BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the Application of Osage Utility Operating Company, Inc. to Acquire Certain Water and Sewer Assets and for a Certificate of Convenience and Necessity	))))	Case Nos. WA-2019-0185 and SA-2019-0186

JOINT APPLICATION FOR REHEARING

COME NOW the Public Water Supply District No. 5 of Camden County, Lake Area Waste Water Association, Inc., and Missouri Water Association, Inc. (collectively the "Joint Bidders") and Cedar Glen Condominium Owners Association, Inc. ("Cedar Glen"), by and through counsel, and pursuant to Section 386.500, RSMo 2016,[1] and 20 CSR 4240-2.160 move and apply for rehearing of the Report and Order entered by the Commission on April 8, 2020 (hereinafter "the Report and Order"). In support of their application, Cedar Glen and Joint Bidders assert the following:

I. INTRODUCTION

In the Report and Order, the Commission authorized Osage Utility Operating Company, Inc. ("Central States"[2]) to close on its purchase of Osage Water Company's assets under the provisions of its agreement with the Bankruptcy Trustee; and effective upon that closing the Commission granted a certificate of convenience and necessity to Central States to provide water and sewer service in the service territories previously served

[1] All statutory citations are to RSMo 2016 unless otherwise noted.

[2] Osage Utility Operating Company, Inc. is an affiliate of Central States Water Resources, Inc., the managing affiliate of CSWR, LLC, the parent of both. It is referred to as "Central States" to avoid confusion with any references to Osage Water Company.

by Osage Water Company. This relief was granted: (1) without an application of or participation by Osage Water Company; (2) over the objection of over 90 current ratepayers of Osage Water Company and potential customers of Central States who submitted written comments; (3) over the objection of a condominium association in which approximately half of those potential customers are members; (4) despite the existence of a better alternative, specifically - local, qualified service providers - who provide service on a nonprofit basis and at rates projected to be far less than those anticipated by Central States; (5) without full consideration of the detriments to the public interest of the transfer; (6) without consideration of the public benefits, financial and otherwise, of regionalizing water and service for the general vicinity; and (7) with consideration of factors irrelevant to the public interest.

The Commission has misinterpreted and misapplied the applicable law governing grants of certificates of need and transfers of assets. The Commission's decision is not supported by competent or substantial evidence. Its decision is unlawful, unreasonable, unjust, arbitrary and an abuse of discretion. For the reasons stated herein, the Commission should set aside the Report and Order, grant a rehearing on this case to reconsider the issues of fact and law as discussed herein, and on rehearing Central States' application should be summarily denied.

II. STANDARD OF REVIEW

The standard of review of Public Service Commission orders was expressed recently by the Missouri Court of Appeals Western District:

> Under section 386.510, the appellate standard of review of a PSC order is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable. The PSC's order is prima facie lawful and reasonable. The burden of proof is upon the party attacking the order to show by clear and satisfactory evidence that the order or determination of the PSC is unlawful or unreasonable.
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> The lawfulness of an order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed de novo.
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> The decision of the PSC is reasonable where the order is supported by substantial, competent evidence on the whole record, the decision is not arbitrary or capricious, or where the PSC has not abused its discretion. "Substantial evidence" is competent evidence which, if true, has a probative force on the issues.
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> The PSC's factual findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, we are bound by the findings of the administrative tribunal. *In re Union Elec. Co.*, 422 S.W.3d 358, 363–64 (Mo. App. W.D. 2013) (citations, internal quotation marks, and brackets omitted).
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> Whether we address purely legal issues as part of our "lawfulness" or "reasonableness" inquiries, we review those legal issues *de novo*, and "exercise[ ] independent judgment to correct erroneous interpretations." *Mo. Pub. Serv. Comm'n v. Union Elec. Co.*, No. SC96222, 552 S.W.3d 532, 539, 2018 WL 3235705, at *5 (Mo. banc July 3, 2018) (citations and internal quotation marks omitted).[3]

An abuse of discretion occurs when the ruling of the tribunal is "'clearly against the logic of the circumstances' and 'so unreasonable as to indicate a lack of careful consideration.'"[4]

[3] *Kansas City Power & Light Co.'s Request for Auth. to Implement a Gen. Rate Increase for Elec. Serv. v. Missouri Pub. Serv. Comm'n*, 557 S.W.3d 460, 466 (Mo. App. W.D. 2018).

[4] *Stephenson v. Countryside Townhomes, LLC*, 437 S.W.3d 380, 390 (Mo. App. E. D. 2014); *see also, Mitchell v. Kardesch,* 313 S.W.3d 667, 674–75 (Mo. banc 2010).

III. THE REPORT AND ORDER IS UNLAWFUL UNDER SECTION 393.190, RSMO, AND 20 CSR 4240-10.10

In cases brought under Section 393.190, RSMo, the seller is consistently the applicant and a party to the case.[5] Here, the seller is not only not the applicant, the seller is not even a party to the case.

The Commission's powers are limited to those conferred by statute either expressly " 'or by clear implication as necessary to carry out the powers specifically granted.' " [6] Here, the Commission does not have the authority to transfer assets under Section 393.190, RSMo and 20 CSR 4240-10.105 without the participation of the seller utility applicant.

Section 393.190.1, RSMo, provides:

> No… water corporation…shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public…without having first secured from the commission an order authorizing it so to do.

(emphasis added). That statute requires the existing, regulated water company (or seller) to seek the approval of the Commission prior to an asset transfer. The Court of Appeals has previously examined the statute, explaining:

> Section 393.190.1 concerns the Commission's authority with regard to a utility's sale of its property. Specifically, the statute states that no utility can sell any part of its franchise, works, or system that is necessary or useful in the performance of its duties to the public without first securing an order from the Commission authorizing

[5] See *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 183 (Mo. banc 2011); *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732 (Mo. banc 2003); *Envtl. Utilities, LLC v. Pub. Serv. Comm'n*, 219 S.W.3d 256 (Mo. App. W.D. 2007); *Love 1979 Partners v. Pub. Serv. Comm'n of Mo.*, 715 S.W.2d 482 (Mo. banc 1986).

[6] *State ex rel. Office of Pub. Counsel & Mo. Indus. Energy Consumers v. Mo. Pub. Serv. Comm'n,* 331 S.W.3d 677, 682 (Mo. App. W.D. 2011) (quoting *State ex rel. Util. Consumers' Council of Mo. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979)).

> such a sale. § 393.190.1. Thus, Section 393.190 grants the Commission the statutory authority to approve a sale only where the seller has …sought the Commission's approval, because it refers to approval after an affirmative, voluntary act by the seller, i.e., the seller's petitioning and securing the Commission's order authorizing the sale.[7]

The Court of Appeals has been unequivocal when discussing the rule that preceded 20 CSR 4240-10.105,[8] as promulgated under Section 393.190, RSMo:

> Rule 4 CSR 240–3.110, a Commission regulation promulgated pursuant to Section 393.190, confirms that the applicant seeking authorization for the sale of a utility's property must be the utility itself and that the sale must be voluntary. Rule 4 CSR 240–3.110 is titled "Filing Requirements for Electric Utility Applications for Authority to Sell, Assign, Lease or Transfer Assets.[9]

Indeed, the title of 20 CSR 4240-10.105, at issue here, is "Filing Requirements for Electric, Gas, Water, Sewer, and Steam Heating Utility Applications for Authority to Sell, Assign, Lease, or Transfer Assets."

