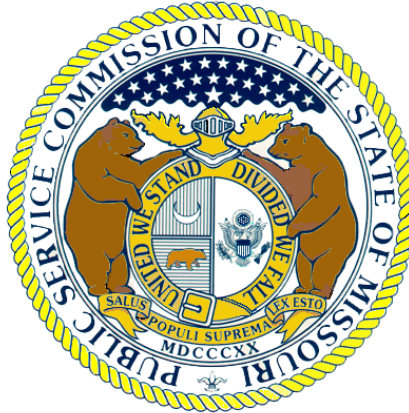


BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI



Summit Investment, LLC

Complainant,

v.

Osage Water Company

Respondent.

File No. SC-2014-0214

File No. WC-2014-0215

REPORT AND ORDER

Issue Date: October 22, 2015

Effective Date: November 21, 2015

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FINDINGS OF FACT:

1. Summit Investment Co., LLC (“Summit”), a developer, has been in business since 1996. Around 1998, Summit began planning and work on the development of its Eagle Woods Subdivision (“Eagle Woods”) in Camden County, Missouri. The development of Eagle Woods was to occur through four phases.¹

2. Osage Water Company (“Osage”) is a Missouri corporation authorized by the Commission to provide water and sewer service in an area located along and off State Highway KK in Camden County.² Osage began operations as a regulated water and sewer utility with Commission approval in Case No. WM-89-73, when Osage acquired the assets

¹ Ex. AA, ¶ 1. Partial Stipulation of Facts and Ex. T, Staff Report of Investigation, pg. 3.

² Ex. T, Staff Report of Investigation, pg. 2.

and Certificate of Convenience and Necessity (“CCN”) of Oak Trees, Inc., a regulated water and sewer utility.³

3. On or about January 12, 1999, Summit and Osage entered into a Water and Sewer Supply Contract (“Contract”) to provide water and sewer services to Eagle Woods. The Contract states Summit, contemplating the construction of 53 residential houses, and desiring public water and sewer utility service for present and future residents of its property, desired to contract with Osage for said public water and sewer utility service.⁴

4. By the terms of the Contract, Osage agreed to provide water and sewer service to Eagle Woods.⁵ In accordance with the Contract, Summit conveyed to Osage its ownership in all infrastructure, water well, pump and storage plant and equipment, real estate and associated easements and all permits in its name for all the facilities supplying sewer and water services to Eagle Woods.⁶

5. On September 21, 1999, DNR issued a construction permit (26-3075a) authorizing the construction of sewers, septic tanks, a recirculating sand filter, and appurtenant facilities to serve 25 lots in Eagle Woods.⁷

6. The Commission granted Osage a CCN to construct, install, own, control, manage and maintain a water and sewer system for the public located in Eagle Woods. The CCN became effective on January 5, 2001, approximately two years after Summit and Osage signed the Contract.⁸

³ Ex. T, Staff Report of Investigation, pg. 2.

⁴ Ex. A, Ex. AA.

⁵ Ex. A, ¶ 7.

⁶ Ex. S, ¶ 5.

⁷ Ex. AA, ¶ 5-6 and Ex. C.

⁸ Ex. AA, ¶ 2, Exhibit E. The Report and Order granting the CCN became effective on January 5, 2001.

7. Osage was also authorized by the Commission to provide water and sewer service to the Golden Glade Subdivision (“Golden Glade”), located in Camden County and adjacent to the Eagle Woods residential development.⁹

8. On September 21, 1999, DNR issued a construction permit (26-3273) to Golden Glade Homeowners Association for a sewer extension in Golden Glade. The permit specifically stated that it did not permit operation of the sewer services until an approved wastewater treatment facility was operational, and that the treatment plant then under construction was designed only for the 25 lots in Eagle Woods.¹⁰

9. On October 13, 2000, DNR issued State Operating Permit No. MO-0123170 authorizing Osage to operate waste water treatment facilities that were constructed pursuant to the earlier DNR construction permit for Eagle Woods (26-3075a). As requested by Osage, the permit did not identify a subdivision to be served by the facilities.¹¹

10. Osage allowed the allocations from the DNR issued State Operating Permit (MO-0123170) to be used for lots in Golden Glade.¹²

11. On January 25, 2001, DNR issued a construction permit to Osage (26-3467) authorizing Osage to complete the sewer extension previously authorized in the construction permit for Golden Glade (26-3273). This permit authorized the construction of a second recirculating sand filter and appurtenant facilities to serve 25 lots in Eagle Woods and 25 lots in Golden Glade.¹³ Osage completed construction of that facility and DNR subsequently issued an operating permit that authorized Osage to operate the expanded wastewater treatment facility.¹⁴

⁹ Ex. AA, ¶ 2.

