MUNICIPAL UTILITY ISSUES

INTRODUCTION

The operation of municipal utilities is free of most state control or regulation. In fact, cities and towns enjoy direct rights to provide utility services. Perhaps for this reason, there are not many Oklahoma court cases in this area of the law.

Municipalities' independence allows them **broad discretion** to establish their local policies controlling most aspects of utility service, including rates, deposits, customer base, extension and termination policies. It also highlights the need for cities and towns to **create policies** that address the various contingencies that arise in providing services to their communities.

SOME GENERAL LEGAL PRINCIPLES FOR MUNICIPAL UTILITY OPERATIONS:

1. Municipalities have the right to engage in any business or enterprise which may be engaged in by virtue of a franchise. *Oklahoma Constitution Article 18, Section 6.*

2. Additionally, municipalities have power to own and operate public utilities. *Oklahoma Constitution Article 10, Section 27.*

3. Municipal utility operations are not regulated by the Oklahoma Corporation Commission. *Oklahoma Constitution at Article 9, Section 18*.

4. Municipal utilities are subject to federal and state environmental and safety regulations pertaining to all providers of such services.

5. As with other municipal actions, municipal utility operations are subject to general constitutional principles of due process and equal protection and to federal and state antitrust statutes.

6. Municipalities may not delegate or surrender its power to regulate rates. *Oklahoma Constitution at Article 18, Section 7.*

7. The fixing of rates of municipally owned utilities is a legislative function and in the absence of a clear showing that the rates are unjust, unreasonable, or discriminatory, the courts may not interfere.

MUNICIPAL UTILITY RIGHTS AND POWERS

WHAT ARE THE BASIC RIGHTS/POWERS OF A PUBLIC UTILITY?

I. LOCAL POLICY. The Legislature may not interfere or curtail municipal utility operations **within** municipal boundaries. Decisions pertaining to conducting the business of the utility outside the municipality are also reserved to local control. State law and administrative rules may, however, require any utility provider to comply with environmental or safety regulations.

Two constitutional provisions prevent the Legislature from usurping a city or town's decision to offer utility service to its citizens or dictating the terms of such service. These specific constitutional provisos also preclude the Oklahoma Corporation Commission from regulating municipal utility operations.

1. Municipalities may incur debt for the purpose of purchasing, constructing or repairing **public utilities** to be owned exclusively by the municipality. OK Const art 10, §27. From the early days of statehood, this authorization to finance public utilities has been viewed as a grant of power to conduct a public utility business. *Barnes v. Hi**ll***, 1909 OK 29, 99 P. 927.

   Also from the early days, **"public utility" is virtually synonymous with "public use".** *City of Shawnee v. Williamson*, 338 P.2d 355 (Okla.1959). It ranges from water facilities to art collections. *Dunogan v. Town of Red Ro**ck***, 58 Okl. 218, 158 P. 1170 (1916); *City of Tulsa v. Williamson*, 276 P.2d 209 (Okla.1954).

2. Municipalities have " the right to **engage in any business or enterprise** which may be engaged in . . . by virtue of a franchise." OK Const art 18, §6. **A franchise** is used by a municipality to secure a business **affected with a public interest** within the municipality by granting it a right to occupy or burden the streets or public grounds. *Oklahoma Gas and Electric Company v. Total Energy, Inc.,* 499 P.2d 917 (Okl. 1972). *Overholser v. Oklahoma Interurban Traction C**o.***, 29 Okl. 571, 119 P. 127 (1911).

II. OUTSIDE MUNICIPAL LIMITS. Cities and towns **may – but are not required to** -- extend their utility services outside municipal boundaries. They may condemn property wherever it is located in the state in furtherance of their operations. 11 O.S. § 22-104.

Fire or Ambulance Service. If a municipality makes fire runs outside its boundaries, it has a duty to be paid for the service. Cities and towns have adopted various methods for obtaining payment: subscription plans, requiring the rural resident to name the municipality as a co-insured on the fire insurance policy, contracting with the county or a fire protection district for payment, regular collection methods.

The municipal fire department performing fire response services or rescue, resuscitation, first aid, inspection or fire prevention work is an

agent of the State and "shall not be liable for any act of commission, omission or negligence" while so engaged. 11 O.S. § 29-108.

