

**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

OUOC INITIAL BRIEF

COMES NOW Osage Utility Operating Company, Inc. (“OUOC” or “Company”),
and, as its *Initial Brief*, respectfully states as follows to the Missouri Public Service
Commission (“Commission”):

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INTRODUCTION

Not only is OUOC's acquisition of the water and sewer assets of Osage Water Company ("OWC") "not detrimental" to the public interest it is, in fact, a benefit to the OWC systems, customers, and public interest as compared to the status quo. OUOC would bring proven experience in the rehabilitation, operation, management, and investment in small water and sewer facilities to systems that have been essentially "treading water" for over 14 years.

The "back-up" proposal made by Public Water Supply District No. 5 of Camden County ("PWSD#5"), Lake Area Waste Water Association, Inc. ("LAWWA"), and Missouri Water Association, Inc. ("MWA") (collectively referred to as the "Joint Bidders") should not be relevant as it does not affect or change OUOC's qualifications or the fact that OUOC's ownership of the OWC assets would not be detrimental to the public interest. However, if the Commission decides to examine the Joint Bidders' proposal, it needs to recognize that the proposal is not comprehensive and not equal in its treatment of the four OWC service areas.

The Joint Bidders propose to split the systems among themselves, with no responsibility among the Joint Bidders to the others' systems on a going forward basis: PWSD#5 would take Cedar Glen; MWA would take Cimarron Bay, Chelsea Rose, and Highway KK water systems; and, LAWWA would take Cedar Glen; MWA would take Cimarron Bay, Chelsea Rose, and Highway KK sewer systems. Thus, if a comparison is to be made, the Joint Bidders' qualifications and proposals need to be examined on a bidder-by-bidder and system-by-system basis.

Most glaring are the deficiencies associated the potential ownership of OWC assets by the LAWWA and MWA. LAWWA and MWA appear to have operated in the past on an approach whereby only after they are cited for deficiencies by the Missouri Department of Natural Resources (“MDNR”) will they determine whether and how to fix the cited deficiencies. This is the same approach that they plan for the OWC assets they propose to acquire. The MWA/LAWWA witness, Mr. Goss, testified that as to the Cimarron Bay, Chelsea Rose, and Highway KK service areas (all of which have significant deficiencies), he has no report from MDNR stating what repairs and improvements are required and, therefore, has not determined what needs to be done. (Exh. 401, Goss Dir., p. 3-4, 4-5, 5)

Similarly, as to Cedar Glen, the water and sewer systems are not currently in the PWSD#5 service territory and PWSD#5 has prepared no estimate for an interconnection it says it would make, which could take more than 2 years to complete.

OUOC, on the other hand, has inspected and analyzed all of the OWC systems and has a comprehensive plan for addressing the repair and replacement needs of all those systems. And its track record of successfully completing rehabilitation of Missouri water and sewer systems it has acquired in the past should give the Commission comfort OUOC has the funds necessary to make, and will make, the repairs and replacements it has identified as necessary to bring the OWC systems into regulatory compliance and ensure the provide safe and adequate service in the future.

Lastly, as a check on the process, OUOC would be subject to the regulation of the Commission on a going-forward basis. As was stated by the OPC in its Position

Statement – “there is no detriment to the public interest when safe and adequate service is provided at just and reasonable rates.” OUOC’s status as a regulated entity will necessarily result in safe and adequate service at just and reasonable rates because of the continued regulation by this Commission. OUOC’s acquisition of the Osage Water Company utility assets and certificates of convenience and necessity should be approved by the Commission, subject to the conditions proposed by the Staff of the Commission, and with a finding that an acquisition premium is in the public interest pending examination of such premium along with all relevant factors in a future rate case.

OSAGE WATER COMPANY BACKGROUND

OUOC seeks to purchase the water and sewer assets of OWC, to include its certificates of convenience and necessity (“CCN”). OWC has had a difficult past. OWC first obtained a CCN in 1989 to operate as a water and sewer utility. (Exh. 1, Cox Dir., p. 11) It obtained several additional CCNs thereafter. (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 3 of 21)

On December 10, 2002, the Commission issued a Report and Order in Case No. WC-2003-0134, finding as follows:

. . . that Osage Water Company has been effectively abandoned by its owners and that it is unable or unwilling to provide safe and adequate service to its customers. The Commission directs its Staff to file a petition in circuit court seeking an order attaching the assets of Osage Water and appointing a receiver to take control and responsibility of the company. The Commission also directs its Staff to seek a determination from the circuit court that Osage Water Company should not be returned to its

owners but rather should be liquidated by the receiver, acting in the best interest of the company's customers.