¹⁰ Ex. AA, ¶ 7, Exhibit D

¹¹ Ex. F, Ex. AA, ¶ 9.

¹² See Summit's Formal Complaint.

¹³ Ex G, Ex. AA, ¶ 11.

¹⁴ See Osage's Response to Complaint.

12. On July 18, 2001, DNR issued another construction permit to Osage that would have authorized the expansion of the wastewater treatment facility by constructing two additional recirculating sand filters and appurtenant structures. This proposed expansion was to serve all 52 lots in Eagle Woods and 47 lots in Golden Glade. This expansion was never built.¹⁵

13. Osage was not able to complete the project to provide sewer and water for the rest of Summit's lots in Eagle Woods due to financial difficulties.¹⁶

14. On December 10, 2002, the Commission issued a Report and Order in Case No. WC-2003-0134, finding that Osage had been effectively abandoned by its owners, and that it was unable or unwilling to provide safe and adequate service to its customers. A petition was filed in Camden County Circuit Court seeking the appointment of a receiver for Osage. On October 21, 2005, the court issued a judgment in Case No. CV102-965CC. The court found that Osage failed to provide safe and adequate service to its customers and appointed Gary V. Cover as a receiver for Osage.¹⁷

15. The court's Order Appointing Receiver directed the receiver to liquidate the assets of Osage as soon as practicable on terms that protect the interests of the customers of Osage, "and allow them to continue to receive utility service from the assets that have been put in place to serve them."¹⁸

16. On July 14, 2006, DNR renewed State Operating Permit No. MO-0123170 to Osage. The permit authorized Osage to operate the facilities that were constructed

¹⁵ Ex. AA, ¶ 12-13.

¹⁶ Transcript, Volume 3 pg. 33, ln. 12-16, 21-24. This finding was based on statements made by counsel for Summit to which counsel for Osage concurred. Unsworn statements by counsel are not evidence of the facts asserted, except where facts asserted are conceded to be true by the adversary party. *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997). Transcript, Volume 3, pg. 51, ln 5-10.

¹⁷ Ex. AA, ¶ 14, 18, Ex.I, Ex. N.

¹⁸ Ex. N, pg. 4-5.

pursuant to Construction Permit NO. 26-3075a. The permit specified that service was to be limited to any 50 lots platted in Eagle Woods and Golden Glades, and that the addition of lots in excess of 50 would require an expansion of the wastewater treatment plant or authority from DNR to add lots to the current permit.¹⁹

17. It is possible that Osage's current sewer system could handle an additional forty customers, based on rough estimates of flow, but Osage would need to determine if this is accurate before deciding if it could serve that many new customers without investing in the system.²⁰

18. Osage currently has an Operating Permit issued by DNR that restricts service to no more than the fifty lots currently connected to the wastewater treatment facility. In order to provide additional service, an expansion of the wastewater treatment plant will be needed or DNR must give authority to add lots to the current Operating Permit.

19. Alternatively, to resolve capacity issues, the City of Osage Beach may be able to provide sewer services, either through retail or wholesale sewage treatment for Osage. Connecting to the City of Osage Beach would also require additional investment in the system.²¹

20. Around 2004, and prior to the appointment of a receiver by the court in CV102-965CC, Summit applied to DNR for its own permit to complete the plant for the Eagle Woods subdivision, but the application was denied by DNR because Osage was already permitted to provide the service and Osage refused to give an authority waiver.²²

¹⁹ Exhibit No. AA, ¶ 19.

²⁰ Ex. T, Staff Report of Investigation, pg. 4-7.

²¹ Id.

²² Hearing Transcript Volume 3, pg. 33, ln. 17-21; pg. 38, ln. 22- pg. 39, ln. 7.

