Wholesale Water Contract: Arkansas Court of Appeals Addresses Municipality/Water Authority Rate Calculation Dispute

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The Arkansas Court of Appeals addressed in a May 23rd opinion a dispute between an Arkansas municipality and public water authority in regards to the sale and purchase of water. See *Northeast Public Water Authority of the State of Arkansas v. City of Mountain Home, Arkansas*, 2018 Ark. App. 323.

Mountain Home, Arkansas ("Mountain Home") and Northeast Public Water Authority of the State of Arkansas ("Northeast") disagreed as to the meaning of certain terms in a wholesale water purchase contract ("Contract").

Mountain Home and Northeast entered into the Contract in 2012. The Contract replaced one that had been in place since 1982.

Paragraph 2 of the contract set the purchase price for water purchased by Northeast from Mountain Home and read as follows:

> 2. Water Purchase Price. City shall sell all potable water purchased by Buyer hereunder at a price per thousand gallons that is equal to Buyer's share of City's actual expenses incurred in connection with the City's production and delivery of the water to the Buyer which expenses include, without limitation, costs associated with the City's water supply source, plant, transmission and telemetry cost and expenses, treatment costs, distribution line costs, pumping and related electrical expenses, general and administrative expenses and general and administrative expenses associated with the production of water, plus, a sum which equals 10% of the foregoing expenses (collectively the "Water Purchase Price"). City agrees to provide Buyer with access to its books and records in order to quantify the Water Purchase Price.

Northeast filed a Complaint in the Baxter County Circuit Court against Mountain Home. The Complaint alleged Mountain Home breached the contract by improperly calculating the rates charged Northeast.

Mountain Home responded that the "contract spoke for itself" and contended that the parties had established through both the previous and present contract a price calculation that had become established and agreed to by the parties.

The parties' contentions at a Circuit Court hearing included:

Northeast

- Obligation to pay was limited to its share of Mountain Home's actual expenses incurred in connection with the production and delivery of water.
- Mountain Home was improperly charging Northeast a percentage of all the tanks, distribution lines, bond costs, and all other associated expenses not related to Northeast's pumping station and water treatment plant.

Mountain Home

- Contract provides two components of permissible general administrative expenses
- General administrative expenses
- General administrative expenses associated with production of water
- 2012 Contract was a continuation of prior Contract
- Contract terms had been same for many years
- Northeast's attorney drafted the Contract

The Circuit Court heard testimony from witnesses on behalf of the parties. It subsequently held that Northeast had not met its burden of proof on the issue of contract interpretation. As a result, Mountain Home was held not to have breached the Contract.

After reviewing the history of the parties' dealings and certain elements of the current and prior Contracts, it found:

- Based on the language of the Contract there could be no dispute that the phrase "actual expenses incurred in connection with the City's production and delivery of water" was expressly agreed by the parties to include "general and administrative expenses" in addition to "general and administrative expenses associated with the production of water."
- The parties' course of performance over the years of the previous contract and the current Contract indicated its construction of the current Contract was further warranted.

The Arkansas Court of Appeals ("Court") noted that Northeast in its appeal focused on the portion of Paragraph 2 of the Contract that states the price per 1000 gallons of water "is equal to Buyer's share of City's actual expenses incurred in connection with the production and delivery of the water to the Buyer." This language was argued to be clear and unambiguous.

Such language was stated by Northeast to limit its charges to the actual expenses incurred in connection with the production and delivery of water to Northeast. The expenses of the rest of the Mountain Home water system were not necessary to comply with its contractual obligation to produce and deliver water to Northeast. Therefore, Mountain Home was argued to have breached the Contract by charging Northeast for general and administrative expenses allocated with the entire water system.

The Court rejects Northeast's contentions. It states that if parties express their intentions in a written instrument with clear and unambiguous language, the writing must be construed in accordance with plain meaning of the language employed as understood by the parties. Northeast is stated to have ignored additional language in Paragraph 2 defining Mountain Home's actual expenses incurred in connection with production and delivery of water to Northeast. Also cited as supporting the Court's conclusion is the fact that the Contract language was drafted by Northeast's attorney.

The Court concludes that:

. . . the phrase "actual expenses incurred in connection with the City's production and delivery of water" was expressly agreed by the parties to include both "general and administrative expenses" in addition to "general and administrative expenses associated with the production of water." Giving he words of the contract their plain and ordinary meaning, the circuit court correctly construed paragraph 2 of the contract to also include the general and administrative expenses of the City's water plant in NPWA's rate calculation. A court cannot make a contract for parties but can only construe and enforce the contract the

parties have made. Kraft, supra. In the present case, the circuit court did just that – construed and enforced the contract made by the parties.

A copy of the opinion can be downloaded here.