III. PROVIDING CUSTOMERS

1. A municipality may require its residents to use or, at least pay a basic rate for, its utilities. It may establish itself as the sole provider of the utility service and satisfy due process or antitrust considerations where it can demonstrate a reasonable belief that certain objective circumstances exist:
   - the municipal service is not economically viable unless all premises within its boundaries help pay for it
   - there is a reasonable concern for health or safety *Ex parte Small, 221 P.2d 669 (Okl.Cr. 1950).*

2. A municipality may also require persons outside the municipal boundaries to agree to be annexed in order to receive municipal utility services.

CONSTITUTIONAL PRINCIPLES AND ANTITRUST LAWS

The federal and state constitutions preserve certain civil rights for individuals in their dealings with local governments. The most applicable to municipal utility operations are **due process** of law and **equal protection** of the laws. Basically, these rights guarantee that a municipality will use fair and reasonable means to advance its legitimate functions.

DUE PROCESS. Before a state or local government can interfere with an individual's life, liberty or property, it must afford that person due process of law. There are two kinds of due process.

1. Substantive -- governmental power will be exercised for the purpose of carrying out the government's functions according to principles of fairness and reason and not in an arbitrary and capricious manner. [For example, laws must be understandable and not vague or ambiguous. They must establish a standard for their enforcement rather than leave the interpretation to the enforcers.]

2. Procedural -- an individual will be given NOTICE that a municipality intends to cut off or curtail a right or privilege and an OPPORTUNITY TO BE HEARD **before** the final action. This means that a municipality may curtail a right if it first satisfies this procedure. [This applies to utility service, weed or dilapidated building abatement, rezoning, animal control, employment and every action of government that affects individual rights.]

EQUAL PROTECTION. All PERSONS SIMILARLY SITUATED have a right to be treated similarly -- equally -- under the laws. This does not mean that everyone has to be treated the same. It means that, if a city or town treats some persons

differently than others (for example, different tiers of rate payers or different categories of potential customers), it must have a **reasonable basis** related to its utility operations or other governmental function **to create the different classifications.**

ANTITRUST. Both federal and state laws prohibit all providers of goods or services, including municipalities, from engaging in certain kinds of anti-competitive activity. These activities include: (a) restraining trade through a contract or other agreement or joint action with another party; (b) creating or maintaining a monopoly; or (c) "tying" services – that is, requiring a customer to pay for a service it doesn't want in order to get a service the customer wants. The courts have recognized that municipalities must be allowed some monopolies and some tying, at least of water and sewer services, where the municipality can demonstrate by objective facts that such results are necessary to carrying out a governmental function for the community.

OTHER OPERATIONS.

GENERAL AUTHORITY

A municipality may engage in a great variety of operations in addition to the traditional public works. The Municipal Code (Title 11 of the Oklahoma Statutes) sets out special procedures for some of these other "utilities". Thus, there are separate provisions for cemeteries, hospitals, libraries, parking stations, and parks. While the statutory language says that a municipality **may** operate in accordance with the special provisions, many non-charter municipalities do so.

Although these provisions give administrative authority over the operation to a separate board, ultimate control remains with the governing body of the municipality. **Note especially that the revenues and expenditures of the operation are not controlled by the board but must be treated like any other funds of the municipality.** They are subject to the municipal budget and appropriations, daily deposit with the municipal treasurer and purchase order requirements.

PARTICULAR ISSUES

Hospitals: Municipal hospitals are **especially vulnerable** to financial damage from lawsuits alleging that there are no limits on the hospital's liability or on persons subject to suit. The Oklahoma Supreme Court has determined that some publicly owned hospitals are **"illusory trusts"** and not protected by the Governmental Tort Claims Act. This occurred when the public trust board or the municipal governing body did not establish administrative oversight over these hospitals or hold these hospitals accountable for disbursement of public funds. **Where a municipality or its public trust abdicates authority over the business of the hospital, an illlusory trust will be found.** *Fowler v. Norman*

Municipal Hospital, 810 P.2d 822 (Okla. 1991); *Roberts v. South Community Trust,* 742 P.2d 1077 (Okla. 1986).

A municipality owning a hospital should review its procedures for financing, controlling revenues and protecting against liability. This is doubly needed if the hospital is leased by the municipality's public trust. There has been much confusion recently about the relationship among the various entities charged with managing hospitals, especially if the hospital is operated under a management contract with a professional hospital administrator or a management company. **A publicly owned hospital must be run in accordance with laws governing expenditure of public funds.** Op.Atty.Gen. No. 86-131.

Cemeteries: Special problems arise about the use of cemetery funds. State law limits how the municipality can spend the **Cemetery Care Fund**. Remember that the **Perpetual Care Fund** does not belong to the municipality or the cemetery. It is held in trust for the donors for the sole purpose of decorating specific graves.

Purchased **cemetery lots** are the private property of the purchasers. They cannot be declared abandoned and resold. It is necessary, therefore, for the municipality to have clear records for determining ownership of lots.

OPERATIONS POLICIES AND PROCEDURES

RATES

RATE COMPONENTS. The Oklahoma Constitution grants municipalities great authority to set rates for municipally owned utilities. See Article 18, §7. The rate formula should include a component for future **capital need**s. It may also contain a reasonable surplus over costs **(profit).** This surplus (profit) may be used for other general fund needs.

RATE CATEGORIES. A municipality **may establish different rates** for different classes of customers so long as those differences are reasonably based on variations in usage or other service-related factors. Likewise, customers outside the municipal limits may be charged higher rates in order to equalize the burden on municipal taxpayers for bearing the utility's development costs.

LOCAL POLICY. The Oklahoma Supreme Court has held that fixing the rates for a municipal utility is a **legislative function** and in the absence of a clear showing that the rates are unjust, unreasonable, or discriminatory, the courts may not interfere. *Oklahoma City Hotel & Motor Hotel Association Inc., v. Oklahoma City*, 531 P.2d 316 (Okla. 1774).

State law does not prescribe what rates may be charged nor the purposes for which the profits may be spent. Sharp v. Hall, 198 Ok. 678, 181 P.2d 972 (1947).

PUBLIC TRUSTS AND OTHERS. A municipality may not delegate or surrender its power to regulate rates. *Meder v. City of Oklahoma City*, 350 P.2d 916 (Okla. 1960). For this reason, a public works authority or other public trust operating a municipal utility may not raise or lower rates without the separate approval of the municipal governing body. 60 O.S. § 176, E. Likewise, a municipality may not promise that it will not change utility rates as an economic development incentive or other project. Oklahoma Constitution at Article 18, Section 7.

BILLING POLICIES. It is permissible to use a **"unified bill";** i.e., a single statement that includes the charges for all municipal utilities. Many cities and towns have adopted a policy that direct how partial payments will be credited, usually providing that the last account to be satisfied is the amount owing for water.

The utility bill should **not** contain a **surcharge** for other operations because the surcharge may be considered to be an unauthorized tax. There is no prohibition against using the utility bill as a means to **collect other charges** that the recipient owes the municipality, such as ambulance fees; however, the municipality may not terminate the utility service if the other charges are not paid. 2004 OK AG 15.

The customer may be billed late fees or other penalties if the municipal policy establishes such additional charges. Cities and towns are not subject to federal consumer credit statutes. *Dalton v. City of Tulsa,* 560 P.2d 955 (Okla. 1977).

CAVEAT: SALES OUTSIDE THE MUNICIPALITY. Special rules apply to sales of water to persons or entities outside the boundaries of the city or town. 11 O.S. §§37-119 and §37-119a. Contracts for out-of-boundary sales must contain the following terms:

1. Agreements to sell outside the municipal limits must be written contracts which provide for an annual review of the municipality's costs and contract modification for increase or decrease of rates accordingly.
2. If the source of the water is obtained by or on behalf of a municipality by permit or prior right or by general obligations bonds, the contract must be in the name of the city or town.
3. Only costs that are attributable to maintaining the ability of the municipality to provide water service to the purchaser shall be included in purchaser's rates.
4. Customers outside the municipal limits must be subject to a consistent rationing program as those inside the city or town.
5. Beginning July 1, 1996 a municipality must utilize an enterprise accounting system to account for the cost of water supply, treatment and delivery.

There are three points to remember about these contract rules:

1. **All contracts for the sale or furnishing of water must be executed by and in the name of the municipality.** This applies even where the city or town has leased its waterworks to a public trust. The only exception is when the source of the water was not obtained by or on behalf of the municipality by permit or prior right or by general obligation bonds.

2. **Rate terms in the contract must provide for the municipality to recoup its reasonable costs**. This is necessary to avoid selling the water at a price that amounts to a subsidy of the buyer. It is required by the constitutional debt limitation provisions at OK Const. Art. 10, § 26. The Oklahoma Supreme Court has clarified that any prior contract that locks in a rate or discretion to raise rates to cover costs is not enforceable after the first year. *City of McAlester v. State ex rel. Bd. of Public Affairs***,** 154 P.2d 579 (Okla. 1944).

3. **There is a difference between costs and rates.** Note that state law recognizes this distinction. 11 O.S. § 37-119, para. B states that " . . . only those *costs* that are attributable to maintaining the ability of the municipality to provide water service to the purchaser shall be included in the purchaser's *rates*." (emphasis added)

   This language does not mean that a municipality can only charge its costs. It means that costs that are not system-wide cannot be considered in the cost component of the municipal rate charged to the out-of-boundary customer.

   The Legislature may not limit a municipality's authority over its utility rates. OK Const. Art. 18, § 6. A city or town may set its rates to outside customers on the same basis that it uses for rates to other customers. This includes a factor for system-wide costs and a "profit" if that is part of the rate formula applied to other customers.

The City of Lawton has been sued by four rural water districts, one private water provider and two municipalities over the recent increase in water rates outside the Lawton municipal limits. The lawsuit is currently pending in Comanche County District Court. This is the first lawsuit to interpret Section 37-119.

EXTENSION POLICIES

WHEN TO PROVIDE SERVICE. A municipality should develop a plan for providing all parts of the municipality with its services in an orderly and nondiscriminatory manner. This includes the need to amend the plan when new territory is annexed. The municipality does not, however, have to provide utility services immediately to the annexed area so long as services to the area are not delayed unreasonably as measured by the plan. Where the territory was annexed without

the consent of the property owners and no capitol improvement plan exists, this delay cannot exceed 120 months (10 years) from the date of annexation unless the annexed residents and the municipality agree to a different timetable at the public hearing preceding the annexation. 11 O.S. 21-103.

CONDITIONS. A municipality may require individuals or developers to install utilities as a condition of extending services to the person's property. Some municipalities provide for reimbursement to the person as other property owners begin to use the installed facilities. *Willow Wind, Inc. v. City of Midwest City*, 1989 OK 171, 790 P.2d 1067.

OUTSIDE THE BOUNDARIES. **A municipality is not required to provide any service outside its boundaries.** It has statutory authority to do so, however. It may require persons outside its boundaries who wish to have municipal utilities to build or otherwise develop their property according to municipal building and land use codes.

SERVICE POLICIES

CUSTOMER RIGHTS. A municipality should have a customer service policy in order to assure itself that it is treating all similarly situated customers alike. This is more than good public relations. It is an equal protection requirement. The United States Supreme Court has told us that it will find that a customer has constitutionally-protected rights to utility service if the municipality has made an unconditional offer of service to anyone who promises to pay for it.

WHO CAN BE A CUSTOMER. A municipal service policy can establish business-based conditions for qualifying for service as well as for continued service. These conditions may address the municipality's need to secure payment, the special problems associated with tenants, service termination procedures other service-based concerns. Such conditions must be reasonably related to the operation of the utility.

COLLECTING BILLS. **A municipality must attempt to collect unpaid utility bills** in order to fulfill its fiduciary duty to the public and to satisfy the constitutional prohibition against giving away public resources. OK Const. Art. 10 § 17. It may use collection methods available through businesses, such as collection agencies, or through the courts.

In the case of a customer's **bankruptcy**, a municipality is not allowed to terminate service or take other measures to collect amounts owing prior to the bankruptcy. This may be collected only by means of a claim filed in the bankruptcy proceedings. The municipality may terminate service if, within 20 days after the bankruptcy order has been issued, the trustee or the debtor have

not furnished adequate assurance of payment, such as a deposit or other security, for service after the date of the bankruptcy order. 11 U.S.C. § 366.

LIENS. There is no Oklahoma statute creating a lien for nonpayment of a utility bill. A lien may be created, however, by contract. The Oklahoma Supreme Court has said that a lien can only be created with the owner's consent. *Harris v. Parks,* 187 P. 470 (Okla. 1920). Additionally, the intention to create a lien on property must clearly appear from the language of some instrument and attendant circumstances; strict proof of intention is required. *Phoenix Mutual Life Insurance Company v. Harden,* 596 P.2d 888 (Okla. 1979).

May a municipality require such consent as a condition of providing service to a customer? It is likely that the courts would consider such a condition as unfair in light of the fact that municipalities usually are the sole source of the service. An acceptable alternative may be to allow a customer to choose the lien from among other ways of offering security for payment.

REFUSING SERVICE. A municipal service policy may state that a person owing a previous unpaid bill is not eligible to be a customer until the prior charges are paid. The city or town may require a connection fee to initiate service at a new address for a current customer. A municipality may not refuse service to an otherwise eligible applicant on the grounds that another person in the household still owes it a previous utility debt.

