ORDER NO. 17 164

ENTERED: MAY 16 2017

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1769

In the Matter of MOUNTAIN HOME WATER DISTRICT, Application to Abandon Water Service and Abandon Water Utility.	ORDER

DISPOSITION: APPLICATION DENIED

I. INTRODUCTION

In this order, we deny the application filed by Mountain Home Water District (Mountain Home) to terminate water service and abandon its water utility. We find Mountain Home has not provided sufficient evidence to obtain our approval to stop serving its remaining customers.

II. PROCEDURAL HISTORY

Mountain Home is a small, service-regulated water utility located in rural West Linn, Oregon. It is owned by Dr. Keith Ironside. On April 1, 2016, Mountain Home filed an application for authority to terminate water service and abandon its water utility under OAR 860-036-2110,[1] effective June 30, 2016.

At the time of filing its application, the company served four households in addition to two properties owned by Dr. Ironside and his daughter, Valerie Meyer. Two of the company's four customers intervened in this case: Mel and Connie Kroker and Elizabeth Kelley.[2]

---

[1] At the time of the application the rule was designated OAR 860-036-0708. We subsequently amended our rules governing water utilities on January 24, 2017, and updated the application rule and redesignated it as OAR 860-036-2110. The updated rule contains no material differences applicable in this proceeding. In this order, we refer to the rules by their new designation.

[2] The Krokers fully participated in these proceedings. Ms. Kelley later sold her property and withdrew from these proceedings. The buyer of her property, Nate Seymour, was apprised of the pending application to abandon service but did not intervene.

At a May 11, 2016 prehearing conference, the parties agreed to convene an informational meeting to be followed by a Commission Staff report to the administrative law judge (ALJ) recommending how to proceed. Following the meeting, Staff reported that a stipulation would soon be filed with the Commission.

The matter did not settle, however, and on September 15, 2016, the ALJ held a second prehearing conference, where he adopted a procedural schedule that provided for the filing of Staff and intervenor reply testimony, Staff and intervenor cross-answering testimony, and company rebuttal testimony. A hearing was held in West Linn on January 9, 2017. The matter was submitted with the filing of opening and reply briefs in February 2017.

With their opening brief, the Krokers filed a request for judicial notice of certain specified documents. Mountain Home opposes the Krokers' request. We find that the proffered materials are "matters of which the courts of the State of Oregon take judicial notice" under OAR 860-001-0460 and grant the request for judicial notice.

III. BACKGROUND

In 1973, the "Bel-Ridge Water Utility" was created by Dale Belford to provide a water supply for an intended subdivision. In 1979, the parcels comprising the proposed subdivision and the Bel-Ridge Water Utility were sold to Douglas H. McGriff. In turn, Mr. McGriff conveyed portions of the property and the Bel-Ridge Water Utility to Dr. Ironside and his late wife, Gladys M. Beddoe. At some later point, Dr. Ironside designated "Mountain Home Water District" as an assumed business name for the water utility. Dr. Ironside is the company's owner and registered agent.

In 2013, Dr. Ironside moved to Kennewick, Washington, and partitioned one of the lots, creating two parcels (Parcels 1 and 2). Dr. Ironside conveyed Parcel 1, which contains nearly all of the utility's water distribution system, to his daughter, Ms. Meyer. He retained ownership of Parcel 2, which contains the pump house, the original well, the interim well, and the replacement well, and a short section of the water distribution system connecting to the pump house. The partition identifies a new easement for this short section of the water line running through Dr. Ironside's Parcel 2. Since Dr. Ironside's relocation to Washington, Ms. Meyer has assumed some of the administrative responsibility for the water utility.

Until recently, customers were provided water from a well drilled in 1973 (the original well) on Dr. Ironside's Parcel 2. In March 2016, Mountain Home experienced a loss of water pressure in this original well. The well was taken out of service for repair and the water system was connected to an interim well on Parcel 2 to temporarily continue service. Based on advice that the original well was damaged beyond repair, Dr. Ironside drilled a replacement well on Parcel 2, which was then connected to the Mountain Home distribution system in spring 2016. This replacement well is currently providing water service to the users remaining on the system. Dr. Ironside's expenses for the repair and drilling exceeded $70,000. He decided not to attempt to recoup these costs from customers but rather file this application to abandon service.

