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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

WA 36

In the Matter of)
)
WILLAMETTE WATER COMPANY.) ORDER
)
Application for an Allocation of Current)
and Expanded Service Territory.)

**DISPOSITION: APPLICATION GRANTED IN PART;
DENIED IN PART**

On February 9, 2000, Willamette Water Company (WWC) applied to the Public Utility Commission of Oregon (Commission) for the designation of an exclusive service territory. The Eugene Water and Electric Board (EWEB), the City of Eugene (City) and the Lane County Local Government Boundary Commission (Boundary Commission) participated as parties. On December 5, 2000, all parties agreed to a 180-day abeyance for processing the application. The Administrative Law Judge granted the abeyance and required WWC to submit, by May 15, 2001, a statement specifying the water resources it has available to serve the requested territory.

On June 8, 2001, WWC filed a request that the matter be held in abeyance for an additional six months while the company negotiated with a potential buyer. On June 22, 2001, the City filed a motion requesting that the Commission dismiss WA 36 for lack of jurisdiction or, in the alternative, to proceed with a hearing on the application. On July 27, 2001, Staff filed a response, opposing the City's motion. On September 12, 2001, the Commission denied the City's motion and granted the abeyance. Order No. 01-797. The order concludes that the Commission has concurrent jurisdiction with the Boundary Commission over territory allocation applications in Lane County. The order also states that we do not have jurisdiction to consider WWC's request for the expanded service territory described in the application.

On November 15, 2001, WWC filed an amended application with the Commission. On December 10, 2001, the ALJ issued a memorandum requiring WWC to serve the amended application on the parties by December 12, 2001, required Staff and interveners to comment on the sufficiency of the amended application by January 9,

2002, and required WWC to respond to the comments of Staff and interveners by January 23, 2002. On December 13, 2001, WWC supplemented the application. On January 9, 2002, the Boundary Commission, EWEB, the City, and Commission Staff filed comments on the amended application. On January 24, 2002, WWC requested an extension of time to file its memorandum responding to the comments. On February 6, 2002, instead of responding to the comments, WWC submitted amendments to the application addressing the comments of the parties. On February 25, 2002, WWC filed a memorandum identifying issues to be resolved in a hearing process. (See Appendix A.) On March 5, 2002, EWEB filed an opposition to WWC's memorandum. On March 18, 2002, the City filed a response to the issues raised by WWC.

At a conference on April 19, 2002, the ALJ determined that WWC had not sent the parties a copy of its February 6, 2002, amended application. At the conference, the ALJ directed WWC to provide copies of its amended application to the other parties. The ALJ also set a schedule for comments and replies to comments on the amended application. In addition, the ALJ directed WWC to submit a list of facts it intended to establish at a hearing. On May 10, 2002, WWC submitted a list of facts it intended to establish at a hearing. On May 24, 2002, the City and EWEB filed comments on whether WWC's amended application resolved concerns previously expressed about the scope and specificity of the original application. In its May 24, 2002, filing, EWEB opposed holding the hearing. On June 10, 2002, the ALJ concluded a hearing in this matter is unnecessary.

On June 19, 2002, WWC filed a complete application incorporating all the amendments previously filed. On July 17, 2002, at the request of the ALJ, the City clarified certain information in its brief.

FINDINGS OF FACT

WWC's only source of water for serving its customers is from EWEB. In 1972, the City, through EWEB and WWC, executed an Agreement for Supplying Water (Agreement), which authorizes WWC to resell the City's water in two geographic areas, designated area A and area B.¹ In 1977, the Agreement was amended, pursuant to a separate contract between the City, WWC, and Shady Oaks Swim Club, Inc., to add an area C.² The amendment consists of a Water Service Extension Agreement (Extension Agreement) with Exhibit I, Addendum to Agreement for Supplying Water (Addendum). The Addendum is between the City acting through EWEB and WWC. In this order, the terms supply contract and contract, refer to the Agreement, the Extension Agreement, and the Addendum.³

¹ On June 22, 2002, the Commission received a comment from a customer association objecting to the allocation of area B to WWC.

