BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Moore Bend Water Company, Inc. and Moore Bend Water Utility, LLC for Authority of Moore Bend Water Company Inc. to Sell Certain Assets to Moore Bend Water Utility, LLC.	)))))	**File No. WM-2012-0335**

STAFF'S BRIEF

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through its attorney, and submits *Staff's Brief* to the Missouri Public Service Commission ("Commission").

Overview

In their *Joint Application*, Moore Bend Water Company, Inc. ("Moore Bend") and Moore Bend Water Utility, LLC, ("MBU") (collectively hereafter referenced as "Joint Applicants") request authority for Moore Bend to sell certain assets to MBU, pursuant to section 393.190 of the Revised Statutes of Missouri and Commission Rules 4 CSR 240-3.605 and 4 CSR 240-3.310. During the prehearing conference on August 24, 2012, the Commission asked the parties to submit briefs on two specific issues raised during the prehearing conference. Staff argues that the issue related to the type of easement that exists is not properly before the Commission because it is a matter resolved by the circuit courts. However, the issue properly before the Commission is whether or not approval of the *Joint Application* is not detrimental to the public interest. Staff is unaware of any rationale under which MBU owning and operating the system, including all rights of access currently possessed by Moore Bend, would be detrimental to the public interest. Still, Staff will address both issues raised by the Commission.

First, the Commission inquired into whether the Joint Applicants bear the burden of proof in this case. Staff asserts that the burden of proof in this matter is placed on the Joint Applicants to establish that this *Joint Application* is not detrimental to the public interest. Staff argues that the Joint Applicants have met that burden in this case.

The second issue is whether legal access to the well sites currently exists under legal theories other than a written easement or purchase of the land, with a specific inquiry into the existence of a common law easement. Staff argues that there are several legal theories under which legal access currently exists so that it may be transferred to the proposed new utility, MBU, and therefore the Commission may make a determination on whether this *Joint Application* is not detrimental to the public interest. The first theory Staff evaluates is a common law easement, then Staff addresses the theory of adverse possession, specifically an easement by prescription; Staff next evaluates the theories of an implied easement and common law dedication.

Staff notes that disputes of this sort typically arise between property owners where treatment of the land has changed for some reason and one party sues the other in circuit court. As a result, the circuit courts make the determination as to what type of easement applies in property disputes, not the Commission. Still, while the determination of which theory applies in this situation is left to the courts, there are legal theories under which the utility currently has legal access to the well sites, making it acceptable and lawful for the Commission to make a determination that this approval of this *Joint Application* is not detrimental to the public interest. In addition, the Commission should find that the approval of this *Joint Application* is not detrimental

to the public interest despite the type of easement or whether it exists, as there is support in the record that the status quo will continue with the new ownership, thus there is not detriment.

Here, there is no dispute between the landowner and utility owner whether the utility has had access. Instead, the argument is that the potential purchaser should take steps to obtain a different form of legal title, either by purchase or a written legal easement, than what currently exists. The focus on this case should be whether the assets may be transferred to a new entity and whether that transfer is not detrimental to the public interest.

Staff asserts that the issue raised by the Office of the Public Counsel ("Public Counsel") is whether the utility has legal access only by written legal easement or through a purchase of the land around the well sites; Staff argues that legal access exists under several other legal theories and such access would be transferred to the potential purchaser, MBU, as part of this case. Since the legal access will continue, the Commission need not determine what type of easement exists, only that the Joint Application is not detrimental to the public interest, as there is sufficient evidence to support such a determination.

I. Burden of Proof

During the August 24, 2012, prehearing conference in this matter, Public Counsel raised a question as to whether the burden of proof regarding whether the request is "not detrimental to the public interest"[1] lies with the Joint Applicants. The Judge ordered the parties to file memorandum responding to the question.

[1] *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo banc 1934). Stating*: "*The state of Maryland has an identical statute with ours, and the Supreme Court of that state in

Section 386.430 RSMo states,"

> In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or seeking to set aside any determination, requirement, direction or order of said commission, to show by clear and satisfactory evidence that the determination, requirement, direction or order of the commission complained of is unreasonable or unlawful as the case may be.