(Exh. 1, Cox Dir., p. 11-12; See *Report and Order in Case No. WC-2003-0134*, p. 2.)

OWC was placed into permanent receivership on October 21, 2005, by the Camden County Circuit Court. The Circuit Court further directed the Receiver to "liquidate Osage Water Company's assets as quickly as practicable" on terms that protect the interests of OWC's customers, subject to approval by the Court. (Exh. 1, Cox Dir., Sched. JC-4) The receiver has been unable to do so over the 14 years that have now passed.

With permission of the Circuit Court (Exh. 1, Cox Dir., Sched. JC-5), OWC filed for Chapter 11 bankruptcy and a bankruptcy trustee was appointed. On August 26, 2018, the Trustee filed a motion with the Bankruptcy Court seeking an order authorizing her to sell substantially all OWC's assets pursuant to the bid procedures attached to the sale motion. (Exh. 1, Cox Dir., Sched. JC-7) On October 24, 2018, an auction was conducted and OUOC was the successful bidder for OWC's assets. (Exh. 1, Cox Dir., Sched. JC-9)

On November 14, 2018, the Bankruptcy Court issued an Order approving the sale of OWC's assets, wherein the Court approved Central States Water Resources, Inc ("CSWR") as the successful bidder for the assets set forth in the executed asset purchase agreement by and among CSWR and the Trustee. (Exh. 1, Cox Dir., Sched. JC-10)

OSAGE WATER COMPANY'S CONDITION

At present, OWC provides water service to approximately 402 customers and sewer service to approximately 420 customers in Camden County, Missouri. (Exh. 1, Cox Dir., p. 12) These customers are spread among four service areas (*Id.*):

- Cedar Glen Service Area - approximately 216 water connections and 216 sewer connections (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 5 of 21);
- Chelsea Rose Service Area - approximately 42 water connections and 38 sewer connections (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 8 of 21);
- Cimarron Bay Service Area – approximately 110 residential water and 110 residential wastewater connections (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 10 of 21); and,
- HWY KK Service Area - Eagle Woods (Water and Sewer) and Golden Glade (Sewer Only) - currently with 33 Eagle Woods homes connected to the OWC water system; wastewater service to 23 Golden Glade lots and 33 Eagle Woods customers (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 13 of 21).

The general condition of the OWC systems was accurately described by the Commission Staff ("Staff") as follows:

Due to certain decisions by company management, failure to properly construct, and failure to properly maintain the water and sewer systems, there are several compliance issues that need to be addressed. Some facilities are operating without permits from DNR; at least one wastewater treatment system is in such a state of is repair that wastewater is bypassing treatment processes. (Bypassing means that partially treated or untreated wastewater is released from the system, endangering public health and the environment.) Varying degrees of immediate repairs and longer term capital improvements are necessary among the systems.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 4 of 21) (emphasis added)

More specifically, Staff made the following observations as to the various OWC service areas:

Cedar Glen Water –

Staff observed caked dirt, algae, and mold on the exterior of the 35,000-gallon hydro-pneumatic tank. The well house has rotten framing and siding. Wiring and electrical panels are exposed and in some places, wiring is hanging or simply stapled to the walls. The submersible well pump pumps water directly to the 35,000 gallon hydropneumatic tank.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 6 of 21) (emphasis added)

Cedar Glen Sewer –

Staff observed that the sand filter consists of four beds, with surface signs such as staining, and rotten timbers on the northeast bed, possibly indicating integrity issues and some failed piping. Two of the eight filter pumps are non-operable.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 7 of 21) (emphasis added)

Chelsea Rose Water –

The system has operated without a permit to dispense water to the public for approximately 10 years, because the system was not constructed according to DNR approved plans and specifications. However, to facilitate the sale of OWC, on May 30, 2018, after the most recent DNR inspection, DNR issued a permit to dispense water to the public. On April 2, 2018, DNR personnel performed an inspection of the Chelsea Rose water system, and on April 19, 2018, DNR issued a report with violations that are summarized below:

1. The Chelsea Rose water system, did not at the time have a Permit to Dispense Water to the Public as required by Safe Drinking Water Regulation IO CSR 60-3.0 I 0(2)(A). This system was referred to the Public Drinking Water Branch for enforcement previously; the ownership and receivership situation has hindered the issue. Once the ownership issues have been resolved, the new owner must complete and submit a new application for a permit to dispense and submit it with all required documentation, including a deed to the well property, to Missouri Department of Natural Resources.