As noted above, when Mountain Home filed its initial application it served four customers plus the properties of Dr. Ironside and Ms. Meyer. Since then, two customers drilled a shared well and left the system. The company has two remaining customers: the Krokers and Mr. Seymour (who purchased Ms. Kelley's property). The Krokers intervened in this proceeding and wish to continue to receive service from Mountain Home. Mr. Seymour's intentions are less clear—Mountain Home reports that Mr. Seymour intends to drill a well on his property after our decision in this proceeding. Dr. Ironside and Ms. Meyer's properties would continue to be served by the new replacement well regardless of the outcome of this case.

IV. POSITIONS OF THE PARTIES

A. Mountain Home

In its initial application, Mountain Home identified the failure of the original well as the reason for the company proposing to abandon service.[3] In his testimony, Dr. Ironside clarifies that "the well's failure was simply the impetus for going forward with the application.* * * I had several important reasons for seeking abandonment that were independent of the well failure."[4] He cites three reasons for seeking abandonment: "regulatory compliance, the financial burden, and my personal circumstances."[5]

Regarding regulatory compliance, the company contends that enforcement of applicable statutory and Oregon Water Resources Department (OWRD) restrictions is impossible, or at least extremely burdensome. Mountain Home's system is located within a designated GroundWater Limited Area.[6] OWRD rules limit the flow of wells used for group domestic purposes in these areas to a maximum flow of 15,000 gallons per day, and each well is limited to irrigation of no more than a half-acre of lawn or non-commercial garden as aggregated among all users.[7] The company believes the total peak use of its system falls below the 15,000 gallons per day threshold, but is concerned that it may not be able to enforce the half-acre irrigation limitation. It suggests that its two former customers decided to drill their own shared well so that they could continue to legally irrigate their lawns and gardens, which totaled about one-half acre for both households. Mountain Home states that it would not serve the public interest to require it to continue water service when it cannot provide the service lawfully.

As to the financial burden, Mountain Home claims that its monthly charge for water is not sufficient to meet the system's ongoing expenses, resulting in Dr. Ironside frequently using personal funds to pay for non-routine repairs and improvements. The company notes that,

---

[3] Application at 2.
[4] Company/100, Ironside/2.
[5] *Id.*
[6] OAR 690-502-0190 (OWRD rule limiting use of groundwater from the basalt aquifers in the Sherwood-Dammasch-Wilsonville Groundwater Limited Area).
[7] OAR 690-340-0010.

when the original well failed, Dr. Ironside elected to bear the resulting expenses himself. Rather than ask for contributions, he decided the best course would be for customers to apply their funds toward securing their own water supply.

Mountain Home adds that the existing distribution system is over 40 years old and nearing the end of its useful life. As a result, maintenance costs will likely increase significantly in the near future. The company expresses reservation that it would successfully be able to fund any extensive repairs as it has had difficulty in the past collecting timely payment from its customers.

Finally, to Dr. Ironside's personal circumstances, Mountain Home suggests that Dr. Ironside's age and relocation to Washington State make him ill-suited to the administrative task of operating a water utility. Although Ms. Meyer has assumed some administrative duties in his absence, the company states she is not willing to manage the utility on a permanent basis.

The company maintains that granting its application to abandon service will not cause unreasonable hardship for any of its remaining customers as they can drill their own well or pursue a shared well with an adjacent property owner.

B. Staff

Staff supports granting the company's application, subject to two conditions. First, Staff recommends that Mountain Home be required to serve its remaining customers until the earlier of August 1, 2017 or when the last customer has secured an alternative water supply. Second, Staff recommends that Mountain Home be required to negotiate in good faith with any customer to facilitate access by the customer and its contractors to the properties of Dr. Ironside and Ms. Meyer to drill or maintain an alternative water system on the customer's property. Mountain Home does not object to either of these conditions.