² In late July, the Commission received several letters from customers expressing concerns about water pressure in area C.

³ WWC's application, filed June 19, 2002, is incomplete and must be revised. Item A.14 does not include the Addendum to Agreement for Supplying Water, Exhibit I to the Water Service Extension Agreement,

While there is some question about the accuracy of WWC's description of each of these areas in the application, the descriptions are roughly correct.

The supply contract between EWEB and WWC contains a number of limitations on WWC's ability to serve the proposed territory, including:

- EWEB is only making water available that is surplus to its own needs and any rights conveyed to WWC under the contract are subject to EWEB's rights to the water.
- WWC's rights to the water are subject to all rules, regulations, and rates set by EWEB.
- WWC is authorized to resell water under the contract only in areas A, B, and C.
- EWEB can terminate the contract if it is unable to furnish sufficient water (applicable to areas A, B, and C) or upon giving 18 months notice (applicable to area C).
- WWC cannot allow any non-EWEB water in any portion of its system connected to EWEB's system, or permit cross connection that would allow outside supplies to mix with water supplied by EWEB.
- WWC can receive water for any new building within area A for which a valid building permit has been issued. The contract is subject to renewal each five years. The current contract expires August 24, 2002. On May 31, 2002, WWC notified EWEB of its intent to renew the contract for an additional five years.
- WWC's ability to serve any customer in area B is subject to EWEB's approval.

The City of Eugene has a restrictive water policy that prevents EWEB from approving any additional customers outside the City's projected urban service area, except in highly unusual circumstances.⁴

APPLICABLE LAW

Chapter 695, Oregon Laws 1999 (the Act)

The Act requires water utilities to apply for an order from the Commission designating the territory that it served adequately and exclusively on the effective date of the Act (October 23, 1999), as its exclusive service territory. The Act requires that the

May 12, 1977. Nor does it include the Boundary Commission's Amended Final Order 307, which is incorporated into the Extension Agreement by reference.

⁴ Pursuant to OAR 860-014-0050(1)(a) and ORCP Rule 202(4) and (7) [ORS 40.090], the Commission takes official notice of the City's Resolution 2643 (October 13, 1975). Any party may explain or rebut the noticed fact within 15 days of the date of service of this order.

application be filed by February 20, 2000. The utility may also apply for designation of territory that it expects to serve within six months of the date of application. The Commission also has authority over designated territories with regard to modifications to size, or the assignment, or transfer of the territory. ORS 758.300 to 758.315

In addition, the Act provides the Commission with a framework for processing the applications. The Act requires that the application shall be made on forms provided by the commission and must include all information required by Commission rule. Act, Sec. 2(1)(b). The Act requires the Commission to hold a hearing upon request by a customer and also allows the Commission to conduct a hearing and investigation, as it deems necessary. Act, Sec. 2(2) through (6).

Based on the record from the application and hearing, if one is held, the Commission must enter an order approving, disapproving or amending the application, together with findings of fact supporting the order. Before approving an application, the Commission must find that the applicant is adequately and exclusively serving the territory covered by the application. Act, Sec. 3(2).

Commission Rules

Among other matters, OAR 860-036-0905 requires:

(1) A completed application requesting an exclusive service territory for area the water utility is currently serving shall include the following:

(d) A statement showing the financial and technical ability of the applicant to provide service to the current territory;

(e) A detailed map or maps of the water system showing the existing lines and facilities;

(f) A detailed map or maps identifying the boundaries of the water utility's current service territory Appropriate maps may include: a GIS map, city or county map, tax lot map, plat map, or telephone book map. The map must be of sufficient scale and detail to identify the utility's current service territory boundaries and enable correlation with a written description of such territory;