DEPOSITS

AMOUNTS. There is no state law mandating municipal utility deposit amount or policy. This leaves cities and towns with great discretion to establish deposits to fit the needs of their community. A larger deposit can be required for problem customers with a history of late or non-payment. Different classifications can be established so long as there is a reasonable basis based on facts or experience.

INTEREST. Oklahoma statutes expressly authorize municipalities to keep the interest earned on customer meter deposits. Such earnings shall be credited to the fund of the utility for which the deposit was given. 11 O.S. § 35-102.1.

UNCLAIMED PROPERTY. A municipality may keep unclaimed customer deposits instead of remitting them to the State. To do so, however, it must follow the procedures set out at 11 O.S. §35-107.

REFUNDS. Section 35-107 requires a municipality to refund the utility deposit upon termination of service and payment of all charges due. In the alternative, the municipality by policy may provide for an earlier refund date.

The deposit is to be refunded by a refund check or warrant payable to the customer within 30 days following the termination of service. For deposits of less than $5, the customer still has 1 year to cash the deposit check or warrant.

A special procedure applies to a refund of more than $5. If the customer does not cash the refund within 1 year following termination, the municipality shall send written notice to the customer at the last-known address stating that the refund check or warrant shall be cancelled and the deposit will be paid over to the municipality unless it is cased within 90 days of the date the notice is mailed by the municipality. If not cashed within the 90 days, the amount of the deposit shall be paid into the fund of the municipal utility or into the general fund as determined by the governing body.

TERMINATION OF SERVICE

AUTHORITY TO TERMINATE SERVICE

Cities and towns may terminate service under the terms and conditions provided in their local service policies. Usual conditions for termination are nonpayment or meter tampering. The policy may provide that a customer's service may be terminated at any location if the customer's payment is delinquent at another address.

Municipalities have the option -- but not the obligation -- to establish deferred payment policies on a nondiscriminatory basis. They may impose penalties and reconnection fees that reflect their administrative costs for collection and reinstating service.

HARDSHIP CONDITIONS. Although it is not required, cities and towns may consider particular conditions, such as ending service during periods of extreme temperatures or where the customer needs to make special arrangements for an incapacitated person in the household. The service policy should clearly state when and under what circumstances a customer will receive such consideration.

DEFERRED PAYMENT PLAN.

1. There is no requirement that a municipality must offer a deferred payment plan but, if it does, it must offer it to all customers on the same terms.
2. The particulars of the plan may be determined by the governing body.

CONSTITUTIONAL DUE PROCESS

The United States Supreme Court has determined that municipalities may not terminate utility service for nonpayment or other reasons without first providing "due process". This means that prior to termination the customer must receive (1) **notice**; and (2) an **opportunity to be heard**. See *Memphis Light, Gas & Water Division v. Craft,* 98 S.Ct. 1554, 56 L.Ed. 2d 30 (1978).

Notice

1. The notice should be a separate final notice. It is not enough to recite on the standard bill that service will be terminated if the bill isn't paid within a certain time after the due date.
2. The notice should inform the customer of the proposed termination and his right to a hearing.
3. The notice may set the time for the meeting with the governing body or representative of the utility.
4. Notice should be sent enough prior to the actual cut-off date that the customer can contact the office for his "hearing".

Opportunity to be Heard

1. This is the customer's right and a meeting must be held with him but only if the customer requests it.
2. The utility representative must have final authority to resolve the dispute.
3. The hearing may be informal but it is advisable to keep a record of the meeting signed by both the customer and the utility representative if possible. Telephone conferences are optional but a record should be made.
4. Disposition of the matter should be made at the meeting.

DISCONTINUING OTHER MUNICIPAL UTILITIES

Sometimes it arises that a municipality would like to discontinue another utility due to a customer's failure to pay an unrelated bill. Although municipalities have authority to stop service due to non-payment, this right of termination is limited when it is applied to unrelated services.

The issue has not been addressed by the Oklahoma Supreme Court. Courts in other states have generally held that discontinuing water service for failure to pay garbage disposal charges or electric charges is not legal. See *Owens v. Beresford*, 201 NW2d 890, 60 ALR3d 707 (S.D 1972). The courts apply either substantive due process (it's not reasonable) or antitrust (tying a desired/paid for service to an undesired/unpaid for one) to disallow such a municipal practice. *Uhl v. Ness City,* 406 F.Supp. 1012 (Ks. 1975).

Where the services are integrally related, as are water and sewer services, courts have allowed cutting off water service for a customer's failure to pay the sewer bill. *Cassidy v. Bowling Green,* 368 S.W.2d 318 (Ky. 1963). Some courts have found common ground between water and garbage services due to their mutual relationship to health and sanitation. *Breckenridge v. Cozart,* 478 S.W.2d (Tx. Civ. App. 1972).

