

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
February 11, 1998**

CASE NOS: WA-98-36, WA-97-110, WC-98-211, WA-98-236

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Osage Beach, MO 65065

Enclosed you will find certified copy of ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified Copy:

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 11th
day of February, 1998.

In the Matter of the Application of)
Osage Water Company for Permission,)
Approval, and a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own,)
Operate, Control, Manage and Maintain)
a Water and Sewer System for the)
Public Located in an Unincorporated)
Portion of Camden County, Missouri.)

Case No. WA-98-36

In the Matter of the Application of)
Osage Water Company for Permission,)
Approval and a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own,)
Operate, Control, Manage and Maintain)
a Water and Sewer System for the)
Public Located in Unincorporated)
Portions of Camden County, Missouri.)

Case No. WA-97-110

Osage Beach Fire Protection District,)
Complainant,)
v.)
Osage Water Company,)
Respondent.)

Case No. WC-98-211

In the Matter of the Application of)
Osage Water Company for Permission,)
Approval and a Certificate of)
Convenience and Necessity Authorizing)
it to Construct, Install, Own,)
Operate, Control, Manage and Maintain)
a Water System for the Public Located)
in Parkview Bay Subdivision,)
Osage Beach, Missouri.)

Case No. WA-98-236

**ORDER REGARDING MOTION TO DISMISS, MOTION TO CONSOLIDATE AND
APPLICATION TO INTERVENE**

On January 2, 1998, Osage Water Company (OWC or Company) filed a Motion to Dismiss Complaint in Case No. WC-98-211. The Company requests an order dismissing the formal complaint filed by Osage Beach Fire Protection District (District). The Company argues that the District seeks affirmative relief in the form of an order granting the District a certificate of convenience and necessity to provide public water utility service to members of the general public located in an area described in the Complaint as the "Passover Road Expansion." OWC asserts that the complaint fails to address the factors required for a certificate and fails to state a claim upon which relief could be granted.

OWC notes that the District further requests an order directing OWC to immediately cease and desist from supplying water to customers in the Passover Road Expansion within the District's political subdivision limits. OWC argues that the statute and regulation cited by the District do not provide the basis for an order terminating service in the manner requested by the District. OWC states that 4 CSR 240-2.060(2) pertains to the requirements for an application for certificate of convenience and necessity and that Section 88.251, RSMo Supp. 1997, provides for conditions upon and manner in which a franchise or service contract between a utility company and municipality must be submitted to a vote within the municipality.

The District filed its Response to Motion to Dismiss on January 13. The District notes that its complaint is not as narrow as OWC's motion suggests. The District points out that its complaint provides,

that OWC had failed to meet the filing requirements set out in Section 393.170, RSMo 1994 and 4 CSR 240-2.060(2) and because OWC had not shown that it had obtained the proper consent and/or franchise from the City . . . (emphasis added).

The District states that its primary concern is the financial condition and viability of OWC. The District alleges in addition that OWC is operating the water system illegally in violation of regulations of the Missouri Department of Natural Resources. Therefore, the District alleges it has submitted facts sufficient to warrant a hearing, and the District requests that the Commission set a hearing in this case.

The District filed a motion on December 12, 1997, to consolidate the following three cases: Case Nos. WC-98-211, WA-97-110 and WA-98-36, all concerning OWC. On January 6 the Commission issued an order denying the District's Motion to Consolidate. The Commission's order stated that the motion was denied because the three cases do not involve common questions of law and fact. On January 16 the District filed a Motion to Reconsider and requested that the Commission reconsider its Order Denying Motion to Consolidate. On January 29 the Commission issued an order denying the District's Motion to Reconsider.

On January 13 the District filed a Motion to Consolidate the following four cases: Case Nos. WC-98-211, WA-97-110, WA-98-36 and WA-98-236. The District states that consolidating these four cases will allow full exploration of OWC's unresolved financial matters. The District believes that OWC's outstanding debt exposure raises questions about the Company's short-term and long-term financial solvency as well as its ability to provide service to potential customers.