(g) A complete and accurate written description of the water utility's current service territory. The description may be a legal description or may reference township, range, and section; interstates, state roads, and local streets; rivers, streams, and major

bodies of water; and recorded plats or lots, tracts, or other recorded instruments identifying permanent fixtures references;

(3) In reviewing a completed application submitted under Chapter 695 Sections 2–4, Oregon Laws 1999 for current exclusive service territory, the Commission shall consider the applicant's ability to provide adequate and exclusive service to its existing customers which may include but is not limited to, financial resources, technical ability, customer service history, physical facilities, system capacity, revenue and cost studies, and system compliance with the Oregon Health Division's water rules and regulations.

DISCUSSION

Need For An Evidentiary Hearing

At a prehearing conference, the ALJ ruled a hearing is not necessary in this case. We affirm the ALJ's decision.

Positions of the Parties

WWC claims a hearing is necessary to address the contested issues, as WWC understands them. WWC's issues with responses from the parties, are as follows:

1. WWC has the ability to provide adequate and exclusive service to its existing customers and any future customers within its service areas.

The City has no objection to granting authority to serve Area A. The City objects to Areas B and C. EWEB asserts this is a legal issue.

2. Absent a material breach by WWC, the City of Eugene does not have the contractual right to terminate its supply contract with WWC unless there is a shortage of surplus water.

The City asserts this issue is irrelevant because the application must be decided on WWC's actions prior to the final decision, the City has not indicated it intends to terminate the contract, and no party has asserted the City's right to terminate the contract is a ground for denying the application. EWEB asserts this is a legal issue.

3. The likelihood of a shortage of surplus water at any time in the foreseeable future is remote, if not impossible.

The City objects to this statement for the reasons listed for item 2. In addition, the City asserts WWC's current ability to receive water under the contract is unrelated to whether the City has surplus water. EWEB asserts WWC has had two years to produce evidence supporting its application. To allow it to produce this evidence now at a hearing would deny the other parties the opportunity to evaluate WWC's evidence, develop their own positions, and submit evidence to challenge WWC's proposed findings. Such a procedure would undermine basic notions of due process. To allow the other parties their right to respond appropriately would necessitate additional delays. EWEB concludes that WWC's request for an evidentiary hearing is too little, too late.

4. Water distribution to customers who require a new connection is not prohibited, but subject to approval of government bodies, which may include Lane County, Lane County Boundary Commission, and the City of Eugene.

The City objects to this statement of fact because it runs counter to the City's metropolitan plan and water policy. EWEB asserts this is a legal issue.

5. WWC will have sufficient capacity to service future development.

The City disputes this statement as to areas B and C. EWEB objects for the reasons set forth under item 3.

6. WWC has the financial resources and technical ability to serve all present and future customers in its service territory.

The City does not object because it does not have sufficient knowledge or reason to know WWC's financial and technical ability. EWEB objects for the reasons set forth under item 3.

7. WWC's customer service history is favorable.

The City does not object because it does not have sufficient knowledge or reason to know WWC's financial and technical ability. EWEB objects for the reasons set forth under item 3.

8. WWC meets the Original Application requirements of OAR 860-036-0905.

The City objects because WWC has not shown it has a legal source of water to serve Areas B and C. EWEB asserts this is a legal issue.

9. WWC meets the requirements of the Joint Application of the Public Utility Commission and the Lane County Boundary Commission.

The City has no position on this matter. EWEB asserts this is a legal issue.

10. WWC has three separate service areas designated in its supply contract as Areas A, B, and C which fall within the definition of “allocated territory” under OAR 860-036-0900.

The City agrees the descriptions of Areas A, B, and C are territories, but does not agree that WWC satisfies the criteria for areas B and C to be allocated as the exclusive service territories of WWC. The City has no opinion on whether area A should be allocated to WWC. EWEB asserts this is a legal issue.

