qualifying water district] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body…." 7 U.S.C. §1926(b). Thus, to proceed on its Section 1983 claim, Douglas-4 must show that: (a) it has Section 1926(b) protection in the affected area and (b) its water service was "curtailed or limited by" the City's annexation. *Id.*

B. The City Did Not Curtail or Limit Douglas-4's Water Service.

The City did not violate Section 1926(b), even if Douglas-4 has such protection, because it did not "curtail or limit" Douglas-4's water service in the affected area. Douglas-4 does not claim that the City provided water in the affected area or that it prevented Douglas-4 from doing so. Nor can it make such claims. The City has not provided (and currently does not provide) any water service in the affected area. It has refused to provide or allow water service by the City to these properties, advising landowners that they must approach Douglas-4 for this service. Douglas-4 even admitted that "Douglas-4 currently provides 100% of the requested water service for all annexed areas in controversy."

Instead, Douglas-4 relies on two bases for its allegation that the City curtailed or limited its service in the affected area: (1) the City's annexation of this land alone constitutes curtailment; and (2) the City's supposed threats and/or solicitations to provide water service equals curtailment. As a matter of law, neither of these claims (even if true) constitute curtailment of water service under Section 1926(b). Thus, the City did not violate Section 1926(b) as a matter of law, thereby causing Douglas-4's Section 1983 claim to fail.

1. Annexation Alone Is not a Section 1926(b) Violation

Annexation of protected land does not violate Section 1926(b). A plain reading of the statute supports this conclusion. Section 1926(b) states that "[t]he service provided or made available through [a qualifying water district] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body…." 7 U.S.C. §1926(b). Section 1926(b) thus requires that a city take two actions to violate its requirements: (a) annex the area (i.e. "inclusion of the area served by such association within the boundaries of any municipal corporation or other public body") **and** (b) provide or limit water services in that area (i.e. "[t]he service provided or made available through [a qualifying water district] shall not be curtailed or limited"). 7 U.S.C. §1926(b). Any other interpretation of Section 1926(b) would read out of the statute the requirement that the water service "be curtailed or limited by inclusion of the area" in an annexation. *Id.* Thus, annexation alone does not breach Section 1926(b) unless that action also curtails or limits the water district's service in the annexed area. *Id.*

Numerous courts (and Douglas-4's own counsel) have adopted this interpretation. As one court noted, "a municipality's annexation of property located within a rural water association does not, of itself, remove it from the water district for §1926(b) purposes." *Village of Grafton v. Rural Lorain Cty. Water Auth.*, 316 F.Supp.2d 568, 571 (E.D. Ohio 2004). Likewise, Douglas-4's attorney admitted to its members that "Eudora has the right to annex our territory into the city, but by federal statute, which cannot be overruled by state law, it does not have the right to prevent the district's continuing to serve all water needs of its territory, despite the city annexation." *See* Doc. 152-20 at p.1. Thus, according to *Village of Grafton* and Douglas-4's own counsel, "Eudora has the right to annex [Douglas-4's] territory into the city" under Section

1926(b) unless it prevents Douglas-4from "continuing to serve all water needs of its territory. . . ." *Id.* *See also Rural Water Dist. No. 1, Ellsworth County, Kansas v. City of Wilson, Kansas*, 211 F.Supp.2d 1324, 1326 (D. Kan. 2002) (same).

The Tenth Circuit agrees that annexation alone does not violate Section 1926(b). It only prohibits the use of annexation "as a springboard for providing water service to the area, and thereby limit[ing] the service made available by" a protected water district. *Glenpool Util. Serv. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988). Under *Glenpool*, a city may annex land within a water district's protected service area; but it cannot use the annexation as springboard to compete with a rural water district's service. *Id.* Likewise, this Court held that "annexation alone does not limit or curtail water service" in violation of Section 1926(b). Thus, unless the City's alleged threats and solicitations to provide water service legally curtail or limit Douglas-4's service in the affected area, no Section 1926(b) violation occurred.

2. Douglas-4's Allegations that the City "Sought to Compel" the Release of Customers or Made Threats regarding Service Are not Section 1926(b) Violations.