Based on its review of past abandonment cases and the concerns raised in Dr. Ironside's testimony, Staff identified several factors for consideration in this case. In arriving at its recommendation to grant the application, Staff considered the company's concerns regarding regulatory compliance, financial hardship, Dr. Ironside's personal circumstances, the availability of alternative water sources, and the age and condition of the water system and the financial hardship to customers of continued operation. Staff concludes that "the totality of the circumstances weighs in favor of" permitting the company to abandon service.[8]

Staff believes that the company's claims that regulatory compliance, financial burden, and personal circumstances weigh in favor of granting the application to abandon service. To regulatory compliance, Staff finds compelling the company's concerns with complying with the half-acre irrigation limitation. In coming to this conclusion, Staff relies on Dr. Ironside's opinion as to whether compliance with OWRD restrictions could reasonably

[8] Staff Opening Brief at 6.

be met given the lot sizes for the former Kelley house (current Seymour house), the Krokers, and the Ironside family. Staff calculates that to meet OWRD restrictions, one would have to assume that the four households that comprise a twelve acre area could agree on a designated one-half acre *total* among them.[9]

To financial burden, Staff finds the financial impacts of continued service also weigh in favor of abandonment. Staff accepts at face value Dr. Ironside's claim that the company generally has been providing service at a financial loss, with the monthly charge sufficient only to cover ongoing regular expenses. Although customers at times have been assessed additional amounts to cover investments and repairs, Staff notes that Dr. Ironside has incurred expenses that were never passed through to customers, and that the financial burden has been compounded by customers' failure to timely pay their bills.

To personal circumstances, Staff finds the personal circumstances of Dr. Ironside weigh in favor of abandonment, citing his age and his relocation to Washington State. Staff notes that his daughter is unwilling to take on the administrative and financial responsibility of running the company.

Staff agrees with Mountain Home that customers have available alternative water sources. Staff concludes that each of the customers has a reasonable option of either drilling their own well or pursuing a shared well with an adjacent property owner. To demonstrate, Staff points out that two former customers already have secured an alternative water supply and are no longer served by Mountain Home. Staff also considers additional factors that we have considered in past abandonment cases—the age and condition of the water system and financial hardship to customers of continued operation—and concludes that these factors also weigh in favor of abandonment.

Concerning age and condition of the water system, Staff cautions that the existing distribution system is of the same vintage as the original well and may be nearing the end of its useful life. Staff suggests the costs associated with distribution system maintenance and well repair or replacement will likely result in significant future rate increases.
As to the financial hardship to customers of continuing to operate the water system, Staff contends that compelling continued operation may be more costly than granting the application. Staff points out that Mountain Home spent over $65,000 attempting to repair the original well and then drilling the replacement well. The company has not assessed its customers any of these costs, preferring that they use those funds to secure an alternative water source.

Staff suggests that, because Mountain Home is a service-only regulated utility with no required rate oversight, the company could theoretically give free service to Dr. Ironside and Ms. Meyer and assess the full $65,000 to remaining customers. Staff adds that if the company or its customers were to invoke the statutory provision for rate regulation under

[9] *Id.* at 8 (emphasis in original).

ORS 757.061(3), the resulting rates might be even higher when a fair rate of return is included.

Staff acknowledges that the cost of drilling individual wells is significant, but contends these costs may be less than customers' current estimate. Staff also posits that the value of a customer's property would increase were it to have its own dedicated water supply and enhanced irrigation rights.

C. Intervenor Krokers

The Krokers oppose the application to abandon service. They dispute the company's three reasons for abandoning service as well as Staff's conclusions. To regulatory compliance, they claim that there is no evidence that Mountain Home has ever complied with the rule, but note that meters are in place to enforce a limitation on water use.

As to financial hardship, the Krokers allow that Dr. Ironside has borne some utility costs, but counter that he is not entitled to claim financial hardship when he did not seek reimbursement from customers. They further question whether the company can at this point be fairly deemed a financially failed or failing entity. Finally, they suggest it would be a greater financial hardship to ask each customer to develop its own water supply rather than continue to distribute the costs of a water system among numerous properties.

