

**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	)	Case Nos. WA-2019-0185
and Sewer Assets and for a Certificate	)	& SA-2019-0186
of Convenience and Necessity	)	

**POSITION STATEMENT OF THE OFFICE OF THE PUBLIC COUNSEL**

COMES NOW, the Office of the Public Counsel (OPC), by and through counsel, and for its position statement as to contested issues states as follows. In compliance with the Public Service Commission (Commission) Order Bifurcating Hearing, Excusing Parties, and Directing Filing of Revised Staff Recommendation, OPC’s Position Statement only addresses issues as to the Osage Water Company (OWC):

**I. Public Interest**

**Would the sale of Osage Water Company’s certificates of convenience and necessity and its water and sewer assets to Osage Utility Operating Company be detrimental to the public interest?**

The transfer of OWC’s certificates of convenience and necessity (CCN) and its water and sewer assets would be detrimental to the public interest by foreclosing the possibilities of other potential ownership opportunities for the OWC systems at more efficient prices. There is no detriment to the public interest when safe and adequate service is provided at just and reasonable rates. Just and reasonable rates are only those that are absolutely necessary to provide safe and adequate utility service, while also providing a utility a fair opportunity to earn a return commensurate with the risk involved.<sup>1</sup> Any charge above just and reasonable is a detriment to the

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<sup>1</sup> *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Bluefield Water Works & Improv. Co. v. PSC of W. Va.*, 262 U.S. 679, 692-93 (1923).

public interest.

The Osage Utility Operating Company (OUOC) is asking for this Commission to approve the transfer of four CCNs from OWC to OUOC covering service to the Chelsea Rose, Cimarron Bay, Cedar Glen, and Eagle Woods Water and Sewer Service Areas.<sup>2</sup> The assets were purchased by Central States Water Resources (CSWR) through a stalking-horse bid. OUOC is a subsidiary of CSWR, with Josiah Cox being the President of both companies. The OWC has been in receivership since 2002, and has numerous environmental code violations, and hence is “distressed.” OUOC proposes to remedy the environmental health and safety concerns with \$2,083,475 in total repairs.<sup>3</sup> The OUOC’s proposed acquisition of the OWC systems is then another chapter in the recent and repeated history of CSWR creating an affiliate to acquire distressed water systems.

The OWC systems may require repairs, but that does not mean all of OUOC’s proposed repairs are in the public interest. The evidence will show those repairs estimates are likely highly inflated. For instance, the actual residents in Cedar Glen believe that repairs for their system will require a \$39,000 investment.<sup>4</sup> OUOC on the other hand is proposing nearly spending 200% more.<sup>5</sup> Such a discrepancy will materially impact future rates, and should be considered when weighing the public interest. This difference is one reason among many that Reflections Subdivision Master Association, Inc. witness Anthony Soukenik concluded that OUOC “would not provide the least cost, capable utility service.”<sup>6</sup>

A full consideration of the public interest shows that other potentially viable avenues are

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<sup>2</sup> *Amended Application and Motion for Waiver*, WA-2019-0185 (Feb. 19, 2019).

<sup>3</sup> *Direct Testimony of Todd Thomas*, WA-2019-0185 p. 7-23 (July 11, 2019).

<sup>4</sup> *Rebuttal Testimony of Kenneth Hulett*, WA-2019-0185 p. 6-7 (Aug. 13, 2019).

<sup>5</sup> *Direct Testimony of Todd Thomas*, WA-2019-0185 p. 15-18.

<sup>6</sup> *Rebuttal Testimony of Anthony J. Soukenik*, WA-2018-0185 p. 4 (Aug. 13, 2019).

available to not only result in an acquisition with “no detriment,” but one that is of lesser detriment than that proposed by OUOC. Public Water Supply District #5 of Camden County, Missouri, Missouri Water Association, Inc., and Lake Area Waste Water Association (Joint Bidders) have offered to purchase the OWC systems at the same purchase price as OUOC’s without the use of an acquisition incentive, and with far more reasonable repair estimates.<sup>7</sup> If OUOC’s CCN transfer request is denied, the Joint Bidders can then make their own application to service the OWC systems at far less cost. This Commission should also consider that another competent system operator, Missouri American Water Company (MAWC) also bid on the OWC system, and is likewise available to operate the OWC systems at far lower costs than those proposed by OUOC provided that the Join Bidders do not purchase the OWC systems as back-up bidders. If water quality concerns can be addressed at lesser cost, then it is incumbent upon just and reasonable principles to disapprove a CCN transfer that results in rate charges far above what other operators would propose.