Even if the City had actually "sought to compel" Douglas-4's release of certain customers or made threats regarding water service (as Douglas-4 alleged), this action is not a service curtailment prohibited under Section 1926(b). Douglas-4 claims repeatedly that the City violated Section 1926(b) because it "has sought to compel Douglas-4 to release certain service areas and potential customers to the City" and threatened to provide water service in the affected area. *See* Doc. 1 at p. 3 & Doc. 95 at p. 3. This statement lacks any factual or legal support. Even if true, however, it would not constitute a "curtailment" of service.

Douglas-4 ignores the substantial difference between actually curtailing service in a protected service area – which is a Section 1926(b) violation – and threatening, contemplating, or

even wishing to do so. This distinction is vital, not only to this case but to the entire fabric of Section 1926(b) litigation. "By enacting §1926(b), Congress intended to protect rural water districts from competition to encourage rural water development and to provide greater security for and thereby increase the likelihood of repayment of FmHA loans." *Post Rock*, 243 F.3d 1263, 1269 (10th Cir. 2001). Actual curtailment of a water district's service runs contrary to this purpose, creating the competition in a protected service area expressly prohibited by Section 1926(b). *See* 7 U.S.C. §1926(b) (prohibiting water service in a protected area from being actually "curtailed or limited by" a city) .

A city does not compete with a protected water district, however, by evaluating its water service options or by merely asserting rights in correspondence or conversation. Nor do offers to purchase service areas or potential customers from a water district constitute competition in violation of Section 1926(b). Likewise, any threats by the City to provide water service in the affected area (even if true) do not limit or curtail Douglas-4's service. As this Court eloquently stated, "threatened harm is not enough for a claim for damages as asserted by District 4, even though it is enough for declaratory relief. Though this Court has found a number of cases that decide actions for declaratory relief based on threatened harm, it has not found any that have granted damages or injunctive relief for threatened harm pursuant to §1926(b)." *See* Doc. 71 at pp. 5-6. For these reasons, and given the clear statutory language of Section 1926(b), threats and solicitations to provide water service (even if true) cannot "curtail or limit" such service in violation of Section 1926(b).

3. The Alleged Threats and Solicitations Did Not Legally Curtail or Limit Water Service, Thus Causing the Failure of Douglas-4's Section 1983 Claim.

Because this Court agreed with the City that neither annexation nor threats/solicitations regarding water service actually "curtail or limit" service in violation of Section 1926(b), the City merited summary judgment on Douglas-4's Section 1983 claim. This Court incorrectly denied summary judgment, however, and presented this claim to the jury based on an erroneous attempt to distinguish its own holding. Specifically, this Court seems to believe that the legal rights allegedly asserted by the City – de-annexation of the Garber property and enforcement of the City's appraisal rights under K.S.A. 12-527 – fall outside of its own legal conclusion and themselves constitute "'curtailment and limitation' under the statute."

The Court's conclusion is wrong, as its own legal reasoning shows. The two claims relied on by this Court to save Douglas-4's Section 1983 claim are not actual acts of curtailment or even threatened curtailment. Both parties admit that the City never de-annexed the Garber property nor did it enforce (or even try to enforce) any supposed right to "take" property under K.S.A. 12-527. 7 U.S.C. §1926(b) is clear – threatened harm is not enough" to support a Section 1926(b) violation.

A brief description of the City's two supposed threats, as alleged by Douglas-4, confirms this conclusion. First, Doug Garber testified that the City's former Administrator informed him that the City could possibly de-annex his property if prohibited from providing water service to it. *See* Trial Transcript, Volume 4, pp.1122-1124. Raising the potential for de-annexation did not prevent Garber from using Douglas-4 water. Garber admits that the City did not threaten de-annexation to prevent him from using Douglas-4's water. *Id.* Instead, the City actually encouraged Garber to use Douglas-4 for his water needs. *Id.* Thus, these actions (even when

construed in Douglas-4's favor) did not limit or curtail Douglas-4's water service in the affected area.

Furthermore, the City has the legal right to de-annex land, especially when keeping territory within its boundaries would entail substantial costs. K.S.A. 12-504. For instance, Kansas law requires cities to provide adequate water for fire protection to annexed properties. *Post Rock*, 243 F.3d at 1272; K.S.A. 80-1513. According to this Court, however, Douglas-4 need not provide water adequate for fire protection in the affected area even if it is the sole provider of potable water on that land under Section 1926(b). *See* Trial Transcript, Volume 7 at pp. 1603-04 & Doc. 388 at p.23. Thus, if raising the potential of de-annexation violates Section 1926(b), this Court would: (a) prevent the City from even discussing a legally authorized action; and (b) force it to provide water for fire protection to the affected area without receiving any water sales to offset that cost.