In Case No. WC-98-211 the District's complaint alleges that the Company is supplying water to the Passover Road Expansion without a certificate of convenience and necessity, that the Passover Road Expansion

is located within the city limits of the City of Osage Beach and within the political subdivision limits of the District.

Case No. WA-97-110 involves the application of OWC for a Certificate of Convenience and Necessity to construct, own and operate water and sewer service systems in the unincorporated area of Camden County known as the Cimarron Bay subdivision and a sewer service system in the unincorporated area of Camden County known as the Chelsea Rose subdivision.

Case No. WA-98-36 involves the application of OWC for a Certificate of Convenience and Necessity to construct, own and operate water and sewer service systems in the unincorporated area of Camden County known as the Cedar Glen Condominiums.

Case No. WA-98-236 involves the application of OWC for a Certificate of Convenience and Necessity to construct, own and operate a water service system in the Parkview Bay Subdivision located in Osage Beach, Missouri.

On January 13 the District filed a timely Application to Intervene in Case No. WA-98-236. The District states that its existing boundaries encompass the city within which OWC proposes to serve. The District asserts it is authorized by Missouri law to provide a common service of control or prevention of fires and the installation, operation and maintenance of water supply distribution to the public within its boundaries including the area which OWC proposes to serve. The District further states that it is ready, willing and financially able to serve the described area within the City with fire protection and water distribution service, having officially authorized such action at a meeting of its governing body held December 17, 1997.

The District opposes the granting of OWC's request because the District believes the Company is not financially viable to maintain short-

term and long-term operations. The District alleges that the Company has already illegally placed this water system into operation in violation of regulations of the Missouri Department of Natural Resources. The District argues that its application to intervene should be granted because pursuant to 4 CSR 240-2.075(4)(B) it is a political subdivision, pursuant to 4 CSR 240-2.075(4)(A) it has an interest in the proceeding different from the general public, and pursuant to 4 CSR 240-2.075(4)(C) the proposed intervention would serve the public interest.

On January 21 OWC filed a Motion to Deny Intervention or, in the Alternative, to Limit Participation to Specific Issues. OWC argued that the District's bases for intervention are insufficient and inappropriate because the District may not legally provide public water utility service and because the District is not abiding by the procedural rules and regulations of the Commission. The Company attached to its motion a letter from the General Counsel of the Commission dated December 9, 1997, which indicates that the likely interpretation of Chapter 321, RSMo 1994, is that a fire protection district is not entitled to own and operate a water supply distribution system. In the letter, the General Counsel requests that the Attorney General file a *quo warranto* action to answer this question.

OWC requests that the Commission deny the District's Application to Intervene. In the alternative, the Company requests that the participation of the District should be limited to the issue of the appropriate amount of capacity that OWC should be required or allowed to provide as part of its proposed water system to provide for fire protection to members of the public residing in the proposed service area.

On January 21 Staff filed its Response to Application to Intervene and Motion to Consolidate. Staff states that for reasons stated

in its December 19 response, Staff opposes the District's Motion to Consolidate Case Nos. WC-98-211, WA-97-110, WA-98-36 and WA-98-236. Nevertheless, because the Parkview Bay Condominiums which are the subject matter of Case No. WA-98-236 are located within the Passover Road Expansion, which is the subject matter of Case No. WC-98-211, the Staff does not object to: (1) the District's intervention in Case No. WA-98-236; or (2) the consolidation of Case Nos. WC-98-211 and WA-98-236.

The Commission has reviewed the Motion to Dismiss Case No. WC-98-211 filed by OWC and the response filed by the District. Commission rule 4 CSR 240-2.070(6) provides, "The Commission, without argument and without hearing, may dismiss a complaint for failure to state facts upon which relief can be granted or may strike irrelevant allegations." The Commission finds that the allegations set forth in the Complaint are not irrelevant and should not be dismissed for failure to state facts upon which relief may be granted. Therefore, the Commission will deny Respondent's Motion to Dismiss Case No. WC-98-211.