There is no application by the utility seller (Osage Water Company) for this Commission to consider. The seller of the assets, as set forth in the Agreement of Sale of Utility System is "Jill D. Olsen as Chapter 11 Trustee of Osage Water Company" ("Trustee").[10] Not only is the Trustee not the applicant, as required by Section 393.130.1, RSMo, but also, the Trustee is not even a party to the case.

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[7] *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 443 (Mo. App. W.D. 2015) (emphasis added).

[8] In 2018, the Commission rescinded a number of rules that only applied to one type of utility and consolidated similar rules across utility types. The substance of 4 CSR 240–3.110 (2015) and 20 CSR 4240-10.105 (2020) is nearly identical.

[9] *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 443 (Mo. App. W.D. 2015) (emphasis added).

[10] Ex. 1, Cox Direct, Schedule JC-11.

In addition, the requirements set forth in 20 CSR 4240-10.105 apply to the applicant seller. For example, 20 CSR 4240-10.105(1) (C) contemplates a verification by the applicant utility seller. This is made clear by 20 CSR 4240-10.105(F) which specifically requires the purchaser to also comply with the rules. If the purchaser already bore the burden of the requirements in 20 CSR 4240-10.105, then subsection (F) would be unnecessary and rendered superfluous.[11,12] Here, there is no application of the seller before the Commission.

Similarly, 20 CSR 4240-2.060 requires a number of items related to the applicant seller; for example, a certificate of good standing (for Osage Water Company). *See* 20 CSR 4240-2.060(1)(B). The rule cannot be satisfied with the documents of the buyer alone, because it specifically and expressly refers to and requires certain documentation from the seller. Without any one of the items, the Commission lacks the authority to grant the relief requested by Central States.[13]

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[11] *See also* 20 CSR 4240-2.060(3) (requiring a purchaser who will be subsequently subject to Commission jurisdiction to comply with the rules). See also I*n the Matter of an Application of Union Elec. Co., d/b/a AmerenUE, for an Order Authorizing the Sale & Transfer of Certain Assets of AmerenUE to St. James Mun. Utilities & Rolla Mun. Utilities*, No. EO-2010-0263, 2010 WL 3454148, at *3 (Aug. 25, 2010) (the Commission's rules for electrical utilities that seek approval to sell assets contemplate that the Commission may not have jurisdiction over the buyer).

[12]Where an interpretation would render provisions of a rule meaningless, such interpretation must be rejected. *Doe v. St. Louis Cmty. Coll*., 526 S.W.3d 329, 341 (Mo. App. E.D. 2017).

[13]*See* 20 CSR 4240-2.060 (2) "If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought.")

IV. THE REPORT AND ORDER IS UNLAWFUL, UNREASONABLE, ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IN FINDING THAT THE APPLICANT MET ITS BURDEN

The Report and Order is unlawful, unreasonable, arbitrary, capricious and abuse of discretion as to its consideration of public interest. This Commission has previously stated:

> [T]o satisfy the "not detrimental to the public interest" standard, the applicant must demonstrate that no net detriment would result[.] [14]

The Commission has also previously elaborated on the term "public interest" as follows:

> The "public interest" is a matter of policy to be determined by the Commission.[11] Determining what is in the interest of the public is a balancing process.[12] In making such a determination, the total interests of the public served must be assessed.[13] This means that some of the public may suffer adverse consequences for the total public interest.[14] Individual rights are subservient to the rights of the public.[15] The "public interest" necessarily must include the interests of both the ratepaying public and the

[14] *In the Matter of the Application of the Empire Dist. Elec. Co. for Auth. to Sell & Transfer Part of Its Works or Sys. to the City of Monett, Mo.*, No. EO-2009-0159, 2009 WL 362184, at *4 (Feb. 11, 2009) (emphasis added); see also *In Re Sho-Me Power Corp.*, No. EO-93-259, 1993 WL 719871 (Sept. 17, 1993) (emphasis added) (an applicant for conversion must prove that the conversion would not be detrimental to the public interest).

investing public; however, as noted, the rights of individual groups[15] are subservient to the rights of the public in general.[16] [16]

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[15] The Report and Order shows the Commission misinterpreted and misapplied the law relating to the phrase "individual groups." The Commission equated Cedar Glen and Joint Bidders with "individual groups" when what that term actually refers to is applicants.

The Commission's footnote cited *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956) in which the Court of Appeals correctly declared:

> The rights of an individual with respect to issuance of a certificate are subservient to the rights of the public. See cases last cited. The dominant purpose in creation of the [Public Service] Commission is public welfare.

The Missouri Supreme Court agreed:

> In the determination of these matters, the rights of an applicant, with respect to the issuance of a certificate of convenience and necessity, are considered subservient to the public interest and convenience.

State ex rel. Missouri Pac. Freight Transp. Co. v. Pub. Serv. Comm'n, 295 S.W.2d 128, 132 (Mo. 1956) (internal citations omitted) (emphasis added).

It is plain from analysis in its Report and Order that the Commission considered the rights of the public, specifically the potential customers of Central States, the majority of which are Cedar Glen unit owners, subservient to those of the applicant, contrary to settled law. Ignoring their status as "the public" the Commission has treated them as members of an "individual group" which, under the Commission's erroneous understanding of the law, has less importance than the public.

[16] *Id.* Each of the sentences were supported by additional authority as follows:

> [11] *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956). *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).
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> [12] *In the Matter of Sho-Me Power Electric Cooperative's Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

The Commission has also discussed the term "detriment" at length:

> A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.[17]

In making a determination regarding whether the applicant has met this burden, the commission's decision, "necessarily includes weighing all of the attendant benefits [or detriments] of the transaction."[18]

The Commission has historically approved a transfer of assets, when the applicant proves benefits and there was an absence of any detriments. *See, e.g.*, Case No. EM-2007-

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[13] *Id.*

[14] *Id.*

[15] *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

[16] *In State ex rel. City of St. Louis v. Public Service Com'n of Missour*i, 73 S.W.2d 393, 400 (Mo. banc 1934), the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.

[17] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008) (emphasis added).

[18] *Id.*

0374[19] ("Given the number of positive benefits associated with the transaction, and the fact that no credible evidence establishes any negative effects" the transaction was authorized).

In EO-2009-0159 (*Empire-Monnett*), the Staff, based on evidence from the applicant, found the following benefits (and the same were uncontroverted):

> (1) improved reliability of service because Monett's substation is closer to the customer loads and Empire will no longer be serving customers in what amounts to two "islands" surrounded by Monett's customers; (2) reduced customer confusion; and, (3) provide for quicker emergency response because power supply and customer support personnel are in closer proximity to customer loads in the two annexed areas. [[20]].