Finally, Douglas-4, who still argues that annexation alone violates Section 1926(b), now argues that de-annexation of protected land also alone violates Section 1926(b). Such arguments are contradictory and merit rejection.

The second alleged "threat" came from the City's attorneys, who wrote a letter to Douglas-4's counsel on September 18, 2007 requesting that he appoint appraisers to value Douglas-4's assets in the affected area pursuant to K.S.A. 12-527. The relevant portion of that allegedly threatening letter is as follows:

> If the District intends to comply with K.S.A. 12-527, I would ask that you name your appraiser on or before October 1, 2007. If the District has not done so by that time, I will assume the District does not intend to comply with K.S.A. 12-527 and proceed to file the appropriate pleadings to compel the District's compliance.

See September 18, 2007 Letter.

This letter between counsel regarding asset appraisal cannot actually curtail or limit Douglas-4's water service. K.S.A. 12-527 provides a mechanism through which municipalities can purchase assets from a water district. K.S.A. 12-527. Before any purchase can occur, however, the parties must agree on the assets' value. If they cannot reach agreement, the statute establishes a procedure for determining value through independent appraisals. K.S.A. 12-527(a). The City and Douglas-4 had been discussing a possible purchase price for Douglas-4's assets in the affected area since Douglas-4's counsel proposed such an arrangement in November 2006. A letter pushing to resolve ten months of negotiations through the appraisal procedure under K.S.A. 12-527 is hardly a threat, and certainly did not "curtail or limit" Douglas-4's water service.

Even if this letter could be read as a threat to force Douglas-4 to sell its assets through litigation (which it was not), that conclusion does not change the dispositive point. **At worst, the September 18 letter was only a threat**. The City did not file suit nor did it seize (or attempt to seize) Douglas-4's property. "[T]hreatened harm is not enough for a" Section 1926(b) violation." *See* Doc. 71 at pp. 5-6. The threat of litigation to begin the appraisal process does not actually curtail water service. Thus, neither the September 18 letter nor any other correspondence can support Douglas-4's Section 1983 claim.

In short, the entire basis for Douglas-4's Section 1983 claim and this Court's refusal to grant summary judgment on this claim is: (a) an assertion of the City's right to de-annex the Garber property; and (b) an assertion of the City's right to invoke a statutory appraisal process to value property which Douglas-4 sought to sell. In short, 7 U.S.C. §1926(b) bars the actual curtailment of water service on protected land, not the mere assertion of rights inconsistent with

Douglas-4's over-reaching claims. Lacking any evidence of an actual curtailment, Douglas-4's Section 1983 claim must fail.

C. In the Alternative, the City Merits a New Trial Because the Court Admitted Irrelevant Evidence of the City's Alleged Threats.

As the previous section shows, Douglas-4 alleged that the City violated Section 1926(b) by annexing the affected area or threatening/soliciting to "curtail or limit" Douglas-4's water service to that land. Because those actions do not violate Section 1926(b), the Court erred in denying the City's summary judgment motion and its motion for directed verdict on Douglas-4's Section 1983 claim.

1. The City Properly Preserved Its Objection to the Admission of this Evidence.

If the Court could find enough evidence to keep this claim alive, it should nonetheless order a new trial based on: (a) the harmful admission of evidence regarding the City's alleged threats; and (b) the clearly improper use of that evidence in argument. The City raised numerous objections to the admission of this evidence both before and during trial. First, through pre-trial motions in limine, the City sought exclusion of its attorney's letters regarding water service and possible actions under K.S.A. 12-527. *See* Doc. 297 at p. 1. These letters included: (a) the September 18, 2007 letter from the City's attorney Curt Tideman regarding K.S.A. 12-527 ("the Tideman letter"); and (b) an August 2007 letter from the City's attorney David Waters to Doug Garber's attorney regarding the potential for Section 1926(b) protection in the affected area ("the Waters letter"). *See* Transcript of Motion in Limine Hearing at p. 57.

