

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Received
on

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In the Matter of the Application of Suburban Water,)
Inc., d/b/a Suburban Water Company, for Approval)
of the Commission to Make Certain Changes in its)
Rates for Water Service, for Approval of an)
Amendment to a Contract for Sale of Water with)
Board of Public Utilities an Administrative Agency)
of the Unified Government of Wyandotte)
County/Kansas City, Kansas ("BPU"), and for)
Approval of a Purchase Water Adjustment ("PWA"))
Tariff)

by
State Corporation Commission
of Kansas

Docket No. 12-SUBW-359-RTS

STAFF'S PREHEARING BRIEF

The Staff of the State Corporation Commission of the State of Kansas (Staff) files this Brief to address legal issues raised by the Commission in the 10-SUBW-602-TAR (10-602 Docket) and the 11-SUBW-448-RTS (11-448 Docket) dockets directly relating to Suburban Water, Inc.'s (Suburban) current Application to increase the rates in Leavenworth, County, Kansas (Application). The purpose of Staff's brief is to identify the issues raised in the prior dockets and provide Staff's position on each issue. In support of its Brief, Staff states:

I. QUESTIONS PRESENTED

- a. Whether legal basis exists permitting the Board of Public Utilities (BPU) to impose a PILOT fee on wholesale water provided to Applicant?
- b. Whether BPU has imposed higher-than-needed rates and if so, whether such rates may be passed through to Applicant's customers as just and reasonable rates?
- c. Whether the contract between Applicant and BPU is sufficient to protect the interests of Applicant's customers?

II. BACKGROUND

Suburban Water, Inc. (Suburban) is a certificated utility based in Basehor, Kansas. In early 2010, Suburban filed an application with the Commission seeking approval of a Purchased Water Adjustment (PWA). This application was docketed as 10-SUBW-602-TAR (10-602 Docket). The PWA would permit Suburban to pass along anticipated annual cost of water increases as identified in the contract for water supply between the utility and the Wyandotte County Board of Public Utilities (BPU).

In response to Suburban's application, Staff and the Citizens' Utility Ratepayer Board (CURB) entered into a Stipulated Agreement with Suburban recommending Commission approval. In the *Joint Motion to Approve Stipulation and Agreement* (S & A) filed on September 7, 2010, the parties proposed the Commission approve the PWA and permit the incremental annual increases to the cost of water to Suburban's Leavenworth County customers. In addition to the annual cost of water increases, the PWA would also pass through incremental increases in the amounts of: 12.9% in 2010, 11.9% in 2011, 10.9% in 2012, and 9.9% in 2013 to account for payment-in-lieu-of-taxes (PILOT).¹

On November 3, 2010, the Commission rejected the parties' Joint Motion finding "the S & A submitted here is not supported by substantial evidence in the record, does not contain evidence to show rates will be just and reasonable for Suburban Water's customers, and is not in the public interest."² In its review of whether the proposed rate increases would result in just and reasonable rates, the Commission questioned whether: (1) BPU had the authority to "unilaterally modify water purchase rates or customer charges through the mechanism of system

¹ See, 10-SUBW-602-TAR, *Joint Motion to Approve Stipulation and Agreement*, September 7, 2010, pg 3 ¶ 7b.

² See, 10-SUBW-602-TAR, *Order on Application*, November 3, 2010, pg 3 ¶ 6.

enhancements as recommended by Black and Veatch”;³ (2) BPU has the authority to avoid paying any direct charges for “free” services consisting of water used by the city, city hall, parks and other operations of the Unified Government;⁴ (3) the BPU is a taxing authority within the contemplation of K.S.A. 12-147 and if so, whether the Unified Government has authority to assess a PILOT percentage on bills of its wholesale water customers like Suburban Water that are outside of the Unified Government’s jurisdiction.⁵

In 2011, the Commission had another opportunity to review the issue of the PILOT fee in docket number 11-SUBW-448-RTS (11-448 Docket). In this case, Suburban filed an abbreviated application for a general rate increase as proscribed in the November 3, 2010, Order on Application.⁶ In the 11-448 Docket the Commission granted Suburban’s requested rate increase on an interim basis again citing the Commission’s concern over the yet-to-be answered questions relating to the sufficiency of the contract for water and the legality of the PILOT Fee.

This Brief serves as Staff’s response to the legal questions raised by the Commission in both the 10-602 and 11-448 dockets.

III. The Standard of Review

In the November 2010 Order on Application in the 10-602 Docket, the Commission declared that “just and reasonable rates” are those rates which fall within the “zone of reasonableness” by taking into account various interests of all parties involved.⁷ The Commission noted that it has broad discretion to determine the range that is most fair to the utility and its customers and that in considering whether proposed rates are within the zone, the

³ *Id.* at pg 11 ¶ 21.

