

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF OREGON**

3 UM 1769

4 In the Matter of

5 MOUNTAIN HOME WATER DISTRICT,

STAFF'S OPENING BRIEF

6 Application to Abandon Water Service and
7 Abandon Water Utility.

8 **I. INTRODUCTION**

9 Staff of the Public Utility Commission of Oregon (Staff) hereby submits its Opening
10 Brief in docket UM 1769. The issue before the Commission in this proceeding is whether
11 Mountain Home Water District's (Mountain Home or Company) Application to Abandon Water
12 Service and Abandon Water Utility (Application) should be granted. Although abandonment of
13 a utility's obligation to serve generally presents a hardship to the utility's customers, as is the
14 case in this proceeding, the hardship to customers must be considered in the context of the
15 hardship to the utility of continued operation and the availability of alternative water sources.

16 Following a review of the circumstances in this case, and in consideration of the fact that
17 alternative water sources are available to current customers, Staff recommends that the
18 Commission grant the Company's Application subject to two conditions. First, Staff
19 recommends that the Company be required to provide water service until the earlier of August 1,
20 2017 or when its last customer has secured an alternative water source. Second, Staff
21 recommends the Commission adopt the Company's proposed alternative condition that it be
22 required to negotiate with any customer in good faith to facilitate access to the property of Dr.
23 Ironside and/or Valerie Meyer, as appropriate, in order to drill and/or maintain an alternative
24 water system on the customers' property.¹

25 ¹ Upon further consideration of the Commission's authority to impose conditions upon a grant of
26 abandonment of a utility's obligation to serve, Staff notes that its second proposed condition is
modified from its recommendation in Reply and Cross-Answering testimony filed in this
proceeding. *See* Staff/100, Hari/16; Staff/200, Hari/8. This issue is discussed more fully, below.

II. BACKGROUND

Mountain Home is a small, service-regulated water utility located in the rural area of West Linn, Oregon.² Customers currently pay \$80 per month for un-metered water service.³ At times, customers have been asked to contribute additional amounts to cover necessary repairs.⁴

The Company's owner and registered agent is Dr. Keith Ironside.⁵ Until recently, the Company served four households other than the two homes owned by Dr. Ironside and his daughter, Valerie Meyer.⁶ In 2016, two of the Company's four customers agreed to drill a shared well and have since completed the project.⁷ In addition to the Ironside family, the Company is currently serving two households: Mel and Connie Kroker and Nate Seymour.⁸ Mel and Connie Kroker are intervenors to the current proceeding; Mr. Seymour has been apprised of the pending Application, but has not intervened in this proceeding.⁹ It is the Company's understanding that Mr. Seymour intends to drill a well on his property if/when the Commission has made a determination on the Company's Application.¹⁰

The water system, originally called the Bel-Ridge Water Utility, was constructed in 1973 by Dale Belford.¹¹ Dr. Ironside and his late wife, Gladys Beddoe, purchased several acres of land including the Bel-Ridge Water Utility in 1979.¹² The water system used to serve customers

² Staff/100, Hari/4.

³ Staff/100, Hari/3.

⁴ Staff/100, Hari3-4.

⁵ Hearing Tr. at 157; Application at 4; *See also*

http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=183034&p_srce=B_R_INQ&p_print=FALSE.

⁶ Staff/100, Hari/2.

⁷ Company/200, Rushmer/1.

⁸ Hearing Tr. at 164.

⁹ *See* Hearing Tr. at 157.

¹⁰ Hearing Tr. at 157.

¹¹ Intervenors/200, Kroker/3.

¹² Intervenors/200, Kroker/3.

1 has been transferred through various deeds or land sale contracts over the years.¹³ The property
2 used to serve customers is currently privately owned in combination by Valerie Meyer, Dr.
3 Ironside (individually) and the Gladys Beddoe Credit Shelter Trust;¹⁴ at the hearing, it was
4 clarified that no property had ever been transferred to the Company from the Ironside family.¹⁵

5 Prior to the spring of 2016, customers were provided natural spring water from a well
6 drilled in 1973 (original well).¹⁶ The Company testified that in March of 2016, there was a drop
7 in water pressure¹⁷ and that Steve's Pump Service, Inc. was retained to identify the cause of the
8 problem.¹⁸ After conducting an investigation and testing, Steve Hougak from Steve's Pump
9 Service, Inc. concluded that the issue was not pump-related, and recommended that Dr. Ironside
10 contact Olsen Pulliam Well Drilling to investigate the well.¹⁹ Vance Wagner of Olsen Pulliam
11 Well Drilling visited the site in following Mr. Hougak's visit in March of 2016,²⁰ and concluded
12 that the well was crooked,²¹ had caved in,²² and could not be cased and lined to what he
13 considered an appropriate depth consistent with his understanding of best industry practices.²³
14 Mr. Wagner further testified that to address the problem on a permanent basis—so that the well
15 would not cave in again at some future point—it would cost more than drilling a new well.²⁴ In
16 consideration of this information, Dr. Ironside proceeded to have Olsen Pulliam Well Drilling

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18 ¹³ Intervenors/200, Kroker/3-4; Intervenor Exhibits 205, 206, and 207.