## **II. Acquisition Premium**

### **Should the Commission approve an acquisition premium for the acquisition of the Osage Water Company under 20 CSR 4240-10.085?**

The Commission should not approve an acquisition premium because the evidence will clearly demonstrate that OUOC, or one of the other bidding entities, would have bought the OWC water and sewer systems without an acquisition incentive. Furthermore, there is insufficient legal basis for the authority to grant an acquisition premium.

The Commission’s recently enacted water acquisition rule relies upon Sections 386.040, 386.250, and 393.140, RSMo for its existential authority.<sup>8</sup> None of those statutes grant the

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<sup>7</sup> *Rebuttal Testimony of Keri Roth*, WA-2019-0185 p. 14 (Aug. 13, 2019).

<sup>8</sup> 20 CSR 4240-10.085.

Commission the authority to enact an acquisition premium program for the procurement of water and sewer systems. Section 386.040, RSMo establishes the Commission and guarantees that it shall be vested with all powers “necessary or proper” to effectuate the powers and duties of Chapter 386.<sup>9</sup> No other statute in Chapter 386 speaks to an acquisition incentive, and Section 386.040, RSMo says nothing further on point. Section 386.250, RSMo is the Commission’s general jurisdiction statute establishing its authority to regulate the rates charged by various corporations. The jurisdictional statute says nothing as to acquisition incentives.<sup>10</sup> Section 393.140, RSMo enumerates certain general powers of the Commission. None of those powers speak to authorizing the Commission to grant acquisition incentives.<sup>11</sup> Any assertion of legality is thus extra-textual. Any reliance on inference for the Commission to engage in single issue ratemaking or grant an extra-textual mechanisms is highly disfavored as this Commission’s power to use and create mechanisms has been narrowly interpreted by Missouri courts.<sup>12</sup> The only statute on point permits a rate of return adjustment of one hundred basis points, not a debit acquisition adjustment, but only following the compelled transfer of a failing water system, and only if there no practical or economically feasible alternatives available.<sup>13</sup>

Regardless of the contested legality of the Commission’s acquisition incentive rule, the rule itself does not permit OUOC to receive any incentive given the facts of this case. The rule in question requires that an incentive only be granted in circumstances where the “acquisition would

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<sup>9</sup> Mo. Rev. Stat. § 386.040 (1939).

<sup>10</sup> Mo. Rev. Stat. § 386.250 (1996).

<sup>11</sup> See Mo. Rev. Stat. § 393.140 (1967).

<sup>12</sup> See *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 525 (Mo. 2015) (overruling a Commission Order that used an expansive view of the word “deteriorate” within the infrastructure system replacement surcharge statute); see also *State ex. rel. Util. Consumers Council v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 47 (Mo. 1979) (denying the Commission’s creation of a fuel adjustment clause without an express authorizing statute).

<sup>13</sup> Mo. Rev. Stat. § 393.146 (2005).

be unlikely to occur without the probability of obtaining an acquisition incentive.”<sup>14</sup> The Joint Bidders have shown their willingness to purchase the OWC systems without an acquisition incentive, and their current provision of water and sewer services to their existing constituency speaks to their ability to service the OWC systems. The acquisition itself is then likely to occur without the probability of obtaining an acquisition incentive.

OUOC has also shown a keen tenacity to acquire the OWC system that one would not expect of an acquiring utility that would only take on the systems with the aid of an incentive. Not only did CSWR negotiate its position as the “stalking horse purchaser” so that any matching bid it offered would win by default during the bidding for the OWC systems, CSWR repeatedly raised its bid offer during the auction by “match[ing] each offer by the Joint Bidders until the Joint Bidders failed to make a competing higher offer.”<sup>15</sup> This behavior resulted in the original bid offer rising from \$465,000 to nearly double at \$800,000.<sup>16</sup> CSWR and OUOC have since initiated a legal action to compel the unwilling Great Southern Bank to sell the Reflections Systems, which OUOC original conjoined with its application regarding OWC. None of this behavior follows the modus operandi of a passive applicant who would not take on these systems but for an acquisition incentive. Of course, none of the OUOC’s behavior is particularly surprising though when one considers that CSWR’s business model is to acquire, rehabilitate, and operate distressed water system. There is simply no need to incentivize CSWR further in its endeavor. Therefore, the Commission’s acquisition incentive rule bar OUOC from receiving one for taking on of the OWC.

**Wherefore**, the OPC offers its Position Statement.

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<sup>14</sup> 20 CSR 4240-10.085(4)(I).

<sup>15</sup> *Staff Recommendation*, WA-2019-0185 Attachment A p. 5 (May 24, 2019).

<sup>16</sup> *Id.*

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 12<sup>th</sup> day of September, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall