

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

In the Matter of the Application Carl Richard	)	
Mills d/b/a Carl R. Mills Water Service	)	File No. WM-2020-0387
for a Transfer of Assets to the Carriage Oaks	)	
Estates Homeowners Association	)	

**SUGGESTIONS IN SUPPORT OF INTERVENORS’  
MOTION TO DISMISS APPLICATION**

COMES NOW, Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (“Intervenors”), and in support of its Motion to Dismiss, states as follows:

*Background*

In November 2019, the Commission approved the application of the Carl Mills (“Applicant”) to operate a water utility system in Stone County, Missouri, which provides service to a small subdivision outside Kimberling City. In previous matters, a companion sewer system was determined to not be regulated by the Commission. The disposition of that sewer system is currently before the Stone County Circuit Court, 18SN-00077.

Mr. Mills is scheduled to conduct his first rate for the regulated water system later this year. However, prior to any rate case, Mr. Mills has filed this application to transfer ownership water system to a nonprofit company, Carriage Oaks Estates Homeowners Association (“HOA”). Intervenors are minority members of the HOA. While Intervenors are not opposed to the concept of a lawful nonprofit water company, established under Section 393.900, RSMo., from operating the water system, the HOA does not comply with the requirements of Section 393.900, RSMo.

## LEGAL STANDARD

The Commission applies the same standard Missouri court's apply in considering motions to dismiss, quoting:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

*USW Local No. 11-6*, No. GC-2006-0313, 2006 WL 1134453, at \*1 (Mar. 16, 2006)

(citing *Eastwood v. North Central Missouri Drug Task Force*, 15 S.W.3d 65, 67 (Mo.

App. W.D. 2000)). The Commission may dispose of all or part of any pleading whenever

such disposition is not otherwise contrary to law or contrary to the public interest. 20

CSR 4204-2.117.

## ARGUMENT

### **I. THE APPLICATION DOES NOT COMPLY WITH § 393.190, RSMO., 20 CSR 4240.2.060 AND 20 CSR 4240-10.105.**

#### *A. Filing Deficiencies – Missouri Statutes*

The application does not meet the statutory filing requirements. Section 393.190, RSMo., regulates the transfer of utility assets, and limits the standing to file such applications to gas, electrical, water or sewer corporations. Each entity is defined in Section 386.020(15), (18), (49) and (59), RSMo. The water system at issue is owned by Carl Mills is a water corporation. *Report and Order*, WA-2018-0370. In an application to transfer utility assets, Section 393.190.1, RSMo., requires that a statement be filed

contemporaneous to the application regarding the transfer's impact on tax revenues of political subdivisions. Section 20 CSR 4240-2.060(1)(M) requires all applications submitted to the Commission to be subscribed and verified by affidavit.

Applicant, a water corporation, seeks to transfer the entity to a nonprofit corporation. Applicant asserts, without explanation, that the system is currently tax exempt. Carl Mills is not a tax-exempt entity. Water corporations, generally, are not tax-exempt entities. Carl Mills is not a non-profit water company. The un-notarized application seeks to transfer the water system to a tax-exempt entity. Necessarily, there likely are tax implications arising from the transfer.

As Applicant is required by statute to submit a statement regarding the impact of the transfer of taxing authorities, and, as Intervenors note deficiencies in the statement filed by Applicant considering that the water corporation operated by Carl Mills is not a non-profit entity, and otherwise the statement filed by Applicant is not under affidavit, the Commission should dismiss the application based on § 393.190.1, RSMo., filing deficiencies.

#### *B. Filing Deficiencies – Commission's General Application Rules*

The application fails to meet the Commission's general filing requirements. Commission Rules establish general filing requirements for any application submitted to the Commission for consideration, being:

20 CSR 4240-2.060 requires, *inter alia*:

- (1)(A): the legal name and brief legal description of each application;
- (1)(B): a certificate of good standing for any Missouri corporation;

- (1)(E): fictitious name registration;
- (1)(H): a statement of the character of the business performed by each applicant;
- (1)(I): a list of persons for whom correspondence should be addressed;
- (1)(J): a list of an association's members;
- (1)(K): a statement of pending actions in federal or state court;
- (1)(L): a statement of annual report or assessment fees; and
- (1)(M); a statement under affidavit.