21. Osage currently uses a well located in Eagle Woods to provide water service to customers in the system. The current well can meet the needs of all fifty-three Eagle Woods lots and still be within DNR's recommended design one-day storage volume. The current well has not been approved by DNR.²³

22. The current flow through distribution system for the water system is inadequate because under some use conditions, the houses farthest away from the well and at the highest elevation have inadequate water pressure. This problem could be made worse if additional homes were constructed and connected. While resolution of the water pressure problem is possible, it would require capital funding.²⁴

23. Osage currently provides waste water service to 23 Golden Glade lots and 33 Eagle Woods customers.²⁵ Summit has approximately 25 remaining undeveloped lots in Eagle Woods that have not been connected to water or sewer services due to Osage's refusal to provide connection.²⁶

24. Summit filed a Petition against Osage in the Circuit Court of Camden County, Missouri in 2011 (Case No. 11CM-CC00113) seeking damages for breach of contract and specific performance.²⁷

CONCLUSIONS OF LAW

Osage is a public utility that provides water and sewer services, and is therefore subject to the Commission's jurisdiction pursuant to section 386.200, RSMo.²⁸ The question before the Commission is whether Osage violated the terms of its CCN or of its

²³ Ex. T, Staff Report of Investigation, pg. 4-5.

²⁴ Ex. T, Staff Report of Investigation, pg. 5.

²⁵ Tr.: pg. 57; In. 4-7.

²⁶ Ex. S, Affidavit of Ron Westenhaver, ¶17-18.

²⁷ Exhibit AA-attachment Exhibit R. Case No. 11CM-CC00113 is stayed pending resolution of this case.

²⁸ All statutory references are to RSMo 2000, as cumulatively supplemented.

water or sewer tariffs. In cases where a “complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions...the burden of proof at hearing rests with the complainant.”²⁹ Therefore, Summit has the burden of proving the violations alleged in its complaint.

The Commission is limited to those powers expressly granted by statute or by clear implication, necessary to carry out the powers specifically granted to it.³⁰ The Commission is a creature of statute and only has those powers expressly conferred upon it by statutes or reasonably incidental thereto.³¹ The dominating purpose for the creation of the Commission was to promote the public welfare.³² The Commission however cannot determine damages or award pecuniary relief and has no authority to interpret or enforce contracts, or to declare or enforce any principle of equity.³³

While it does not have the authority to determine if Osage violated the terms of the Contract with Summit, the Commission does have the statutory authority to determine if Osage violated its statutory obligation to provide its customers safe and adequate service in compliance with the terms of the tariffs and its CCN.³⁴

Osage was granted a CCN by the Commission in 2001 to provide water and sewer service to a service territory that includes the Eagle Woods subdivision. A CCN is a mandate to provide service to the area covered by it.³⁵ “[I]t is the utility’s duty, within

²⁹ *State ex rel. GS Technologies Operating Co., Inc. v. Public Service Comm’n*, 116 S.W.3d 680, 693 (Mo. App. 2003).

³⁰ *Utilicorp United, Inc. v. Platte-Clay Elec. Co-op, Inc.*, 799 S.W.2d 108 (Mo. App. W.D. 1990).

³¹ *State ex rel. Harline v. Public Service Commission of Mo.* 343 S.W.2d 177 (Mo. App. 1960) citing *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044 (Mo. 1943).

³² *Id.* at 181.

³³ *State ex rel Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. 1980).

³⁴ *Demaranville v. Fee Fee Trunk Sewer, Inc.*, 573 S.W.2d 674 (Mo. App. 1978).

³⁵ *State ex rel. Harline v. Pub. Serv. Comm’n of Mo.*, 343 S.W.2d 177 (Mo. Ct. App. 1960).

reasonable limitations, to serve all persons in an area it has undertaken to serve.”³⁶ It is recognized in Missouri that when a corporation devotes its property to a public use, it may not selectively choose which portions of the covered service area it will serve, thereby restricting the development of the remaining portions by leaving the remaining inhabitants without service that the company alone can render.³⁷ Therefore, when a utility refuses service, the Commission will review its actions with heightened scrutiny.

Once the CCN was granted in 2001, Osage became obligated to provide service to those entities within its service territory that requested service, pursuant to the terms of its tariffs. There is no disputing that all of Eagle Woods’ lots are within Osage’s service territory and that Summit has requested service. Since the first disputed issue before the Commission is whether Osage was and continues to be obligated to provide water and sewer service to the undeveloped lots in Eagle Woods, the Commission must now consider Osage’s obligations to those non-connected lots under the terms of the company’s tariffs.