19 ¹⁴ Intervenors/200, Kroker/4.

20 ¹⁵ Hearing Tr. at 97-98.

21 ¹⁶ Intervenors/102, Lambie/1.

22 ¹⁷ At the hearing, Mr. Hougak clarified that the system could lose pressure without the end-user
noticing a drop in pressure at the tap. Hearing Tr. at 49-51.

23 ¹⁸ Company/300, Hougak/1; *See also* Hearing Tr. at 25.

24 ¹⁹ Company/300, Hougak/2.

25 ²⁰ Hearing Tr. at 57.

26 ²¹ Hearing Tr. at 76.

²² Hearing Tr. at 59, 63,

²³ Hearing Tr. at 63, 65-67, 70, 88.

²⁴ Company/400, Wagner/1.

1 drill a new replacement well, which is currently providing service to the users remaining on the
2 system.²⁵ For the period of time between when the original well became unavailable and the
3 completion of the replacement well, the Company connected its distribution system to an
4 already-existing well on the Ironside property to provide water service on an interim basis.²⁶ The
5 replacement well became operational in the spring of 2016.

6 On April 1, 2016, Mountain Home filed its Application to Terminate Water Service and
7 Abandon Water Utility effective June 30, 2016, citing the failure of the original well as the basis
8 for its request.²⁷ In response to Staff Data Request 11, the Company provided additional reasons
9 for its request: the personal circumstances of the owner, the historic and future financial hardship
10 of operating the utility, and concerns over compliance with Oregon Water Resources Department
11 (OWRD) restrictions.²⁸ All customers except for one were provided notice of the Company's
12 Application on March 28, 2016 at an in-person meeting.²⁹ The final customer was provided
13 notice on the following day, March 29, 2016.³⁰

14 III. LEGAL STANDARD

15 ORS 757.020 requires every public utility to provide adequate and safe service at just and
16 reasonable rates. However, Oregon law also contemplates the abandonment of a utility's
17 obligation to serve. ORS 757.480(5) requires, in relevant part, that a water utility obtain
18 Commission approval prior to disposing of its right "to maintain and operate such water utility or
19 water utility property, or perform any service as a water utility." OAR 860-036-0708³¹ sets forth

20 ²⁵ Intervenors/100. Lambie/10.

21 ²⁶ Staff/102, Hari/1.

22 ²⁷ Application at 1-2.

23 ²⁸ Staff/102, Hari/3-6.

24 ²⁹ Application at 3.

25 ³⁰ Application at 3.

26 ³¹ Staff notes that OAR 860-036-0708 was replaced by OAR 860-036-2110 when the
Commission filed with the Secretary of State its updated water rules adopted by the Commission
at the January 24, 2017 public meeting. Because OAR 860-036-0708 was in effect at the time
the Application was made and is referenced throughout the record in this proceeding, Staff
continues to refer to this version of the rule.

1 the application and notice requirements for water utilities seeking to terminate water service
2 and/or abandon utility property.

3 In prior cases, the Commission has considered several factors relevant when determining
4 whether abandonment of an utility's obligation to serve is appropriate. These factors include the
5 financial hardship of continued utility operation,³² the personal circumstances of the owner,³³
6 concern over compliance with other applicable law,³⁴ and the availability of alternative water
7 sources.³⁵

8 IV. ARGUMENT

9 As stated above, Staff recommends that the Commission approve the Company's
10 Application, subject to two conditions. First, Staff recommends that the Company be required to
11 serve its remaining customers until August 1, 2017 or when the last customer has secured an
12 alternative water source, whichever is sooner. Second, Staff recommends that the Commission
13 adopt the Company's proposed alternative condition that it be required to negotiate in good faith
14 to facilitate access to any customer and its contractors to the extent reasonably necessary for
15 construction and maintenance of their well to be located on the customers' property.³⁶

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17 ³² See e.g. *In re Judy Bedsole and Fish Mill Lodges Water System*, OPUC Docket No. UM 1489
18 et al, Order 16-075 (In this case, the Commission approved a stipulation wherein Fish Mill
19 agreed to have the Commission appoint a regent to operate and repair the water system and that
20 customers would ultimately take over the system and repay the funds over time. The financial
21 hardship of continuing to operate the utility was a factor in the utility's request to abandon its
22 obligation to serve.); *In re Marastoni Water Co.*, OPUC Docket No. UM 303, Order No. 91-32
23 (Jan. 1, 1991) (noting that the utility was operating at a loss, and that the aging owner wished to
24 sell his property but was unable to find a buyer to assume the responsibility of the water system).