The Commission has reviewed the Application to Intervene filed by the District in Case No. WA-98-236 and the Motion to Consolidate Case Nos. WC-98-211, WA-97-110, WA-98-36 and WA-98-236 filed by the District, the response filed by the Company and the response filed by Staff. The Commission finds that the application to intervene in Case No. WA-98-236 should be granted because pursuant to 4 CSR 240-2.075(4)(B) the District is a political subdivision and pursuant to 4 CSR 240-2.075(4)(A) it has an interest in this proceeding different from the general public. The Commission will deny the alternative request that the participation of the District should be limited to the issue of the appropriate amount of capacity that OWC should be required or allowed to provide as part of its proposed water system for fire protection to members of the public residing

in the proposed service area. The Commission further determines that the Motion to Consolidate Case Nos. WC-98-211, WA-97-110, WA-98-36 and WA-98-236 should be denied because these four cases do not involve common questions of law and fact. Nevertheless, the Commission determines that Case Nos. WC-98-211 and WA-98-236 involve common questions of law and fact and should be consolidated for purposes of prehearing conference and evidentiary hearing.

The Commission also finds that it is appropriate to schedule a prehearing conference in Case Nos. WC-98-211 and WA-98-236 so the parties can identify the issues in dispute and develop a proposed procedural schedule. The parties should be prepared to discuss the facts and stipulate to those facts which are not in dispute. The parties shall then file a recommended procedural schedule or stipulation and agreement no later than March 11, 1998.

IT IS THEREFORE ORDERED:

1. That the Motion to Dismiss Case No. WC-98-211 filed by Osage Water Company on January 2, 1998, is hereby denied.

2. That the application to intervene in Case No. WA-98-236 filed by Osage Beach Fire Protection District on January 13, 1998, is granted.

3. That the Motion to Consolidate Case Nos. WC-98-211, WA-97-110, WA-98-36 and WA-98-236 filed by Osage Beach Fire Protection District on January 13, 1998, is denied.

4. That Case Nos. WC-98-211 and WA-98-236 are consolidated for purposes of prehearing conference and evidentiary hearing.

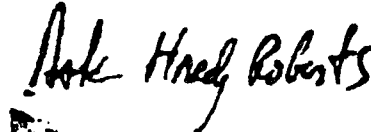
5. That a prehearing conference is now set in Case Nos. WC-98-211 and WA-98-236 for March 4, 1998, at 9:00 a.m. in the Commission's offices on the fifth floor of the Harry S Truman State Office Building, 301

West High Street, Room 530, Jefferson City, Missouri. Any person with special needs as addressed by the Americans with Disabilities Act should contact the Missouri Public Service Commission at least ten (10) days prior to the hearing at one of the following numbers: Consumer Services Hotline -- 1-800-392-4211, or TDD Hotline -- 1-800-829-7541.

6. That the parties shall file a proposed procedural schedule in Case Nos. WC-98-211 and WA-98-236 no later than March 11, 1998.

7. That this order shall become effective on February 24, 1998.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
and Drainer, CC., concur.

G. George, Regulatory Law Judge

ALJ/Sec'y:

George Boyce

WA-98-36 WA-98-236
WA-97-110
WC-98-24

2-5
Date Circulated

CASE NO.

[Signature]
Lumpe, Chair

[Signature]
Crumpton, Commissioner

[Signature]
Murray, Commissioner

[Signature]
Commissioner

[Signature]
Drainer, Vice-Chair

2-11
Agenda Date

Action taken:

4-C AA

Must Vote Not Later Than _____

**STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION**

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 11th day of February, 1998.

Dale Hardy Roberts

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge