

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1769

In the matter of

MOUNTAIN HOME WATER DISTRICT,

Application to Terminate Water Service
and Abandon Water Utility.

**MOUNTAIN HOME WATER
DISTRICT'S REPLY BRIEF**

INTRODUCTION

Applicant Mountain Home Water District (the "District" or the "Company") files the following reply brief, in accordance with the schedule set in Administrative Law Judge Power's Ruling issued January 19, 2017. This reply brief responds to Staff's Opening Brief, filed February 3, 2017; the Opening Brief of Mel and Connie Kroker, Intervenors, filed February 6, 2017; and Intervenors Request for Judicial Notice and accompanying Declaration of Peter D. Mohr in Support of Intervenors Request for Judicial Notice, filed February 6, 2017. The District urges the Commission to approve the Application to Terminate Water Service and Abandon Water Utility (the "Application"), subject to the District's obligation to continue water service until August 1, 2017, or until all customers have secured an alternate water supply, whichever is earlier.

ARGUMENT

A. The Commission Should Not Consider Evidence Offered After the Record Closed

The record in this docket closed at the conclusion of the hearing on January 9, 2017. Nonetheless, the intervenors have requested that the Commission take "judicial notice" of seven additional exhibits, including "as-built" drawings of the water system and six real estate conveyances involving Keith Ironside's property. The District requests that the Commission decline to take official notice of these documents or otherwise include them in the record, for

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three reasons. First, the proffered documents are not of the type contemplated by OAR 860-001-0460(1). Second, the parties had ample opportunity to develop the record in this proceeding, and thus there is no compelling reason to admit additional exhibits introduced without an opportunity for parties to raise objections or conduct cross-examination. Third, the proffered exhibits are irrelevant, as further explained in Part B, below.

In their Opening Brief, the intervenors also assert, for the first time, that the District's owner plotted to "take over the Bel-Ridge Water Utility for his, and his family's exclusive use" as early as 2013, and that this "evidence" undermines "the sincerity of the District's Application." (Intervenors' Opening Brief at 23-24.) The intervenors' theory of nefarious intent is not a legal argument, but a factual assertion, and the Commission should give it no consideration. Keith Ironside, the owner, was available at the hearing for cross-examination, and the intervenors' attorney questioned him at length. That would have been the appropriate time to supplement the record with questions about his intent in 2013 — not in the guise of legal briefing after the record was closed.

B. The Commission Is Without Authority to Adjudicate Property Rights; and in Any Case Intervenors Have No "Vested Right" to Continued Water Service

Much of the intervenors' opening brief is devoted to tracing the history of conveyances of the Ironside property and contending that the intervenors hold a "vested right to a water supply." (Intervenors' Opening Brief at 11.) Intervenors do not, however, argue that the Commission should enforce this "vested right," and indeed the Commission has no authority to do so. (See Staff's Opening Brief at 17-18 ("The Commission has no authority, express or implied, from the legislature pursuant to which it may adjudicate property rights.").)

In any event, the intervenors have no such right to receive water service, either from the original well or the replacement well, as a matter of property law. The intervenors assert that a five-foot easement for a water line to the Kroker property conferred a right "to access *and receive* water from the Bel-Ridge Water Utility water system." (Intervenors' Opening Brief

at 6 (emphasis added).) However, an easement is a right of use. See ORS 105.170. The water line easement conferred the right to place and keep a pipe in the easement area, not a right to demand water.

C. The Company's Application Satisfies the Requirements of OAR 860-036-0708

In their opening brief, the intervenors argue that the District failed to meet the requirements of OAR 860-036-0708 because the Application lacked sufficient detail about (1) the District's reasons for seeking abandonment and (2) the District's description of alternative water service options for its customers. The District provided more information, detail, and documentation in response to data requests from Staff and intervenors over the nine-month course of these proceedings. According to the intervenors, however, such additional information was "never * * * properly submitted" because it was not included in the Application itself. (Intervenors' Opening Brief at 11.)

Intervenors are incorrect in their interpretation of OAR 860-036-0708, which contains no requirement that all details justifying abandonment be set forth in the Application. As Staff points out, the assessment of an application under OAR 860-036-0708 is based on an "evaluation of the totality of circumstances" presented in the Application, during discovery, and through testimony and cross-examination. (See Staff's Opening Brief at 6.) If the rule precluded any development of the record beyond the Application, there would be no reason to conduct discovery or submit testimony.

D. Conditions for Abandonment

Staff's opening brief restates the recommended conditions for approval of the District's Application as follows: "First, Staff recommends that the Company be required to provide water service until the earlier of August 1, 2017 or when its last customer has secured an alternative water source. Second, Staff recommends that * * * [the Company] be required to negotiate with any customer in good faith to facilitate access to the property of Dr. Ironside

and/or Valerie Meyer, as appropriate, in order to drill and/or maintain an alternative water system on the customers' property." (Staff's Opening Brief at 1 & n.1; *see also* Staff Ex. 100 at 16-17.)

The intervenors originally requested the condition of access in their Petition to Intervene, filed May 11, 2016. In response to data requests, however, the intervenors stated that, if the Application were approved and if they elected to drill a separate well on their own property, they would construct an access route from Turner Road. (Staff Ex. 104: 12-13.) In their opening brief, the intervenors propose that the Application be denied, or alternatively that they "be granted ownership of the Original Well" subject to various conditions about repair costs and access. (Intervenors' Opening Brief at 24-25.) Significantly, the intervenors do not, in the opening brief, maintain their original request for a right of access over Buckman Road.

For these reasons, the District believes it is unnecessary for the Commission to impose a condition requiring Keith Ironside or Valerie Meyer to negotiate terms of access over Buckman Road. However, the District will accept such a condition if Staff and the Commission decide it is warranted. The District reiterates its support for the August 1, 2017 extended deadline for termination of water service.

The District joins Staff in rejecting the alternative condition of well ownership proposed in the intervenors' opening brief, which would be "more punitive" to the owner than denial of the Application and in any event is beyond the Commission's authority. (*See* Staff's Opening Brief at 16-17.)

CONCLUSION

The District requests that the Commission approve the Application, with the condition that the District continue to provide water service until all customers have secured another water supply, but until no later than August 1, 2017. The District will support Staff's

recommended additional condition requiring good-faith negotiation of access rights, but believes this additional condition is not necessary.

DATED this 16th day of February, 2017.

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that on February 16, 2017, I filed the foregoing **UM 1769: Mountain Home Water District's Reply Brief** by electronic mail with the Public Utility Commission at puc.filingcenter@state.or.us, with an electronic mail copy to the UM 1769 Service List, including interested parties:

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DATED: February 16, 2017.

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