21 ³³ See e.g. *In re Marastoni Water Co.*, OPUC Docket No. UM 303, Order No. 91-32 (Jan. 1,
22 1991) ("At the time of the hearing. Mr. Pomeroy was 78 years old. His health is not good. It is
23 difficult, both physically and financially, for him to continue to operate the water system.").

23 ³⁴ See e.g. *In re Westland Estates Water System*, OPUC Docket No. UP 244, Order No. 08-360
24 (July 7, 2008); *In re Vista Dale Water Co.*, OPUC Docket No. UP 183, Order No. 02-044 (Jan.
25 24, 2002).

25 ³⁵ See e.g. *In re Fruitdale Water Utility*, OPUC Docket No. UW 12, Order No. 88-255 (Mar. 10,
26 1988); *In re Marastoni Water Co.*, OPUC Docket No. UM 303, Order No. 91-32 (Jan. 1, 1991);
In re Western Estates Water Company, OPUC Docket No. UW 41, Order No. 93-545 (Apr. 14,
1993).

³⁶ Company/100, Ironside/5.

1 Staff's recommendation that the Company be permitted to terminate the provision of
2 service and abandon the water utility in this proceeding is based on Staff's review of several
3 factors, consistent with those considered by the Commission in previous abandonment cases.
4 Specifically, Staff considered the age and condition of the water system, the costs to customers
5 to remain on the system, the availability of alternative water sources, the Company's concerns
6 regarding compliance with OWRD statutes and rules, the personal circumstances of the owner,
7 the financial hardship of continuing to operate the utility, and the financial hardship to customers
8 of continuing to operate the utility. Staff's evaluation of the totality of circumstances caused
9 Staff to conclude that the Company should be permitted to terminate the provision of water
10 service, subject to Staff's two proposed conditions.

11 **(A) The totality of circumstances weighs in favor of Mountain Home Water District**
12 **being permitted to abandon its obligation to serve as a water utility, subject to two**
13 **conditions.**

14 *1. Alternative water sources are available to customers.*

15 All parties agree that each of the Company's customers has the option of either drilling
16 his or her own well or pursuing a shared well with an adjacent property owner. Two of the
17 Company's four customers have already secured an alternative water source and are no longer
18 being served by the Company.³⁷ Intervenors Mel and Connie Kroker have indicated that
19 although it is not their preferred course of action, it is possible to drill a well on their property.³⁸
20 Nate Seymour, the Company's other remaining customer, has indicated to the Company that he
21 intends to drill his own well if the Company's Application is granted.³⁹ It is unclear whether Mr.
22 Seymour plans to drill his own well at some point regardless of the outcome of this case. The
23 financial implications of abandonment versus continued service, for both the Company and its
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³⁷ Hearing Tr. at 154-155.

26 ³⁸ Hearing Tr. at 172.

³⁹ Hearing Tr. at 157.

1 customers, is discussed more fully below. However, Staff believes the availability of alternative
2 water sources is compelling.

3 2. *The Company's concerns with regulatory compliance weigh in favor of abandonment.*

4 The Company testified that it is concerned that compliance with OWRD restrictions for
5 exempt wells cannot be reasonably achieved under its current operations.⁴⁰ The well serving
6 customers is an exempt well pursuant to ORS 537.545.⁴¹ ORS 537.545(1) provides an
7 exemption for wells with certain characteristics from certain registration, permitting and ground
8 water right certifications. Exempt wells used for "single or group domestic purposes" may use
9 water up to 15,000 gallons a day,⁴² but are subject to a one-half acre total of lawn or non-
10 commercial garden irrigation.⁴³ OWRD regulations clarify that "[n]ot more than ½ acre of lawn
11 and non-commercial garden in total area may be irrigated through a group delivery system under
12 such exemption."⁴⁴

13 On July 7, 2015, a letter from the OWRD was received by Dr. Ironside.⁴⁵ The letter
14 states that it is informational, and intended to remind landowners of what uses for groundwater
15 are exempt from needing a water right.⁴⁶ The letter states that use of groundwater in excess of
16 statutory limits, including irrigation in excess of one-half acre, would typically require that a
17 water right permit be obtained, but goes on to state that:

18 However, you are located within the boundaries of the Sherwood-Dammasch-
19 Wilsonville Groundwater Limited Area. Therefore, the use of groundwater from
20 the basalt aquifers is classified for exempt uses only and you will not be able to
21 obtain a new water right permit.