In cases brought under Section 393.190.1 and the Commission's regulations, the applicant bears the burden of proof.[2] That burden does not shift.[3] Thus, a failure of proof requires a finding against the applicant. The Commission may not withhold its approval of the proposed transaction unless the applicant fails in their burden to demonstrate that the transaction is not detrimental to the public interest.[4]

Staff has ascertained from rules and case law that the Joint Applicants bear the burden of proof that their Joint Application is not detrimental to the public interest. Unless the Applicants fail in their burden to demonstrate that the transaction is not detrimental to the public interest, the Commission may not withhold approval of the

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the case of Electric Public Utilities Co. v. Public Service Commission, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public." No Missouri court has deviated from that ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190.

[2] Report and Order, *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, issued October 6, 2004, effective October 16, 2004. See also Report and Order on Rehearing, issued February 10, 2005, effective February 20, 2005, reiterating the standard, 2005 WL 433375 (Mo.P.S.C.) Re Union Electric Company, d/b/a AmerenUE. (Internal citations omitted).

[3] *Id*.

[4] Report and Order, *In the Matter of the Joint Application of Stoddard County Seward Company, Inc., R.D. Sewer Co., L.L.C. and the Staff of the Missouri Public Service Commission for an Order Authorizing Stoddard County Sewer Co., Inc. to Transfer its Assets to R.D. Sewer Co., L.L.C., and for an Interim Rate Increase.* Case No. SO-2008-0289, issued October 23, 2008, effective November 2, 2008.

proposed transaction.[5] Staff goes on to note that the detriment is determined by performing a balancing test where attendant benefits are weighed against direct or indirect effects of the transaction that would diminish the provision of safe or adequate service or that would tend to make rates less just or less reasonable.[6]

Staff argues that the Joint Applicants have met their burden in this case. In their application, the Joint Applicants provided several points to support their claim that the Application is not detrimental to the public interest:

(a) The assets of Moore Bend will be acquired by MBU which will become subject to the jurisdiction of the Commission.

(b) The manager of MBU, Hollis H. "Bert" Brower, Jr. has considerable experience and expertise in providing water utility services to residents of southwest Missouri; and

(c) MBU will be fully qualified, in all respects to own and operate the systems to be sold pursuant to the Agreement and to otherwise provide a safe, reliable and affordable water service

Further, MBU goes on to state that the customers will pay the same rates they have been paying at the time of closing until such time as those rates may be modified by law.

The single detriment asserted by the Public Counsel is that the MBU will not have "legal access" to the wells should the Application be granted. "Legal access" is defined by Public Counsel as a written legal easement or land purchase. Staff argues that lack of "legal access" as defined by the Public Counsel is exactly what

[5] *Id*.
[6] *Id.*

exists currently. Public Counsel is asking MBU, an as yet unregulated entity, to take steps that Moore Bend has not been required to take as a regulated entity. If the Commission were to grant this Application that fact would not change, therefore "legal access" would not be a direct or indirect effect of Commission action. Where the presently existing circumstances will not change, the transfer cannot be said to be detrimental to the public interest.

Therefore, Staff argues that the attendant benefits of the transaction of remaining a Commission-regulated utility and having a knowledgeable and experienced manager, who is able to provide safe, reliable and affordable water service, without a change in rates, far outweigh the Public Counsel's detriment, since that "detriment" is the status quo ante. Staff further argues that the Joint Applicants have met their burden of proof in this matter that approval of the *Joint Application* is not detrimental to the public interest.

II. Easements

The Commission also asked the Parties to brief the issue of whether a common law easement exists in this case.

Background Information for Easements

A history of the utility obtained from public information is helpful in addressing this issue. According to the Missouri Secretary of State's ("MSOS") website, Moore Bend Water Co., Inc. was created in September 1996 by Mr. Mickey Plummer. [7] In Commission Case WO2000-4, Moore Bend Water Company changed to Moore Bend Water Co, Inc. ("Moore Bend"). According to the Annual Reports filed with the MSOS, stock sales occurred in 2001, 2007 and 2009, with the current owner, Mr. Tom Tyre,

[7] Brenda J. Plummer and John W. W. Plummer are also listed, but Mickey Plummer has been involved in this case and will be used as the reference for the owner in an effort to be consistent.

obtaining the stock in 2009. This history is important to highlight that the utility has been providing utility service as Moore Bend, possibly since 1996 but certainly since the WO2000-4 case before the Commission in 2000. As such, Moore Bend has been operating without incident for at least twelve (12) and possibly sixteen (16) years.