2. The previous owners of the Chelsea Rose water system failed to construct the water system in accordance with approved plans and specifications in violation of Safe Drinking Water Regulation 10 CSR 60-10.010(4). The new owners will submit two copies each of engineering

report, plans, and specifications along with an application for a new or revised construction permit to the Missouri Department of Natural Resources.

Staff observed that the well house roof and siding has deteriorated, and inside the well house there is exposed wiring. The 250-gallon bladder tank does not meet the DNR recommendation to provide 2,730 gallons of hydro-pneumatic storage. In general, the water system is substandard and was not constructed according to DNR approved plans and specifications.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 8-9 of 21) (emphasis added)

Chelsea Rose Sewer –

Staff observed that the access road to the system is washed out and there is significant water erosion around the system. The system is located in a wooded area, and there is a floating mat of fallen leaves and excessive sludge in the clarifier and aeration basins. There is evidence that sludge has overflowed the system. The treatment system is in a general state of disrepair. The plant effluent pipe is broken, so the effluent does not reach the permitted discharge site, and the effluent is causing further erosion around the system.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 10 of 21) (emphasis added)

Staff witness Roos further testified at the hearing that at the Chelsea Rose sewer system he observed “bypassing” and “visible signs of activated sludge on the ground.”

(Tr. 256-257, Roos)

Cimarron Bar Water –

Staff observed that the well house has rotten siding and fascia boards, and the interior shows some water damage. Some of the equipment power is supplied through extension cords stapled to the well house wall.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 11 of 21) (emphasis added)

Cimarron Bay Sewer –

Staff observed that the sand filter consists of three in-ground beds, although only two of the beds are in use. The visible portion of the walls of

the sand filter are constructed of plywood, which has partially rotted away leaving exposed piping. Some of the wastewater flows through the walls of the filter, resulting in partially treated wastewater bypassing the chlorination/dichlorination treatment step.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 11 of 21) (emphasis added)

Highway KK – General

Because of the incomplete utility expansions, there are approximately 25 remaining lots in Eagle Woods that cannot be sold because new homes on those lots are not allowed to be connected to the water and sewer systems due to the lack of capacity.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 13 of 21) (emphasis added)

Highway KK/Eagle Woods Water -

Because the well serving Eagle Woods was constructed as a 'non-community' well, it does not meet DNR construction standards for a public water supply. The well, therefore, does not have a permit to dispense water, and does not meet approval requirements by DNR for use with a public water supply.

In the well house, Staff observed exposed and corroded wiring, corroded piping and fittings and other corrosion caused by chlorine being stored in the well house. The outside ground storage tanks are caked with dirt and mold.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 13-14 of 21) (emphasis added)

Highway KK/ Eagle Woods and Golden Glade Sewer –

Staff observed that the road to the system is washed out. The site is covered with discarded pipes, pumps, and trash from repairs and maintenance. Staff observed large cracks and signs of leakage on the sand filter's wall. Both beds have broken distribution piping. Some inlet piping is not fully connected and there is surface soil staining around this piping. Pipe supports are makeshift posts with rope ties. The chlorination chambers appear makeshift and of temporary construction. The chambers are choked with algae and plant growth.

(Exh. 105, Dietrich Dir., Sched. ND-s3, p. 15 of 21) (emphasis added)

OUOC'S QUALIFICATIONS

OUOC is an affiliate of CSWR. (Exh. 1, Cox Dir., p. 5) The following CSWR affiliates are public utilities authorized to provide water and sewer service in Missouri subject to the regulation of the Commission: Hillcrest Utility Operating Company, Inc., Elm Hills Utility Operating Company, Inc., Raccoon Creek Utility Operating Company, Inc., Indian Hills Utility Operating Company, Inc., and Confluence Rivers Utility Operating Company, Inc. (Exh. 5, Cox Sur., p. 8-9)

These companies have acquired small Missouri water and sewer companies, brought capital to improve those systems, upgraded the services provided to customers, and delivered safe and adequate service where that was not the case prior to acquisitions. CSWR companies have purchased multiple systems in Missouri that were in state-appointed receivership, with numerous MDNR deficiencies and brought those systems back into regulatory compliance for the provision of safe and reliable service. (Exh. 5, Cox Sur., p. 9)

CSWR has purchased 22 wastewater treatment plants with associated sewer pumping stations, gravity force mains, and gravity conveyance lines. In Missouri, CSWR-affiliated companies have designed, permitted, and completed construction, with MDNR approval, of approximately \$5.1 million of sanitary sewer investments since March of 2015. (Exh. 1, Cox Dir., p. 5)