21 Exempted uses are on a **per-property or per-development** basis. Adding
22 additional wells does not increase an exempt limitation. For example, adding a

22 ⁴⁰ Company/100, Ironside/2; *see also* Staff/102, Hari/4.

23 ⁴¹ Staff/102, Hari/4.

24 ⁴² ORS 537.545(1)(d).

25 ⁴³ ORS 537.545(1)(b).

26 ⁴⁴ OAR 690-340-0010(1).

27 ⁴⁵ Staff/102, Hari/17.

28 ⁴⁶ *Id.*

1 second well does not increase the irrigation exemption to more than ½ acre. The
2 ½ acre lawn and garden is established annually and therefore cannot be rotated to
a different location from day to day.⁴⁷

3 According to the Company, these restrictions formed a basis for Mr. Rushmer and Mr.
4 Weist to conclude that they wanted to drill their own well so that their irrigation usage would not
5 be out of compliance with OWRD restrictions.⁴⁸

6 The Company has stated that it does not believe that compliance with OWRD irrigation
7 usage restrictions can be achieved with the number of users on the system.⁴⁹ Staff relied upon
8 Dr. Ironside's opinion, as the owner of the utility and party subject to compliance actions and
9 following consultation with his attorney, as to whether compliance with OWRD restrictions
10 could be reasonably met.⁵⁰ The lot sizes for the former Kelley house (current Seymour house),
11 the Krokers, and the Ironside family total approximately *twelve acres*.⁵¹ In order to meet OWRD
12 restrictions, one would have to assume that the four households that comprise a twelve acre area
13 could agree on a designated one-half acre *total* among them. Further issues could occur if there
14 is not agreement, and/or one or more users irrigates outside of the designated area. This would
15 require the Company to somehow curtail usage or face an enforcement action from OWRD.
16 Given the lot sizes and the personal circumstances of Dr. Ironside, as discussed below, Staff
17 found the Company's assertion that enforcement is impractical to be compelling. Staff also
18 notes that even if the system were equipped with functional meters, the issue at hand is regarding
19 designation of irrigation areas, and not a concern that the 15,000 per day limit has or will be
20 exceeded.⁵²

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22 ⁴⁷ *Id.* (emphasis added).

23 ⁴⁸ Hearing Tr. at 154.

24 ⁴⁹ Staff/102, Hari/4.

25 ⁵⁰ Hearing Tr. at 196.

26 ⁵¹ See Intervenors/202, Kroker/1 (deed showing description of Kroker property at 1.945 acres);
Intervenors/403; Staff/102, Hari/11 (map showing property of each customer, including number
of acres for each parcel).

⁵² See Hearing Tr. at 199.

1 3. *The personal circumstances of the owner weigh in favor of abandonment.*

2 The Company also testified that the personal circumstances of Dr. Ironside make
3 continued operation of the Company overly burdensome. Dr. Ironside is 75 years old, currently
4 resides in Kennewick, Washington, and works six days per week.⁵³ He is not physically able to
5 manage the day-to-day affairs of running the utility. Furthermore, the recordkeeping and
6 operations of the utility have been somewhat haphazard since the passing of Dr. Ironside's wife,
7 Gladys Beddoe, as she was the person who managed the utility until 2004.⁵⁴ Although his
8 daughter, Valerie Meyer, and her family have taken on some duties and responsibilities, they are
9 not willing to take on the administrative and financial responsibility of running the utility.⁵⁵

10 4. *The financial impacts of continued service weigh in favor of abandonment.*

11 Staff considered the financial hardship to Dr. Ironside of continuing to operate the utility
12 as well as the financial hardship that would be faced by customers if abandonment were
13 granted.⁵⁶ The financial impacts to customers are discussed in the next session of this brief.