To Dr. Ironside's personal circumstances, the Krokers note that Ms. Meyer has been managing the utility since 2013 and add that there is nothing to prevent Mountain Home from engaging a sub-contractor to manage the water system. Alternatively, they suggest, the utility could be organized into an independent entity separate from the land and sold to a third party to take over operations.

The Krokers refute any suggestion that they have a viable supply alternative given the extensive costs customers would incur if they were to construct their own system. To Staff's condition to require service through August 1, 2017, the Krokers question whether they would be able to complete a well within that short timeframe.

The Krokers also dispute many of Staff's claims. Regarding Staff's concern that future rates could escalate, the Krokers claim that the repair work on the original well was poorly performed and would likely be found imprudent if customers petitioned for rate-regulation. They offer expert testimony that the alleged failure of the original well was actually caused by poor workmanship and it may still be possible to rehabilitate the well to provide the utility with greater supply certainty during maintenance periods.

Finally, the Krokers add that they have a deeded water right from the original well, and that our decision must recognize and protect that right. They rely on a provision in the real estate contract they executed with Mr. Belford in 1974 that provides:

> Seller warrants that he is owner of the Bel-Ridge Water System, approved as to design and quality to satisfy all known and existing regulations and, from

> which the buyer will be supplied water, on demand at going rates, from any day on or after the date of this contract and that such water service will continue for so long as the well supplying the system, the well being a part of the system, continues to be adequate for such supply.
>
> The parties hereto understand that the seller has granted a five-foot wide water line easement through his contiguous property to that being sold, which assures uninterruptible water line access to the property herein described.[10]

V. DISCUSSION

As a public utility, Mountain Home is obligated by statute to provide adequate and safe water service at just and reasonable rates.[11] It may be excused from its obligation to serve as a water utility only with our express approval.[12] The procedural requirements for a water utility's application to terminate, abandon, or dispose of a water system are set out in OAR 860-036-2110.[13] Abandonment of utility service is a very serious matter and should be authorized only under compelling circumstances.

As there is no express legal standard in statute or rules to apply when considering this type of application, we examine the totality of the circumstances to determine whether the water utility has presented sufficient evidence to support abandonment. In our examination, we are guided by past considerations to inform our decision in this case. Here, we consider the several factors identified the company[14] and Staff—regulatory compliance, financial burden, personal circumstances, the availability of alternative water sources, the age and condition of the water system, and the financial burden to customers of continuing to operate the water system.

We find the totality of circumstances in this proceeding does not support abandonment. For reasons set forth below, we deny the application.

"Regulatory compliance" refers to the OWRD rule that limits the irrigation use of water from an exempt well to no more than a half-acre of lawn or non-commercial garden as aggregated among all users.[15] Compliance with the OWRD rule was among the factors that were taken in to account when we granted an application for abandonment in *Westland Estates Water System*, Docket No. UP 244, Order No. 08-360. In that case, the utility served about 22 homes and the local watermaster found that it appeared likely that the irrigation limit was

---

[10] Kroker Opening Brief at 10.
[11] ORS 767.020.
[12] ORS 757.480(5).
[13] At the time this matter was heard the rule was designated OAR 860-036-0708. We filed updated water rules with the Secretary of State on January 24, 2017, in which we now designate the rule as OAR 860-036-2110.
[14] Mountain Home initially indicated in its application that the original well was out of service and the replacement well had not yet been completed. Regardless of what caused the failure, a replacement well has since been completed, and Mountain Home is capable of providing service as a viable water utility. Accordingly, the failure of the original well is not a reason to support abandonment.
[15] OAR 690-340-0010.

being exceeded.[16] Like Mountain Home, Westland Estates was in an area where a new water right could not be secured.

In this case, however, Mountain Home serves only 4 (or possibly 3) customers. Whatever concerns Dr. Ironside might have regarding enforcement of the rule, these remaining customers together have an overarching interest in keeping their irrigation water use within the limits of the OWRD rule. To find otherwise would be to find that a public utility cannot operate with an exempt well.