To avoid guessing, Oklahoma cities and towns may use a **single unified statement** for all municipal services and to adopt a policy that partial payments will be applied to services in a certain order. For example, a partial payment could go first to an ambulance fee, then electricity, sewer and garbage with payment for water last. This way if the customer does not pay the total balance due, the water bill remains unpaid and service can be discontinued. See *Perez v. City of San Bruno*, 616 P.2d 1287 (Ca. 1980).

LANDLORD/TENANT ISSUES

May a municipality hold a landlord responsible for the utility bill of his tenant? There are no court cases in Oklahoma on the question. The answer appears to be, "Yes, if you do it right."

NO, IF IT'S ANOTHER PERSON'S DEBT. Generally, in cases from other states, a municipality may refuse service to premises if a bill hasn't been paid. However, refusing service to a different tenant or the property owner for a prior customer's unpaid bill usually is not allowed.

"In the absence of a lien, or contract, a rule, regulation or charter provision is unreasonable and void when it seeks to impose a water service obligation onto someone other than the one who actually incurred the debt." McQuillan, *Municipal Corporations*, at §35.35.20

WHAT'S IN THE SERVICE POLICY? Given the general language on creating a lien by contract, it appears there is an opening to make the landowner liable when his tenant has not paid the utility bill. [See prior discussion of liens.]

Additionally, a municipal service policy may define who is eligible to be a customer -- so long as the classification of unacceptable applicants for service is reasonably based on objective business-related grounds.

If the municipality has documented experience with high delinquency among tenants, its service policy may require that the property owner must be the customer. Alternatively, it may provide that the landlord must, at the very least, furnish a guarantee for payment.

WHAT ABOUT THE TENANT? A situation may arise where the landlord is responsible for the utility bills of his tenant and he fails to pay them. The question then arises – what do you do with the tenant?
There are no court cases in Oklahoma. Some other courts have held that refusal to reinstate water service terminated because of a landlord's failure to pay may constitute a violation of the tenant's right to equal protection, where the tenant promises to pay for future water service and offers a deposit to guarantee payment. This result was based on laws creating a duty for the city to provide service. Oklahoma law does not impose such a duty unless the municipal service policy creates it.

Courts have held that requiring a city to provide tenants with pre-termination notice prior to terminating water service because of their landlord's failure to pay is not unduly burdensome. See McQuillan, *Municipal Corporations*, at §35.35.20.

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EXAMPLES

FINAL NOTICE

Your account is now delinquent in the amount shown below. Unless your bill is paid by the cut-off date indicated, SERVICE WILL BE DISCONNECTED without further notice from this office.

AMOUNT DUE	CUT-OFF DATE

-IMPORTANT NOTICE-

IF YOU BELIEVE THE AMOUNT IS NOT CORRECT, YOU MAY MEET WITH A CUSTOMER SERVICE REPRESENTATIVE BETWEEN 8:00 A.M. AND 4:30 P.M. MONDAY THROUGH FRIDAY. THE REPRESENTATIVE HAS AUTHORITY TO ADJUST CUSTOMER'S BILLS IN CASE OF ERROR OR APPROVE PAYMENT SCHEDULES FOR ELIGIBLE CUSTOMERS.

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ELEMENTS OF A SERVICE TERMINATION POLICY

Notice to Customer

1. When notice should be sent.

a. Sent __ days after bill becomes delinquent: This is determined by each municipality's billing system.

b. Receipt by customer __ days before cut-off date: The customer must be given a reasonable time to respond. Three business days is probably a minimum.

2. Contents

a. Balance due including any late charge.

b. Termination date.

c. Customer's right to meet with a designated utility representative who has authority to resolve disputes or adjust the bill.

"Hearing"

1. Must be held only if customer requests it.
2. Written record of the meeting signed by both utility representative and customer (see sample form following.)
3. Disposition of matter should be made at the meeting.

Disconnect

1. Within __ days of cut-off date is payment if not arranged.

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ELEMENTS OF A DISCONNECTION PROCEDURE

Timing

1. Hours (i.e., disconnections will be made during business hours only).
2. Days (i.e., disconnections will be made only Monday through Thursday. It is best to avoid cut-off on the day before a weekend or holiday.)
3. Allow sufficient time to credit payment received on termination date.