14 Regarding the financial impacts to the Company, the Company stated that it has generally
15 been providing service at a financial loss, and that the monthly charge paid by customers is only
16 enough to recover ongoing, regular expenses such as electricity and water quality testing.⁵⁷
17 Although customers have at times been assessed additional amounts to help cover certain
18 investments and repairs,⁵⁸ Dr. Ironside and his family have incurred expenses that were never
19 recovered from customers.⁵⁹ In addition, there have been times where customers have been
20 behind on payments or missed payments altogether, sometimes for extended periods of time.⁶⁰

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⁵³ Staff/100, Hari/9-10.

22 ⁵⁴ Staff/100, Hari/10.

23 ⁵⁵ Staff/100, Hari/9-10.

24 ⁵⁶ Staff/100, Hari/8-9 and Staff/100, Hari/14-16.

25 ⁵⁷ Staff/102, Hari/4-5.

26 ⁵⁸ *See e.g.* Intervenor/305, Kroker/1.

⁵⁹ Company/100, Ironside/2-3.

⁶⁰ Hearing Tr. at 130-131, 176; Company/100, Ironside/3.

1 These issues could become more compounded given sentiments regarding what is “fair” to be
2 charged⁶¹ and what customers have testified they might be willing to pay.⁶² Furthermore, the
3 remaining customers have the ability to leave the system at any time, which could leave the
4 Company with stranded costs. Finally, given the large liability associated with the continued
5 operation and maintenance of a water utility, Dr. Ironside testified that if he is not permitted to
6 abandon the utility, he does not expect to be able to sell his property.⁶³

7 *5. The procedural requirements of OAR 860-036-0708 have been met.*

8 The purpose of a utility’s application pursuant to OAR 860-036-0708 is to apprise the
9 Commission and all other interested parties, including utility customers, of the utility’s desire to
10 terminate water service and/or abandon the water utility and the general circumstances
11 surrounding abandonment. Upon receiving an application for abandonment, the Commission
12 may then determine whether additional investigation is warranted, including whether more
13 detailed information is necessary prior to reaching a final decision.⁶⁴ Staff believes that the
14 Company’s obligations pursuant to OAR 860-036-0708 have been effectively met in this case.⁶⁵
15 Customers have been adequately apprised of the Company’s request to abandon its obligation to
16 provide service, and have had a meaningful opportunity to engage in the contested case process
17 to bring their concerns before the Commission. Commission Staff has investigated the
18 Company’s request and has an adequate basis upon which to make a recommendation to the
19 Commission.

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22 *6. If the Commission grants the Company’s Application, it should impose two conditions
23 on abandonment.*

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24 ⁶¹ Intervenors/200, Kroker/10-11.

25 ⁶² Hearing Tr. at 155-156.

26 ⁶³ Company/100, Ironside/3.

27 ⁶⁴ ORS 756.515.

⁶⁵ Staff/100, Hari/5-6.

1 Should the Commission determine that abandonment is appropriate in this case, Staff
2 recommends that the Commission impose two conditions upon the Company. First, Staff
3 recommends that the Company be required to serve its remaining customers until August 1, 2017
4 or when the last customer has secured an alternative water source, whichever is sooner.
5 Intervenors request that the Company be required to continue to provide service “until the [later]
6 of August 1, 2017 or such date that my wife and I have obtained a permanent, operational
7 alternative water service, whichever is later”⁶⁶ in the event that abandonment is granted. Staff’s
8 concern with Intervenors’ proposed condition is that there is no date certain by which the
9 Company would be free of its obligation to serve—which could effectively negate a finding by
10 the Commission that abandonment is appropriate. In prior abandonment proceedings, the
11 Commission has taken into account the particular circumstances of customers securing
12 alternative water sources and the burden of the utility continuing to serve while alternative water
13 sources are secured.⁶⁷ Given the amount of work that customers have already undertaken and the
14 relatively quick turn-around for drilling the Rushmer/Weist well, Staff believes that giving
15 customers until August 1, 2017 strikes an appropriate balance between the interests of customers
16 and the interests of the Company. This would be 16 months after the Company filed its
17 Application.

18 Second, Staff recommends that the Commission adopt the alternative condition supported
19 by the Company that it be required to negotiate in good faith to facilitate access to any customer
20 and its contractors to the extent reasonably necessary for construction and maintenance of their
21 well.⁶⁸ Staff’s recommendation is revised from the recommendation made in its testimony,
22 wherein Staff recommended that the Company be required, as a condition of abandonment, to
23 execute a written instrument demonstrating that the Krokors have permanent access from
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25 ⁶⁶ Intervenors/300, Kroker/19.

26 ⁶⁷ Staff/100, Hari/13.

⁶⁸ Company/100, Ironside/5.