Staff's position is that other legal theories exist[8] that support the theory that the utility currently has legal access and therefore any new utility would also acquire that legal access, thereby eliminating the need to obtain a legal written easement or purchase of the land in this current case.[9] Staff argues that this *Joint Application* is not detrimental to the public interest and that the utility has legal access to the utility's well sites under several theories of law and any such access would transfer as part of the *Joint Application*, upon Commission approval. If challenged, the issue of whether or not an easement exists would ultimately be decided by the courts and is not a necessary part of this proceeding. However, the Commission should still approve this *Joint Application* because it is not detrimental to the public interest in that the system will continue to operate with all rights of access currently available to the utility under new ownership. The Commission does not need to determine the type of legal access that exists in order to determine that this *Joint Application* is not detrimental to the public interest, however below Staff argues that several forms of legal access currently exist so that Public Counsel's objections are moot in this case.

[8] Paragraph 5 of *Staff's Response to the Office of the Public Counsel's Response and Motion to Amend Staff's Recommendation.*

[9] Throughout this case, Staff has been agreeable to the concept that the utility purchasing the well site properties or obtaining a legal written easement would make ownership and access a moot issue in the future and is in the public interest; Staff does not agree that it is necessary to obtain either of those legal documents as part of this case.

Legal Analysis

Common Law Easement

"A variety of methods to obtain access to and from parcels of land is available under Missouri law. Common law provides for easements to establish rights-of-way, i.e., easements by implication, prescriptive easements and easements of necessity."[10] "The rights and obligations as well as the requirements for establishing and vacating each such easement or road differ depending upon the type of easement or road at issue."[11] Staff will apply several legal theories to the current situation, including common law easement, easement by prescription, implied easement and common law dedication to demonstrate that legal access currently exists.

First, Staff will address the Commission's specific inquiry into a common law easement. The common law remedy contemplates the severance of an estate, which leaves the owner of one of the severed parcels without means of ingress or egress. The law implies an easement in favor of the landlocked parcel.[12] A prerequisite for common law relief is a showing the plaintiff and defendant have a common source of title to their properties. The plaintiff then would have to show a subsequent deprivation of access to a public road.[13]

For a common law easement to exist in the current case, the parties involved would have to first show a common source of title. In this case, the land and the utility were at one time under Mr. Plummer's common ownership. Under this theory,

[10] *Howell v. Rickard, 295 S.W. 3d 602, 607 (Mo. Ct. App. 2009)* quoting: *Rogers v. Brockland,* 889 S.W.2d 827, 829 (Mo. banc 1994).
[11] *Id.*
[12] *King v. Jack Cooper Transp. Co., Inc.*, 708 S.W.2d 194, 197 (Mo. Ct. App. 1986).
[13] *McDougall v. Castelli,* 501 S.W.2d 855, 858–59 (Mo.App.1973); *Causey v. Williams,* 398 S.W.2d 190, 197–98 (Mo.App.1965).

the separation of the property occurred when Mr. Plummer first sold the stock of the utility and retained ownership of the land in 2001. As Staff understands, the utility has continued to have access regardless of who owns the stock of the utility. This theory is further supported by the assumed fact that in order to access the wells, the utility must encroach on the property surrounding those wells. As a result of such encroachment, the wells are landlocked and do not carry with them ingress and egress access. So, when the utility uses them, it must utilize portions of the property owned by Mr. Plummer. While there may be difficulty between the parties in the future should Mr. Plummer deny the utility access, no such denial has occurred to date. Still, it is foreseeable that the utility has obtained a common law easement as defined in case law, but other theories exist as well.

Prescriptive Easement

One alternative legal theory that is well supported is that Moore Bend possesses a prescriptive easement to the well sites. Whether the use of the land establishes a prescriptive easement is a fact question to be inferred from the circumstances and the nature and character of the use.[14] To establish a prescriptive easement, it is necessary to show use that has been continuous, uninterrupted, visible and adverse for a period of ten years.[15] For use to be continuous it is not necessary that it be constant. What is necessary, however, is that there be no break in the essential attitude of the mind required for adverse use.[16]

In this case, the public record is clear; the utility has had continuous, uninterrupted, visible access to the well sites for more than ten years. As noted by the

[14] *Whittom v. Alexander-Richardson P'ship*, 851 S.W.2d 504, 508 (Mo. Banc 1993).
[15] *White v. Ruth R. Millington Living Trust,* 785 S.W.2d 782, 784 (Mo.App.1990).
[16] *Jacob v. Brewster* 354 Mo. 729, 190 S.W.2d 894, 899 (1945).