With no evidence of any detriments, the Commission approved the transfer, finding it was in the public interest.[21] The Commission has also approved number of transactions when the evidence was similar. In EM-2007-0374 (*Aquila Merger*), the Commission described the balancing test:

> The substantial and competent evidence on the record as a whole demonstrates that Applicants' revised merger proposal offers greater protection and more benefits to ratepayers than their original proposal. There is long-term advantage in Aquila becoming an operating subsidiary of Great Plains in coordination with KCPL. Operational efficiencies and significant realized synergies will result in rates over time rising less than they would have otherwise. This will occur because the geographical service territories of the utilities are adjacent, therefore increasing the potential for economies of scale and improved reliability.[[22]]

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[19] *Id.*

[20] *In the Matter of the Application of the Empire Dist. Elec. Co. for Auth. to Sell & Transfer Part of Its Works or Sys. to the City of Monett, Missouri*, No. EO-2009-0159, 2009 WL 362184, at *5 (Feb. 11, 2009).

[21] *Id.*

[22] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.*, Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008).

In Case No. WM-93-255 (*Missouri American-Missouri Cities*), the Commission summarized the evidence as follows:

> No substantial evidence was offered to indicate that the public will suffer any negative effect as the result of this stock purchase. In fact, evidence exists to show that some positive result will occur, that being an improved financial position allowing repair and expansion of aging infrastructure.[23]

Similarly, in Case No. EO-2002-178 (*AmerenUE-Gascosage*):

> The evidence showed that the effects on the current customers of Gascosage were positive. Gascosage presented testimony that no rate increase was expected to its current customers because of the proposed amendment to the territorial agreement. Gascosage and AmerenUE also presented substantial evidence that many of Gascosage's current customers would benefit from proposed future improvements to the system.[24]

Central States provided no evidence of reduced customer confusion or quicker customer service, as was shown in *Empire-Monnett*. The only evidence in the record shows that Central States plans to outsource customer service to a St. Louis based company.[25] In contrast to *Aquila Merger*, Central States did not prove that the transaction would result in rates over time rising less than they would have (in fact, the evidence shows the opposite).[26] In both *Empire-Monnett* and *Aquila Merger*, the Commission found benefit in the proximity of personnel and in geographically adjacent service. Here, the evidence only proved that the transaction would decrease the proximity of personnel and prevent service

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[23] *In Re Missouri-Am. Water Co.*, No. WM-93-255, 1993 WL 449449 (July 30, 1993).

[24] *In Re Union Elec. Co.*, No. EO-2002-178, 2002 WL 535123 (Jan. 24, 2002).

[25] Ex. 105, Revised Staff Recommendation (attached to Dietrich Rebuttal) at 29.

[26] See Point IX(A), *infra.*

by geographically adjacent providers. Unlike in *Missouri American-Missouri Cities*, there is substantial evidence of negative effects. Finally, unlike in *AmerenUE-Gascosage*, the evidence is undisputed that there will be a rate increase.

In contrast to the cases in which the Commission approved an application for transfer, in *Environmental Utilities, LLC v. Public Service Commission*,[27] the Court of Appeals affirmed the Commission's decision denying an application to transfer assets when the evidence showed that customers "could conceivably see the cost of sewer service double." The only evidence in the record with respect to rates is consistent with *Environmental Utilities*.[28]

Similarly, the Commission found a transaction detrimental to the public interest when the transaction involved "foregoing greater financial benefits" of an alternative transaction and "accepting lesser financial benefits."[29] The evidence here shows the transaction involved foregoes the financial benefits associated with public and nonprofit service providers, including no need for return on equity, lower financing rates, and access

[27] 219 S.W.3d 256, 266 (Mo. App. W.D. 2007).

[28] *See* Point IX(A), *infra; see also* Reply Brief of Joint Bidders, filed October 17, 2019, which is incorporated herein by reference, pp. 3-5.

[29] I*n the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks - MPS & Aquila Networks - L&P for Auth. to Transfer Operational Control of Certain Transmission Assets to the Midwest Indep. Transmission Sys. Operator, Inc.*, No. EO-2008-0046, 2008 WL 4691014, at *7 (Oct. 9, 2008).

to public bonding.[30] The evidence shows that the transaction would also require foregoing potential synergies.[31]

Here, the applicant has not met its burden in showing the transaction is not detrimental to the public interest. The Applicant must show that potential benefits outweigh any possible disadvantages.[32] The detriments as more fully discussed herein (in Point IX), are not outweighed by any benefits.

The Commission explains the greatest "benefit" is "stability" for Customers.[33,34] Yet there is no evidence in the record that Joint Bidders would not be able to provide the same stability.[35] The other benefits cited by the Commission, including "not having to have another proceeding" and "continuing to have oversight of the systems" are irrelevant to the analysis, and cannot be used to "outweigh" the significant detriments -- including

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[30] *See* Point IX(A), *infra.*

[31] *See* Point IX(C), *infra.*

[32] *In Re Union Elec. Co.*, No. EO-91-204, 1991 WL 498639 (Aug. 16, 1991).

[33] Report and Order, at 35.

[34]Stability is not the same as "safe and adequate service." The Applicant did not show an added benefit of providing "safe and adequate service" as it was already determined that the existing service was safe and adequate. See Ex. 105, Revised Staff Recommendation (attached to Dietrich Rebuttal).

[35] The Commission comments, without identifying it as "benefit" that "Osage Utility has a proven track record of bringing distressed systems into compliance and operating them in a safe and adequate manner." Report and Order at 35. Again, this is not an added benefit as there is substantial and competent that Joint Bidders operate systems in a safe and adequate manner (Tr. 374:18-376:13) and substantial and competent evidence that the Joint Bidders have the same track record -- Joint Bidders have a history of taking over abandoned or distressed systems, conducting repairs, and returning the systems they do purchase to compliance. Tr. 426-432.

rate shock, unnecessary duplication of assets, foregoing synergies, private ownership, and a non-local service provider.[36] Central States has not and cannot satisfy its burden of showing no net detriment. In approving the application, the Commission's Report and Order is unlawful, unreasonable, arbitrary, capricious and an abuse of discretion.

V. THE REPORT AND ORDER IS UNLAWFUL AND UNREASONABLE AS THE COMMISSION ERRONEOUSLY SHIFTED THE BURDEN OF PROOF TO INTERVENORS

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.[37]

The Commission correctly observes that only the application filed by Central States was before the Commission.[38] Yet, it suggests that the Joint Bidders should have had a "plan" which could be endorsed as a "complete application." [39] The Commission chides the Joint Bidders for not including "comprehensive detailed cost estimates and planned improvements and not including detailed cost estimates for their proposed interconnection between Public Water Supply District#5 ("PWSD#5") and Cedar Glen

[36] *See* Point VI, *infra.*

[37] *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, at 43 (October 6, 2004).

[38] Report and Order at 31.

[39] *Id*. at 33.

Condominiums."[40,41] The Commission "was not persuaded by the testimony of Cedar Glen's witness" on these subjects although he was the only Licensed Professional Engineer who testified in this matter.

The Commission scolds the Joint Bidders for not submitting "financing plans that would cover needed repairs," and not providing costs associated with acquiring permits to cross US 54 for purposes of the interconnection between Cedar Glen and PWSD #5.[42]

Although they were intervenors only, the Commission treats the Joint Bidders as applicants in this matter imposing on them a burden of proof and persuasion that by law rests exclusively on Central States. The burden to show a non-detriment was on Central States. That the Osage Water Company customers could be served by qualified alternative providers of water and sewer service at lower rates over the long term was never disproven.

On page 35 of the Report and Order the Commission found:

> Osage Utility's ownership would definitively provide many benefits over the status quo, the greatest of which would be finally having stability for the Osage Water Company customers after more than 14 years of instability.

There is no evidence in the record that the service provided by the Joint Bidders would be

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[40] *Id.*

[41] Contrary to the Commission's finding, there is ample evidence in the records and testimony on the financing plans. See, e.g., Tr. 411-421; Ex. 400, Stone Direct. Furthermore, Joint Bidders' witnesses committed to making the necessary improvements as required by DNR. *See*, e.g., Ex. 401, Goss Direct.

Also contrary to the Commission's finding in Paragraph 28 on page 17 of the Report and Order, PWSD#5 has prepared an estimate for its interconnection with the Cedar Glen system. The amount of the estimate was explained by Mr. David Stone during examination by Commissioner Kenney. Tr. 404.

[42] *Id*. at 34.

unstable, or that service provided by Central State would be more stable than Joint Bidders. By shifting the burden to Joint Bidders, the Commission's Report and Order is unlawful and unreasonable.

VI. THE REPORT AND ORDER IS UNLAWFUL AND UNREASONABLE AS THE COMMISSION ERRONEOUSLY CONSIDERED IRRELEVANT FACTORS IN THE NO NET DETRIMENT TEST

In making its determination of whether the transaction was detrimental to the public interest, the Commission considered factors irrelevant to such determination.

A. Avoiding Another Proceeding

Specifically, the Commission expressed a "benefit" in "not having to have another proceeding."[43] While that may be a benefit to the Commission, there is no explanation for why this would be in the public interest. Avoiding another case for approval of the Osage Water Company asset purchase is not a factor related to the public interest. Furthermore, and more importantly, the Commission is forbidden to consider administrative convenience and expediency in its decision making.

> The PSC "is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the Statutes and powers reasonably incidental thereto." *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard,* 350 Mo. 763, 168 S.W.2d 1044, 1046 (Mo. banc 1943). "Neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute." *State ex rel. Mo. Cable Telecomms. Ass'n v. Mo. Pub. Serv. Comm'n,* 929 S.W.2d 768, 772 (Mo. App. 1996).[44]

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[43] Report and Order at 35.

[44] *State ex rel. Cass County v. Public Service Commission,* 259 S.W.3d 544, 547 -548 (Mo. App. W.D. 2008).

There is no public interest in "not having to have another proceeding." Given that another proceeding would involve consideration of the transfer to PWSD#5, exactly what the public, in their comments, overwhelmingly desire, "not having another proceeding," if it is relevant at all to the public interest, is detrimental to the public interest. Cedar Glen and Joint Bidders are not aware of any case that holds avoiding another proceeding is relevant to the public interest.

B. Retaining Jurisdiction

The Commission also considered the fact that Central States will be a "regulated public utility" going forward as a "benefit" in its balancing test.[45] The Supreme Court of Missouri has previously rejected the inclusion of this factor in deciding the public interest. In *State ex rel. Consumers Public Service Company v. Public Service Commission,*[46] the intervenors argued "in their brief that it will not be in the public interest to permit a regulated utility to sell to a cooperative." The Commission, in that case, held it lacked authority to consider whether that question was in the public interest since the Legislature had already decided -- and by permitting cooperatives, necessarily decided such alternative was in the public interest. The court, in upholding the Commission, stated:

> It is presumed that the General Assembly intended to promote the public interest not only in the creation [of Cooperatives], but in the definition, of corporate purposes and powers. Consequently, the Commission cannot hold, we believe, that it is not in public interest for the…Cooperative upon its conversion, and becoming subject to the provisions of the Rural Electric Cooperative Act, to acquire by

[45] Report and Order at 33.

[46] 180 S.W.2d 40, 47 (Mo. banc 1944).

purchase the properties of the applicant[.]"[47]

In considering whether it would be able to retain jurisdiction over the system in its analysis of "public benefit," the Commission's Report and Order was unlawful and unreasonable.[48]

C. Preference for Regulated Entity

Similarly, the Report and Order also indicated a "benefit" to regulated public utility ownership of the assets. While keeping another entity under its regulatory authority might be a considered a "benefit" to the Commission, there is absolutely no public interest in the same. This "benefit" grants a preference to existing utilities and is irrelevant to the determination of the public interest. The legislature has statutorily created public water supply districts, and has even shown a preference for them.[49] "It can be further concluded that our own state's policy against competition is a flexible one created to protect the public first and concerning itself with the existing utility only in an incidental manner."[50] Here, the Commission, in concerning itself with the existing utility, and considered the same a "benefit" acted unlawfully and unreasonably.

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[47] *State ex rel. Consumers Pub. Serv. Co. v. Pub. Serv. Comm'n*, 352 Mo. 905, 923, 180 S.W.2d 40, 47 (Mo banc. 1944).

[48] While it is true that the Commission will require that any future rate increase be just and reasonable, a public water supply district is also statutorily required to fix only "reasonable" rates. *See* Section 247.110, RSMo.

[49] *See* Chapter 427, RSMo; Section 393.146, RSMo.

[50] S*tate ex rel. Pub. Water Supply Dist. No. 8 of Jefferson Cty. v. Pub. Serv. Comm'n*, 600 S.W.2d 147, 155 (Mo. App. 1980).

D. Creating Future Incentives

During the Commission's open agenda meeting of February 13, 2020, Commissioner Rupp voiced support for granting Central States' application to purchase the Osage Water Company assets and then explained:

> I don't want to be sending a message to other companies that are looking at distressed systems saying "Hey, come on out here and bid and if we don't like you and we can find a public entity then we are just going to hand it to them." I don't think it is detrimental to the public interest.

Commissioner Rupp's policy statement has no connection to a determination of the public interest. Moreover, there is no evidence in the record that a public entity's ownership of a distressed system discourages private regulated companies from acquiring them. It appears that Commissioner Rupp expected PWSD#5 or Cedar Glen to prove the contrary.[51] To the extent Commissioner Rupp's comments influenced and are shared by the other Commissioners, excepting one, and are in the fabric of the Report and Order, the decision is unlawful and unreasonable.

Furthermore, his policy statement contravenes the Commission's statutorily assigned duties. Public water supply districts and cooperatives are among the entities a distressed company must approach first before acquisition by a regulated utility is pursued. It is true that in accordance with Section 393.146, RSMo, the Commission has authority to order a utility company to acquire a distressed small water or sewer company. Before doing so however:

[51] If so, his expectation would constitute another unlawful shift in the burden of proof not to mention proof of an utterly immaterial item of evidence.

the commission shall discuss alternatives to acquisition with the small water or sewer corporation and shall give such small water or sewer corporation thirty days to investigate alternatives to acquisition, including:

(1) . . . ;

* * *

(4) The acquisition of the small water or sewer corporation by a municipality, a municipal authority, a public water supply district, a public sewer district, or a cooperative.

The Legislature and Commission, through rule, has already created an incentive structure related to distressed companies.[52] Any consideration for creating additional incentives, outside the legislative or rulemaking process, is unlawful and unreasonable and ultimately, irrelevant to the determination of the public interest. Section 393.146, RSMo.

VII. THE REPORT AND ORDER IS UNLAWFUL AND UNREASONABLE BECAUSE THE STAFF'S REFUSAL AND FAILURE TO REVIEW ALTERNATIVES DEPRIVED COMMISSION OF ITS ABILITY TO WEIGH THE BENEFITS AND DETRIMENTS AS REQUIRED BY LAW

The Report and Order makes clear that despite its statutorily charged duties in Section 386.135, RSMo, "Staff did not…review in-depth the Joint Bidders' proposal."[53] Staff did not send any requests to the Joint Bidders to see if their alternative could provide safe and adequate service.[54,55]

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[52] *See e.g.*, Section 393.146, RSMo; 20 CSR 4240-10.10.

[53] Report and Order at 33.

[54] Tr. 255:23-256:3.

[55] One reason suggested by Staff for failing to conduct a review of the Joint Bidders as an alternative was because Joint Bidders did not submit an application. *See* Tr. 257:5-11. As described herein, under the applicable statute and rule, buyers (like Joint Bidders) are not required (and indeed cannot) apply for a transfer of assets.

This is contrary to the process Staff has followed in the past and deprived the Commission of the ability to weigh the benefits and detriments of the transfer as required by law. In another transfer case, the Commission stated:

> As Staff's response correctly states, the Commission's purview is whether it is prudent for AmerenUE to sell the assets, not whether it is prudent for the Cities to buy them.[56]

Here, Staff has turned that analysis on its head -- focused only on whether not it is prudent for Central States to buy the Osage Water assets. When Aquila applied for authority to transfer certain assets to MISO, one of the issues before the Commission was as follows:

> In making its determination whether to grant Aquila's application to join MISO, should the Commission compare Aquila's membership in MISO to other alternatives? If so, what are the alternatives and what do the comparisons of the alternatives show?[57]

Interestingly, and in stark contrast to this case, Staff's position was as follows:

> Staff Response: Yes. The Staff's position is that for Aquila not to choose the best alternative, whether it be joining an RTO or not, is detrimental to the public interest.[58,59]

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[56] *In the Matter of an Application of Union Elec. Co., d/b/a AmerenUE, for an Order Authorizing the Sale & Transfer of Certain Assets of AmerenUE to St. James Mun. Utilities & Rolla Mun. Utilities*, No. EO-2010-0263, 2010 WL 3454148, at *3 (Aug. 25, 2010).

[57] *See* Staff's Position Statements at 4, Case No. EO-2008-0046 (March 18, 2008).

[58] *Id.*

[59] Appling the same test here, Staff's position would be: "[F]or…[Osage Water] not to choose the best alternative…is detrimental to the public interest."

In its Post-Hearing Brief Staff's position was the same: "the Commission should only authorize Aquila to join the Midwest ISO if it is the best alternative."[60] In its Report and Order, the Commission agreed with Staff:

> When alternatives with economic impacts are presented, an evaluation of the detriments of a particular alternative to the public interest must include consideration of the opportunity cost of not pursuing any available alternatives.
> …
>
> Missouri's Western District Court of Appeals has recently held that the Commission is not limited to narrowly considering the possible benefits of a presented alternative when other alternatives are also important. In *Environmental Utilities, LLC v. Public Service Commission*, the court upheld the Commission's rejection of a proposed sale of a part of the sewer system of a troubled utility, because, while there were benefits to those customers who would be served by the purchaser, the benefits of the sale of the entire system would be greater, and would be lost if the incomplete transaction were allowed to proceed.[[61]]

Here, the Staff, in failing to analyze or even review, alternatives deprived the Commission of the ability to weigh the benefits and detriments of the transfer as required by law. The Staff complained in testimony that the information regarding Joint Bidders proposal was "incomplete"[62] but readily admitted it did not seek any additional information regarding such proposal as it was permitted to do during discovery.[63] The onus is on the applicant to

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[60] *See* Staff's Post Hearing Brief at 15, Case No. EO-2008-0046 (May 29, 2008).

[61] *In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks - MPS & Aquila Networks - L&P for Auth. to Transfer Operational Control of Certain Transmission Assets to the Midwest Indep. Transmission Sys. Operator, Inc.*, No. EO-2008-0046, 2008 WL 4691014, at *7 (Oct. 9, 2008).

[62] Tr. 255:2-4. This was reflected in the Commission's Report and Order when it stated " additionally, neither the Commission, nor Staff, have had the opportunity to truly vet the Joint Bidders' proposal given its incompleteness[.]" Report and Order, at 35.

[63] Tr. 255:23-256:3.

prove its transfer (in Staff's words) is the best alternative. Staff, in making its recommendation, could only recommend approval of Central States' application if it determined the transfer was "the best alternative." In failing to consider any alternatives, Staff's Recommendation is unlawful and unreasonable, as is the Commission's Report and Order, in relying on the incomplete Staff Recommendation.

The Court of Appeals has previously reversed the Commission when the "PSC's refusal to consider… issues…may have substantially impacted the weight of the evidence evaluated to approve [the transaction.]"[64] Here, the Staff and the PSC's unlawful and unreasonable refusal to consider alternatives associated with the transaction, as discussed herein, impacted the weight of evidence evaluated.

VIII. THE REPORT AND ORDER IS UNLAWFUL, UNREASONABLE, ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IN THAT THE COMMISSION FAILED TO CONSIDER ALTERNATIVES AS REQUIRED BY LAW AND EMPLOYED THE "STATUS QUO" TEST

As described above in Point VII, the Commission, in making its determination whether to grant Central States' application, was required to consider alternatives in its analysis. Rather than determining that Central States' proposal was the best alternative, as required, the Commission disregarded the alternatives.[65] Instead, the Commission based its determination on the fact the application "would provide many benefits over the status

[64] *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732, 736 (Mo. banc 2003).

[65] *See* Report and Order at 35 "Neither the Commission, nor Staff, have had the opportunity to truly vet the Joint Bidders' proposal given its incompleteness." Staff had the opportunity to vet the proposal through the data requests but failed to do so. Tr. 255:23-256:3.

quo."[66] Undoubtedly almost any alternative would be better than "the status quo" when faced with a company in receivership or bankruptcy, but "benefits over the status quo" is not the test, and the Commission's use of such test is unlawful, unreasonable, arbitrary, capricious and an abuse of discretion.

IX. THE REPORT AND ORDER IS UNREASONABLE BECAUSE THE SUBSTANTIAL AND COMPETENT EVIDENCE SHOWS THAT THE TRANSFER WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST AND ANY FINDING TO THE CONTRARY IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION

The Commission failed to appropriately weigh the detriments to the public interest in its analysis. These detriments have been previously identified as relevant in a transfer of assets case analysis and are discussed in turn below (along with the detriment of significant public and ratepayer opposition, discussed in Point X), and the Commission acted unlawfully and unreasonably in discounting such detriments. The Court of Appeals has previously reversed the Commission when the "PSC's refusal to consider… issues…may have substantially impacted the weight of the evidence evaluated to approve [the transaction.]"[67] Here, the PSC's unlawful and unreasonable refusal to consider the detriments associated with the transaction, as discussed herein, impacted the weight of evidence evaluated.

[66] Report and Order at 35.

[67] *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732, 736 (Mo. banc 2003).

A. Detriment: Rate Shock

The Commission failed to appropriately weigh the public detriment of rate shock in its balancing test. The Commission has previously determined that a potential rate increase goes directly to whether an application is detrimental to the public interest.[68]

The rate shock here is actually a combination of a number of significant detriments to the public as established in the record: Central States rates' will require return on equity to be built into rates,[69] Central States financing will inevitably be higher than a political subdivision,[70] Central States rates will be inflated by unnecessary repairs and improvements, [71] and Central States customer base is so small that rate shock is inevitable. In addition, Central States failed to include known costs in its estimates so the actual rate increase will be even higher than suggested by Central States. Despite each of these facts, whether director or indirect, the effect of the transaction tends to make rates going forward less just and less reasonable.

On page 32 of the Report and Order gives short attention to the rates Central States will charge when its improvements to the water and sewer asset are in service. The

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[68] *In Re Aquila, Inc.*, No. EF-2003-0465, 2003 WL 22840055 (Oct. 19, 2003).

[69] *See* Mr. David Stone's discussion with Commissioner Kenney about the District's favorable refinancing potential. Tr. 405-406.

[70] Tr. 150:22-24.

[71] *Compare* Ex. 6, Thomas Direct 16: 21-22, 18:18-19 with Ex. 400, Stone Direct, 3:5 - 4:20 and the MoDNR inspection reports in Ex. 5, Surrebuttal Testimony of Josiah Cox, at JC-S3. Based on the substantial and competent evidence, the Commission erred in finding such the proposed repairs and improvements reasonable and in finding Osage Utility's evidence regarding the same, credible. *See* Report and Order, pp. 32-33.

Commission acknowledges though that "if approved during a rate case, [those rates] would be a significant increase for Osage Water Company's" and "could be a financial detriment to Osage Water Company's customers." The Commission takes some consolation however in the assurance by Central States' that it will not have an immediate rate increase, then adds that if the Joint Bidders' become owners of the assets their rates would be higher than what the Osage Water Company customers are paying even before improvements are made. Still, the evidence makes clear that Central States' charges for the same services will be nearly double or more than double when compared to the rates of the Joint Bidders.[72]

The Report and Order notes, " That estimated rate, if approved during a rate case, would be a significant increase for Osage Water Company's customers and would be substantially more than the rates proposed by the Joint Bidders."[73] The Commission determined that a "substantially" higher rate was justified because it would not be imposed immediately. There are two scenarios for the ratepayer: (a) no rate increase for months 1 - 24, and a substantially higher rate for year two to year 10 (and possibly longer) (b) a substantially lower increase in rates for months 1 through year 10 (and possibly longer). There is no evidence in the record and no justification by the Commission why option (a) would be in the public interest over option (b).

[72] *See* Reply Brief of Joint Bidders, filed October 17, 2019, which is incorporated herein by reference, for a discussion of the unnecessary proposed repairs, pp. 5-7.

[73] Report and Order at 32.

The Commission has missed the central point. It is inevitable that Central States will increase its rates, perhaps in less than a year, to levels exponentially higher than what the Joint Bidders will ever charge for service due greatly in part to the Joint Bidders' status as not for profit entities, one of which has access to financing at interest rates and payment terms only available to political subdivisions of the state; also due to the Joint Bidders' much larger customer base over which costs of service and capital improvements can be more equitably divided.[74] Cedar Glen residents prefer PWSD#5 service over Central States'. The increase in PWSD#5's rates is inconsequential when the Central States alternative of significantly higher rates for decades enters the cost/benefits equation.

For the Commission to pretend that Central States' rates will be the same or lower than those of the Joint Bidders in the long term is an abuse of discretion. The Commission has witnessed repeatedly how Central States' sister companies have operated, and the core of those operations includes high cost improvements followed by approved rate increases for customers sometimes exceeding 200%.[75] The Commission's procedures for approving a "just and reasonable" rate virtually guarantee that Central States' rates will always be unreasonably high when compared to those that will be charged by Joint Bidders for the same service.

[74] If the Osage Water assets are transferred to Central States, they will have just 432 customers (Tr. 112:21-25); if transferred to PWSD, MAWA, and LAWA, they would have in excess of 4,000 customers combined. Tr. 403:18-20; Tr. 458:19-21; Tr. 458:22-24.

[75] *See Order Approving Unanimous Disposition Agreement and Small Company Rate Increase with Accompanying Tariffs*, WR-2020-0053 (Apr. 8, 2020).

What is more, even though the Commission has already found the Central States' rate would ultimately be "substantially higher," the record shows Central States underestimated potential rate increases by failing to include known costs in its calculations. One example is the second well at Cedar Glen.

The Commission ruled in error that a second well for Cedar Glen was not conclusively proven.[76] In order to show that the Central States' figures were reasonable, it was incumbent on Central States to show that a second well would not be needed. Mr. Cox testified that whether or not a second well is required is a "question of how many residents are actually in the condos themselves" and claimed he doesn't have that "completely figured out." [77]

Yet attached to his own Surrebuttal Testimony, as Schedule JC-S3 was evidence that MoDNR inspectors noted in 2015 and 2017: "PWS needs a second well (serves more than 500 people)."[78] The same inspection reports state with respect to "System Information for 12 months" a population served of 535. [79] [80] Mr. Cox cannot deny the need for a second well simply because he "hasn't figured it out yet" and offered no reason whatsoever why

[76] Report and Order at 34.

[77] Tr. 112:4-14.

[78] Ex. 5, Cox Surrebuttal, at 53, 58 (numbers are to the PDF page numbers).

[79] Ex. 5, Cox Surrebuttal, at 57, 62.

[80] The only suggestion that the number was less than 500 was by Mr. Thomas whose testimony includes the conclusory statement that Cedar Glen serves approximately "432 people." See Ex. 6. Mr. Thomas admitted 432 wasn't the "population served" but was rather was twice the number of units - representing 216 water customers and 216 sewer customers. Tr. 112:21-25.

the MoDNR's recommendations and reporting of a population of 535 were inaccurate.

Unmistakably, the MoDNR has concluded that the public water system at Cedar Glen needs a second well.[81] The prospects that Central States will prevail in an argument with MoDNR over the need for that second well, or that MoDNR might overrule its own field inspectors or disregard the public water supply guidelines it publishes, certainly delight the imagination but they are simply implausible. The Commission's disregard for another state agency's conclusion in favor of Mr. Cox is unreasonable and clearly against the logic of the circumstances and an abuse of discretion. The record shows that the application will cause a detriment to the public interest in the form of rates that will be substantially higher than other alternatives, and even higher than estimated by Central States. The Commission erred in failing to appropriately weigh such detriment.

B. Detriment: Unnecessary Duplication of Assets/Infrastructure

Transferring the assets to Central States creates a detriment to the public interest because it unnecessarily duplicates assets and infrastructure. The Commission has previously held that eliminating "overlapping of efforts" is a public benefit.[82] The Commission has likewise held that "reduction of duplicate facilities" is a public benefit.[83]

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[81] Ex. 5, Cox Surrebuttal, JS-S3, at 52-62.