A tariff details the manner in which a utility will provide service. “A tariff is a document which lists a public utility’s services and the rates for those services.”³⁸ Osage’s tariff for water service, Form No. 13 P.S.C. MO. No. 1 Sheet 7, establishes the definitions for Osage Water Company and defines “Customer” under Rule 1(b) as follows:

The “Customer” is any person, firm, corporation or governmental body which has contracted with the Company for water service or is receiving service from Company, or whose facilities are connected for utilizing such service.³⁹

³⁶ *Id.*

³⁷ *State v. Public Service Commission*, 229 S.W. 782, (Mo. 1921).

³⁸ *Pub. Serv. Comm’n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012).

³⁹ *Similarly*, Osage’s tariff for sewer service, P.S.C.Mo. No. 1 Original Sheet No. 12 Rule 1(c) defines “Customer” as: The “Customer” is any person, individual, partnership, association, corporation or governmental body which has contracted with the Company for sewer service from the Company, or whose facilities are connected for utilizing sewer service.”

Under the terms of its tariffs, Osage must provide service to those entities within its service territory that are considered a “Customer.” A “Customer” is not limited to an entity that is already receiving service. It also includes those entities that are already connected or that have contracted with Osage for service. Summit meets that requirement to be considered “Customer” under Osage’s tariffs, since it contracted in 1999 for utility services to all lots in Eagle Woods.

While Summit may fit within the meaning of “Customer” under the terms of the tariff, it is unclear if the Camden County Circuit Court’s use of the term ‘customer’ also encapsulates those undeveloped lots in Eagle Woods. Although the Commission has the authority to enforce a CCN or ensure a utility’s compliance with the terms of its tariffs, this is recognizably a unique situation, due to Osage’s receivership. Osage’s ability to perform its obligations under the terms of its tariff may currently be limited by the Court’s order establishing the receivership.

The Commission previously had concerns about Osage’s ability to provide safe and adequate service - a condition for granting a CCN - in 2002. As authorized by section 393.145, RSMo, the Commission successfully petitioned the Camden County Circuit Court to appoint a receiver for Osage in 2005.⁴⁰ The court appointed Gary Cover as receiver for Osage. Mr. Cover remains the receiver to this day. The powers, rights, and authority of a receiver are enumerated in section 393.145.6, RSMo, which states in pertinent part:

The receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment. The receiver shall operate the utility so as to preserve the assets of the utility and to serve the best interests of its customers. A receiver is not

⁴⁰ Case No. CV102-965CC.

the owner of the property; he is merely the custodian.⁴¹ (Emphasis added).

Under section 393.145.7, RSMo, a receiver normally holds a utility until such time that it can, in the best interests of its customers, be returned to the utility owners. The court, however, has the discretion to determine that the utility should never be returned to its owners, and instead order the receiver to sell or liquidate its assets. The Camden County Circuit Court elected the latter option by directing the receiver to find a buyer for Osage in its entirety or to “liquidate the assets of the company as soon as practicable on terms that protect the interest of the customers of the Company and allow them to continue to receive utility service from the assets that have been put in place to serve them” (emphasis added).⁴²

Osage asserts that it is not capable of providing service to the remaining unconnected lots in Eagle Woods since it was bound by the circuit court’s Order Appointing Receiver to only provide service to those customers receiving service. The Commission must determine if this language in the circuit court’s order is a “reasonable limitation” to Osage’s CCN that prevents it from adding service to the twenty-five undeveloped lots in Eagle Woods.

To evaluate the reasonableness of Osage’s receiver relying on the Order Appointing Receiver as a restriction to expanding service to the additional Eagle Woods lots, the Commission must first evaluate the authority of a receiver. A receiver is merely a ministerial officer of the court, and is limited by the language of the court order appointing him.⁴³ A

⁴¹ *Jennings Sewer Dist. of St. Louis County v. Pitcairn*, 187 S.W.2d 750 (Mo.App. 1945).

⁴² Case No. CV102-965CC.

⁴³ *Wheelock v. Cantley*, 50 S.W.2d 731 (Mo. 1932).

receiver must obtain court approval before entering into any contract, incurring indebtedness, or expending the monies of the receivership estate.⁴⁴

Summit may argue that the cases discussing restrictions on receivers entering into contracts can be distinguished from the present scenario since Summit and Osage entered into the Contract before the appointment of a receiver. Yet the timing of the contract in relation to the receivership does not change the fact that performance under the contract or tariff requires additional expenditures after the receivership's creation. If expenses are to be incurred *after* the receivership is established, court approval is still necessary.⁴⁵ No one disputes that in order to provide service to the additional lots in Eagle Woods, Osage must incur additional debt. Therefore, Osage's receiver could not act to provide the expansion requested by Summit without first obtaining authority from the court, which it can do but has not yet done. Osage may seek the court's approval generally or specifically, at the discretion of Osage and the court.