⁴ *Id.* at 12 ¶ 24.

⁵ *Id.* at pg 13 ¶ 25.

⁶ *See*, 10-SUBW-602-TAR, *Order on Application*, November 3, 2010, pg 20 ¶ 41.

⁷ *See*, 10-SUBW-602-TAR, *Order on Application*, November 3, 2010, pg 9 ¶ 18, citing *Farmland Industries, Inc. v. Kansas Corp. Comm’n*, 24 Kan. App. 2d 172, 195, 943 P.2d 470, rev denied, 263 Kan. 885 (1997).

Commission must balance the competing interests identified in the 1986 Supreme Court decision in the *Kansas Gas & Electric Co. v. State Corp. Commission*.⁸

In a concurring opinion in the 11-KCPE-581-PRE docket, citing the *Kansas Gas and Electric Company v. State Corporation Commission* case, Commission Chairman Sievers stated that a “just and reasonable” inquiry requires an “explicit assessment” of public interest – a task to be completed by considering the three elements identified in the *Mobile-Sierra* cases. The three elements identified in the *Mobile-Sierra* cases are: (1) whether there is an impact on the financial ability of the public utility to continue to provide service; (2) whether there is an excessive burden on customers; and, (3) whether the rate is unduly discriminatory.⁹ Additionally, the Supreme Court held that “in rate-making cases, the parties whose interests must be considered and balanced include: the utility’s investors vs. the ratepayers; the present ratepayers vs. the future ratepayers; and, the public interest.”¹⁰

IV. Whether legal basis exists permitting the Board of Public Utilities (BPU) to impose a PILOT fee on wholesale water provided to Applicant?

a. The Unified Government of Wyandotte County is a taxing authority.

On October 1, 1987, the local governments of Wyandotte County and the city of Kansas City, Kansas formally merged becoming what is now known as the Unified Government of Wyandotte County/Kansas City, Kansas or simply “WYCO”.¹¹ Pursuant to Kansas law, WYCO is a county and as such has all the powers, functions and duties of a county and may exercise

⁸ *Id.*, at pg 9 ¶ 18, citing *Kansas Gas & Electric Co. v. State Corp. Comm’n*, 239 Kan. 483, 488-90, 720 P.2d 1063 (1986), appeal dismissed at 481 U.S. 1044 (1987).

⁹ Chairman Sievers concurring opinion, 11-KCPE-581-PRE citing *Kansas Gas and Elec. Co. v. State Corp. Com’n*, 239 Kan. 483, 720 P.2d 1063, 1071 (Kan. 1986).

¹⁰ Chairman Sievers concurring opinion, 11-KCPE-581-PRE citing *Kansas Gas and Elec. Co. v. State Corp. Com’n*, 239 Kan. 483, 720 P.2d 1063, 1063 (Kan. 1986).

¹¹ See, *About Kansas City, Kansas*,

http://www.wycokck.org/Dept.aspx?id=16384&menu_id=1358&banner=15284&ekmense=1358_submenu_0_link_1; See also, *About Kansas City, Kansas – Consolidated Governments*, <http://www.wycokck.org/InternetDept.aspx?id=26614>.

home rule powers in the manner proscribed by Article 12, § 5(b) of the Kansas Constitution¹² which provides in part:

Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is prohibited by enactment of the legislature applicable uniformly to all cities of the same class....

As such, WYCO is a "political and taxing subdivision" of the State of Kansas.¹³

b. Home Rule: Exemption from State Statutes Governing Cities

Pursuant to Article 12, Section 5 of the Constitution of the State of Kansas, as discussed above, cities may exempt themselves from certain statutes governing the activities of cities. This doctrine is commonly known as "Home Rule."¹⁴ Under Home Rule, a city may by charter ordinance, elect to exempt itself from the whole or any part of any enactment of the legislature applying to such city.¹⁵ Additionally, pursuant to K.S.A. 12-346(m), WYCO is declared a city of the first class and as such has all the powers, functions and duties of a city of the first class to include the right to exercise home rule powers.¹⁶ In 2001, WYCO enacted Charter Ordinance No. CO-5-01, exempting WYCO from most of Chapter 13 (Cities of the First Class), Part I (Government by Mayor and Council and General Laws), Article 12 (Public Utilities).¹⁷ With

¹² S.A. § 12-346(l) (2001).

¹³ K.S.A. § 12-3202 (2001).

¹⁴ Constitution of the State of Kansas, Art. 12, § 5

¹⁵ *Id.*, § 5(c)(1) & (2).

¹⁶ K.S.A. § 12-346(m) (2001).

¹⁷ Specifically, Charter Ordinance No. CO-5-01 (CO-5-01) exempts WYCO from K.S.A. §§ 13-1213, 13-1214, 13-1215, 13-1220, 13-1221, 13-1222, 13-1223, 13-1224, 13-1225, 13-1226, 13-1227, 13-1228, 13-1228a, 13-1228c, 13-1228d, 13-1228e, 13-1228f, 13-1228g, 13-1228h, 13-1229, 13-1230, 13-1231, 13-1232, 13-1235, 13-1236, 13-1237, 13-1252, 13-1253, 13-1254, 13-1255, 13-1257, 13-1258, 13-1259, 13-1260, 13-1261, 13-1269, 13-1270, 13-1271, 13-1272, 13-1273 and 13-1275, relating to the election, salary, terms of office, meetings, qualifications, election of officers, and vacancies of members of the board of public utilities, the sale of surplus utility services or products by board, the powers and duties of the board, the appointment, qualifications, and powers of a general manager of the board, the power of the board to enter into contracts for extensions of retail service outside the unified government limits, the percentage of gross operating revenues of the board which must be transferred to the unified government and the timing of such transfer, and providing for any proposed sale of utilities, requirements for an election on the question of sale, including a feasibility study, and the manner of such election, the fixing of utility

regard to the questions posed for this brief, Charter Ordinance CO-5-01, Section 3 creates an administrative agency known as the Board of Public Utilities (BPU).¹⁸ Section 5 authorizes BPU to:

. . . manage and control the daily operation of any utility. The board shall be charged with the exclusive duty of producing and supplying the unified government and the inhabitants within the city with utility services or products provided by any utility for domestic, commercial and industrial purposes and for public use within the city. **The board may also produce and supply such utility services outside the city on an exclusive or nonexclusive basis. . . . The board may contract for the purchase and sale of utility services or products within or outside the city as deemed necessary for the ultimate benefit of the unified government and the inhabitants within the city; . . .**¹⁹ (emphasis added).

c. The BPU is an agent of the city of Kansas City, Kansas.

The Board of Public Utilities of Kansas City (BPU) is an administrative agency of the city of Kansas City, Kansas which is charged with the duty of managing, operating, maintaining the daily operation of the city's water plant.²⁰ BPU is not a municipal corporation nor is it a quasi-municipal corporation and as a result, BPU does not have the power to levy taxes.²¹ BPU however, operates the water facility in the name of the city as an agent of the city, subject to application of the home rule charter ordinance.²²

d. Authority to Charge a Payment In Lieu Of Taxes (PILOT) fee

As an agent of the City of Kansas City, Kansas, BPU has the authority to pass along a PILOT fee to its customers. K.S.A. 12-147 provides:

Every **taxing subdivision** of the state of Kansas is hereby authorized to enter into contracts for the payment of service charges in lieu of taxes, with the owner or owners of **property which is exempt from the payment of ad valorem taxes**

rates, the ownership and improvement of utilities, the issuance of general obligation bonds and revenue bonds for utilities and providing substitute and additional provisions on the same subjects.

¹⁸ CO-5-01, Section 3.

¹⁹ CO-5-01, Section 5 (emphasis added).

²⁰ *Board of Public Utilities of Kansas City v. City of Kansas City*, 227 Kan. 194, 605 P.2d 151 (1980); K.S.A. 13-1220.

²¹ *Id.*, at 198

²² *Id.*

under the laws of the state of Kansas and is further authorized to receive and expend revenue resulting there from in the manner hereinafter provided. (emphasis added).

Likewise, K.S.A. 12-3902 states:

For purposes of this act, all references to "political and taxing subdivisions of this state" shall mean and include counties, townships, cities, school districts, library districts, park districts, road districts, drainage or levee districts, sewer districts, water districts, fire districts and taxing subdivisions created and established under the laws of the state of Kansas.

And, K.S.A. 79-201a provides that:

The following described property, to the extent herein specified, shall be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas: . . . Second. All property used exclusively by the state or any municipality or political subdivision of the state . . . which is used or is to be used for any governmental or proprietary function and for which bonds may be issued or taxes levied to finance the same, shall be considered to be used exclusively by the state, municipality or political subdivision for the purposes of this section.