The financial burden to the utility owner is a factor that we considered in granting the abandonment application in *Marastoni Water Company* Docket No. UM 303, Order No. 91-032. In that case, we noted that the utility had been losing money and that the system needed repairs for it to meet minimum safety and health standards. Given that another adjacent utility was willing to serve the customers, we decided that it would be unreasonable to require the petitioning utility to continue operations in light of the owner's personal circumstances.

We do not find the evidence here regarding financial burden as compelling. Mountain Home's accounting has been casual, as has been its management. There is evidence that Mountain Home has been able to pass through extraordinary costs to its customers when it has chosen to do so. Moreover, unlike *Marastoni* and other abandonment applications that we have granted, Mountain Home does not intend to cease operations, but rather continue to operate and serve Dr. Ironside and Meyer. Rather than an application to abandon service, this application might instead be styled an application to privatize the utility. Whatever the financial circumstances going forward, the financial burden on Mountain Home will be less with the additional two (or one) customers to share the costs of operating the utility.

We also considered "personal circumstances" in authorizing abandonment in the *Marastoni* decision. There, we found that the owner was 78 years old, that "[h]is health is not good. It is difficult, both physically and financially, for him to continue to operate the water system. He wants to sell his property, but is unable to find a buyer willing to assume the responsibilities of the water system."[17]

Although some factual similarities are present here—Dr. Ironside is 76 years old, has moved Eastern Washington and is not available to operate the system—we do not find these persuasive given Mountain Home's plan to continue operations. As noted above, if the application were granted, the enterprise will carry on. Someone will have to operate it—if not Dr. Ironside or Ms. Meyers, then a contractor will have to be engaged. Moreover, there is no evidence that Dr. Ironside could not or is unable to sell Mountain Home.

We also find that Mountain Home has failed to establish that its remaining customers have a reasonable alternative water source consistent with past cases where we have granted applications for abandonment. We acknowledge that the Krokers and Seymour have the

[16] *In Re Westland Estates Water System,* Order No. 08-360, Appendix A at 4.
[17] *In Re Marastoni,* Order No. 91-32 at 3.

option of either drilling his or her own well or pursuing a shared well with an adjacent property owner. That reality, however, generally exists for customers of many utilities.

Past cases where we have found customers had an alternative supply present much more reasonable, and significantly less costly, alternative water sources. These include *Marastoni,* where the alternative water source was another water utility whose service area encompassed the abandoning utility's customers, with distribution mains running along each of the two roads adjacent to their homes.[18] Similarly, in *Fruitdale Water Utility* and *Western Estates Water Company*,[19] affected customers had the option of connecting to municipal water systems. The Krokers and Mr. Seymour have no similar option.

Finally, we acknowledge Staff's concerns that customers may be worse off remaining on the system given questions how Mountain Home might seek to recover the costs to replace the well. That risk, however, is one that the Krokers have chosen to assume. Moreover, the customers have protections under ORS 757.061(3) to seek regulation of rates charged by Mountain Home—protections that, if triggered, would provide this Commission the authority to review those costs and determine how best to allocate them.

In summary, based on the evidence in this record, we find the totality of the circumstances do not support the abandonment. The application should be denied.[20]

[18] *Id.*

[19] *In re Fruitdale Water Utility*, Docket No. 88-255, Order No. 88-255 (Mar 10, 1988); and *In re Western Estates Water Company*, Docket No. UW 41, Order No. 93-545 (Apr 14, 1993).

[20] Because we deny the application, there is no need for use to address the Kroker's claim to a contract right to water from the original well. We note that both Mountain Home and Staff have raised a legitimate issue regarding our jurisdiction to decide that issue in any event.

VI. ORDER

IT IS ORDERED that the application of Mountain Home Water District for authority to abandon water service and abandon water utility is denied.

Made, entered, and effective MAY 16 2017.

Lisa D. Hardie
Chair

Stephen M. Bloom
Commissioner

Megan W. Decker
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.