

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

In the Matter of the Application of)	
Old National Bank for Authority to)	File No. WM-2012-0314
Seize the Assets of Tri-States Utility, Inc.)	

RESPONSE OF TRI-STATES UTILITY, INC.
IN OPPOSITION TO APPLICATION

COMES NOW Tri-States Utility, Inc. ("Tri-States"), pursuant to the Missouri Public Service Commission's ("Commission") Order Extending Time For Filings issued in this matter on June 1, 2012, and for its Response in Opposition to the Application of Old National Bank and Affirmative Defenses, respectfully states as follows:

RESPONSE

Tri-States denies all averments and allegations in Old National Bank's Application not specifically admitted herein.

1. With respect to the averments contained in numbered paragraph one (1) of the Application, Tri-States states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph one and therefore denies same. Tri-States further responds that, while Old National Bank alleges that it is a "national banking association organized under the laws of the United States," as a foreign corporation it does not supply a certificate from the secretary of state that it is authorized to do business in Missouri in conformance with Commission Rule 4 CSR 240-2.060(1)(C), nor does it seek a waiver from said rule.

2. With respect to the averments contained in numbered paragraph two (2) of the Application, Tri-States states that it is without knowledge or information sufficient

to form a belief as to the truth of the allegations contained in paragraph two and therefore denies same.

3. Tri-States admits the allegations contained in paragraph three (3) of the Application.

4. Tri-States is aware of the Order Granting Motions for Summary Judgment entered by the United States District Court for the Western District of Missouri in its Case No. 6:09-CV-03388-DGK (attached as Appendix A to the Application) and said Order speaks for itself. The remaining averments in numbered paragraph four (4) are legal assertions and conclusions and, as such, no admission or denial is required.

5. With respect to the averments contained in numbered paragraph five (5), Tri-States denies that a stipulation was filed with the Court regarding Tri-State's damages. The remaining averments are legal assertions and conclusions and, as such, no admission or denial is required.

6. Tri-States is aware of the Order Regarding Damages referenced in numbered paragraph (6) (attached as Appendix B to the Application) and said Order speaks for itself. The remaining averments are legal assertions and conclusions and, as such, no admission or denial is required.

7. Tri-States is aware of the Judgment referenced in numbered paragraph seven (7) (attached as Appendix C to the Application) and said Judgment speaks for itself. The remaining averments are legal assertions and conclusions and, as such, no admission or denial is required.

8. Section 393.190.1, RSMo speaks for itself. Regarding the other averments contained in numbered paragraph eight (8), Tri-States has no knowledge

concerning the information and belief of Old National and therefore denies the same. Further responding, Tri-States states that it is providing safe and adequate service to its customers in accordance with its lawfully approved tariffs, utilizing its property which is necessary and useful in the performance of its duties to the public, and that it is not now seeking Commission approval to sell, assign, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system pursuant to Section 393.190.1, RSMo.

9. With respect to the averments contained in numbered paragraph nine (9), these averments are legal assertions and conclusions and, as such, no admission or denial is required.

10. With respect to the averments contained in numbered paragraph ten (10), the averments regarding the relief sought by Old National Bank are legal assertions and conclusions and, as such, no admission or denial is required. Tri-States denies the remaining allegations in said paragraph.

11. Tri-States denies the allegations contained in numbered paragraph eleven (11).

12. With respect to the averments contained in numbered paragraph twelve (12), Tri-States denies that the granting of Old National Bank's requested relief will not be detrimental to the public interest. Tri-States further denies that any such sale, transfer, and/or other disposition of the assets of Tri-States may be accomplished in such a manner as not to negatively impact the provision of safe and adequate service to the customers of Tri-States. Further responding, Tri-States states that the granting of Old National Bank's requested relief will be detrimental to the public interest and will

negatively impact the provision of safe and adequate service to the customers of Tri-States. Tri-States opposes Old National Bank's requested waiver of the provisions of Commission Rule 4 CSR 240-3.605(1). The remaining averments regarding the relief sought by Old National Bank are legal assertions and conclusions and, as such, no admission or denial is required.

FURTHER RESPONSES AND AFFIRMATIVE DEFENSES

A. Failure to State A Claim.

13. Applicant Old National Bank ("Applicant") alleges in the introductory paragraph of its Application that, "pursuant to RSMo. §393.190 and Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.605," it "requests an order of the Missouri Public Service Commission ("Commission") authorizing the sale, transfer, and/or other disposition of the property of Tri-States Utility, Inc." Fast forward to the prayer or "WHEREFORE" clause, and one finds that Old National Bank is actually requesting an Order from this Commission "authorizing the sale, transfer, and/or other disposition of the property of Tri-States by the sheriffs of all counties in which Tri-States has real and/or personal property." (Emphasis added). The Application fails to comply with the referenced statute and implementing rules of the Commission and fails to set forth facts showing that Applicant is entitled to relief prayed for or any relief whatsoever and, as such, fails to state a claim upon which relief can be granted.

14. Section 393.190, RSMo., "Transfer of franchise or property to be approved, procedure – impact of transfer on local tax revenues, information on to be furnished, to whom, procedure," applies to water corporations such as Tri-States. Subsection 1 refers to "[a]ny person seeking an order under this subsection" (emphasis

added), and applicable case law provides that the Commission may approve a covered transaction if it is “not detrimental to the public interest.” See, *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980). Accordingly, the Commission has adopted implementing rules regarding applications to effectuate such transactions for water utilities at 4 CSR 240-2.060 and 4 CSR 240-3.605.

15. 4 CSR 240-2.060(1) addresses Applications to the commission requesting relief under statutory or other authority and its requirements include information that applicants must provide. Subsection (C) provides that if any applicant is a foreign corporation, it must submit a certificate from the secretary of state that it is authorized to do business in Missouri.¹ Such a requirement is inherently obvious in reaching the required determination that a proposed transaction will not be detrimental to the public interest. Indeed, 4 CSR 240-2.060(3) provides, in part: “If the purchaser or any other necessary party to a transaction for which approval is sought under the provisions of . . . 4 CSR 240-3.605 . . . is not subject to the jurisdiction of the commission, but will be subject to the commission’s jurisdiction after the transaction, the purchaser or other necessary party must comply with these rules.”²

16. In Paragraph 1 of its Application, Old National alleges that it is a national banking association organized under the laws of the United States “that does not conduct business in the State of Missouri.” Of course, if Old National Bank did conduct business in Missouri, since it has not registered as a foreign corporation it could not

¹Section 351.015(7), RSMo. provides: “‘Foreign corporation’ means a corporation for profit organized under laws other than the laws of this state.”

² 4 CSR 240-3.605(2) contains similar language regarding purchasers. Tri-States would also note that Great Southern Bank holds an existing encumbrance of said properties pursuant to the Order Approving Financing entered April 11, 1997, in Case No. WF-97-349.

even maintain such a proceeding in this state.³ However, therein lies the Catch-22 that Applicant would place this Commission in -- of having no knowledge of the identity, let alone the underlying qualifications, of the purported entity, if any, that might purchase said assets or property now necessary and useful in providing water service to the public. Under Applicant's proposed scenario, the situation is one-step further removed with actual authorization to sell, transfer or dispose of property vesting in the sheriffs of certain counties.

17. As shown above, the Application fails to comply with the referenced statute and implementing rules of the Commission and fails to set forth facts showing that Applicant is entitled to relief prayed for or any relief whatsoever and, as such, fails to state a claim upon which relief can be granted. A utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare. *State ex rel. Harline v. Public Serv. Com'n*, 343 S.W.2d 177, 182 (Mo. App. 1960).

B. Additional Affirmative Defenses.

18. Tri-States reserves the right to raise additional affirmative defenses which may become apparent through the course of this case.

C. Procedural Schedule

19. As referenced in the previously filed Motions to Extend Filing Dates, Tri-States and Applicant Old National Bank continue discussions exploring resolution of this matter and those discussions have been productive. The current ordered filing dates in

³ Section 351.574.1, RSMo. "A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court of this state until it obtains a certificate of authority."

this matter provide that: no later than August 6, 2012, the Commission's Staff shall file a recommendation on the application; and, no later than August 23, 2012, any party may file a reply to the response, the recommendation, or both. Accordingly, Tri-States understands that Applicant's reply to this response will be due on August 23, 2012, and Tri-States intends to continue said discussions with the hope of resolving this matter prior to the next scheduled filing date of August 6th herein.

CONCLUSION

WHEREFORE, Tri-States Utility, Inc. respectfully submits its Response and requests that the Commission deny or dismiss all of Old National Bank's prayers for relief contained in the Application filed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were sent by electronic mail, or hand-delivered, on this 6th day of July, 2012, to:

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