On the drinking water side of the business, CSWR-affiliated companies have purchased 13 drinking water systems in Missouri and Arkansas. In Missouri, CSWR-affiliated companies have designed, permitted, and completed construction, with MDNR

approval, of approximately \$4.1 million of investments in drinking water systems since March 2015. (Exh. 1, Cox Dir., p. 6)

CSWR has customer service systems at each Missouri utility it currently operates that provide benefits to the customers and comply with the Commission's Chapter 13 rules. This includes 24-hour emergency service phone lines for potential service issues, on-call emergency service contractor personnel, implementation of a computerized maintenance management system for wastewater and drinking water utility assets, real-time remote monitoring to ensure service stability, customer dissemination of MDNR drinking water testing information, on-line bill-pay options, up-to-date website bulletins about current service status, and service initiation or discontinuance procedures. (Exh. 1, Cox Dir., p. 7)

CSWR has experience in the design and operation of water and sewer systems. As it does with all its water and wastewater systems, OUOC intends to hire a contract operator for plant operations, utilizing the services of appropriately qualified and licensed utility system operators (for water and for sewer). The contract operator will undertake routine day-to-day inspections, checks, sampling, reporting, and meter reading for the water and sewer systems, as well as accomplish most system repairs and extraordinary operations tasks as needs arise, to address proper facility operations and customer service matters. All these activities will be tracked inside CSWR's computerized maintenance management system. Computerized maintenance monitoring also feeds in remote monitoring data from individual plants, which together with the maintenance data, integrate with a water information management system for

all CSWR facilities. (Exh. 1, Cox Dir., p. 8)

CSWR has been able to attract investment capital to construct and maintain facilities necessary to provide safe and reliable water and wastewater service and is willing and able to invest the capital necessary to bring the water and wastewater systems at issue in this case up to standard and maintain compliance with applicable MDNR regulations. OUOC plans to fund the purchases using equity infused by OUOC's parent company, CSWR, LLC. (Exh. 1, Cox Dir., p. 8, 10)

In each of their previous applications, the Commission has determined CSWR-affiliated companies have the technical, managerial, and financial capability to own and operate water and wastewater systems in Missouri. OUOC, another CSWR-affiliated company, similarly has the technical, managerial, and financial capability to own and operate the systems and provide safe and adequate service for the customers.

APPLICABLE LEGAL STANDARD

Must Approve If Not Detrimental to the Public Interest

Under applicable law, the Commission must approve those acquisition applications over which it has jurisdiction, unless the transaction is shown to be "detrimental to the public interest," a standard established by the Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393 (Mo. 1934) and reaffirmed in *State ex rel. AG Processing, Inc. v. Public Service Commission*, 120 S.W.3d 732, 735 (Mo. banc 2003).

The statutory basis for this matter arises from the following requirement in

Section 393.190.1, RSMo:

No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

The Commission's review of these types of matters begins with the constitutional concept of property rights – the owners of property have a constitutional right to determine whether to sell their property or not. “To deny them that right would be to deny them an incident important to ownership of property. *A property owner should be allowed to sell his property unless it would be detrimental to the public.*” *State ex rel St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. 1934), *citing City of Ottawa v. Public Service Commission*, 288 Pac. (Kan.) 556 (emphasis added).

This standard was further explained by the Missouri Supreme Court as follows:

To prevent injury to the public, in the clashing of private interest with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefited*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'

State ex rel. St. Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. 1934).

The analysis calls for a *netting* of detriments and benefits. The Commission has applied the standard as a no-net-detriment standard in which "all the benefits and

detriments in evidence are considered." See, *Re Union Electric Company*, 13 Mo.P.S.C.3d 266, 293 (2005), Case No. EO-2004-0108.

The Commission has described this standard as follows:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that UE provides safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the power supply less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is *not detrimental to the public interest* where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 454-455 (MoPSC July 1, 2008), quoting *Re Union Electric Company*,), Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005).

Thus, detriments that are outweighed by benefits can support a finding that a transaction is "not detrimental."

What Is the Public Interest

The Commission has stated as follows as to the "public interest":

"The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public."

The public interest is a matter of policy to be determined by the Commission. It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The "public interest" necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.

In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 458-459 (MoPSC July 1, 2008).

Transfer of Public Utility Assets v. Certificate of Convenience and Necessity

The Commission asked at the end of the proceeding that the parties brief the difference between the standard of review for requests for the transfer of public utility assets and the standard of review for the issuance of a certificate of convenience and necessity ("CCN").

As stated above, the requirement for the Commission to authorize the transfer of public utility assets comes from Section 393.190.1, RSMo. The requirement for a public utility to have a franchise/ CCN is found in Section 393.170, RSMo. While transfer of public utility assets must be approved if the Commission finds the proposed transfer to be "not detrimental to the public interest," a CCN may only be issued where the Commission finds such CCN to be "necessary or convenient for the public service."

(Section 393.170.3, RSMo)

Similarly, the Commission's rules address these items separately. Commission Rule 20 CSR 4240-10.105 governs applications to transfer public utility assets. Commission Rules 20 CSR 4240-3.305 and 20 CSR 4240-3.600 govern applications for sewer and water CCNs, respectfully.

The concept of these statutes appears to be that before a public utility provides service it must have a CCN from the Commission and such service (the provision of such utility service) must be "necessary or convenient for the public service."

When making a determination as to whether a project is "necessary or convenient for the public service," the Commission has traditionally exercised its discretion by applying the following five criteria, commonly known as the *Tartan factors*:

- a) There must be a need for the service;
- b) The applicant must be qualified to provide the proposed service;
- c) The applicant must have the financial ability to provide the service;
- d) The applicant's proposal must be economically feasible; and
- e) The service must promote the public interest.

In re Tartan Energy, Report and Order, 3 Mo.P.S.C. 3d 173, Case No. GA-94-127, 1994 WL 762882 (September 16, 1994) (emphasis added).

The Commission's CCN rules also include a requirement that the applicant for a CCN provide a "statement as to the same or similar utility service, regulated and nonregulated, available in the area requested." (emphasis added) This makes sense in

the context of a CCN because only in extraordinary situations would the Commission want to authorize new construction that would overlap existing utility systems.

However, once a CCN has been granted and the utility service is being provided by a public utility in accordance with a CCN, the service is already implicitly “necessary or convenient for the public service.” Customers are being served and it is hard to imagine a situation where it would make sense to remove that system or cease to use the existing system to provide service.

Accordingly, the transfer of a public utility’s “franchise” or CCN, as contemplated by Section 393.190.1, RSMo. Section 393.170.2, RSMo (the CCN statute), references the permission to provide service interchangeably as a “franchise” or a “certificate.” Section 393.190.1, RSMo, states in part that “No . . . water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system” (emphasis added)

LIST Of ISSUES

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?

OUOC’s acquisition of OWC’s assets will not be detrimental to the public interest.

OWC has been in receivership, followed by a federal bankruptcy proceeding, for approximately 14 years. When OWC was placed into receivership on October 21, 2005, the Receiver was directed to liquidate OWC’s assets as quickly as practicable on terms that protect the interests of OWC’s customers. The Receiver was unable to

liquidate the assets. Ultimately, as described above, the federal Bankruptcy Court issued an Order approving the sale of OWC's assets as set forth in the executed asset purchase agreement by and among CSWR and the Trustee.

While there is some disagreement as to what improvements, replacements, and other work needs to be accomplished as to the OWC systems, it appears uncontroverted that all of the systems need work and improved quality of operations. However, some of the systems are severely comprised at this particular time. For example, there are approximately 25 remaining lots in Eagle Woods subdivision that cannot be sold because new homes on those lots are not allowed to be connected to the water and sewer systems due to the lack of capacity. (Exh. 105, Dietrich Dir., Sched. ND-s3, p. 13 of 21) That is a situation that has existed since at least January 30, 2014, when formal complaints (WC-2014-0215 and SC-2014-0214) were first filed with the Commission (*Id.* at 12 of 21) The Commission has directed steps in these complaint cases that have never been completed. (*Id.* at p. 13 of 21)

Once OUOC takes possession of the Eagle Woods facilities and completes the planned system improvements, both the water and wastewater treatment systems will be able to provide service to the additional 25 lots. (*Id.*) These are the types of situations with which the CSWR companies have proven themselves capable of addressing and the result of which is, among other things, the renewed opportunity for economic development.

OUOC's acquisition of the identified assets is not only "not detrimental" to the public interest, it is a benefit to the systems, customers, and public interest as compared

to the status quo. As described above, OUOC brings proven experience in the rehabilitation, operation, management, and investment in small water and sewer facilities to systems that have been essentially “treading water” for over 14 years.

After closing of the proposed transaction, OUOC seeks to provide service under the same water and sewer tariffs currently applicable to the OWC service area and charge the same rates currently applicable to that service area. Neither the rates nor the tariff provisions may be changed without approval of the Commission.

The Commission recently applied the “not detrimental to the public interest” standard in its order for a case involving another CSWR-affiliate, Confluence Rivers Utility Operating Company, Inc. (“Confluence Rivers”) (Commission Case No. WM-2018-0116 (February 14, 13 2019)). In the Confluence Rivers order, the Commission found that the proposed sale was not detrimental to the public interest and stated in support as follows:

Considering the present troubled nature of the systems at issue, the Company’s sound track record in rehabilitating similarly situated systems, the Company’s ability to acquire, maintain, and operate the systems, and the statutory obligation of the Commission to ensure safe and adequate service, allowing the Company to acquire the Selling Companies’ assets per the terms and conditions of the Stipulation will not be detrimental to the public.

