

**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 Water)
and Sewer Assets and for a Certificate of)
Convenience and Necessity)
Case No. WA-2019-0185

**RESPONSE TO MOTIONS TO STRIKE
AND MOTIONS FOR LEAVE TO FILE RESPONSIVE TESTIMONY**

COMES NOW Osage Utility Operating Company, Inc. (“OUOC” or “Company”), and, as its *Response to Motions to Strike and Motions for Leave to File Responsive Testimony*, states as follows to the Missouri Public Service Commission (“Commission”):

1. On September 9, 2019, the following motions were filed seeking to strike certain portions of the Surrebuttal Testimony of OUOC witnesses Josiah Cox and Todd Thomas:

- Cedar Glen Condominium Owners Association, Inc.'s Motion to Strike Portions of the Written Surrebuttal Testimony of Todd Thomas and Josiah Cox, or Alternatively, Motion for Leave to File Testimony in Response; and,
- Public Water Supply District No. 5 of Camden County, Lake Area Waste Water Association, Inc., and the Missouri Water Association, Inc.'s Motion to Strike Portions of the Written Surrebuttal Testimony of Todd Thomas and Josiah Cox, or Alternatively, Motion for Leave to File Testimony in Response.

(the “Motions to Strike”).

2. OUOC also filed its own *Amended Motion to Strike and/or to Limit Scope of the Proceeding*.

3. In its *Order Bifurcating Hearing, Excusing Parties, and Directing Filing of Revised Staff Recommendation* issued September 11, 2019, the Commission directed

that responses, if any, to these Motions to Strike be filed by noon on September 16, 2019.¹

BACKGROUND

4. In part, this Application concerns the proposed acquisition of the assets of an existing water corporation and sewer corporation regulated by the Commission (Osage Water Company), by an affiliate of existing water and sewer corporations (Osage Utility Operating Company, Inc.). Osage Water Company has been in receivership and bankruptcy for approximately fourteen (14) years. The Bankruptcy Trustee has agreed to sell the Osage Water Company utility assets pursuant to an *Agreement For Sale of Utility System*.

5. OUOC seeks to provide service after closing of the proposed transaction under the same water and sewer tariffs currently applicable to the Osage Water Company service area and charge the same rates currently applicable to the Osage Water Company service area. Neither the rates nor the tariff provisions may be changed in the future without approval of the Commission.

MOTIONS TO STRIKE

6. The Cedar Glen Condominium Owners Association, Inc. (“Cedar Glen”) and Lake Area Waste Water Association, Inc., the Missouri Water Association, Inc., and Public Water Supply District No. 5 of Camden County, (“Lake Area/Mo Water/Public Water Supply”) (collectively, “Movants”) Motions to Strike are identical in reasoning, although the Lake Area/Mo Water/Public Water Supply Motion seeks to

¹ OUOC also filed an Amended Motion to Strike and/or to Limit Scope of the Proceeding, also on September 9, 2019. Responses to that Motion are also due on September 16, 2019.

strike more testimony. The Movants allege that the testimony identified by the Motions to Strike constitutes untimely rebuttal and, thus, violates Commission rules and unfairly prevents the Movants from filing responsive testimony.

7. As an initial matter, OUOC would note the link between its *Amended Motion to Strike and/or to Limit Scope of the Proceeding* and the Movants' Motions to Strike. The testimony of OUOC witnesses Josiah Cox and Todd Thomas that the Movants seek to strike concerns the same subjects as the testimony OUOC seeks to strike. Accordingly, if OUOC's *Amended Motion to Strike and/or to Limit Scope of the Proceeding* is granted in whole, OUOC's responsive testimony could also be stricken.

8. The Commission Rule at issue in the Movants' motions is 4 CSR 240-2.130(7)², which states as follows:

(7) For the purpose of filing prepared testimony, direct, rebuttal, and surrebuttal testimony are defined as follows:

(A) Direct testimony shall include all testimony and exhibits asserting and explaining that party's entire case-in-chief;

(B) Where all parties file direct testimony, rebuttal testimony shall include all testimony which is responsive to the testimony and exhibits contained in any other party's direct case. A party need not file direct testimony to be able to file rebuttal testimony;

(C) Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case; and

(D) Surrebuttal testimony shall be limited to material which is responsive to matters raised in another party's rebuttal testimony.

(emphasis added).

² Counsel for OUOC is aware that the Commission is no longer a part of the Department of Economic Development. However, the Code of State Regulations, as published on the Missouri Secretary of State web site, has not yet been updated. Given that, counsel for OUOC has continued to use the Title 4 designation that is available.

9. Thus, the question for the Commission in regard to the Movants' Motions to Strike is solely whether the identified surrebuttal testimony "*is responsive to matters raised in another party's rebuttal testimony.*" Whether testimony could or could not have been provided earlier is not a part of the rule. This is for good reason as the applicant in matters before the Commission has the burden of proof. The party that carries that burden should have the final opportunity to respond.

10. The testimony the Movants seek to strike is very much responsive to the rebuttal testimony. Office of the Public Counsel ("OPC") witness Roth criticized the Staff for not investigating "whether or not other utility entities are *available to provide similar service.*" (Roth Reb., p. 13:14 – p. 14:2) (emphasis added). She then named the Public Water Supply District #5 of Camden County, Missouri, Missouri Water Association, Inc., and Lake Area Waste Water Association, Inc. (referred to collectively in Ms. Roth's testimony as the "Joint Bidders") as having "a standing offer to purchase the OWC systems." (Roth Reb., p. 14:3-6) Finally, she stated as follows:

Q. Does the offer match OUOC's purchase price of \$800,000?

A. Yes. However, the Joint Bidders believe it is *in the ratepayer's best interest* that the systems be acquired by them at lower costs. This is explained further in the direct testimony of the Joint Bidders, and *OPC urges the Commission to not ignore other available, and potentially cheaper, options.* The Joint Bidders are also offering to purchase the systems without the use of an acquisition incentive.

(Roth Reb., p. 14:7-13) (emphasis added)

11. Given Ms. Roth's testimony, OUOC is within the Commission's rules to provide a response that addresses whether or not the Joint Bidders are able to provide a "similar service"; whether their acquisition is in the "ratepayers best interest"; and what

costs there may be associated with this “other available, and potentially cheaper option.”

12. The testimony about the “Joint Bidders” that the Movants seek to strike provides this response by identifying the many Department of Natural Resources (“DNR”) compliance actions and correspondence associated with the Joint Bidders’ existing operations.

13. Moreover, Cedar Glen witness Hulett also makes statements in his Rebuttal Testimony regarding the ability of Public Water Supply (or PWSD #5) to provide the services required. He states as follows:

During the 14 or more years of Osage Water Company’s receivership, water and sewer services available from Public Water Supply District No. 5 of Camden County (PWSD#5) have expanded and, as Mr. Krehbiel has discussed in his direct testimony, an interconnecting water distribution line between PWSD#5 and facilities at Cedar Glen is not only feasible but would economically address regulatory compliance concerns about a secondary well. Should this Commission approve a sale of the Osage Water Company assets serving Cedar Glen to PWSD#5, the Association board of directors has authorized the voluntary annexation of the condominiums into PWSD#5. The board has determined that for the long term condominium unit owners are better served by PWSD#5 water and wastewater services. At this time approval of OUOC’s application would effectively overlay a regulated public utility on PWSD#5’s anticipated expanded service territory all to the detriment of the District’s plan for future service growth and to the detriment of Cedar Glen’s unit owners. At present there is no need for a regulated public utility in our area which will essentially duplicate services already supplied, or services which could be easily extended, by an existing and fully qualified non profit and publicly supported provider of those services.

(Hulett Reb., p. 3: 1-17) (emphasis added)

14. Mr. Hulett further states that the “board of directors of the Association places great confidence in the District’s financial condition and *its abilities to provide reliable and adequate service.*” (Hulett Reb., p. 8:3-5)

15. Given Mr. Hulett’s testimony, OUOC’s surrebuttal testimony – which addresses whether or not “the unit owners are better served by PWSD#5 water and wastewater services”, whether the Water Supply District is “fully qualified” to provide the service, and whether it has the ability “to provide reliable and adequate service” – is within the Commission’s rule governing the scope of surrebuttal testimony.

16. Again, the testimony about Public Water Supply that the Motions seek to strike provides this response by identifying the DNR compliance actions and correspondence associated with the Public Water Supply’s existing operations.

17. Cedar Glen witness Hulett further stated that “Mr. Stone estimates that the ‘cost (combined) of upgrading and improving the water and wastewater facilities at Cedar Glen is approximately \$39,000.00. PWSD#5 can improve the Cedar Glen water and wastewater facilities to achieve compliance standards at a much, much lower cost than OUOC.’” (Hulett, Reb., 6:22 – 7:2)

18. OUOC witness Thomas’ response to Mr. Hulett’s statement as to estimated cost is directly responsive to rebuttal testimony and consistent with Commission Rule 4 CSR 240-2.130(7).

19. Lastly, it is interesting that the Lake Area and Mo Water parties stress that they believe OUOC’s testimony should have been provided in rebuttal testimony, which was filed August 13, 2019. OUOC sought the DNR compliance information from the

Lake Area/Mo Water/Public Water Supply parties by way of data requests (DRs 1.17, 1.18, and 1.19) served on July 19, 2019. Assuming, arguendo, that information regarding the Lake Area and Mo Water parties track record regarding DNR compliance should have been presented in rebuttal testimony, timely responses to these data requests (DR responses would have been due August 1, 2019) might have provided such an opportunity. However, Lake Area and Mo Water requested a five (5) day extension until August 6, 2019. (See Lake Area/Mo Water/ *Request for Additional Time*, EFIS Item 40)

20. A timely response on August 6, 2019, might still have provided an opportunity to include information in rebuttal (although such is not required, as stated above). However, Lake Area and Mo Water did not provide answers to the DNR questions on August 6, 2019. After being contacted by counsel on August 7, 2019, some responses were received on August 16, 2019. However, these were still not complete and OUOC has not yet received complete responses to the July 19 data requests. As stated in the testimony, OUOC instead sought information directly from DNR pursuant to Sunshine Law requests. Todd Thomas' Surrebuttal testimony Schedules TT-S6 and TT-S7 contain the records and summary of violations identified to date that Lake Area and Mo Water failed to disclose in response to DRs 1.17, 1.18, and 1.19.

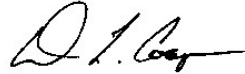
MOTIONS FOR LEAVE TO FILE RESPONSIVE TESTIMONY

21. The Motions also request in the alternative that the movants be provided an opportunity to file responsive testimony. There is no reason to take this step. As

stated above, OUOC's surrebuttal testimony is responsive to rebuttal testimony in accordance with Commission Rule 4 CSR 240-2.130(7). Further, because the burden of proof falls on OUOC as the applicant, there is no compelling reason to afford the movants the "last word" on this subject.

WHEREFORE, OUOC respectfully requests the Commission issue its order denying the Lake Area/Mo Water/Public Water Supply and Cedar Glen Motions to Strike for the reasons stated herein.

Respectfully submitted,



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**ATTORNEYS FOR OSAGE
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served electronically on all parties of record herein on this 16th day of September, 2019.