Because WYCO is a political/taxing subdivision, it may contract for PILOT fees on property that is used exclusively by a political subdivision of the State. The utilities for which BPU is responsible consist of property used exclusively by WYCO, and BPU and WYCO entered into an agreement for the payment of such charges in lieu of taxes pursuant to K.S.A. 12-147. In a later charter ordinance, WYCO provided for a payment from BPU to WYCO in lieu of taxes in an amount "not less than five percent nor more than 15 percent of its gross revenues for such fiscal year."²³

e. The PILOT fee ("Contribution to General Fund") is a Fee, not a Tax.

However, with regard to BPU's wholesale water sales, the PILOT fee (now titled "Contribution to General Fund") is more like a "fee" than a "tax." The Kansas Supreme Court stated that:

²³ CO-3-02, Section 18.

[A] tax is a forced contribution to raise revenue for the maintenance of governmental services offered to the general public. In contrast, a fee is paid in exchange for a special service, benefit, or privilege not automatically conferred upon the general public . . . Payment of a fee is voluntary – an individual can avoid the charge by choosing not to take advantage of the service, benefit, or privilege offered.²⁴

Here, because BPU's utility product – water – is not offered to the general public outside of the areas defined in CH-5-01, the PILOT fee or Contribution to General Fund is not a tax, but a fee charged to BPU's wholesale customers for the service, benefit and privilege of using BPU's water.

In its application for a rate increase filed in this docket, Suburban filed an *Amended Contract For Water Service* which deletes the terms "PILOT fee" and replaces the term with "Contribution to General Fund."²⁵ Supporting testimony in Suburban's filing indicates that the parties agree that the fee being charged is not a tax and therefore the new term more accurately reflects the nature of the fee being charged.²⁶

V. Whether BPU has imposed higher-than-needed rates and if so, whether such rates may be passed through to Applicant's customers as just and reasonable rates?

First, as discussed above, BPU is an agent of WYCO which serves primarily to operate the Unified Government's municipally owned water facility. Kansas law provides that municipal owned facilities of this nature are exempt from Commission authority pursuant to K.S.A. 66-104.²⁷ Notwithstanding the exemption from KCC jurisdiction, the public utility is still obligated under state law to provide just and reasonable rates in a manner which is non-discriminatory.²⁸ Citing *Holly v. City of Neodesha*, the Kansas Supreme Court said: "[c]ities which undertake to

²⁴ *Rockers v. Kan. Turnpike Auth.*, 268 Kan. 110, 116, 991 P.2d 889 (1999) (citing *Exec. Aircraft Cons., Inc. v. City of Newton*, 252 Kan. 421, 427, 845 P.2d 57 (1993)).

²⁵ Amendment To Contract For Water Service, page 1 and page 3 - ¶4, 12-SUBW-359-RTS.

²⁶ Direct Testimony of Gary Hanson, Exhibit GH-1, Page 2, 12-SUBW-359-RTS.

²⁷ *Holton Creamery Co. v. Brown*, 137 Kan. 418, 20 P.2d 503,505 (1933).

²⁸ *Id.* at 504.

furnish water to their inhabitants are subject to the same limitations in this respect as private companies operating under city franchises.”²⁹ The Kansas District Courts have the jurisdictional power to address complaints of questionable rates relating to the justness of municipal utility rates.³⁰ Staff’s research has not identified any actions filed in the District Court which allege that the rates BPU charges for water service are unreasonable. Because the BPU rates at issue in this case, have gone unchallenged in the State Courts, the rates are presumed reasonable.

VI. Whether the contract between Applicant and BPU is sufficient to protect the interests of Applicant’s customers?

In both the 10-SUBW-602-TAR and 11-SUBW-448-RTS, the Commission expressed concern over the terms of the contract between Suburban Water and BPU. Specifically, the Commission questioned whether the contract would provide a reasonable guarantee that Suburban’s customers would have a reliable source of water in the foreseeable future. In the 10-602 Docket, the Commission denied Suburban’s request for a Purchase Water Adjustment (PWA) citing as one reason its concern that “Suburban Water customers would pay capital costs for improvements to the BPU water system for almost 9 years with no assurance that Suburban Water will not lose its right to this water supply when the Water Contract ends.”³¹

In the November 3, 2010 Order (10-602 Docket), the Commission questioned the use of “surplus water” designation of the supply to be received by Suburban. At the heart of this concern was the statutory provision which prohibited BPU from selling or “disposing” of water

²⁹ *Id.* at 504, citing *Holly v. City of Neodesha*, 88 Kan. 102, 109, 127 P.616 , 619 (1912) (rehearing denied December 13, 1912).

³⁰ *Id.*,

³¹ Order on Application, 10-SUBW-602-TAR, November 3, 2010.

outside of the city, unless such water was 'determined to be surplus water produced by the BPU not required for use within the corporate limits of the Unified Government.'"³²

Staff's review of the Contract submitted with Suburban's Application in the current docket indicates that Suburban has addressed both of these two concerns. First, the parties expanded the primary term of the contract from the initial term of 20 years to 30 years with an automatic renewal of five years (expanded from the initial one-year term), unless otherwise terminated by either party.³³ Next, the parties added language to Article I and Article II of the contract which establishes BPU's intent to treat Suburban as a priority customer with regards to water supply. In Article I, the agreement now reads:

Notwithstanding that all water to be supplied by the BPU to the Company pursuant to the terms of this Contract shall be surplus water produced by the BPU not required for use within the corporate limits of the Unified Government, BPU agrees to include and list the Company on the state water rights held by BPU with respect to BPU's water supplies. BPU further agrees to include the Company's contract demand for water in all water supply demand forecasts and planning performed by BPU while this Contract is in effect.³⁴

With regard to Article II, the parties have amended the contract to reflect the following:

BPU shall supply Company sufficient water to meet its maximum daily demand over the term of the Contract. The maximum daily demand quantity (gallons) shall be defined as the actual maximum water use over a 24-hour period based upon normal water supply consumption by the customers of Company. Furthermore, Company has provided BPU estimated demand projections in 5-year increments to allow BPU and Company sufficient time to plan for any changes in the maximum daily rate. The estimated projections shall be updated every five years and applicable changes made to the estimate to ensure appropriate planning for both water systems. BPU is completing an AMI system within the next three years that will be used along with meter data from Company for verifying demand rates and maximum daily use for Company. Peak Hour Demands will be supplied by storage in Company's distribution system. Projections shall be sent to BPU by the end of this year and updated in 2015, 2020 and 2025.³⁵

³² Order on Application, 11-SUBW-448-RTS, June 3, 2011, pg 12, citing: *Water Contract* -between Suburban Water and the BPU, dated April 6, 2000, page 1.

³³ Amendment To Contract For Water Service, pg 2, ¶1., 12-SUBW-359-RTS

³⁴ *Id.* at pg 2-3, 12-SUBW-359-RTS.

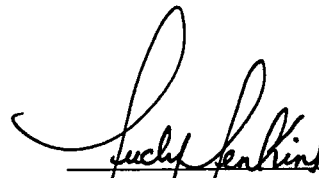
³⁵ *Id.*

It is Staff's position that the inclusion of these two amendments serves to bolster Suburban's position with regard to its ability to claim it has a reliable source water for its customers for at least the next 18 years. This step appears to begin to address the Commission's concerns about reliability and to provide Suburban additional time to consider its supply options.

VII. Conclusion

Based on the foregoing, Staff has taken the position that the Agreement between Suburban and BPU as amended on November 30, 2011, supports Suburban's claim that it has secured an adequate supply of water for its customers for the foreseeable future, and that BPU's rates (to include the "contribution fee") are just and reasonable. Therefore, Staff respectfully recommends that the Commission find the amended Agreement between Suburban and BPU reasonable for the purposes of securing a water supply for Suburban's customers at a just and reasonable rate.

Respectfully submitted,

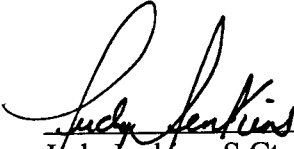


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VERIFICATION

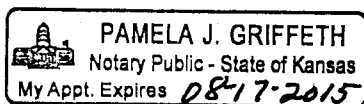
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) ss.
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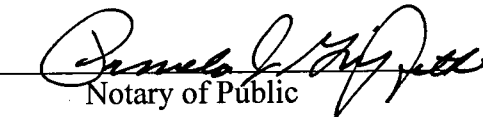
Judy Jenkins, of lawful age, being duly sworn upon her oath deposes and states that she is Litigation Counsel for the State Corporation Commission of the State of Kansas; that she has read and is familiar with the foregoing filing of *Motion for Protective Order* and attests that the statements therein are true to the best of her knowledge, information and belief.



Judy Jenkins, S.Ct. #23300
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SUBSCRIBED AND SWORN to before me this/ 2th day of April, 2012.





Notary of Public

CERTIFICATE OF SERVICE

12-SUBW-359-RTS

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing Staff's Prehearing Brief was served by electronic service on this 12th day of April, 2012, to the following parties who have waived receipt of follow-up hard copies.

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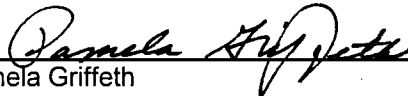
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12-SUBW-359-RTS

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