The elements referenced by the Commission could easily be applied to this case. (Exh. 5, Cox Sur., p. 9)

OUOC does not believe there are detriments to its ownership. However, should the Commission believe that it should weigh benefits and detriments, the following specific benefits justify a finding of no detriment:

- OUOC would be a single, known owner/operator for all of the OWC water and sewer systems. This is important as each of the four OWC services areas (eight systems) have experienced issues over the last fourteen plus years and need attention;
- OUOC is an owner/operator with a solid track record of rehabilitating, maintaining and operating small water and sewer systems;
- OUOC's financial and technical resources are sufficient to provide improved service options for customers; and,
- OUOC's ownership will result in continued regulation of operations by the Commission to ensure safe and adequate service at just and reasonable rates.

When the benefits are considered, OUOC's acquisition of the OWC utility assets and CCN is not detrimental to the public interest and should be approved by the Commission subject to the conditions proposed by the Staff.

Staff Conditions

The Staff has proposed that the Commission impose certain conditions in conjunction with approval of the proposed acquisition of the OWC assets. OUOC has no objection to the conditions proposed by Staff. (Exh. 1, Cox Dir., p. 26-28)

Joint Bidders' Proposal

If the Commission chooses to examine the Joint Bidders' proposal, it is important to remember the Joint Bidders' proposal is NOT for all the Joint Bidders, as a group, to

own and operate the entirety of the OWC service areas. PWSD#5 proposes to only own and operate the water and sewer systems in Cedar Glen service area. The Cimarron Bay, Highway KK, and Chelsea Rose service area water systems will be owned and operated by the MWA. The Cimarron Bay, Highway KK, and Chelsea Rose service area sewer systems will be owned and operated by the LAWWA.

Thus, PWSD#5's estimates for repairs have nothing to do with rehabilitation required by the Cimarron Bay, Highway KK, and Chelsea Rose systems. Additionally, PWSD#5 has provided no estimates for the interconnection and road crossing Joint Bidders' proposed as to the Cedar Glen system. (Tr. 255, Roos; Tr. 340-341, Krehbiel) This is likely what Staff witness Roos was referring to when he indicated that the OUOC proposal is "a complete preliminary proposal," but that the Joint Bidders' proposal is not a complete proposal or a complete cost estimate. (Tr. 252, Roos) Mr. Roos further explained that he believed OUOC "has provided a proposal that is a good road map for safe and adequate service," but that he did not feel as confident about the Joint Bidders proposal. (Tr. 252-253, Roos)

In fact, there are no estimates provided by the Joint Bidders for the rehabilitation of the Cimarron Bay, Highway KK, and Chelsea Rose systems. MWA and LAWWA witness Goss stated as follows as to each of those systems:

Q. What repairs and improvements do LWWA and MWA anticipate with respect to the Chelsea Rose water and sewer systems?

A. LAWWA and MWA do not currently have a report stating what repairs and improvements are required by the Missouri Department of Natural Resources at this time. LAWWA and MWA, upon receipt, will

review the reports and make the necessary improvements to the water and sewer system.

Q. What repairs and improvements do LWWA and MWA anticipate with respect to the Eagle Woods water and sewer systems?

A. LWWA and MWA do not currently have a report stating what repairs and improvements are required by the Missouri Department of Natural Resources at this time. LWWA and MWA, upon receipt, will review the reports and make the necessary improvements to the water and sewer system.

Q. What repairs and improvements do LWWA and MWA anticipate with respect to the Cimarron Bay water and sewer systems?

A. LWWA and MWA do not currently have a report stating what repairs and improvements are required by the Missouri Department of Natural Resources at this time. LWWA and MWA, upon receipt, will review the reports and make the necessary improvements to the water and sewer system.

(Exh. 401, Goss Dir., p. 3-4, 4-5, 5) (emphasis added)

Further, even where the Joint Bidders have estimates, such as Cedar Glen, those estimates are suspect. Lake Ozark Water and Sewer is the operator, and entity responsible for, the existing condition of the Cedar Glen water and sewer systems. (Tr. 444, Goss; Exh. 400, Stone Dir., p. 3) As is detailed in the surrebuttal testimony of Todd Thomas, the Cedar Glen systems are in a general state of disrepair. (Exh. 7, Thomas, Sur., p. 19-24) These conditions are something for which Lake Ozark Water and Sewer appears to be responsible.