Commission Decision

We agree with the ALJ’s conclusion that a hearing is not necessary. We note the statute governing this application states, “The application shall be made on forms provided by the commission and shall contain *all* information required by commission rule.” Act, Sec. 2(1)(b). (Emphasis added.) In other words, the applicant has an obligation at the outset of the docket to provide a complete record for the Commission to rule on the application. We further note that the statute requires a hearing only upon request of a customer or upon the Commission’s own motion. Act, Sec. (2) through (6).

In this proceeding, WWC has had ample opportunity to present facts and evidence supporting this application. This docket started in February 2000. Over that period, WWC has amended its application several times and has had two opportunities to respond directly to the objections of the parties. It would be wasteful of our resources and the resources of the parties to allow WWC yet another opportunity to make its case.

Furthermore, the facts WWC intends to prove at hearing are facts that should have been included in the application, legal matters, uncontested issues, or irrelevant. Issue 1 is clearly a legal conclusion of the key issue in the case. Issue 2 is irrelevant for the reason set forth by the City and is a legal issue. Issue 3 is irrelevant. No party is claiming there is a likely shortage of surplus water. Issue 4 is a legal issue. As to issue 5, WWC has had adequate opportunity to provide evidence of its capacity to service future development. This evidence is required by the application. Any facts relevant to issues 6 and 7 should have been included in the application. Issues 8 and 9 are catchall legal conclusions. Issue 10 is a legal conclusion. The request for hearing was properly denied.

Applicant’s Ability to Exclusively and Adequately Serve Areas A, B, and C

Positions of the Parties

The City. The City of Eugene opposes the application. The City argues that WWC does not have its own water or sufficient water to serve the requested territory and will not be able to provide service to new customers in areas B and C without action by the City. As a result, the City concludes that the Commission cannot find that WWC is “adequately and exclusively serving the territory covered by the application,” as required by the Act.

The City also asserts that WWC's application is flawed because it seeks a grant of exclusive service territory instead of simply confirming WWC's rights under the contract. In the City's view, WWC may serve existing and approved customers in areas B and C, not a geographic territory, as long as the City agrees to continue to provide water to WWC for those customers.

For area A, the City agrees that, under the EWEB contract, WWC has a right to receive water for any new building for which a valid building permit has been issued. The City also asserts the City’s current water policy may require EWEB to refuse to renew the contract unless WWC agrees to limit its water service to existing customers.

The City claims the contract also limits service in areas B and C to specifically identified customers. According to the City, the contract requires WWC to seek approval of the City through EWEB for sale of water to any customers in area B. According to the City, WWC has presented no evidence it has this approval, and the City has no record of giving such approval. In addition, the City claims its new water policy will prevent EWEB from approving any new customers in area B.

Finally, the City claims there are a number of customers in area B who receive their water directly from EWEB’s water main. Although WWC bills those customers, the City claims no part of WWC's physical system is used to deliver water to these customers. As a result, the City claims the Commission cannot find WWC is providing exclusive service to these customers.

Under the contract, plat records for a subdivision known as Shade Oaks define area C. The City argues the contract limits WWC's right to distribute water not by geographical or platted area, as required by the territory allocation law, but by the right to make 22 connections to the 22 existing parcels within Shade Oaks. As a result, the City argues the Commission cannot find WWC is adequately serving a “territory.”

The City asserts WWC cannot adequately and exclusively serve area C because WWC does not have the capacity to serve all new customers as well as existing customers. The City cites ORS 758.305(2) for the proposition that a water utility must be able to serve all applicants for service within its designated territory. It also cites

ORS 758.305(4), which gives the Commission authority to revoke exclusive territory from a utility without sufficient water to serve all development within the designated territory.

The City argues that if any of the 22 parcels within Shade Oaks is subdivided, WWC will not be able to provide water service connections to the resulting subdivision. While WWC may be able to demonstrate that it is exclusively and adequately providing service to the original 22 platted parcels, the City asserts that WWC will not be able to satisfy a future request for a 23rd connection to a newly subdivided parcel.