The City also moved this Court to exclude testimony regarding the de-annexation comments allegedly made by the City's former administrator to Doug Garber. *See generally* Doc. 198. This Court heard oral argument on both motions and denied them during trial. *See*

Transcript of Motion in Limine Hearing at pp. 44-57 & Trial Transcript, Volume 4 at pp. 831-840. The City also objected unsuccessfully during trial to the admission of this evidence. *See* Trial Transcript, Volume 3 at pp. 821-824; Volume 4 at pp. 831-840; Volume 7 at pp. 1619-1622.

2. The Court Erred by Admitting "Threat" Evidence that Lacked Probative Value and Unduly Prejudiced the Jury against the City.

The Court erred in admitting this evidence at trial. The evidence lacked any relevance or probative value. *See* FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."). Douglas-4 sought two forms of relief at trial: (1) a declaration that it had Section 1926(b) protection over certain property; and (2) damages under Section 1983 for an alleged violation of any Section 1926(b) rights that it had. To establish Section 1926(b) protection, Douglas-4 must "(1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area." *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1197 (10th Cir. 1999). This "threat" evidence is not relevant to either requirement. Furthermore, as shown in the previous section, threats regarding water service cannot "curtail or limit" service so as to trigger a violation of 7 U.S.C. §1926(b). Thus, the "threat" evidence is not relevant to establish Section 1926(b) protection or show violation of such a requirement. As such, it lacks any probative value here.

This evidence also merits exclusion under Rule 403 because it has substantial potential for unfair prejudice. FED. R. EVID. 403. Douglas-4 did not use this evidence to show an actual curtailment of its water service. Instead, Douglas-4 was allowed to distort this evidence to the jury as a sign of the City's supposed bad intentions. Instead of offering the required evidence to show Section 1926(b) protection or violations, Douglas-4 used this evidence to inflame the jury and obtain a verdict based on unfair prejudices against the City. In fact, this testimony even

caused the Court to express concerns of "jury confusion" about the real issues in the case. *See* Trial Transcript Vol.3 at pp. 823-24. Indeed, Douglas-4's counsel repeatedly mischaracterized both the facts and the law surrounding the City's assertion of its legal rights in the presence of the jury.

A good example of Douglas-4's improper use of this evidence is in its closing argument. Douglas-4 used the Waters Letter's discussion of the City's possible liability under Section 1926(b) to claim that the City had thereby admitted such liability and thus worked to illegally scheme against Douglas-4 in violation of that statute. Specifically, Douglas-4's counsel argued "in their heart of hearts, within the confines of the law firm that represented the City in this case, they early on knew, determined, researched, and found out that the City was indeed bound by 1926(b) and precluded from providing water service in competition with the Rural Water District. They knew that." *See* Trial Transcript, Vol.7 at pp. 1644-45. "Being aware of it, [the City's law firm] said—or embarked upon a plan to try to circumvent the statute." *Id.*

To present clearly Douglas-4's improper use of this evidence, the following is an extended excerpt from its closing argument.

> This is a very rare and unusual letter. The reason that it's so rare is that it was intended to be confidential, it was intended to be secret, and it was never intended for me to read or to show you in case a trial were later to occur. This is a confidential letter from one lawyer to another one seeking assistance in an effort to circumvent a federal statute. We only got our hands on this letter because Mr. Garber got his hands on it through a fax from his lawyer. I served him with a subpoena and I got the letter.
>
> As Mr. Schultz pointed out, our prior request for copies of this letter through the Open Records Act, we didn't get any. And if you look very carefully at the letter you won't see any carbon copies, there's no carbon copy to the mayor, there's no carbon copy to Ms. Beatty. I submit to you that the reason for that is the moment Ms. Beatty receives it, it becomes a City document. I submit it's an Open Records Act request and they have to give it to me. So they didn't give it to Ms. Beatty, they didn't give it to the mayor. This was intended to be secret.