The application before the Commission omits each of the aforesated requirements.

Both Applicant and HOA are required to comply with these filing requirements. *See* 20 CSR 4240-2.060(1) and (3). Neither entities provide a legal description, and in fact two, different names are used to identify the HOA (“HOA of Carriage Oaks Estates, Inc.” and “Carriage Oaks Estates HOA, Inc”), neither of which are the name of registered legal entities. The HOA, a registered nonprofit, is required to submit a certificate of good standing from the Missouri Secretary of State, and has not. Carl Mills purportedly operates under the fictitious “Carl R. Mills Water Service”, though a search of the Secretary of State’s database indicates no such fictitious name exists. Neither entity describes the character of the business with which it is engaged. There is no person identified as representing the HOA or means to contact or correspond with them for the purposes of this matter. The HOA is comprised of members, such as the intervenors, and is required by rule to submit a list of its members. Neither applicant submitted a list of pending actions. Carl Mills did not submit a statement regarding pending annual reports or outstanding assessments. Most concerning, the application is not submitted under an affidavit.

While the rule is permissive to permit supplementation, its limited to circumstances where such information is *unavailable at the time the application is filed*. 20 CSR 4240-2.060(2). Otherwise, Applicant is seeking a variance from the filing requirements and has failed in doing so. 20 CSR 4240-2.060(4). The information omitted from the filing is available, the applicants have simply failed to provide it. Should the Commission endeavor to permit the applicants the opportunity to cure the aforestated deficiencies, good cause should be demanded and strictly scrutinized. Failing to follow clearly stated directions is not considered “good cause” in administrative proceedings. *See Hubbard v. Schaefer Autobody Centers, Inc.*, 561 S.W.3d 458, 462 (Mo. Ct. App. 2018).

As Applicant has failed to comply with a majority of its general filing requirements, and further has failed to request leave for cause from Commission Rules, the Commission should dismiss the application and avoid the unnecessary expense of litigating a half-baked application.

### *C. Filing Deficiencies – Commission’s General Application Rules*

Commission Rules establish specific filing requirements for applications concerning transfers of utility assets submitted to the Commission for consideration, being:

20 CSR 4240-10.105 further requires, *inter alia*:

- (1)(B) a copy of the contract or agreement.
- (1)(C) a certified copy of the resolution of the board of directors of each applicant authorizing the proposed action; and

(1)(E) a copy of the balance sheet of the acquiring entity with adjustments showing the results of the acquisition of the properties.

Both the applicant and HOA are required to comply with these filing requirements. *See* 20 CSR 4240-10.105 (1) and (2). Applicant purports there is no contract or agreement. Rather, Applicant has submitted a description indicating that the HOA agreed to accept a gift of a water system. The rule clearly demands that a copy of the agreement itself be produced, not a description thereof. Moreover, the HOA has not submitted a certified copy of a board resolution authorizing the action. Finally, the HOA is required to submit a draft of its current balance sheet with appropriate adjustments showing the results of the transfer.

Each of these requirements are mandatory. Like 2.060, a party may only supplement their application *if the information is unavailable at the time of the application*. As the information is available, as evidenced by the applicant describing an agreement, their failure to meet the filing requirements should not be curable through supplementation.

As Applicant has failed to comply with the Commission's specific filing requirements, and further has failed to request leave for cause from Commission Rules, the Commission should dismiss the application.

Given every benefit and inference of the pleading, the application remains critically deficient. The application fails to present the Commission with sufficient information consider the matter, and places a burden on the Staff of the Commission to

build a record for the Applicant. That is not the obligation of the state. It is the Applicant's obligation. Consequently, the application should be dismissed.

## **II. THE APPLICATION DEMANDS THE COMMISSION WAIVE JURISDICTION BY MISREPRESENTING THE ACQUIRING ENTITY AS AN EXEMPT NONPROFIT WATER COMPANY**

The application demands, by approving its application, the Commission waive its jurisdiction over the water system, as the purported acquiring entity is falsely identified as a not for profit company “not subjection to the jurisdiction of the commission.” *Application for Transfer*, Pg. 3. While it may be a nonprofit company, it is not a nonprofit water company, as contemplated under Section 393.900, *et seq.*, RSMo.