PWSD#5 witness Stone based his understanding of necessary repairs to the

Cedar Glen systems on the opinion of Lake Ozark Water and Sewer:

Lake Ozark Water and Sewer (“LOWS”) has been maintaining the system on behalf of the Receiver and Trustee of Osage Water Company for many years. provides the estimates of necessary repairs for those parties. LOWS recommends the following repairs be made based on DNR inspections.

(Exh. 400, Stone Dir., p. 3) (emphasis added)

Staff witness Roos, when asked by PWSD#5’s counsel whether he had “any reason to disagree with the statement made by LOWS to DNR regarding that the systems there meet effluent limitations without further upgrades,” Mr. Roos responded that he did. He then explained as follows:

The same type of letter was submitted to DNR for other sewer systems at [Osage Water Company] and those systems have now shown to be exceeding permit limits.

(Tr. 249-250, Roos) Mr. Roos further clarified that he was referring to the Cedar Glen, Cimarron Bay, and the Eagle Woods systems. (*Id.* at 250)

Additionally, as noted earlier in this brief, a major part of the PWSD#5 proposed solution for many of the problems inflicting the Cedar Glen water system is an interconnection that would cross under Highway 54. (Exh. 300, Krehbiel Dir., p. 3-4) However, the PWSD#5 witness provided no estimates for this interconnection and suggested that in his professional judgment the project could take longer than 24 months to complete. (Tr. 340, 364, 365, Krehbiel) OUOC witness Thomas explained that the expense is tied to the number of easements required, the length of the main, any solid rock excavation, and boring and encasement necessary. (Exh. 7, Thomas Sur., p. 16-17) These are all costs that are not taken into account in the Cedar Glen

estimates provided by PWSD#5.

Moreover, the Cedar Glen water and sewer systems are not even currently within the authorized service area of PWSD#5. (Exh. 300, Krehbiel Dir., p. 2) Today, PWSD#5 has no authority to provide water and sewer service to the Cedar Glen facilities.

While OUOC's affiliated companies have been under close examination of the Commission for several years, the capabilities of PWSD#5, MWA and LAWVA to provide safe and adequate service or to fund necessary system upgrades and improvements have not been carefully examined in this proceeding, as they are not applicants. Staff expressly testified it has not examined PWSD#5, MWA, or LAWVA to assess their technical, managerial and financial capability to own and operate water and wastewater systems in Missouri. (Tr. 210, Dietrich)

OPC witness Roth seemed surprised to know that no estimates had been supplied in regard to the rehabilitation of the Cimarron Bay, Chelsea Rose, and Highway KK systems. (Tr. 311-313, Roth) Ms. Roth also testified she did not do any analysis as to the repair estimates; had not done any analysis as to the Joint Bidders' technical, managerial and financial capabilities; had not reviewed any MDNR records as to those entities past performance; and had not reviewed any PWSD#5, MWA, or LAWVA financial statements to ascertain their financial standing. (Tr. 309, 315, 317-318, Roth) She also confirmed that the financing identified by PWSD#5 would only be applicable to the Cedar Glen service area going forward and that she did not know what

the financing situation would be for MWA and LAWVA as to Cimarron Bay, Chelsea Rose and Highway KK service areas. (Tr. 310, Roth)

Lastly, the MDNR compliance history of PWSD#5, MWA, and LAWVA was a significant subject during the hearing in this matter. While the Joint Bidders attempted to discount deficiencies with the DNR regulations as “paper violations” and identified a few deficiencies that predated the interveners ownership of certain facilities, the lists of cited MDNR deficiencies over the past five years were largely acknowledged by the Joint Bidders.

MWA and LAWVA witness Goss examined the deficiencies identified on Thomas Sur. Schedules TT-S5 (MWA), TT-S7 (LAWVA and MWA), and TT-S12 (LAWVA), and stated that he recognized all of items of noncompliance identified. (Tr. 445, 447, Goss) The deficiencies for MWA included lack of cross connection control, public water system not protected by Class 1 backflow device, and potential route for naphthalene contaminant (“signs of significant rodent activity in the storage tank building” and “pack rats nesting under and around booster pump”). (Exh. 7, Thomas Sur., Sched. TT-S5; Exh. 7, Thomas Sur., Sched. TT-S4, MWA 1.18-000680)

For LAWVA, it was a much longer list of deficiencies over that five-year period. The list included many failures to reach ammonia limits in discharge, failure to submit discharge monitoring reports (making one wonder what those reports would have shown), failure to attain E coli limits, construction of facilities without valid construction permits from MDNR, failure to post warning signs, and other matters. (Exh. 7, Thomas Sur, Sched. TT-S12; TR. 447-448, Goss) These failures should be particularly alarming

considering that the sewer facilities being discussed are located in and around the Lake of the Ozarks – an important tourist location for the Missouri and an asset that would be much diminished by effluent carrying high levels of ammonia, E coli, or other substances.