> Now, what is their own secret analysis regarding 1926(b)? This letter is a very detailed research of 1926(b). And they reached the conclusion unless the RWD drops its threat of litigation, it appears that 1926(b) will prevent the City from providing water service to Fairfield development unless—it says—unless your client can show, they're putting the burden on Mr. Garber, hey, Mr. Garber if you can figure out a way to get around the statute, such as maybe the Water District's charges are too high, maybe they're confiscatory, we'll try to figure out something and we will help you. But they acknowledged what the law was right up front.
>
> Now today are they challenging that? Sure they were. But in their own secret memorandums and as a result of their own research how did they feel about 1926(b) back in 2007? They knew it was a valid statute. The only way they were seeking to get around that statute was via some kind of cooperative arrangement with Mr. Garber.
>
> Now, that began what I referred to in my opening statement as the secret plan. The secret plan really starts out with supplying Ms. Theisen and Mr. Garber with phony information.

Trial Transcript, Vol.7 at pp. 1650-52.

Douglas-4's evidence and closing argument are replete with numerous additional examples of its use of this evidence to create an unfair prejudice against the City. These excerpts reveal clearly that the evidence lacked any probative value and elicited substantial unfair prejudice against the City. As such, the Court clearly erred in admitting this evidence at trial.

Moreover, even if they were relevant to any issue before the jury, the other attorney letters constitute inadmissible settlement negotiations under Rule 408 of the Federal Rules of Evidence. The legislative history of Rule 408 indicates that its purpose is to encourage settlements. *See* S. Rept. No. 93-1277 for H.R. 5463 (Pub. L. No. 93-595) (1974). Congress recognized that (without Rule 408) the fear of having a party's statements made in settlement negotiations used against it at trial would impede settlements. *Central Soya Co. Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982). "The philosophy of the Rule is to allow the parties to drop their guard and to talk freely and loosely with-out fear that a concession made to

advance negotiations will be used (against them) at trial." SALZBERG AND REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, p. 191 (3d ed. 1982)

The attorney letters at issue here fall clearly within the letter and spirit of inadmissible settlement discussions under Rule 408. Douglas-4's lead counsel even admitted at trial that the parties through these letters "are negotiating. They are trying to resolve the issue." *See* Trial Transcript, Vol.7 at p. 1645. Thus, to avoid the very evil that Rule 408 seeks to prevent – the use of the City's settlement statements against it at trial – the Court should grant the City a new trial based on the improper admission of these settlement letters.

This error is not a harmless one. The trial excerpts reveal that Douglas-4 relied exclusively (and at minimum heavily) on the "threat" evidence to support its claim that the City violated section 1926(b). Douglas-4 also tried to convince the jury that the letters from the City's counsel were binding admissions regarding Section 1926(b) protection in the affected area, even though the letters had absolutely no bearing on whether Douglas-4 satisfied both parts of the *Sequoyah County* test. Given the primary importance placed on this improper evidence at trial by Douglas-4, this Court's improper admission of this evidence was harmful error that mandates a new trial.

III. The City Also Merits a New Trial Because the Court Erroneously Placed the Burden of Proof on the City, not Douglas-4, to Show that Douglas-4 "Made Service Available" to the Affected Area under *Post Rock*.

A. Douglas-4 Bears the Burden of Showing that It Made Service Available to the Garber Property, a Burden Which Includes Proving the Reasonableness of Its Water Service Costs.

This Court erred by placing the burden of proof on the City to prove that Douglas-4 did not "make service available" to the Garber property by providing water at non-confiscatory rates. *See Post Rock*, 243 F.3d 1263, 1271-72 (10th Cir. 2001). The *Post Rock* Court held that a rural

water district has not "made service available" to an area, and thus is not entitled to Section 1926(b) protection there, if it only offered water service at "unreasonable, excessive, or confiscatory" rates. *Id.* at 1271. Nonetheless, this Court held that the *Post Rock* test is an affirmative defense against a Section 1926(b) claim, which would place the burden on the City to prove that Douglas-4's rates in the affected area were confiscatory. *See* Doc. 388 at p.22.

The Court erred in this conclusion. *Post Rock* explicitly holds that, if a district did not make water available at non-confiscatory rates, then it failed to "make service available" as required in *Sequoyah County* to obtain Section 1926(b) protection. Specifically, the *Post Rock* court states:

> even though a rural water district 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,'" **the cost of those services may be so excessive that it has not made those services "available" under §1926(b)**. . . . There is some point at which costs become so high that assessing them upon the user constitutes a practical deprivation of service. Just as there are limits on how long a period of time a water district may take to provide service (i.e. a "reasonable amount of time"), so **there are limits on how much it can charge for that service and still be considered to have "made [it] available."**

Post Rock, 243 F.3d at 1271. Thus, under *Post Rock*, if the cost of a water district's service is confiscatory, it fails the second part of the *Sequoyah County* test because "the court should conclude that the water district has not "provided or made [service] available." *Id.* at 1272.