1 Buckman Road for the construction and maintenance of their well.⁶⁹ Staff's intent was to relieve
2 a burden, to the extent one is created, so that the Krokors have the access necessary to drill and
3 maintain their well in the least-cost manner if abandonment is granted.⁷⁰ However, given the
4 uncertainty regarding what access is necessary, the fact that access from Buckman Road would
5 also require an easement from Nate Seymour, and the Commission's lack of authority to order
6 the Company to enter into a private contract with a customer, Staff proposes the Commission
7 adopt the Company's proposed alternative condition.

8 **(B) There are not guaranteed benefits to customers associated with continued service**
9 **provided by the Company.**

10 Staff's consideration of the financial impact on other customers has focused more heavily
11 on Intervenors Mel and Connie Kroker, as they are one of the two remaining customers and have
12 expressed concerns regarding financial hardship.⁷¹ Staff's evaluation of the financial impact to
13 the Krokors included consideration of both the cost of drilling a new well and the potential
14 known and unknown costs of remaining a customer of Mountain Home. Although the cost of
15 drilling a well on their property is significant, it is not clear that there are long-term financial
16 benefits associated with continued service from the Company.

17 *1. Significant capital investments remain unrecovered from customers, and the*
18 *distribution system is nearing the end of its useful life.*

19 Among the reasons cited by the Company for seeking abandonment is the failure of the
20 original well it used to serve customers since 1973.⁷² The combined cost of attempting to repair
21 the original well and drilling the replacement well in the spring of 2016 was approximately
22 \$65,000.⁷³ The Company stated that rather than assess customers a portion of these costs to

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24 ⁶⁹ Staff/100, Hari/16.

25 ⁷⁰ Hearing Tr. at 190.

26 ⁷¹ Staff/100, Hari/12-13; 14-16; Staff/200, Hari/4-6.

27 ⁷² Application at 2.

28 ⁷³ Staff/102, Hari/3.

1 remain on the system, customers should instead use those funds to secure an alternative water
2 source.⁷⁴ The Company has not been charging customers for service since June 2016, and has
3 not assessed customer for any portion of the costs incurred related to repairing the original well
4 or drilling the replacement well.⁷⁵

5 The distribution system is of the same vintage as the original well, and may be nearing
6 the end of its useful life.⁷⁶ Company Witness Mr. Rushmer testified that when he was drilling
7 his shared well with former customers Rob and Barb Weist, the pipe was “really, really thin
8 PVC, quite brittle.”⁷⁷ Mr. Hougak testified that “[t]he District’s water system is about 43 years
9 old. The lines are a combination of galvanized pipe and black poly pipe. The life expectancy of
10 either material is approximately 50 years.”⁷⁸ Mr. Hougak also testified that he had knowledge
11 relating to a number of leaks in the Company’s distribution system.⁷⁹ Further complicating
12 matters, there is testimony on the record that the actual location of the system was inconsistent
13 with drawings of the system, making locating the lines difficult and therefore more costly to
14 repair.⁸⁰ In combination, costs associated with both the replacement well and the distribution
15 system will likely result in significant rate increases by Mountain Home.

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20 *2. The estimated cost of securing an alternative water source are significant, but may be
offset by other benefits.*

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22 ⁷⁴ Staff/100, Hari/9.

23 ⁷⁵ Hearing Tr. at 173.

24 ⁷⁶ Company/200, Rushmer/2.

25 ⁷⁷ Company/200, Rushmer/2; Hearing Tr. at 12.

26 ⁷⁸ Company/300, Hougak/2.

⁷⁹ Company/300, Hougak/2; Hearing Tr. at 47-49.

⁸⁰ Company/200, Rushmer/2; Hearing Tr. at 12; Hearing Tr. at 143.

1 The Krokors provided testimony that the cost of a new “water system”⁸¹ on their property
2 would cost approximately \$72,000.⁸² The Company raised concerns that this estimate may
3 include components that are not necessary,⁸³ as it includes approximately \$13,043 related to the
4 installation a buried concrete cistern which is atypical for the area.⁸⁴ Furthermore, if the Krokors
5 are able to drill their well using access from Buckman Road, rather than Turner Road, additional
6 cost savings may be achieved as costs to construct a road could be avoided.⁸⁵ If the Krokors
7 were able to agree to a shared well with Nate Seymour, the costs of an alternative water source
8 would also be substantially less. Staff also notes that it stands to reason that the Krokors’
9 property value would increase as a result of having its own dedicated water supply that includes
10 an expanded right to irrigate beyond what would theoretically be available to them as customers
11 of Mountain Home in light of OWRD restrictions.