Notice of Termination

1. To be left at each residence where service is terminated.
2. Contents

a. Notice that service has been terminated.

b. Balance due including all additional charges.

c. Procedure for arranging a deferred payment plan, if any.

d. Procedure for reconnection.

3. Personal contact if possible.

Collection by Serviceman - optional

1. Accounting

   a. Written report (work order) on each termination stating disposition.

   b. If no termination, deposit of money collected with copy of numbered receipt.

   c. Copy of receipt to customer.

2. Established policy regarding acceptance of checks by serviceman.

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AGREEMENT FOR DEFERRED PAYMENT

I hereby acknowledge that my account for service with *(utility's name)* ("Utility") has an outstanding delinquent balance in the amount of $_____. In order to continue to receive service, I hereby pay $_____, and agree to make a payment of $_____ each (check one, below)

☐ week

☐ twice each month on _____ and

☐ month beginning _____,

and for as long as an outstanding balance remains.

I understand that, if I fail to make payments as agreed herein, Utility may upon its option declare this agreement null and void and begin proceedings to terminate my service within a reasonable time.

It is further understood that any payment made under this agreement is in addition to my regular bill and nothing herein relieves me from my obligation to pay in full any such bill as it comes due.

APPROVED BY:

Customer

_____ _____

Utility Representative

Address

****

CUSTOMER CONSULTATION

Date _____ Account #

On this date __*(customer's name)*__ ("Customer") met in person at Customer's request with __*(utility representative's name)*__, who is an agent of __*(utility's name)*__ authorized to resolve billing disputes and adjust payment schedules. Customer states in response to notice of pending termination of service date _____, that: (check one)

☐ 1. he does not owe the amount shown in the notice because: _____

_____

☐ 2. he can't pay the balance due

☐ 3. other *(explain):* _____

_____

The following disposition is ordered: (check one)

☐ 1. bill adjusted as follows: _____

_____

☐ 2. deferred payment plan *(attached)*

☐ 3. no change - termination unless payment is received on or before: _____

_____
Customer's Signature

Representative's Signature

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SPECIAL ISSUES

SERVICE OUTSIDE THE MUNCIPALITY -- PARTICULAR EXCEPTIONS

1. COMPETITION WITH RURAL WATER DISTRICTS

The federal courts have held that once a rural water district has obtained a federal loan, a municipality cannot compete within the territory of the district. This is known as 1926(b) protection. The City of McAlester has litigated these territorial issues for the past 7 years with a new trial being ordered by the federal courts on October 17, 2003. See *Pittsburg County Rural Water District No. 7 v. City of McAlester.*

The state courts have considered whether a state loan program at 82 O.S. § 1085.36 gives similar monopoly protections to rural water districts. In a big win for cities and towns, the Oklahoma Supreme Court held that unlike the federal 1926(b), municipalities can compete so long as they do not take away actual customers of the district. *See Rural Water and Sewer District No. 4 v. Coppage, 2002 OK 44.*

The major difference between the federal loan and the state loan is the federal protection is for all district **territory** whereas the state protection is limited to **actual customers.** Said another way, the federal law protects a district's growth area – state law does not. These federal and state cases are discussed in detail on the OML web site in a paper prepared by Michael R. Vanderburg, City Attorney of Broken Arrow.

2. COMPETITION WITH RURAL ELECTRIC COOPERATIVES

Effective June 10, 1998, the Oklahoma Legislature established a moratorium on competition for electric customers currently being served or those served in the past and the electric facilities are in place to render such service. 11 O.S. §21-121. In addition, there is a moratorium on all municipal condemnation proceedings against rural electric cooperative property. The moratorium shall remain in effect until the enactment of electric restructuring legislation and implementation of consumer choice of retail electric energy suppliers. Once electric restructuring is in place, the municipal condemnation provisions authorizing condemnation of rural electric cooperative facilities is repealed. See *City of Tahlequah v. Lake Region Elec., Co-op,* 47 P.3d 467 (Okl. 2002).

VOLUNTEER FIRE DEPARTMENTS: State statute authorizes volunteer departments at 11 O.S. § 29-201 et seq. The department operates as a part of the municipality, which appoints the chief. The other volunteers are selected by the majority of the members of the fire department.

The volunteers may form a separate private association that raises money for various purposes, including equipment for the municipal department. Such money does not belong to the municipality nor is the municipality accountable for these private funds. The municipality should require the volunteers to make it clear to the public that money obtained by their fundraising is not the property of the municipality.

Any run fees, insurance or other money paid for the department's fire response and inspection duties should be paid to the municipality and handled in the same manner as any other municipal revenues. These are subject to appropriation by the governing body.