As part of the *Sequoyah County* "made service available" requirement, the *Post Rock* test is not an affirmative defense. The water district seeking Section 1926(b) protection bears the burden of showing that it "made service available" to the area for which such protection is claimed. *Sequoyah County*, 191 F.3d at 1196-97. Thus, as a required component of establishing Section 1926(b) protection for federally-indebted water districts, Douglas-4 bears the burden of proving that its water rates are non-confiscatory under *Post Rock*. *Id.* *See also North Alamo*

Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996) ("To secure the protections of §1926(b) **the Utility must establish** that (1) it has a continuing indebtedness to the FmHA, and (2) the City has encroached on an area to which the Utility "made service available.") (emphasis added); *Rural Water Dist. No. 1 v. City of Ellsworth*, 995 F. Supp. 1164, 1168 (D. Kan. 1997) (same).

The language in *Post Rock* does not relieve Douglas-4 of the burden clearly placed on it by this Court in *Sequoyah County*. The Tenth Circuit can reverse its precedent and shift the burden of proof only through clear and unequivocal language from an en banc court. A three-judge panel cannot disregard or overrule circuit precedent. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990).

Post Rock was decided by a three-judge panel that did not shift the burden of proof from Douglas-4. Douglas-4 relies on one sentence taken out of context in its effort to place the burden of proof on the City. The *Post Rock* court stated that "if the city can show that Post Rock's rates or assessments were unreasonable, excessive, and confiscatory, then the water district has not made services available under §1926(b)." *Post Rock*, 243 F.3d at 1271. *Post Rock* never mentions the word "burden" (or "affirmative defense") in its opinion.

Such an omission is hardly surprising – *Post Rock* is a case about deciding whether a district's water costs are relevant to the "made service available" requirement, not a case about shifting burdens. *Post Rock*, 243 F.3d at 1271-72. Thus, because *Post Rock* was decided by a three-judge panel and did not shift the burden of proof on the "made service available" test, Douglas-4 bears the burden of proving that it "made service available" to the Garber property by providing water at non-confiscatory prices.

This legal error greatly prejudiced the City, thus mandating a new trial on all claims. In determining whether a water district's pricing is unreasonable, excessive or confiscatory, this Court considers whether the pricing: (1) allows the district to yield more than a fair profit; (2) establishes a rate that is disproportionate to the services rendered; (3) is followed by other, similarly situated districts; and (4) establishes an arbitrary classification between various users. *Post Rock*, 243 F.3d at 1270-71 (citing *Shawnee Hills Mobile Homes, Inc. v. Rural Water District*, 217 Kan. 421, 537 P.2d 210 (1975)).

Douglas-4 offered no evidence on any of these factors at trial. In fact, it offered no evidence at all of the reasonable, non-excessive, or non-confiscatory nature of its pricing, instead relying only on the burden of proof misapplied by this Court. Rather, the City offered the only evidence regarding Douglas-4's rates or the *Post Rock* test, the results of a pricing survey conducted by Douglas-4 itself. *See* Doc. 152-14; Doc. 152-15; 152-16. The rates in this survey applied at the time of the annexations and when Garber first made his request for water service from Douglas-4. *Id*. *See also Post Rock*, 243 F.3d at 1271 (holding that the relevant prices are those charged by the water district when water service is first requested in the annexed area).

These rates show the confiscatory nature of Douglas-4's water pricing. For instance, Douglas-4 charged $58.46 for 6000 gallons of water – the 51st highest charge out of the 365 water providers covered in this comprehensive study. *Id*. Douglas-4's had the second highest benefit unit price ($7700) out of the 352 water providers in the study. *Id*.

Douglas-4 also forced new customers to cover all of the costs for onsite and offsite improvements, including the line extensions required for the new water service. *Id*. Douglas-4 refused to refund any of a new customer's line extension costs, even when subsequent customers

used the same line. *Id*. Under these prices, Garber would have paid $320,400 to provide water service from Douglas-4 to 22 new homes. *Id*.