[82] *In re Union Elec. Co*., No. EO-91-204, 1991 WL 498639 (Aug. 16, 1991).

[83] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008) (emphasis added).

It follows then that a transaction which unnecessarily requires the duplication of facilities is a detriment to the public interest. As described *supra*, the substantial and competent evidence shows that if the Commission approves Central States' application, Central States will have to construct a second well. A second well would not be needed if there was simply interconnection with PWSD#5. The transaction, in requiring the unnecessary duplication of facilities, is a detriment to the public interest and the Commission unlawfully and unreasonably failed to appropriately weigh this detriment.

An interconnection between PWSD#5 and Cedar Glen would eliminate the need for the second well at Cedar Glen and a second well for the District. That interconnection would also achieve other important public purposes including an opportunity for PWSD#5 to refinance its long-term debt at a lower interest rate which in turn would translate into lower charges for service.[84]

C. Detriment: Foregoing Synergies

The Commission has previously identified as "synergies" as a public interest benefit.[85] The Commission has also found a transaction detrimental to the public interest when it means foregoing benefits.[86] There are synergies and operational efficiencies

[84] *See* Mr. David Stone's discussion with Commissioner Kenney about the District's favorable refinancing potential. Tr. 405-406.

[85] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.*, Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008).

[86] I*n the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks - MPS & Aquila Networks - L&P for Auth. to Transfer Operational Control of Certain Transmission Assets to the*

associated with allowing an adjacent service provider to provide service to the Osage Water Company Customers. Not only would an interconnection between PWSD#5 and Cedar Glen would eliminate create a synergy by eliminating the need for the second well at Cedar Glen but also by eliminating the need for a second well for the District.[87] The interconnection would also achieve additional efficiencies including an opportunity for PWSD#5 to refinance its long term debt at a lower interest rate which in turn would translate into lower charges for service.[88] By refusing to fully consider this detriment, the Commission's Report and Order is unlawful and unreasonable.

D. Detriment: Private Company vs. Public/Nonprofit Entity

The Commission has previously stated that a detriment in any effect "which tends to make rates less just or less reasonable."[89] Here, the Commission failed to consider the detriments of selecting a private company over a public entity and nonprofit entities. A private entity, under the Commission's basic ratemaking principles, will always be entitled to a return on equity. The reason the legislature created the Public Service Commission was to avoid the potential detriments associated with private operators:

Midwest Indep. Transmission Sys. Operator, Inc., No. EO-2008-0046, 2008 WL 4691014, at *7 (Oct. 9, 2008).

[87] Tr. 361:24-362:5.

[88] *See* Mr. David Stone's discussion with Commissioner Kenney about the District's favorable refinancing potential. Tr. 405-406.

[89] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008) (emphasis added).

> The legislature, in its wisdom, has given the Commission jurisdiction only over investor-owned utilities, and has specifically exempted public agencies of Bi-State's type. The fear, apparently, was that profit-making utilities might make use of their naturally monopolistic situation to extract exorbitant profits for their owners. The Commission does not regulate rates of municipally-owned utilities and rural cooperative associations. See Pace v. City of Hannibal, 680 S.W.2d 944 (Mo. banc 1984). Public agencies have no motive for seeking profits and political pressures arguably exert downward pressure on rates. Whether or not we agree with the legislature's concept of the public interest, as evidenced by its regulatory program, is beside the point.[90]

Transferring the assets to Central States creates a detriment to the public interest because it Central States has a motive for seeking profits and will not be subject to any political pressures exerting downward pressure on rates.

As a private company, entitled to a return on equity, Central States is incentivized to "over-build" any infrastructure or repairs.[91] Also, as a private company, there is a detriment that the company will be guided by a Board which is neither personally interested or personally invested. The boards of the Joint Bidders consist of customers of the systems they serve. The public comments in this case suggest a strong preference for this model in that is would give residents and ratepayers a "greater voice" with respect to operations.[92] This provides an additional protection to ratepayers that is not present with

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[90] *Love 1979 Partners v. Pub. Serv. Comm'n of Missouri*, 715 S.W.2d 482, 489 (Mo. banc 1986).

[91] *See* Reply Brief of Joint Bidders, filed October 17, 2019, which is incorporated herein by reference, for a discussion of the unnecessary proposed repairs, pp. 5-7.

[92] *See* Appendix A, attached hereto.

a private entity. The Commission erred when it failed to appropriately weigh the detriment of transferring the assets to a private entity.

E. Detriment: Non-Local Company

The Commission found previously benefit in the proximity of personnel and in geographically adjacent service.[93] The public comments evidence additional benefits of a local service provider: the provider knows its customers, will use local contractors (and support the local area) and will keep customer interests in mind, and be more responsive to customer needs. While Central States plans to outsource its customer service to a St. Louis Company, local providers would provide the same locally. If an applicant has an issue with the Public Water Supply District, there is no need to call a 1-800 number. As Mr. Stone testified at the hearing, "[I]f somebody is out of water, they ask me.[94] The detriments are two sides of the same coin -- a non-local company is not as in tune with customers, has no incentive to use local contractors or support the local area, is motivated by profits rather than customer interests, and will be less responsive to customer needs.

The Commission has acted unlawfully, unreasonably and abused its discretion in approving Central States' application in that it ignores the tremendous detriments

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[93] *In the Matter of the Application of the Empire Dist. Elec. Co. for Auth. to Sell & Transfer Part of Its Works or Sys. to the City of Monett, Missouri*, No. EO-2009-0159, 2009 WL 362184, at *5 (Feb. 11, 2009); *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.*, Case No. EM-2007-0374, 2008 WL 2648913, 266 P.U.R.4th 1 (July 1, 2008).

[94] Tr. 403:4.

associated with the Central States' transaction, ignores the larger needs of the public welfare, handicaps a public entity's efficient use of its assets and resources, including financial resources, by needless duplication of assets in public service, and arrests efforts at regionalization of water treatment and distribution facilities in the affected service area.

X. THE REPORT AND ORDER IS UNREASONABLE BECAUSE THE SUBSTANTIAL AND COMPETENT EVIDENCE SHOWS THAT THE TRANSFER WOULD BE DETRIMENTAL TO THE PUBLIC INTEREST AND ANY FINDING TO THE CONTRARY IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION GIVEN THE HISTORIC AND CONSISTENT CUSTOMER OPPOSITION

The Commission invites the public to comment on proceedings before it. The invitations are plain in the Commission's web presence:

> **Submit Comments In Writing** -- Your comments are appreciated and will be kept on file with the Missouri Public Service Commission.[95]
>
> Make your voice heard in cases or on issues in front of the Commission by making a public comment.[96]

Over 90 public comments were submitted in this matter all in opposition to Central States' application. The comments evidenced the ratepayers' strenuous objections to Central States' service offerings and ratepayers' preference for PWSD#5 service. Beyond a general preference for PWSD#5 over Central States, the commenters offered specific benefits of being served by PWSD#5 (and detriments of being served by Central States):

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[95] *See* https://psc.mo.gov/General/Submit_Comments.

[96] *See* https://psc.mo.gov/General/Look%20Up%20Docket%20Files.