Staff's report indicates that absent improvements to the water system, the expansion of service will exacerbate the existing water pressure issue. Counsel for Summit acknowledges that the current permit from DNR for Osage's sewer treatment is at capacity and that he doesn't believe there are any additional sewer connections available under the current permit.⁴⁶ Staff is correct that the court order does not prohibit the receiver from undertaking improvements; improvements are simply a matter of scale. No one would argue the receiver could not replace a pipe that is leaking under his authority to preserve the assets of the utility to the best interests of its customers. However, improvements on

⁴⁴ *Naslund v. Moon Motor Car Co.*, 134 S.W.2d 103 (Mo. 1939).

⁴⁵ *Scott v. Home Mut. Tel. Co.*, 488 S.W.2d 922 (Mo. App. 1972)(Court found that when a receiver paid attorney's fees without prior court approval, he acted at his peril).

⁴⁶ Volume 3, Hearing Transcript, pg. 42, ln.21-pg. 43, ln. 4.

the scale of a system expansion to serve new customers in the certificated area would constitute a major management decision and the entering into of binding obligations by the utility.

By the current terms of the circuit court's order, the receiver may not be authorized to make the improvements to the system necessary to serve its territory without first receiving specific authorization or at least clarification of the court's order.

While the Commission has the authority to regulate a public utility and ensure compliance with the terms of a utility's tariffs and CCN, the Commission does not have the authority to order Osage to disregard a court's order. By this order, the Commission is not doing so. On the contrary, as the circuit court likely intended when staying the parties' contract dispute, the Commission is resolving here the issues within its expertise and over which it has authority so that the parties, including the receiver, can know how to proceed with their claims and obligations.

While Osage could have sought direction on its authority from the court when this conflict first arose, Osage's past reliance on the court's Order Appointing Receiver may have been reasonable. However, the Commission now will direct Osage to seek clarification from the court as to the extent of its ability to act without first seeking specific authorization for each action. The court has the power to direct Osage to take what steps are necessary to serve the area Osage is obligated to serve in a manner that protects the assets of the utility and serves the best interests of its customers. The utility's tariff will determine the responsibilities of Osage and Summit as they relate to additional facilities being required to serve the undeveloped Eagle Woods lots. Any costs incurred by Osage to expand the utility's system or to serve new customers can be addressed in a rate case before this Commission. What other actions are necessary related to providing service to

Summit or related to DNR's authority over Osage are properly left to the receiver and the court to resolve as the custodians of the utility.

Therefore, the Commission does find Osage to be in violation of its tariffs, but as a result of the Order Appointing Receiver in 2005, the company may currently be limited in its options. The Commission recognizes that an expansion of the system to provide additional service will be a financial burden to Osage, yet no evidence was presented as to the level of those additional costs, and such evidence would not relieve Osage from its obligations under its tariffs. Camden County Circuit Court has the authority to order Osage's receiver to incur those costs in order to provide safe and adequate service to those additional Eagle Woods lots. The Commission will direct its Staff to work with Osage to determine what steps are necessary to provide services to the undeveloped Eagle Woods lots and bring Osage into compliance with its tariffs and CCN.

THE COMMISSION ORDERS THAT:

1. Osage shall seek clarification from the Camden County Circuit Court in case number 26V10200965CC as to the extent of its authority to take the necessary steps to connect the twenty-five lots in Eagle Woods. Osage shall seek all authority it deems necessary to fulfill its duties under its certificate and its tariffs as those duties are explained in this order.
2. The Staff of the Missouri Public Service Commission shall work with Osage to determine what steps are necessary to expand services to the undeveloped lots in Eagle Woods. Staff shall file a status update on its efforts by February 1, 2016.
3. Osage shall file a status report with the Commission no later than March 15, 2016, on its progress towards connecting the undeveloped lots owned by Summit in Eagle Woods.
4. This order shall be effective on November 21, 2015.

BY THE COMMISSION



Morris L. Woodruff

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney,
Rupp, and Coleman, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 22nd day of October, 2015.