The City also raises possible land use implications from a grant of exclusive territory allocation. The City states that if the Commission grants exclusive territory to WWC and WWC has no permanent water source to serve new customers, landowners who are unable to develop a private source of water will not be able to obtain water from any source at all. This will have the effect of prohibiting all development of lands without sufficient, potable ground water. Such an action could have the effect of imposing a de facto moratorium on development within the territory and might, therefore, be a land use decision.

EWEB's Position. EWEB agrees with the City that the principal issue is whether the supply contract provides WWC an adequate source of water to serve the requested territory. EWEB asserts that the application does not fully reflect WWC's dependence on the supply contract with EWEB. Any grant of allocated territory should specify that the contract authorizes WWC to distribute water only in certain defined geographic areas or to specific customers, and that, under certain circumstances, EWEB has the unilateral right to terminate the contract. EWEB urges that an order allocating territory to WWC specify that the order does not create an implied non-contractual duty for EWEB to continue to supply water to WWC.

EWEB also argues that WWC's maps, customer lists, and descriptions do not sufficiently define the geographic territories proposed for allocation or fully reflect WWC's dependence on the water supply contract with EWEB. It asks that the parties be given an opportunity to review and verify for accuracy detailed maps of the proposed territory. If the application is granted, the order should make clear that the maps are provided for reference and in the case of a discrepancy a written description of the geographical allocation will prevail.

Assuming WWC provides proper maps and the Commission acknowledges the contract limitations, EWEB has no objection to the Commission finding that WWC has met the statutory criteria for an allocation of area A.

EWEB asserts WWC should not be granted exclusive territory allocation for the portion of area B that is within the boundaries of the Eugene-Springfield Metropolitan General Plan.

As for area C, EWEB claims the application's description does not accurately reflect the area WWC may serve pursuant to the contract. In addition, EWEB asserts service to area C is subject to the limitations in the Addendum.

WWC's Position. WWC argues it can adequately and exclusively serve all three areas. WWC asserts it could show at hearing that it has met the standard and could do so in the future. It argues that a hearing is necessary to rebut the City's arguments about contract interpretation, ordinance interpretation, statements based on information and belief, and speculation about the future.

WWC also argues the City misinterpreted the language in the agreement that limits Area C to 22 connections. WWC contends the contract refers to 22 parcels, so if one of the parcels requested additional connections, WWC would have the right to provide them.

WWC argues that the issue of whether the Commission should allocate a portion of area B that is within the Eugene-Springfield Metropolitan Area General Plan should be resolved through a hearing process. WWC asserts the provisions of the supply contract giving EWEB the option of taking over WWC's water system deal with the issue of metropolitan growth. It concludes neither party is harmed by this approach. It asserts it has amended its application so the description of area C is precisely as the contract defined it.

Commission Decision

We grant WWC's application, as modified here and as conditioned on the water supply contract with EWEB. We specifically limit allocated territory to the terms and geographical scope of the contract with EWEB. Should WWC's ability to obtain water under the contract be restricted by any action of a party, a court, a governmental unit, or in any other way, the territory allocated may be revised to conform to the restriction. Finally, we will hold this allocation in abeyance until the Boundary Commission acts on WWC's application. After the Boundary Commission acts, we will review our order for consistency with the Boundary Commission's action.

Area A. EWEB and the City agree that the Commission can grant area A, subject to the limitations in the supply contract and agreement on the legal description of the territory. We conclude that area A should be allocated to WWC subject to the limitations identified by EWEB and the City.

Area B. We agree with the City that WWC's application does not demonstrate WWC's ability to exclusively and adequately serve area B. The contract, attached as Exhibit A.14 to the application, states:

The Company (WWC) also agrees that it will not sell or dispose of any of said water in Area B ... without prior approval of the Board (EWEB).