MSOS' website, the Company has been in business in the state of Missouri since 1996. The utility has been operating those wells since that time. The first stock transfer occurred in 2001, the second in 2007 and the most recent in 2009. For more than ten years, water service has continued outside Mr. Plummer's ownership of the utility. The utility has had and continues to have access to the wells. There has been no break or interruption despite multiple owners being in charge of the utility system. So, there has been continued, uninterrupted and visible access for more than ten years. The only remaining concern is whether that use was adverse.

To be adverse the use does not need to be under a belief or claim of right that is legally justified.[17] All that is required for the use to be adverse is non-recognition of the owner's authority to permit or prohibit the continued use of the land.[18] Whether the use of the land establishes a prescriptive easement is a fact question to be inferred from the circumstances and the nature and character of the use.[19]

In this case, there is no recognition from any owner of the utility that Mr. Plummer's permission was required to access the wells. Further, there is no indication that any owner, including Mr. Plummer, was aware that Mr. Plummer could prohibit the continued use of the land where the wells are located. It is apparent from the record that there has never been an issue about the access and use of the land from anyone involved with the property. The utility has consistently acted as though it was lawfully entitled to use the land around the well sites. Staff argues that the elements of a prescriptive easement are met and there is an alternative theory that

[17] *Id.*
[18] *Id.*
[19] *Id.* at 897; *Whittom v. Alexander-Richardson P'ship*, 851 S.W.2d 504, 508 (Mo. Banc 1993).

demonstrates "legal access" which allows the Commission to determine this *Joint Application* is not detrimental to the public interest.

However, while not part of the official record, in this case there has been some indication that Mr. Plummer permitted such access for the same period of time. If there is evidence to support such permission, the Commission should note that a permissive use cannot ripen into an easement.[20] However, if a use has been open, continuous, visible and uninterrupted for a period of longer than ten years, there is a presumption that the use was adverse and under a claim of right and the burden shifts to the landowner to show that the use was in fact permissive.[21]

Staff argues that there is a presumption that a prescriptive easement exists and that Mr. Plummer would bear the burden to demonstrate that permission was granted. There is no evidence of such permission in the record of this case. Staff highlights that any dispute about access to the wells has been dormant until this case. As long as the utility has been operating its water system, it has had access to the well sites, without question. At this time there is a presumption that the use was adverse and a prescriptive easement exists. If such a prescriptive easement exists, then the utility currently has legal access to the well sites and there is no need to delay this proceeding, as the legal access would transfer to the potential owner, MBU.

Implied Easement

Another alternative theory is an implied easement. To establish their right to an easement by implication, one must demonstrate: (1) unity and subsequent separation of title; (2) obvious benefit to the dominant estate and burden to the servient portion of

[20] Miller v. Archdekin, 497 S.W.2d 178, 180 (Mo.1973).
[21] *Homan v. Hutchison,* 817 S.W.2d at 948; *Neale v. Kottwitz,* 769 S.W.2d at 476; *Gill Grain Co. v. Poos,* 707 S.W.2d 434, 437 (Mo.App.W.D.1986); *Burgess v. Sweet,* 662 S.W.2d 916, 918 (Mo.App.E.D.1983).

the premises existing at the time of the conveyance; (3) use of the premises by the common owner in the altered condition long enough before the conveyance under such circumstances as to show that the change was intended to be permanent; and (4) reasonable necessity for the easement.[22] The party seeking to demonstrate the existence of an implied easement bears the burden of demonstrating the existence of all four prerequisites by clear and convincing evidence.[23]

In this case, there is clear and convincing evidence that an easement by implication was established. First, the unity of title was established when Mr. Plummer owned the land and the utility. The subsequent separation occurred when Mr. Plummer sold the stock of the utility to a third party but retained ownership of the land. Secondly, the utility company, the dominant estate, has established an obvious benefit, the provision of water to its customers, while the servient portion of the premises, the land, has been burdened because it is not in use for any other purpose than to provide water to the utility. Mr. Plummer, while owning both the land and the utility, used the land around the well sites for the utility. Since that time, the land has been used for the utility, which demonstrates that such use was intended to follow the utility, not the land or its owner. Mr. Plummer used the wells and the surrounding land for the utility operations, and all of the subsequent owners used the wells and the surrounding land for the utility operations. Such use demonstrates an expectation that that land and the wells would continue to be used for the benefit of the utility. The utility has access to the property surrounding the wells through an implied easement.

[22] *Gerken v. Epps*, 783 S.W.2d 157, 160 (Mo.App. S.D.1990) (cited with approval in *Rogers v. Brockland*, 889 S.W.2d 827, 829 (Mo. banc 1994)).
[23] *Causey v. Williams*, 398 S.W.2d 190, 197 (Mo.App.1965); *Pendleton v. Gundaker*, 381 S.W.2d 849, 851 (Mo.1964).

Common Law Dedication

The final theory that Staff argues may be applicable is a common law dedication. A common law dedication awards the public the use of the land in dispute and is proven by showing: (1) that the owner, by unequivocal action, intended to dedicate the land to public use; (2) that the land dedicated was accepted by the public; and (3) that the land dedicated is used by the public.[24] The intention of the owner to set apart land for public use is the foundation of every dedication.[25] When there is no actual intention, it is possible that an owner's actions may nevertheless evince an intention to dedicate.[26] In such circumstances, because dedication is a theory premised on estoppel rather than on an affirmative grant, the owner can be precluded from resuming rights over the property if the public acts upon the owner's manifestations.[27] The law discussing "public use" is typically related to eminent domain and use for public transportation, but this theory may still apply to the situation at hand because it involves a public utility and the standard is whether approval is not detrimental to the public interest.

Under the theory of common law dedication, it may be argued that Mr. Plummer intended, either by plain implication of his actions or without intention but solely by action, to dedicate the land for public use. After becoming the owner of the Moore Bend in 1996, Mr. Plummer accessed the wells for the benefit of the utility. Since first selling the stock of the utility in 2001, Mr. Plummer unquestionably sold the stock of the utility without selling the land yet allowed the utility to continue its access to the well sites.

[24] *Whittom v. Alexander-Richardson Partnership*, 851S.W. 2d 504 (Mo. 1993) (Citing: *Haertlein, et al., v. Rubin,* 195 S.W.2d 480, 483 (Mo.1946); *Connell, et al. v. Jersey Realty & Investment Co.,* 352 Mo. 1122, 180 S.W.2d 49, 52 (1944)).
[25] *Connell,* 180 S.W.2d at 52.
[26] *Id.*
[27] *Id.* at 52–53.

The utility has had unfettered access to the wells since 2001 and has possessed such access to date. Mr. Plummer's actions demonstrate his intent for the land to be used for the public utility.

The second and third elements of this theory relate to "public use." In this case, "public use" may be argued to include providing access to a public utility to provide service to the public customers. Staff argues that the customers have been receiving the benefit of the land at all relevant times despite who owned the utility. The customers receive their water from those wells; a definite benefit for these ninety customers. The third element is arguably established as well because the land is being used by the public. Even though the customers do not go to the well or directly use the well, they use the land indirectly through the utility. As a result of this analysis, a common law dedication may be deemed to have occurred in this matter, which creates another legal theory whereby Moore Bend currently has legal access to the well sites.

Conclusion

Staff asserts that the burden of proof is on the Joint Applicants to demonstrate that approval of their *Joint Application* is not detrimental to the public interest. Staff argues that the Joint Applicants have met that burden.

Staff further argues that the utility currently has legal access to the land surrounding the well sites through a variety of legal theories and such legal access may be transferred to the potential new utility, MBU, in this case. Based on the record, the utility undeniably has had access to the land for more than ten years and there has never been a dispute until this case; there is no requirement that either utility purchase the system or obtain a written legal easement in order to provide safe and adequate

service. The Commission may make a determination that this transfer is not detrimental to the public interest over the objections made by Public Counsel based on the record in this case.

The issues of the type of easement that exists is not properly before the Commission, however, the issue of whether or not approval of the *Joint Application* is not detrimental to the public interest is properly before the Commission. Public Counsel has failed to provide any rationale for how MBU owning and operating the system, including all rights of access currently possessed by Moore Bend, will be detrimental to the public interest. In contrast, the Joint Applicants have provided sufficient justification that the approval of the *Joint Application* is not detrimental to the public interest. Barring any evidence to support a detriment, the Commission should, based on the record, approve this *Joint Application* because it is not detrimental to the public interest.

WHEREFORE, Staff respectfully submits *Staff's Brief* for the Commission's information and consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed, sent by facsimile or hand-delivered to all counsel of record this 4th day of September, 2012.

/s/ Rachel M. Lewis