AMBULANCE SERVICE: Municipalities have several different options for providing EMS/ambulance services to their communities. *[See the section of this paper on Billing.]* Concerns about ambulance/EMS services usually focus on **three issues**: obtaining a provider; funding the operation; and liability with its attendant costs.

The main problem for cities and towns is the fact that such service is usually too costly to be supported by the municipal citizens alone. At the same time, the private sector usually cannot afford to operate such a service without substantial governmental payments.

- Contracts with Private Operators**:** Municipalities may contract with a private provider that operates both inside and outside the municipal limits. The municipal payment, however, cannot be a subsidy of the company's entire operations. It must be based on the cost of providing service **only within the municipal boundaries**.

  Private ambulance companies do not enjoy the public sector's liability immunities or limitations. Therefore, a municipal ambulance contract should require the operator to carry sufficient liability insurance to cover the operator's risks.

- Following are statutory mechanisms for cities and towns to use to deliver this service.

  1. Direct Service: Insurance and liability issues create large costs for this service. Also**,** state statute allows cities and towns, whether directly

operating an ambulance service or acting through a district, to establish a sole-provided system for stretcher aid van and/or ambulance service transports.

2. Contracts with Other Public Entities: The city/town may contract with any other unit of government for ambulance service. 11 O.S. § 23-105. Municipalities also have general authority to contract for any municipal function. 11 O.S. § 22-101. They may provide any service inside or outside of their boundaries. 11 O.S. § 22-104. Using the Interlocal Cooperation Act, they may contract with any other public body for any municipal function, such as EMS service. 74 O.S. § 1001 et seq.

   - **Counties** are expressly authorized to contract for ambulance services with any municipality. 19 O.S. § 371.

   - Counties may create **rural ambulance service districts** as a means to join with other units of governments to share costs of the service. 19 O.S. § 1201 et seq. The district is authorized to contract with municipalities for this purpose. *There is no authorized assessment on the property within the district so this choice is little different from a contract under the general contract powers or the Interlocal Cooperation Act.*

   - The city/town may contract with any **rural fire protection district** that offers EMS service. See, 19 O.S. §§ 901.25, 901.25a. This could be an additional source of revenue for the EMS service because these districts may issue bonds and make an assessment against the ad valorem taxed property of all property owners within the district which shall be a lien upon the property until paid.

3. Districts for ambulance or EMS service: The Constitution authorizes ambulance/EMS districts access to ad valorem tax for funding. OK Const. Art. 10, § 9C. Although this mechanism and the districts created under 19 O.S. § 1201 et seq. provide a regional approach for cost sharing, only one creates a new funding mechanism. Both of these choices result another entity -- NOT the municipality – actually having policy control over the provision of such emergency services for the municipal citizens.

USE OF MUNICIPAL BUILDINGS AND FACILITIES

A municipality may establish policies governing use by **individuals or groups** of publicly owned facilities, including parks and community centers. This may include a general rule that certain community sites may be used without charge. The policy must apply without distinction among classes of persons unless the

distinction is based on reasonable factors, such as those related to the preservation of the facilities, health or safety considerations, or similar issue.

Use of such facilities may not be conditioned on the program, status or activity of the persons wishing to use it but may be denied if the intended activity itself is unsafe, disruptive or destructive. For this reason, a municipality is not automatically required to deny use of its facilities to **religious groups**. The First Amendment prohibits a government from basing its decisions or policies on the content of a person's speech or the identity of those who wish to assemble. A government may establish only reasonable controls of time, place and manner of speech or assembly.

FINANCING PUBLIC UTILITIES

A municipality has many tools for financing the capital needs of its utility services:

General Obligation Bonds: Ok.Const. Art. 10, §§26,27
Revenue Bonds: Ok.Const. Art. 10, §27B
Public Trusts: 60 O.S. §176 et seq.: loans and revenue bonds
Capital Improvement Fund: 11 O.S. §17-109 and §17-110
Enterprise Fund: 68 O.S. § 3011
Earmarking Sales Tax: 68 O.S. § 2701; *Arthur v. City of Stillwater*, 1980 OK 64, 611 P.2d 637.
Assessment (Improvement) Districts: Articles 36, 37 and 39 of Title 11. *See also*, OK Const. Art. 10, § 7.

NOTICE: This paper is a summary of legal principles applicable to municipal utility issues. Like all such publications it is not a substitute for legal advice. You should consult with your city or town attorney prior to taking any action based on this document.

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