

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	]	Case No. WA-2019-0185
Water and Sewer Assets and for a Certificate of	]	and SA-2019-0186
Convenience and Necessity	]	

**THE REPLY BRIEF OF THE JOINT BIDDERS  
PUBLIC WATER SUPPLY DISTRICT NO. 5 OF CAMDEN COUNTY,  
LAKE AREA WASTER WATER ASS'N, INC., AND MISSOURI WATER ASS'N, INC.**

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 hereby submit their Reply Brief for the Commission's consideration in whether or not to approve Osage Utility Operating Company, LLC's ("OUOC") Application to acquire the water and sewer assets of Osage Water Company ("OWC"). This Reply Brief is in supplementation to the Joint Bidders Initial Brief and in response to the Initial Briefs filed by the other parties herein.

**I. THE PURPOSE OF THE PUBLIC SERVICE COMMISSION**

"The Public Service Commission is the state agency charged with ensuring that you receive safe, adequate, and reliable utility services at reasonable rates. The Commission must balance the interests of the public—ratepayers—as well as company shareholders. In proceedings before the Commission, rates are set to give the utility company an opportunity, but not a guarantee, to earn a reasonable return on its investment after recovering its prudently incurred expenses." <sup>1</sup> The Mission Statement of the Commission states "We will ensure that Missourians receive safe and reliable utility services at just, reasonable and affordable rates." <sup>2</sup>

<sup>1</sup> *A Snapshot of What We Do*; www.psc.mo.gov

<sup>2</sup> *About the PSC*; www.psc.mo.gov

The Public Service Commission promotes the public interest and protects the ratepayer from private utility companies by balancing the public need for safe, adequate and reliable utility services against the corporate desire for profit. There is no preference for a private for-profit utility company, such as OUOC, over non-profit public water and sewer districts organized pursuant to RSMo. Chapter 247, or non-profit water and sewer companies organized pursuant to RSMo. Chapter 393, such as the Joint Bidders. The sole preference is for the public—the ratepayer.

## II. THE DUTY OF THE STAFF

The Commission has a specific purpose and it retains a staff of technical advisors to investigate and render advice on technical matters that may arise during the course of proceedings before the Commission.

A. Staff argues that the Joint Bidders do not have an application pending before the Commission and that "Staff has only those recourses available to it to review an existing application and therefore, cannot perform an investigation of a competing proposal unless the competing entity also files an application for approval."<sup>3</sup> The Staff does not cite any support of this conclusion and it directly conflicts its statutory duty as stated in RSMo. §386.135.

RSMo. §386.135 authorizes the Commission to retain an independent technical advisory staff of which shall have expertise in accounting, economics, finance, engineering/utility operations, law, or public policy.<sup>4</sup> RSMo. §386.135 states "**It shall be the duty of the technical advisory staff ... to render advice and assistance to the commissioners and the commission's administrative law judges on technical matters within their respective areas of expertise that may arise during the course of proceedings before the commission.**" (emphasis added).

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<sup>3</sup> Staff's Initial Brief Pg. 17

<sup>4</sup> RSMo. § 386.135.1

In this proceeding before the Commission, the Staff failed to provide the Commission with the technical advice on the main issues that arose during the proceeding. The Joint Bidders, Cedar Glen and the Office of Public Counsel were left to provide the Commission with the relevant information required to make an informed decision with respect to OUOC's application. Specifically, uncontroverted evidence was presented to the Commission that approval of OUOC's application would result in harm to the ratepayer, that the repairs and improvements proposed by OUOC were not necessary or reasonable, and that the Joint Bidders have the technical, managerial and financial abilities to operate the OWC assets.

i. **Harm to Ratepayers.** In the *AmerenCIPS* case, which was the first contested case under RSMo. §393.190.1 following *AG Processing*, the Commission elaborated on the “not detrimental to the public interest” standard.<sup>5</sup> The Commission stated the following:

Public Counsel urges the Commission to ignore UE’s quotations of erroneous language from past Commission orders that approval must be granted unless “compelling” evidence shows that a “direct and present” detriment is “likely” to occur. Instead, as recently articulated by the Missouri Supreme Court in *AG Processing*, and restated by the Commission itself, “*a detriment to the public interest includes a risk of harm to ratepayers.*”<sup>6</sup>

Throughout the course of the proceeding, the Staff has continued to take no position on the future of rates for the OWC customers. In its Initial Brief, Staff states that "OUOC has requested to adopt the current rates for the systems; meaning there will be no

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<sup>5</sup> *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. (October 6, 2004).

<sup>6</sup> *Id.* at 41.

immediate impact to the customers of the OWC systems."<sup>7</sup> Staff completely ignores the future harm to the ratepayer as projected by the Applicant OUOC itself.

OUOC's own projections are that cost for water and sewer service to the OWC customers in the very near future will be approximately \*\*\$\_\_\_\_\_\*\* per month.<sup>8</sup> The substantial rate increase includes a projected annual cash flow of \*\*\$\_\_\_\_\_\*\* per year<sup>9</sup> and unnecessary repairs, which will be discussed later.

The Joint Bidders and Cedar Glen complain that OUOC intends to make unnecessary repairs, finances them at a high interest rate, requests an acquisition premium, doubles the cost of services to ratepayers and on top of all of that turns a profit, all of which is harmful to the ratepayer. OUOC has little, if any, concern about the financial impact on the rate payer, it is all about money.

In contrast, David Stone testified on behalf of the PWSD#5 that the Cedar Glen residents would receive water and sewer service at the total rate of \$78 per month.<sup>10</sup> Neddie Goss testified on behalf of LAWVA and MWA that the total cost of water and sewer service for the remainder of the OWC (Eagle Woods, Cimarron Bay and Chelsea Rose) would all be \$94.00 per month.<sup>11</sup> **OUOC charges for the same services will be nearly double or more than double when compared to the rates of the Joint Bidders.**

The Staff provides zero advice to the Commission on the issue of rate increase, which is part of the mission of the Public Service Commission: "We will ensure that Missourians receive safe and reliable utility services as just, reasonable and affordable

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<sup>7</sup> Staff Initial Brief Pg. 14

<sup>8</sup> Tr. at Pg. 98-100.

<sup>9</sup> Direct Testimony of Josiah Cox Schedule JC-3C

<sup>10</sup> Direct Testimony of David Stone Pg. 5 Ln. 9-16.

<sup>11</sup> Direct Testimony of Neddie Goss Pg. 4 Ln. 6-8, Pg. 5 Ln. 4-6, Pg. 6 Ln. 1-3.

rates."<sup>12</sup> The issue of reasonable rates was known by the Staff to be a central issue in this case and it failed to provide the Commission with any advice, except to say that rates would be determined in the future. The Staff completely ignores the evidence and reality. The evidence remains uncontroverted; the OWC customers will receive a significant rate increase if the OUOC application is approved—**which is a substantial harm to the ratepayer.**

ii. **Necessity of Proposed Repairs.** One of the central issues in the proceeding was whether or not the repairs proposed by OUOC to the Cedar Glen, Cimarron Bay, Eagle Woods and Chelsea Rose water and sewer systems (the "OWC assets") were necessary to provide safe and adequate water and sewer service to the ratepayers, which is a material factor in determining the reasonability of future rates.

In their Initial Brief, the Staff states "**although it did not conduct a prudence review on the preliminary proposals**, Staff believes that OUOC's plan for its proposed improvements at this point is generally reasonable..."<sup>13</sup> The staff failed to conduct any substantive review of the repair proposals and provide advice to the Commission despite knowing this was a matter raised in the proceeding. However, despite that failure, the uncontroverted evidence presented to the Commission clearly shows that **the repairs proposed by OUOC are unnecessary and will be a burden on the ratepayer.**

As a specific example, OUOC proposes repairs and upgrades to the Cedar Glen water and sewer systems that total \*\*\$\_\_\_\_\_\*\*.<sup>14</sup> The repairs recommended by the current operator of the Cedar Glen systems, LOWS, are approximately \$65,000.<sup>15</sup> On

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<sup>12</sup> *About the PSC*; www.psc.mo.gov

<sup>13</sup> Staff's Initial Brief Pg. 5

<sup>14</sup> Direct Testimony of Todd Thomas Pg. 16 Ln. 21-22, Pg. 18 Ln. 18-19

<sup>15</sup> Direct Testimony of David Stone Pg. 3 Ln. 5-Pg. 4 Ln. 20

August 24, 2017, MoDNR completed a compliance and operational inspection of the Cedar Glen systems.<sup>16</sup> This inspection report does not support the proposition that the repairs and improvements proposed by OUOC to the Cedar Glen system are necessary and reasonable. A quick review of repairs proposed by the Joint Bidders and OUOC to the MoDNR inspection report clearly shows that the repairs and improvements proposed by OUOC are not necessary and that proposal by the Joint Bidders is exactly what MoDNR currently requires for the provision of safe and adequate water and sewer service. In addition, it clearly states that a second well is needed, which OUOC did not include in its already extreme cost of repairs and improvements.

As second example, the same analysis can be made with respect to Eagle Woods. OUOC proposes \*\*\$\_\_\_\_\_\*\* in repairs and improvements.<sup>17</sup> However, when reviewing the MoDNR Compliance and Operation Inspection report for Eagle Woods dated April, 27, 2017, the repairs and improvements proposed by OUOC do not appear to be necessary.<sup>18</sup>

The total estimated cost for repairs or improvements to the OWC assets submitted by OUOC is \*\*\$\_\_\_\_\_\*\*, which will be entirely paid for by the ratepayer.<sup>19</sup> Unnecessary repairs harm the ratepayer who wants safe and adequate water and sewer service at a reasonable rate, not a rate inflated by unnecessary repairs.