We conclude the application fails to demonstrate that WWC has a reliable and adequate source of water to serve area B. In our view, an application must contain a clear and unequivocal showing that it has the ability to serve customers. Written documentation would be the clearest showing that EWEB approved WWC's sale or disposal of EWEB water within area B.

We acknowledge WWC's argument that EWEB is approving of WWC's resale of water by continuing to supply the water that WWC resells in area B. However, for our purposes, we do not consider that an adequate demonstration to show compliance with the contract term. For us to reach that conclusion, we would have to interpret provisions of the contract and the parties' actions to determine whether EWEB's conduct constitutes approval. In our view, a court of general jurisdiction should make that decision, for at least three reasons.

First, courts of general jurisdiction are far more familiar with the law surrounding contracts than we are. Our expertise lies in interpreting the statutes that we enforce, our rules, utility rate schedules, and the subject matter surrounding regulated utilities. None of that expertise is useful in determining the relative rights and obligations of the parties under the supply contract. See *Portland General Electric*, DR 28, Orders No. 02-121 (February 25, 2002) and No. 02-317 (May 7, 2002).

Second, a decision interpreting this contract has implications far beyond territory allocation. WWC asks us to involve ourselves in matters that may affect a city's ability to sell municipal resources and to regulate development. Such matters should be addressed in a broader context than a territory allocation proceeding.

Finally, as pointed out above, WWC is obligated to submit all of its information when it submits its application. One alternative available to WWC is to file a declaratory ruling action in Lane County Circuit Court. A favorable declaration by a court could be included in an application and could clarify any ambiguities regarding the adequacy of WWC's source of supply.

We can find no basis in the law for denying the application because area B lies within the Metro Plan Boundary, EWEB has facilities in the area, and EWEB is ready to serve the area if the City Council and EWEB Board determine that EWEB should provide service.

Area C. We tentatively conclude area C should be allocated to WWC.

The City and WWC disagree on the proper interpretation of the Addendum. The parties agree that paragraph 2. of the Addendum contains language limiting WWC's right to sell and dispose of water in area C.⁵ They disagree on whether the paragraph limits WWC to one connection to each of 22 parcels or an unlimited number of connections to those parcels. The City argues that the Addendum limits WWC service to a specified number of connections, not a specified geographic area.⁶ Because the Act requires an applicant to demonstrate that it has adequate resources to serve a territory, the City claims that WWC cannot meet the statutory requirement for an exclusive allocation.

We disagree with the City that this limitation is fatal to the application. The supply contract describes area C, as follows:

Shade Oaks, as platted and recorded in Book 43, Page 9, Lane County, Oregon Plat Records, together with the line extension and easement area 10 feet in width as particularly described in the Amended Final Order (307 of the Boundary Commission).

This description is consistent with our rules, which authorize an applicant to describe its current service territory by reference to recorded plats or lots. OAR 860-036-0905(1)(g). The supply contract description is sufficient to meet the requirements of the Act.

The City next argues that we cannot find WWC is adequately and exclusively serving the territory because the Act requires a water utility to be able to

⁵ Paragraph 2 of the Addendum provides: (a) The Company (WWC) shall have the right to make connections from the extended line and sell and dispose of water only to the existing 22 parcels within Shade Oaks and shall not have the right and shall not make or permit any other connection within Shade Oaks; and

(b) The Company shall not have the right and shall not make any connection to sell or dispose of water to existing housing having direct access to the line to be extended *from the point of connection of the existing water distribution system of the Company to the most northerly corner of Shade Oaks, or to any other parcel along the route to be extended*, except upon all of the following having occurred: (i) Boundary Commission approval, as required by law then in force and effect, for each particular connection; and (ii) Approval of the City and approval of each and every governmental agency, bureau, department, or division then having jurisdiction over such connection. (Emphasis added.) (The City's brief quotes subparagraph (b) with the italicized language omitted. The City does not mark the omission with an ellipsis.)

⁶ The City argues that subparagraph (b), in its truncated form, requires WWC to obtain Boundary Commission approval for each connection in Shade Oaks. The quote, when viewed in its entirety, appears to belie the City's assertion. Maps provided by the City at the request of the ALJ seem to indicate that the line to be extended terminates at the northerly corner of Shade Oaks. Our review of the maps suggests that subparagraph (b) does not apply to parcels within Shade Oaks at all. As we decided regarding area B, any questions regarding EWEB's and the City's obligation to provide water to WWC should be addressed by a court of general jurisdiction.

serve all new customers. The City quotes ORS 758.305(2) as requiring, “a water utility ... shall serve all applicants within the designated territory.”

The City misstates the water utility’s obligation to serve. Reading the entire statute discloses that a water utility may refuse service, if it follows the procedures set forth in the Commission's rules. ORS 758.305(2) states, in full:

(2) A water utility shall serve only customers within its designated exclusive service territory and shall serve all applicants for service within its designated territory. The water utility may refuse service only as provided by commission rule. (Emphasis added.)

Our rules recognize that a water utility may not have sufficient resources to serve a new customer. The Commission's rules provide:

A water utility shall not accept an application for service or materially change service to a customer if it does not have adequate facilities or water resources to render the service applied for, or if the desired service is of a character that is likely to unfavorably affect service to other customers. ...

ORS 860-036-0080(7).

Furthermore, our rules setting forth the requirements for a territory allocation require us to consider the “applicant’s ability to provide adequate and exclusive service to its existing customers...” OAR 860-036-0905(3). (Emphasis added.) The rule does not require that we consider an applicant’s ability to serve new customers.

We conclude that a water utility applicant for allocated territory is not required to have adequate facilities to serve all potential new customers. The City's argument is rejected.

We also note that, if the City or EWEB exercise their rights under the supply contract to terminate service and WWC does not have adequate capacity to serve the designated area, the Commission could decrease the exclusive service territory. ORS 758.300(4).

Similarly, we reject the City's argument that an allocation of area C may require compliance with land use law. The City made the argument without reference to statute, rule, or case law. We have no basis to evaluate the City's argument.

Customer Concerns

We are concerned about the service quality problems raised in the ex parte letters referred to in footnote 2. The Act and our rules require us to consider the adequacy of service to existing customers. We direct our Staff to contact the customers in area C to determine the nature and extent of the service quality in that area.

Our Staff should report its findings to us within 28 days of service of this order. Specifically, Staff should recommend whether we should conclude that WWC is providing adequate service to its existing customers.

Staff should serve copies of its report on the service and interested persons list. Parties and interested persons may respond to the Staff report within 14 days of the date of service of the Staff report.

The Commission may order further proceedings if necessary.

Specific Provisions of the Application

The City and EWEB raise a number of concerns regarding the language of WWC's application. Issues include the need for:

- Accurate maps and descriptions of the service territory;
- Accurate statements of WWC's reliance on EWEB water subject to the supply contract and subject to the jurisdiction of the Eugene City Council;
- Customer lists that differentiate between customers in areas A, B, and C;⁷
- A statement that any new service within the designated territory is subject to the terms of the supply contract, including the ability to serve customers whose wells may fail or customers who may get permits to build within the allocated territory.
- A statement regarding EWEB's prior and superior right to the use of its water; and
- A statement that granting this application imposes no contractual or non-contractual duties on EWEB to supply water.

The final application should contain a statement that, under ORS 758.300(4), the Commission may revise the territory allocation if WWC's ability to use the City's water is restricted by action of a party, a court, a governmental unit, or in any other way.

⁷ The City asks that WWC be required to show that, for area B, EWEB has authorized sale of water, and for area C, whether the customer occupies one of the 22 authorized parcels under the Addendum. We have rejected the application for area B because the applicant failed to show it is authorized to serve customers as required by the Addendum. As for area C, the City can request that WWC supply information about compliance with the terms of the supply contract.

We direct our Staff to work with the parties to make the appropriate changes to the application so that it complies with this order and addresses the City and EWEB's above requests for specificity. A final application should be filed for approval within 14 days of service of this order.

Lane County Boundary Commission Proceedings

As we pointed out in Order No. 01-797, we have concurrent jurisdiction with the Boundary Commission over applications for allocated territory within Lane County. We are aware of the conflict that might arise if we allocate territory and the Boundary Commission does not. Such an action could preempt the Boundary Commission and render its jurisdiction moot. We consider it vital to coordinate our efforts with the Boundary Commission to ensure, to the maximum extent possible, a consistent approach to territory allocations in Lane County. This is particularly true given the late filed letters from customers in area C expressing concern about water pressure. As a result, we will stay implementation of this order until the Boundary Commission has acted and we have had an opportunity to consult with them and coordinate a resolution of this case.

We direct our Staff to inform the Boundary Commission of our action. Our Staff should request that the Boundary Commission inform us when they have resolved the issues before them. At that point, our Staff can propose to us a means for reconciling any differences between our action and the Boundary Commission's action.

If the Boundary Commission has not acted within 120 days of this order, WWC may request that we lift our stay and allow the territory allocation to go into effect.

ORDER

IT IS ORDERED that:

1. The application, as may be further revised under paragraph 4., for exclusive allocation of area A to WILLAMETTE WATER COMPANY, is granted.
2. The application for exclusive allocation of area B to WILLAMETTE WATER COMPANY is denied.
3. The application, as may be further revised under paragraphs 4. and 5., for exclusive allocation of area C to WILLAMETTE WATER COMPANY, is tentatively granted.
4. Within 14 days of the date of service of this order, WILLAMETTE WATER COMPANY shall submit a revised application to the Commission Staff, LANE COUNTY LOCAL GOVERNMENT BOUNDARY COMMISSION, THE EUGENE WATER AND ELECTRIC BOARD and the CITY OF EUGENE for their review. WILLAMETTE WATER COMPANY shall file the agreed upon language for Commission approval, within 28 days of the date of service of this order. The final agreed-upon language shall include a legal description of areas A and C. If the parties are unable to reach agreement, any party may request that the Commission determine the final language of the application.
5. Within 28 days of the date of service of this order, Commission Staff shall report to the Commission on the adequacy of service to customers in area C. Within 14 days of the date of service of the Staff report parties and interested persons may file a response with the Commission.
6. Paragraphs 1., 2 and 3. above, are stayed.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to 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 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

Appendix A

Willamette Water Company's List of Issues for Hearing

Contract issues

- May the City of Eugene unilaterally change its obligations under the contract by amending its City Charter or amending its water policies?
- Did WWC reasonably rely upon the contract and the charter and water policy of the City of Eugene when it constructed its water discharge system for the City of Goshen and the areas identified in the contract as areas A and B?
- Are the rights and obligations of the parties to the contract defined by the contract and the City of Eugene's charter and water policy as of the date of the contract?
- May the City of Eugene refuse to approve additional water hookups to structures or facilities which otherwise qualify for occupancy?
- May the City of Eugene enact legislation, either by charter amendment or policy or ordinance, which has the effect of frustrating the mutual intent of the contract or impairs the ability of EWEB to WWC to perform the contract?
- May the City of Eugene terminate the contract in the absence of a showing that it has insufficient surplus water?

Land use issues.

- If the PUC grants WWC an exclusive territory, is that action a land use decision?

Policy issues.

- Does public policy preclude the City of Eugene from refusing to approve additional service connections in all areas of WWC's territory?
- May the PUC's decision, on public policy grounds, override certain terms and conditions of the contract?