BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of a Proposed Rule	)	
Regarding Incentives for Acquisition	)	**File No. AX-2018-0240**
Of Nonviable Utilities.	)	

PUBLIC COUNSEL'S COMMENTS ON PROPOSED RULE 4 CSR 240-10.085

The Office of the Public Counsel (OPC) requests that the Public Service Commission (Commission) consider the comments and recommendations provided herein. Public Counsel voices its primary concern as item number 21 of the chart below, questioning the legal authority for implementing the proposed nonviable utility rule. Although the Commission's proposed rule is an improvement from the proposed rule in Case No. WW-2017-0283, OPC still disputes the lawfulness of implementing this proposed rule. In addition, OPC sees even less reason why Missouri-American Water Company would need further acquisition incentives in light of this Commission's decision to grant further consolidation in Case No. WR-2017-0285. It was the WR-2017-0285 case in which Missouri-American argued greater rate design consolidation would be sufficient incentive to acquire small, distressed systems. Given that the Commission granted requests for further rate consolidation in Missouri-American's service areas, any additional incentive would be undue and unreasonable.

OPC outlines its concerns in detail in the chart below.

#	Draft Proposed Rule	Recommendation
1	4 CSR 240-10.085's Purpose Section. The purpose section contains the statement that the rule's purpose is to encourage those utilities with "the resources to rehabilitate the acquired utility within a reasonable time frame" to acquire "a nonviable utility." Definition section, (1)(A)-(1)(D).	Because § 393.146, RSMo, only applies to capable utilities, the proposed rule should also only apply to capable utilities. To that end, OPC recommends adding the following definition: "'Capable public utility', a public utility that regularly provides the same type of service as a small water corporation or a small sewer corporation to more than eight thousand customer connections, that is not an affiliate of a small water corporation or a small sewer corporation, and that provides safe and adequate service; and shall not include a sewer district established pursuant to article VI*, section 30(a) of the Missouri Constitution, sewer districts established under the provisions of chapter 204, 249 or 250, public water supply districts established under the provisions of chapter 247, or municipalities that own and operate water or sewer systems."
2	Definition section, (1)(A)-(1)(D)	If the Commission wants to allow a provision similar to § 393.146.14, RSMo (a small utility can petition to be designated as a capable utility), then a similar procedure could be part of the definition of a capable public utility or added elsewhere. The small utility who considers itself to be a "capable public utility" should carry the burden of proof to show such a designation is "not detrimental to the public interest" including factors, like that it has access to low-cost financial resources and/or that its current ratepayers won't be unduly disadvantaged by any consolidated cost sharing of the proposed improvements.
3	Definition section, (1)(A)-(1)(D)	OPC recommends re-arranging the definitions to appear in alphabetic order and adding the definition of "capable public utility" that appears on § 393.146.1(1), RSMo.
4	Definition section, (1)(A)-(1)(D)	OPC previously noted, through its comments in Case No. WW-2017-0283, that there are no size limitations on what constitutes a nonviable utility and whether this would extend to municipalities. OPC had commented in Case No. WW-2017-0283 that "if this rule applies to the acquisition of a major metropolitan utility. For an investor owned utility to acquire a large municipal system, the investor-owned utility already has an incentive to grow its customer base and revenue. Even without size differences, investor-owned utilities have already been acquiring small systems in recent years." OPC still has these concerns. OPC also suggests that the term nonviable utility be limited to those utilities (water or sewer) which are stated in the purpose section of the proposed rule. Limiting the application of this rule to small utilities would be much more in line with § 393.146, RSMo.

5	4 CSR 240-10.085(1)(B) provides rate of return premiums for "the associated system improvement costs." and 4 CSR 240-10.085(4)(E), (G) discuss a three year time frame for plant improvements and operational changes	OPC has concerns over scope of "the associated system improvement costs," including identifying the costs for which the rate of return premium would apply. OPC recommends that the rate of return premium not apply to the overall company ROR. OPC recommends the rate of return premium, if any, apply only to acquired small utility plant instead of operational costs/expenses. OPC also recommends that any ROR premium not apply to any "debit acquisition adjustment" because doing so would violate § 393.146.7, RSMo, which prohibits a rate of return on the "portion of the purchase price in excess of the ratemaking rate base." Along these same lines, OPC recommends that commission not award a rate of return premium on the plant-in-service study. OPC further recommends that, if any ROR adjustment be made to costs associated with system improvement, that such ROR be only applied up to a certain amount (e.g., no more than $250,000 for which the rate of return premium can apply).
6	4 CSR 240-10.085(1)(B) refers to rate of return premiums and (4)(D) refers to a reasonable purchase price	Echoing comments that OPC made in Case No. WW-2017-0283, OPC questions why a rate of return premium would be necessary given that the risks attendant to the purchase of a system are often considered as part of the purchase price.
7	4 CSR 240-10.085(1)(C) allows a debit acquisition adjustment.	It would be unreasonable for a utility to receive more in rate base than would be supported by the assets, and the proposed rule does not contemplate the amount of time to amortize a debit acquisition adjustment.
8	4 CSR 240-10.085(2) states the Commission may approve an acquisition incentive in the acquisition case.	OPC recommends that it would be inappropriate to designate future plant as eligible for an acquisition incentive, such as the "associated system improvement costs." That is because these costs would not be known and measurable nor used and useful.
9	4 CSR 240-10.085(2) states the Commission may approve an acquisition incentive in the acquisition case.	OPC questions how the commission could grant a "debit acquisition adjustment" if the rule also allows in (3)(B) records to be produced post-acquisition. In other words, it may be impossible to identify whether there is an acquisition premium if records are withheld.
10	4 CSR 240-10.085(3)(A), (4), and (5) refers to an "acquisition incentive"	OPC recommends that the rule either define the term, "acquisition incentive," or use defined terms of "rate of return premiums" and "debit acquisition adjustment"
11	4 CSR 240-10.085(3) includes a semi-colon at the end of the paragraph	OPC recommends a period rather than a semi-colon.
12	4 CSR 240-10.085(3)(B) and (3)(C) refers to lack of records.	OPC questions why an item that is unavailable during the acquisition would become available at a later time.
13	4 CSR 240-10.085(4) states, ". . . the acquiring utility has the burden of proof and shall demonstrate the following:"	OPC recommends, ". . .the acquiring utility has the burden of proof." This phrase should constitute its own section. The remainder of the phrase should be a separate section beginning, "The acquiring utility shall demonstrate each of the following:"

14	4 CSR 240-10.085(3), (4)	OPC recommends that the applicant must certify it is a capable public utility in 4 CSR 240-10.085(3) and that the utility has the burden of proving it is a capable public utility in 4 CSR 240-10.085(4). If petitioning to be a public utility, the petitioning utility shall also carry the burden that the designation will not be detrimental to the public interest including consideration of factors like access to financial resources and the impact on existing customers to share any costs.
15	4 CSR 240-10.085(4)(E) and (4)(G) refer to improving deficiencies within three years.	The statute (§ 393.146.8, RSMo) does not have a timeline. OPC prefers the statutory approach under § 393.146.8, RSMo because it encourages the utility to work with DNR on an appropriate timetable to cure violations. DNR is in a good jurisdictional position to create compliance schedules relating to curing violations of environmental laws. OPC believes it's in the utilities' best interest to work in a regulatory environment that promotes inter-agency cooperation with DNR, with Staff, with OPC, and with others to create reasonable timeframes - be it one year, two year, three years, four years, or more. Reasonable timeframes are important to properly stagger needed capital investments and prevent rate shock. OPC recommends that the rule permit interested stakeholders to work with DNR/those agencies with jurisdiction over the enforceability of environmental rules in order to come up with a reasonable timetable.
16	4 CSR 240-10.085(5) states, "…as ordered by the commission in section 393.190 or 393.170, RSMo case, unless…"	The use of the word "case" in this instance appears to be a typo.
17	4 CSR 240-10.085(5) states, "…the acquisition incentive is approved in section 393.190 or 393.170, RSMo case, prior…"	This phrase uses the term, "acquisition incentive." OPC has previously pointed out that this term should either be defined or the rule should use existing definitions. In addition, the proposed rule uses the word "case," which again appears to be a typo.
18	4 CSR 240-10.085(5) states, "unless the utility requests and the commission otherwise approves."	OPC recommends, "unless the utility requests and the commission otherwise approves a different time period."
19	4 CSR 240-10.085(7) states, "up to the depreciated original cost of the acquired system."	OPC recommends, "up to the depreciated original cost of the acquired system in the next general rate case."
20	4 CSR 240-10.085(7) does not preclude recoupment of an acquisition discount.	OPC is concerned that the Commission, through this rule, could be endorsing inefficient market choices by allowing a utility to record assets at an amount greater than their purchase price. Additionally, customers would be paying more than the utility actually expended, which would be an unreasonable and inequitable outcome.

21	Authority sections refer to 393.146	OPC disputes the Commission's authority to rely on 393.146, RSMo as authority for this proposed rule. Further, OPC does not believe the other sections of law the Commission cites for its authority are valid authority for the promulgation of this rule. OPC reasons that § 393.146, RSMo contemplates a forced sale; however, the proposed rule contemplates a voluntary transaction. Further, OPC reasons that, under 393.146, RSMo, only non-utility parties may initiate proceedings that would be a prerequisite for receipt of a rate of return premium. Unlike 393.146, RSMo, the proposed rule would permit utilities to initiate the proceedings that would be a prerequisite for them to receive of a rate of return premium or a debit acquisition adjustment. In OPC's comments during the workshop in Case No. WW-2017-0283, OPC questioned the authority of this rule when it stated that "OPC appreciates the spirit of this rule to encourage healthy utilities to acquire unhealthy utilities; however, the proposed regulation is not without many concerns and many questions. First, OPC is interested in the enabling authority for this rule. OPC has identified Mo. Rev. Stat. § 393.146, RSMo, and OPC questions if this statute is the enabling authority for the proposed rule. If so, many provisions of the statute appear to be inconsistent with the proposed rule. . . The proposed rule should be consistent with, and within the confines of, what the legislature has expressed in statute."

WHEREFORE, Public Counsel requests that the Commission adopt the comments and recommendations provided herein.

Respectfully submitted,

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ATTORNEYS FOR THE OFFICE
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on August 1, 2018 to all counsel of record.

/s/ Ryan D. Smith