12 The costs of remaining a customer of the Company were also considered by Staff.
13 Because the Company is service-regulated, the Commission has no authority to set rates or
14 determine the prudence of capital expenditures that could be assessed to customers. To date, the
15 Company has not assessed customers for any portion the costs of securing the current water
16 source—approximately \$65,000.⁸⁶ Under Oregon law, public utilities are permitted to offer free
17 service or service at reduced rates to its officers, directors, employees and members of their
18 families.⁸⁷ This means that the Company could, in theory, assess the full \$65,000 to its

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20 ⁸¹ Intervenors/300, Kroker/18.

21 ⁸² Staff/104, Hari/2.

22 ⁸³ Company/100, Ironside/4. Staff further notes that Intervenors’ expert, Mr. Lambie, indicated
23 that there is likely ample water to provide an adequate supply of groundwater to users in the area.
24 Intervenors/100, Lambie/4.

25 ⁸⁴ Company/100, Ironside/4; Staff/105, Hari/2.

26 ⁸⁵ Hearing Tr. at 163; Hearing Tr. at 170 (“Even if it takes easements across other people’s land,
as long as he’s prepared to pay for that access, and I don’t have to pay almost \$11,000 just to get
that to my own land or go through the trauma of all the things we have to do to get that same
water system on our own land.”).

27 ⁸⁶ Staff/102, Hari/3.

28 ⁸⁷ ORS 757.315.

1 remaining customers—currently the Krokors and Nate Seymour—in addition to charging for on-
2 going operational costs and future costs for distribution system replacement and/or repairs. If
3 either the Company or its customer seek and prevail on a request for rate regulation by the
4 Commission, the impact of capital investments and ongoing operations and maintenance costs
5 could be even more significant as the Company would be entitled to a fair rate of return on any
6 prudent capital investments.

7 What could potentially be assessed, under either scenario, compared to what Mr. Kroker
8 testified that he would be willing to pay for water service are significantly far apart.⁸⁸ Under
9 either scenario, the failure of the original well and the cost of the replacement well are
10 significant, as is the cost of the Krokors drilling their own well. As Staff noted in testimony, “it
11 is unfortunate any time unexpected and significant costs occur. However, it is not clear that
12 costs are avoidable or able to be shifted away from the Krokors.”⁸⁹

13 **(C) The Commission does not have the authority to grant Intervenors’ requested**
14 **conditions in this case.**

15 Oregon courts have found that an administrative agency has the express powers granted
16 to it by the legislature, as well as the implied powers that are reasonably necessary to carry out
17 the agency’s duties and functions as expressly granted by the legislature.⁹⁰ Therefore, the
18 Commission does not have the authority to impose conditions on abandonment that do not fall
19 within express or implied powers granted to it by the legislature⁹¹ and that would be contrary to
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21 _____
⁸⁸ Hearing Tr. at 155-156; *see also* Intervenors/200, Kroker/10.

22 ⁸⁹ Staff/100, Hari/16.

23 ⁹⁰ *See e.g. Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or App 302, 309-310 (1992) (“It is
24 well established that an agency has such implied power as are necessary to enable the agency to
carry out the powers expressly granted to it.”).

25 ⁹¹ 73B C.J.S. Public Utilities § 208 (“Where statutory authority therefor exists, a public utilities
26 commission may attach reasonable conditions to its consent to abandonment. The commission
may impose such terms, conditions, or requirements as in its judgment are necessary to protect
the public interest and safety. The conditions which it imposes must be within the express or
implied power of the commission.”) (internal citations omitted).

1 both the Oregon and United States constitutions. For these reasons, Intervenor's requested
2 conditions of abandonment in this case cannot be granted by the Commission.

3 *1. The Commission does not have the authority to require property interests be donated*
4 *in consideration of abandonment.*

5 At the hearing, Mr. Kroker clarified his requests to the Commission in this case. First,
6 Mr. Kroker requests that the Commission disapprove the Company's Application and require the
7 Company to continue providing water service to its remaining customers.⁹² If, however, the
8 Commission grants the Company's Application, Mr. Kroker made the general request that the
9 Commission impose conditions to "put [him] back into the good state of where we were before
10 the application... we need to get something back, so part of what we are after is we need to get
11 something back from this process."⁹³ When asked more specifically, Mr. Kroker indicated that
12 he would like the Commission to order the Company to repair the original well to make it
13 operational, provide deeded access to the well house, and allow the Krokors (and perhaps Nate
14 Seymour) to obtain water from that well in exchange for paying the electricity and maintenance
15 on that well.⁹⁴ Should this condition be adopted, the Ironsides would essentially be required to
16 act "as if it were a utility" but without the opportunity to recover fixed costs. Essentially, this
17 option is more punitive to Dr. Ironside than a decision that the Company not be allowed to
18 abandon its obligation to serve.