- Public (Joint Bidders) vs. Private (Central States) -- Central States being a private company will be entitled to a return on equity (which will be factored into future rate increase);
- Local (Joint Bidders) vs. Nonlocal - (Central States) -- A local company knows its customers, will use local contractors (and support the local area), will keep customers' best interests in mind, more responsive to customer needs;
- Customer Regulated (Joint Bidders) vs. PSC Regulated (Central States) - Customers sit on the Boards of Joint Bidders such that they would have a "greater voice" in operations and rate increases; and
- Company History -- several commenters noted Joint Bidders were doing a "fantastic job" or had not had any issues at other complexes but stated Central States has a history of aggressively raising costs.[97]

This evidence was summarized in just one sentence in the Report and Order.[98] No discussion ensued about the objections to regulated public utility service asserted by Cedar Glen and its unit owners over time, and how that history joined with the present volume and pitch of complaint affected the public interest determination in this case. In addition to the public comments, Kenneth Hulett, President of Cedar Glen testified at the hearing

[97] *See* Appendix A (attached hereto).

[98] Report and Order, at 35 ("[T]he residents represented by Cedar Glen oppose Osage Utility's ownership and prefer the Joint Bidders to be the owners.").

expressing opposition to the transfer of assets.

The Commission has previously found a project fails to "promote the public interest" when faced with such strong public opposition. [99] In the Grain Belt case, the Commission weighed the benefits and burdens of the proposed project. The Commission stated:

> The Commission acknowledges the substantial opposition to the Project expressed by business owners, farmers, and individual landowners across whose properties the Project was proposed to cross. The volume of public comments received in this case demonstrates the level of involvement of individuals who may be affected by this Project. Additionally, several people testified sincerely about their concerns relating to the ProjectHR3. Those concerns were conveyed by farmers who could experience problems related to soil compaction, interference with irrigation equipment, aerial applications to crops and pastures and difficulty in moving large equipment around the towers proposed as part of the Project. For one landowner who owns a bed and breakfast, the view of that business would be marred for any guests staying at the bed and breakfast. In this case the evidence shows that any actual benefits to the general public from the Project are outweighed by the burdens on affected landowners.[100]

Here, there is substantial opposition to the asset transfer. The sheer volume of public comments (compared to the affected ratepayers) demonstrates the importance of this transaction to those who may be affected.

Based on the public comments and testimony from ratepayers, the substantial and competent evidence only supports a finding that the transfer would be detrimental to the

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[99] In contrast, where the Commission has found that "public (consumers) would not be affected by the transfer," it has approved the transfer. *State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

[100] *In the Matter of the Application of Grain Belt Express Clean Line LLC for A Certificate of Convenience & Necessity Authorizing It to Construct, Own, Operate, Control, Manage, & Maintain A High Voltage, Direct Current Transmission Line,* No. EA-2014-0207, 2015 WL 4124748, at *16 (July 1, 2015)

public interest. There is not substantial and competent evidence in the record of any benefits sufficient enough to overcome the many detriments. In finding to the contrary, the Report and Order is arbitrary and capricious and an abuse of discretion. The Commission has abused its discretion in inviting customers to share their preferences and objections in a public forum and then discarding them. The Commission has abused its discretion in issuing the Report and Order in the face of intense customer opposition to Central Sates as the potential service provider.

XI. THE REPORT AND ORDER IS UNREASONABLE AND THE COMMISSION HAS ABUSED ITS DISCRETION IN DENYING CEDAR GLEN AND JOINT BIDDERS' MOTIONS TO STRIKE

Rule 20 CSR 4240-2.130 governs the form and content of written testimony before the Commission and provides:

> (7) For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:
>
> . . .
>
> (D) Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.

On September 4, 2019, Todd Thomas and Josiah Cox filed written surrebuttal testimony. On the pages and in the lines identified in Cedar Glen's and the Joint Bidders' Motions To Strike Portions of The Written Surrebuttal Testimony of Todd Thomas And Josiah Cox, or Alternatively, Motion For Leave To File Testimony In Response (the "Motions to Strike"),[101] which are incorporated by reference as if fully set forth herein, Mr. Thomas and Mr. Cox failed to limit their testimony to material which is responsive to

[101] Filed with the Commission on September 9, 2019.

matters raised in rebuttal testimony in violation of the Commission's evidentiary rule, 20 CSR 4240-2.103(7)(D). Their testimony was in response to matter raised in direct testimony and therefore was untimely and inadmissible rebuttal.

The failure of Mr. Thomas and Mr. Cox to file timely rebuttal and their delay in filing rebuttal until the surrebuttal phase of this matter violated Commission rules and unfairly prevented Cedar Glen and Joint Bidders and other parties from filing responsive testimony to their prejudice. The Commission abused its discretion in overruling Cedar Glen's and Joint Bidders' Motions to Strike.

XII. THE COMMISSION'S REPORT AND ORDER IS UNLAWFUL, UNREASONABLE, ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION IN DETERMINING THE APPLICANT SATISFIED THE REQUIREMENTS FOR A CNN

In order to obtain a CCN, the applicant must show (in addition to the other *Tartan* factors) that the granting of the CCN is in the public interest. The Report and Order, in finding that the granting of a CCN is in the public interest is unlawful, unreasonable, not supported by substantial and competent evidence, arbitrary, capricious and an abuse of discretion. For all the reasons stated herein -- for all the reasons the Commission cannot lawfully or reasonably determine the transfer is not detrimental to the public interest, the Commission cannot lawfully or reasonably determine issuance of a new CCN is in the public interest. As to the issue of a new CCN, the Commission should set aside the Report and Order and grant rehearing in this case.

XII. CONCLUSION

Section 386.610, RSMo, provides: "[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." The Supreme Court has explained:

> The prime object and real purpose of commission control is to secure adequate sustained service for the public at the least possible cost, and to protect and conserve investments already made for this purpose. Experience has demonstrated beyond any question that competition among natural monopolies is wasteful economically and results finally in insufficient and unsatisfactory service and extravagant rates.[102]

The Commission's Report an Order defies the purposes of the Commission as decreed by the Missouri Supreme Court a decree that has not lost strength with the passage of time. For all of the reasons stated herein, the Report and Order is unlawful and unreasonable.

The Joint Bidders supply adequate and sustained service for the public in the Osage Water Company service area at just and reasonable rates. They commit to, as mandated by law, to provide that service at the least possible cost (actual cost). The Commission can only approve transfer of assets to Central States' if Central States has shown that it is the best alternative, which it has not shown, and it cannot show. Similarly, Central States has not shown and cannot show the granting of a new CCN would be in the public interest.

WHEREFORE, Cedar Glen and Joint Bidders respectfully request that the Commission set aside the Report and Order and grant rehearing in this case.

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[102] *State ex rel. Mo. Pac. Freight Transp. Co. v. Pub. Serv. Comm'n*, 295 S.W.2d 128, 134 (Mo. 1956) (emphasis added) (internal citations omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon all of the parties of record or their counsel, pursuant to the Service List maintained by the Data Center of the Missouri Public Service Commission on May 7, 2020.

/s/ Stephanie S. Bell
Stephanie S. Bell