**iii. Technical, Managerial and Financial Abilities of the Joint Bidders.**

Although Staff did not provide the Commission with any advice on the technical, managerial and financial abilities of the Joint Bidders, it is abundantly clear from the

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<sup>16</sup> Surrebuttal Testimony of Josiah Cox, Ex. JC-S3.

<sup>17</sup> Direct Testimony of Todd Thomas, Pg. 18 Ln. 20-Pg. 23 Ln. 10

<sup>18</sup> Surrebuttal Testimony of Josiah Cox, Ex. JC-S4 Pg. 23-27

<sup>19</sup> Direct Testimony of Todd Thomas.

evidence before the Commission that the Joint Bidders are qualified to operate the OWC assets. While OUOC interjected this issue improperly through the surrebuttal testimony of Josiah Cox and Todd Thomas, their testimony proved to be disingenuous, self-serving and incomplete. OUOC submitted violations on systems not owned by the Joint Bidders at the time of the violation and did not include any of the certificates showing that all of the systems were immediately returned to compliance. OUOC complains that the Joint Bidders take a "wait for a citation from MDNR and then react to fix the problem".<sup>20</sup> This mischaracterizes the evidence as some of the violations cited by OUOC were because MWA made emergency repairs to the water system at Silver Creek in order provide safe service; something that MWA was not even required to do as it did not own the system at the time.<sup>21</sup>

The PWS#5 has been in service for almost 10 years and Neddie Goss, the administrator for LAWVA and MWA, has been employed in the operation of water and sewer utilities for over 39 years.<sup>22</sup> The Joint Bidders have the technical, managerial and financial abilities to operate the OWC assets.

**OUOC's only game is to pervert the evidence in an effort to make the Joint Bidders appear to be incompetent because they can't compete with their rates.**

### III. THE POTENTIAL FOR DELAY

**i. No Significant Delay if Application Denied.** During the hearing it was apparent that the potential for delay was of concern to the Commission; rightfully so. However, the evidence was not that these systems were in a state of dire need for repair. Instead, while the OWC systems have been neglected, they are currently being

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<sup>20</sup> OUOC Initial Brief Pg. 26

<sup>21</sup> Transcript Pg. 425 Ln. 10-Pg. 426 Ln. 20

<sup>22</sup> Transcript Pg. 373 Ln. 5-9; Pg. 433 Ln. 10-12.

maintained by LOWS at the direction of the Trustee and the OWC assets will continue to be operated by the Trustee and LOWS until the assets are ultimately transferred to another party, so there is no substantial risk to OWC customers if the transfer to OUOC is denied. The Commission may recall that in 2007 it denied the transfer of the Cedar Glen system to a potential purchaser, and as of this proceeding, the Cedar Glen water and sewer systems remain operational and provide safe and adequate service to the people residing there.<sup>23</sup>

Further, concern was that the Joint Bidders would have to be approved by the Bankruptcy Court. In Case No. 17-42759-drd11, document 135 filed and entered on November 14, 2018, the Bankruptcy Court "[s]hould the Stalking Horse Purchaser (OUOC) fail to close on the sale pursuant to the Stalking Horse APA, and without further order from this Court, the Trustee is authorized and empowered to sell the Assets to the First Back-up Bidder (the Joint Bidders)."<sup>24</sup> No further action is required in the Bankruptcy Court.

Further concern was related to annexation of Cedar Glen into the PWSD#5. Cedar Glen has indicated its desire to be annexed as part of PWSD#5. With the cooperation of Cedar Glen, the annexation will likely take 45 to 60 days.<sup>25</sup>

It appears to the Joint Bidders that the longest process will be the approval of their application by the Commission. As the Staff and OPC have already undertaken an investigation into the OWC assets and reviewed the testimony and evidence herein, the Joint Bidders are hopeful that the application would move forward quickly without

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<sup>23</sup> *Environmental Utilities, LLC v. Public Service Commission*, 219 S.W. 3d 256 (Mo. App. W.D. 2007)

<sup>24</sup> Direct Testimony of Josiah Cox Exhibit JC-10 Page 7 Paragraph 26

<sup>25</sup> RSMo. § 247.030



opposition or controversy. Upon approval the Joint Bidders will begin to maintain and upgrade the systems immediately.

**ii. The Actual Threat of Delay by OUOC**

OUOC has threatened to not consummate the purchase of the OWC assets and withdraw its application if the Commission did not agree to the acquisition premium.<sup>26</sup>

In his surrebuttal testimony Josiah Cox states the following:

Q. AT PAGE 12, LINES 9-23 THROUGH PAGE 13, LINES 1-12, MS. ROTH OPINES THAT OUOC HAS NOT MET ITS BURDEN OF PROOF TO SHOW THAT THE PURCHASE OF THE OSAGE WATER SYSTEMS AND REFLECTIONS SYSTEMS WOULD BE UNLIKELY TO OCCUR WITHOUT THE PROBABILITY OF OBTAINING AN ACQUISITION INCENTIVE. DO YOU AGREE WITH MS. ROTH'S CONCLUSION?

A. No, I do not.

Q. PLEASE EXPLAIN.

A. Ms. Roth states that CSWR bid to purchase the assets of Osage Water Company and then executed the Agreement for Sale of Utility System (Agreement for Sale) before the incentive rule became available. The Agreement for Sale was executed on October 24, 2018. Regulation 4 CSR 240-10.085 became effective January 30, 2019. See Schedule JC-11 attached to my Direct Testimony in this case. Ms. Roth argues that the timeline of events shows the acquisition would occur regardless of the Commission approving a debit acquisition adjustment. What Ms. Roth

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<sup>26</sup> Surrebuttal Testimony of Josiah Cox, Pg. 5 Ln. 5-Pg. 6 Ln. 13.

ignores is that the incentive rule was filed May 30, 2018, so CSWR was aware of the rule's progress through the rulemaking schedule when it placed its bid at the Bankruptcy Court's auction. Further, the language in Paragraph 9 (a) on page 8 of the Agreement for Sale that contains the conditions precedent for CSWR to close. The protective language reads:

The PSC and DNR shall have, if necessary, authorized or approved the sale, transfer or disposition of the Assets to Buyer from Seller, the proposed financing, and any schedule of compliance for proposed utility improvement projects for regulatory compliance deemed necessary by Buyer, each in form and substance (including without limitation with respect to *the terms and conditions contained in such approval*) *acceptable to Buyer in Buyer's sole and absolute discretion.*

(emphasis added). What this language means is that CSWR may choose to not consummate the purchase if the final commission order makes CSWR's acquisition not feasible from an economic standpoint.<sup>27</sup>

Although this likely requires no translation, Josiah Cox is stating to the Commission, if you do not approve the acquisition incentive, then OUOC will terminate the contract. Although this issue was not covered at the hearing, OUOC's ultimatum is part of the evidence in this proceeding. Alternatively, if the Commission denies the application, there should be no concern that the Joint Bidders will not move forward expeditiously without conditions or contingencies.

#### **IV. THE AGREEMENTS FOR SALE OF UTILITY SYSTEMS**

I ask the Commission to review the Agreement for Sale of Utility Systems executed by and between the Bankruptcy Trustee and Central States. Paragraph 3 states that the Bankruptcy Trustee and Central States are to make application to the Public Service Commission for the

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<sup>27</sup> Surrebuttal Testimony of Josiah Cox, Pg. 5 Ln. 5-Pg. 6 Ln. 13.

authority to complete the transfer of the Assets.<sup>28</sup> The Agreement for the Sale of Utility Systems between the Bankruptcy Trustee and the Joint Bidders contains the exact same language. This begs the question of why is the Trustee not an Applicant in this procedure? Also, Staff and OUOC argue that the Joint Bidders should not be considered because they have not filed an application herein. This is contrary to the contractual language. Once the Joint Bidders have the right to purchase the OWC assets, then the Joint Bidders and the Trustee will make a joint application to the Commission for approval of the transfer per the Agreement.

## V. CONCLUSION

The Staff and OUOC have no real response to the Joint Bidders' proposal. The Staff remains silent or non-committal on the main issues of this procedure, specifically the harm to the ratepayer, whether the repairs by OUOC are necessary, and the technical, managerial and financial capabilities of the Joint Bidders. OUOC's only defense to charging twice the rates or more of the Joint Bidders is to pervert the MoDNR records to try and make the Joint Bidders look incompetent. Both Staff and OUOC urge the Commission to disregard the Joint Bidders, because no application is pending, which contradicts the entire purpose of the Commission.

"We will ensure that Missourians receive safe and reliable utility services at just, reasonable and affordable rates."<sup>29</sup> The Mission Statement of the Public Service Commission requires that the Joint Bidders be given just consideration and not disregarded. The public itself, in the form of 70 public comments, has spoken in regard to this application. The public, the OWC ratepayers, are requesting that the Commission protect them from the unreasonable and unaffordable rates that will result if the OUOC application is granted.

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<sup>28</sup> Direct Testimony of Josiah Cox Exhibit JC-10 Page 7 Paragraph 26

<sup>29</sup> *About the PSC*; [www.psc.mo.gov](http://www.psc.mo.gov)

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 17<sup>th</sup> day of October, 2019, to:

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