The Commission has jurisdiction over all water corporations in operation within the state of Missouri. Section 386.250, RSMo. The Commission does not have jurisdiction over nonprofit water companies. Section 393.933, RSMo. Section 393.900, *et seq.*, sets forth the formation requirements for a nonprofit water company and dictates certain rights among members of such a corporation.

Section 393.900.1, RSMo., requires the entity be established “only for the purpose of supplying water for distribution, wholesale and treatment services within the state of Missouri” and its articles of incorporation filed with the secretary of state and department of natural resources. Section 393.900.2(9) and 3.(1). Further, Section 393.921.7, RSMo., requires “[E]ach member shall be entitled to one vote on each matter submitted to a vote at a meeting.” Missouri law further requires that the nonprofit water company be managed by not less than five directors. Section 393.297.1, RSMo.

The articles of incorporation (“Articles”) for the purported acquiring party,

Carriage Oaks Estates Homeowners Association was established for additional purposes beyond the exclusive provision of water utility services. A true and accurate copy of the HOA's articles of incorporation is appended hereto and marked **Exhibit 1**.

Contrary to the "one member-one vote" requirement of the statute, the HOA establishes a Class A and Class B voter, permitting Class B members 10 votes for each Lot, while Class A members are restricted to one voter per lot. **Exhibit 1**, pg. 2. On its face, the HOA's Articles violates the voting requirements of Section 393.921.7.

Finally, the HOA's Articles only requires two directors, as opposed to five directors, as required by statute. **Exhibit 1**, pg. 1. While the Articles are permissive of five directors, in fact, the HOA is managed by only three directors; two shy of the mandatory five-director limit. A true and accurate copy of the HOA's 2019-2020 Biennial Registration Report identifying the HOA's current Board of Directors is appended hereto and marked **Exhibit 2**. Consequently, the Articles discriminate against Class A members by diluting the effectiveness of their votes and restricting the number of representatives on the Board of Directors.

The primary purpose of the Commission is to promote public welfare and ensure that the public has a say in the provision of its services. In the absence of a true non-profit water company, where members have equal access in the governance of a utility's administration, the customer relies on the Commission to provide its oversight and expertise to ensure the citizens of Missouri are receiving safe service at a fair cost. The structure of the HOA's Articles offend the purpose of the non-profit water corporation statutes, and necessitate the Commission's oversight. The application is defective in that



it misrepresents the capacity of the HOA as a non-profit entity not subject to the Commission's jurisdiction. As the application contains material misrepresentations and otherwise seeks relief, being the transfer and waiver of jurisdiction to the acquiring party, the application should be dismissed.

WHEREFORE, the Intervenor submit these Suggestions in Support of its *Motion to Dismiss* for the Commission's information and respectfully request the Commission APPROVE Intervenor's *Motion to Dismiss*.

Respectfully submitted,

SCHENEWERK & FINKENBINDER,  
ATTORNEYS AT LAW, LLC

By: /s/ Hampton Williams

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COUNSEL FOR INTERVENORS

### **CERTIFICATE OF SERVICE**

The below signed counsel hereby certifies that a true and accurate copy of the foregoing was sent to all counsel of record via email on June 12, 2020, to the following email addresses:

Mark Johnson [Mark.Johnson@psc.mo.gov];  
Jamie Myers [Jamie.Myers@psc.mo.gov];  
Missouri Public Service Commission [staffcounsel@psc.mo.gov];  
Office of the Public Counsel [opc@opc.mo.gov];  
Carl Richard Mills [mrrsykes@aol.com].

The above was also served via U.S. Mail, postage prepaid to the following interested parties on June 12, 2020:

Carriage Oaks Estates Homeowners Association  
Legal Department  
209 Falling Leaf Court  
Reeds Spring, MO 65737

Missouri Department of Natural Resources  
Legal Department  
PO Box 176  
Jefferson City, MO 65102-0176

/s/ Hampton Williams

Hampton Williams