

**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) File No. WM-2012-0335
Authority of Moore Bend Water Company,)
Inc. to Sell Certain Assets to Moore Bend)
Water Utility, LLC.)

THE OFFICE OF THE PUBLIC COUNSEL’S MEMORANDUM

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Memorandum states as follows:

BACKGROUND

On April 11, 2012, Moore Bend Water Company, Inc. (Moore Bend) and Moore Bend Water Utility, LLC (MBU) filed a Joint Application with the Missouri Public Service Commission (Commission) requesting authority for Moore Bend to sell certain assets to MBU.

A review of the assets to be acquired revealed that there was no mention of the transfer of the real property where the two wells are located, nor was there any documentation that legal access in the form of easements to the well sites is being transferred to MBU. To this date, no proof of legal access to the well sites has been provided.

It is Public Counsel’s position that the lack of legal access to the wells would greatly affect the utility’s ability to provide safe and adequate service and as a result the proposed transfer is not in the public interest. As a result, Public Counsel requested that the Commission schedule an evidentiary hearing in this matter to determine if the transfer is in the public interest. During the prehearing conference on August 24, 2012, Judge Jones, the Regulatory Law Judge

assigned to this case, suggested the possibility that the matter could be settled if the Commission found that Moore Bend possessed a prescriptive easement to the well site properties. As this issue was discussed for the first time during the prehearing conference, Judge Jones requested that the parties file a memorandum discussing prescriptive easements. Also during the prehearing conference the issue of who held the burden of proof in an asset transfer case was discussed. Judge Jones also requested that the parties discuss the issue of burden of proof in this case.

BURDEN OF PROOF

Asset transfers of most regulated utilities must be approved by the Commission prior to the transfer. Section 393.190.1 RSMo (2011) provides in pertinent part:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. . . .

The Commission recently issued an order in an asset transfer case specifically setting out the approval standard under 393.190.1 as “Not Detrimental to the Public Interest” and clearly stating which party holds the burden of proof:

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.¹

¹ Report and Order, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, issued July 1, 2008, effective July 11, 2008, page 232, citing 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 and 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. (emphasis added)

Consequently, the Commission may not withhold its approval of the proposed transaction unless the Applicants fail in their burden to demonstrate that the transaction is not detrimental to the public interest, and 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 of service or that would tend to make rates less just or less reasonable.²

The Commission's Report and Order in that case was appealed on grounds unrelated to the Commission's determination of the approval standard or which party holds the burden of proof and was ultimately affirmed by the Missouri Supreme Court.³

The Commission has been quite clear that the approval standard of an asset transfer case brought under Section 393.190.1 is that the transaction is not detrimental to the public and it is the applicant that holds the burden of proof.

PRESCRIPTIVE EASEMENT

Judge Jones suggested the parties discuss the possibility that the matter could be settled if the Commission found that Moore Bend possessed a prescriptive easement to the well site properties. The creation of an easement requires a writing with plain, direct and unequivocal language showing the grantor's intent to create a property right in the nature of an easement rather than a revocable license.⁴ Generally, any positive easement that may be expressly created may also be acquired by prescription.⁵ In Missouri, a prescriptive easement requires proof of continuous, uninterrupted, visible, and adverse use which continues for at least ten years.⁶

As argued above, the Commission has found that the applicant bears the burden of proof in an asset transfer case. The lack of legal access to the wells would greatly affect the utility's

² Id., citing *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. Banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980). (emphasis added)

³ *State ex rel. Praxair, Inc. v. Missouri Public Serv. Comm'n*, 344 S.W.3d 178 (Mo. banc 2011).

⁴ 7-60 Thompson on Real Property, Thomas Editions § 60.03.

⁵ 7-60 Thompson on Real Property, Thomas Editions § 60.03.

⁶ *Bateman v. Platte County*, 363 S.W.3d 39, 45 (Mo. 2012), citing *Phillips v. Sommerer*, 917 S.W.2d 636, 638 (Mo. App. 1996).

ability to provide safe and adequate service. A prescriptive easement provides a legal right of access to the real property owned by another. Legal access through the existence of a prescriptive easement to the well sites would be significant evidence in the applicants proving that the transfer is not detrimental to the public. So, it is possible that the matter could be settled if Moore Bend possessed a prescriptive easement to the well site properties which would be transferred to MBU.

However, no evidence of a prior court finding of the existence of a prescriptive easement has been provided by the applicants to this case. So, the real question for discussion is whether the Commission can, on its own, find the existence of a prescriptive easement. In short, the answer is no.

Decisions regarding the existence of a prescriptive easement are decisions of equity regarding the property rights of another. As a limit on the rights of the property owner, prescriptive easements are not favored in the law and courts should grant them only when the required elements have been established by clear and convincing evidence.⁷ Due process dictates that the property owner must be given the opportunity to dispute the claim of the existence of a prescriptive easement. Whether a use was permissive or adverse is an issue involving credibility of the witnesses with respect to what occurred and the trial court is the ultimate judge of witness credibility.⁸

But, the Public Service Commission is not a court.⁹ It is an administrative body with limited statutory powers.

⁷ *Smith v. Chamblin Props., LLC*, 201 S.W.3d 582, 588 (Mo.App. 2006), citing *Tuf Flight Indus., Inc. v. Harris*, 129 S.W.3d 486, 488 (Mo. App. W.D. 2004).

⁸ *Thomas v. King*, 160 S.W.3d 445, 450 (Mo.App. 2005), citing *Phillips v. Sommerer*, 917 S.W.2d 636, 640 (Mo.App. 1996).

⁹ *Gaines v. Gibbs*, 709 S.W.2d 541, 543 (Mo. App. 1986), citing *State ex rel. Wash. Univ. v. Public Service Commission*, 308 Mo. 328, 272 S.W. 971, 972 (1925) and *State ex rel. Kansas City v. Public Service Commission*, 360 Mo. 339, 228 S.W.2d 738, 741[1] (1950).

The Commission is a creature of the legislature and has only such powers as are expressly conferred upon it by statute and those powers reasonably incident thereto. It may not perform the judicial function. It has no power to determine damages, award pecuniary relief, declare or enforce any principle of law or equity.¹⁰

The Missouri Public Service Commission exercises no judicial functions and has no authority to adjudicate and determine individual or personal rights.¹¹ A finding of a prescriptive easement would certainly involve the adjudication and determination of the individual and personal rights of both Moore Bend and the well site property owner. This goes beyond the limited statutory powers granted to the Commission. Therefore, the Commission has no authority to find on its own the existence of a prescriptive easement.

CONCLUSION

A review of the assets to be acquired revealed that there was no mention of the transfer of the real property where the two wells are located, nor was there any documentation that legal access in the form of easements to the well sites is being transferred to MBU. Ultimately, it would be a waste of time and money for the applicants in this case to offer evidence in an attempt to have the Commission make a finding of whether a prescriptive easement exists or not. The property owner is not a party to this case and has had no notice that his property rights may be at issue. The Commission has no jurisdiction over the property owner and has no power to make a determination about the property rights of that owner. As the Commission exercises no judicial functions and has no authority to adjudicate and determine individual or personal rights, the Commission has no authority to find, on its own, the existence of a prescriptive easement.

¹⁰ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980), citing *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666 (Mo. 1950).

¹¹ *State ex rel. Rutledge v. Public Service Co.*, 316 Mo. 233, 239 (Mo. 1926), citing *State ex rel. Railroad v. Pub. Serv. Comm.*, 303 Mo. 1. c. 219 and *Lusk v. Atkinson*, 268 Mo. 1. c. 116-117.

The applicant bears the burden of proof in an asset transfer case. It is Public Counsel's position that the lack of legal access to the wells would greatly affect the utility's ability to provide safe and adequate service and as a result the applicants have failed to meet the burden of proof that the transaction is not detrimental to the public.

WHEREFORE, Public Counsel respectfully submits its Memorandum.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By: _____

Christina L. Baker (#58303)

Senior Public Counsel

PO Box 2230

Jefferson City, MO 65102

(573) 751-5565

(573) 751-5562 FAX

christina.baker@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 31st day of August 2012:

Missouri Public Service Commission

Rachel Lewis
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Rachel.Lewis@psc.mo.gov

Missouri Public Service Commission

Office General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
GenCounsel@psc.mo.gov

Moore Bend Water Company, Inc.

Legal Department
872 Painter Rd.
PO Box 6640
Branson, MO 65615

Moore Bend Water Utility, LLC

David Wieland
1548 E Primrose
Springfield, MO 65804
rachel@wielandlaw.com

/s/ Christina L. Baker