19 It is axiomatic that a government entity cannot take the property of one person for the
20 sole purpose of transferring it to another private party, even if the original party is paid just
21 compensation.⁹⁵ Doing so as a condition to abandonment, rather than a direct order from the
22 Commission, does not remedy the issue.⁹⁶ To the extent that the Krokors are proposing that the

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24 ⁹² Hearing Tr. at 160-161.

25 ⁹³ Hearing Tr. at 168-169.

26 ⁹⁴ Hearing Tr. at 171-172.

⁹⁵ *Kelo v. City of New London, Conn.*, 545 US 469, 477 (2005).

⁹⁶ 73B C.J.S. Public Utilities § 208.

1 Commission condition abandonment on the transfer of private property, or any interests therein,
2 owned either by Dr. Ironside or Valerie Meyer for his own private use, the Commission has no
3 authority to grant Mr. Kroker's request.

4 To the extent that the Krokero's request in this case is for the Commission to impose the
5 condition for a "public use," such as to provide water utility service to both the Kroker parcel
6 and the parcel owned by Nate Seymour, to do so would amount to a physical taking, contrary to
7 the takings clauses found in both the United States Constitution and the Oregon Constitution.⁹⁷
8 A physical taking occurs when the government dispossesses a person of his or her property,
9 through destruction, restriction or interruption of the necessary use and enjoyment of the private
10 property.⁹⁸ In this case, Intervenors' request that the Commission condition abandonment on the
11 Company expending funds to rehabilitate the original well at its own expense and then order the
12 Dr. Ironside and/or Valerie Meyer to grant a deeded easement for access to the well and well
13 house. Abandonment subject to these conditions would require the Commission to violate the
14 takings clauses of the Oregon and United States constitutions. The Commission has no such
15 authority.

16 Finally, the Commission has no authority to force a utility to contract with one of its
17 customers.

18 2. *The Commission does not have the authority to adjudicate property rights.*

19 Throughout this proceeding, Intervenors have argued that they have an "enforceable right
20 to receive water from the water system."⁹⁹ Although there is considerable evidence in the record
21 related to the various property interests held by members of the Ironside family and the Krokero's,
22 determination of the significance of any rights and obligations that those interests pose to each

23 ⁹⁷ See Article I, § 18, Oregon Constitution ("Private property shall not be taken for public
24 use...without just compensation."); U.S. Const., amend. V (In relevant part, "private property
25 [shall not] be taken for public use, without just compensation.") The Takings Clause of the Fifth
26 Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.
See *Kelo v. City of New London, Conn.*, 545 US 469, 496 (2005).

⁹⁸ *Moeller v. Multnomah Cnty.*, 218 Or 413, 430-31 (1959).

⁹⁹ Staff/104, Hari/3.

1 party are not appropriately before the Commission. The Commission has no authority, express
2 or implied, from the legislature pursuant to which it may adjudicate property rights.¹⁰⁰ Whether
3 or not an enforceable right to receive water from the water system exists is a question for the
4 courts to decide. The Commission's determination of the Company's Application would have no
5 bearing on a court proceeding to enforce property rights.

6 **IV. CONCLUSION**

7 For the reasons stated above, Staff recommends that the Commission allow Mountain
8 Home Water District to abandon its obligation to provide water service effective August 1, 2017,
9 or when its last customer leaves its system, whichever is earlier, subject to the condition that the
10 Company be required to negotiate in good faith with any customer that requires an interest in
11 property in order to drill and/or maintain an alternative water source on his or her property.

12
13 DATED this 3rd day of February, 2017.

14 Respectfully submitted,

15 ELLEN F. ROSENBLUM
16 Attorney General

17 

18 Sommer Moser, OSB # 105260
19 Assistant Attorney General
20 Of Attorneys for Staff of the Public Utility
21 Commission of Oregon

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23
24 ¹⁰⁰ *In re Marastoni Water Co.*, OPUC Docket No. UM 303, Order No. 91-32 (Jan. 1, 1991)
25 (“The Commission’s jurisdiction is established by statute. It does not have authority to enforce
26 deed covenant or award damages for breach of those covenants. Therefore, any rights that
owners of deed covenants may have are not affected by this proceeding and should be decided in
court of competent jurisdiction or other approximate forum.” Citing to *McPhearson v. PP&L*,
207 Or 433, 452 (1956)).