Douglas-4's own Board members essentially admitted that these prices were confiscatory. According to Richard Morantz (a Douglas-4 Board member), the Douglas-4 Board voted reduced its water costs on September 12, 2007 "in an attempt to avoid confiscatory pricing" and to "ensure that we were being non-confiscatory in our pricing." *See* Doc. 152-18 at pp. 2-3. Douglas-4's Administrator's Report confirms this conclusion, noting that Douglas-4 reduced its costs and fees to avoid its pre-existing confiscatory pricing.

In short, Douglas-4's own statements and survey (the only pricing evidence admitted at trial) both confirm the confiscatory nature of Douglas-4's pricing at the time Doug Garber first requested Douglas-4's water service in the affected area. Thus, this Court's improper placement of the *Post Rock* burden on the City resulted in clear prejudice that mandates a new trial.

IV. This Court Erred by not Entering Judgment for the City on the Section 1983 Claims for the Lawrence Memorial Hospital, the LLC, and the Grinnell Properties Because Douglas-4 Offered No Evidence that the City Limited or Curtailed Water Service to These Lands.

A. The Court Acknowledged that No Evidentiary Basis Existed for these Section 1983 Verdicts

Douglas-4 cannot sustain its Section 1983 verdict regarding the Hospital, LLC, and the Grinnell properties because it offered no evidence that the City "curtailed or limited" Douglas-4's water service to those lands. As mentioned previously, the City merits judgment in its favor on all of Douglas-4's Section 1983 claims because annexation, threats, and solicitations cannot alone curtail or limit Douglas-4's water service in the affected area. *Supra* at 19-28.

Regardless, however, Douglas-4 cannot maintain its verdict regarding the Hospital, LLC, and the Grinnell properties because even its "threat" evidence pertained only to the Garber land.

Douglas-4 did not offer one piece of evidence at trial or during summary judgment briefing supporting its claim that the City curtailed or limited water service (or even threatened to do so) on these three properties.

This Court specifically recognized this evidentiary omission. It acknowledged that the only relevant evidence remaining on this issue was Douglas-4's allegations that "the City has effectively curtailed or limited Rural's ability to **provide water to the Garber property.**" *See* Doc. 256 at p.50 (emphasis added). Thus, even if these supposed threats regarding the Garber property constitute Section 1926(b) violations (which they did not), this Court admits that the violations do not apply to the Hospital, LLC, or the Grinnell properties.

CONCLUSION

For all of the foregoing reasons, the City of Eudora, Kansas respectfully requests that the Court enter judgment in the City's favor on Douglas-4's claims under 7 U.S.C. §1926(b) and 42 U.S.C. §1983. In the alternative, the City respectfully requests a new jury trial on both of these claims in which this Court: (a) properly instructs the jury that Douglas-4 must prove that its federal loan guaranty was "necessary" under K.S.A. 82a-619(g); (b) properly instructs the jury that Douglas-4 bears the burden of showing that its water prices at the time Doug Garber first requested water in the affected area were non-confiscatory; and (c) excludes from evidence all letters from the City's attorneys and testimony regarding the former City Administrator's comments to Doug Garber on the potential for de-annexation.

Respectfully submitted,

LATHROP & GAGE LLP

/s/ Curtis L. Tideman
Curtis Tideman, KS# 13433
David R. Frye, KS# 18133
Jeffrey R. King, KS# 20735
10851 Mastin Blvd., #1000
Overland Park, KS 66210-1669
(913) 451-5100 FAX (913) 451-0875
ATTORNEYS FOR DEFENDANT CITY OF EUDORA, KANSAS

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

John W. Nitcher
Riling, Burkhead & Nitcher, Chartered
808 Massachusetts Street
PO Box B
Lawrence, KS 66044
jnitcher@rilinglaw.com

Steven M. Harris
Michael D. Davis
Doyle Harris Davis & Haughey
1350 South Boulder, Suite 700
Tulsa, OK 74119-3216
steve.harris@1926blaw.com
mike.davis@1926blaw.com

Michael C. Kirkham
Sanders, Conkright & Warren, LLP
9401 Indian Creek Parkway, Suite 1250
Overland Park, KS 66210
m.kirkham@sanconwar.com

/s/ Curtis L. Tideman
Curtis L. Tideman