As to MWA and LAWVA, it appears that their theory of managing these properties is to wait for a citation from MDNR and then react to fix the problem. (Tr. 453, Goss) This is not an ideal situation when one is dealing with drinking water and effluent to be released into the environment.

The bottom line is that the Joint Bidders' proposal regarding the Cedar Glen, Cimarron Bay, Chelsea Rose, and Highway KK water and sewer systems is not an equivalent of the OUOC proposal in regard to the technical, managerial and financial capabilities of the proposed purchasers, the environmental compliance history of the potential owners, or the plans and estimates for rehabilitation of the systems.

Acquisition Premium

Should the Commission approve an acquisition premium for the acquisition of the Osage Water Company and Reflections Systems under 20 CSR 4240-10.085?

OUOC requests a debt acquisition adjustment equal to the difference between the total purchase price and the net original cost for the Osage Water Company.¹

For many years, this Commission has wrestled with the problem of how companies like CSWR and its affiliates, who have the operating and managerial

¹ OUOC had previously requested a rate of return premium associated with these acquisitions. However, it dropped that request with its filing of surrebuttal testimony. (Exh. 5, Cox Sur., p. 8)

expertise and the capital necessary to convert small non-viable utilities into utilities that consistently comply with applicable regulations and are able to provide safe and reliable service to customers, can be encouraged to acquire, maintain and operate the many non-viable systems operating in this state. (Exh. 5, Cox Sur., p. 3)

OWC is a nonviable utility within the meaning of Commission Rule 20 CSR 4240-10.085(1)(C). OWC has filed bankruptcy and the Trustee is liquidating the utility's assets. As such, OWC is not expected to furnish and maintain safe and adequate service and facilities in the future. The purchase agreement is the result of arm's length transaction between the parties, under supervision of the United States Bankruptcy Court and the terms are fair and reasonable given the systems' current conditions. (Exh. 1, Cox Dir., p. 24)

OUOC is a viable utility and will not be materially impaired by the acquisition of these systems. OUOC and CSWR have the resources to rehabilitate and maintain the systems it proposes to acquire, as well as the managerial, technical, and financial capabilities to safely and adequately operate the systems going forward. (Exh. 1, Cox Dir., p. 25)

The acquisition of all the OWC utility systems, all requiring some level of investment in improvements, is unlikely to occur without the probability of obtaining an acquisition adjustment. If the Commission decides not to award the incentive requested, OUOC will need to reevaluate its risk in taking on numerous failing systems to determine how it will move forward. (Exh. 1, Cox Dir., p. 25-26)

The Commission's Acquisition of Nonviable Utilities Rule states in part:

If the commission determines the request for an acquisition incentive is in the public interest, it shall grant the request. The commission may apply an acquisition incentive in the applicant's next general rate proceeding following acquisition of a nonviable utility if the commission determines it will not result in unjust or unreasonable rates.

(20 CSR 4240-10.085(2))

OUOC reads this rule to mean that in this proceeding the Commission need not specify a particular dollar amount for this acquisition premium (and, even if it did, the Commission would reexamine that number in a rate case). Staff witness Bolin similarly testified that "the Commission may grant an acquisition adjustment in this case, but in the next rate proceeding the Commission could determine to either allow or not allow recovery of some or all of the acquisition incentive once all relevant rate factors for the OUOC are reviewed. (Exh. 102, Bolin Sur., p. 3)

It is enough for the Commission to look at the facts of this case and find whether an acquisition premium is in the public interest given the condition of OWC systems. Ms. Bolin further recounted that "OWC was placed into permanent receivership on October 21, 2005, approximately 14 years ago, and the receiver was unable to finalize any sale of the assets during that entire historical time period until now." (Exh. 102, Bolin Sur., p. 3) Even now, should the Joint Bidders' position prevail, we are at a minimum, another Commission proceeding away from a possible purchase.

For all the reasons stated herein, the Commission should find that a premium is in the public interest based on the facts of this case. If it does so find, the amount can be, and, ultimately, should be, addressed in the next rate case where the Commission

has before it the actual rate information and is considering all relevant factors to determine the just and reasonable rate at that time.

WHEREFORE, OUOC respectfully submits this *Initial Brief* for the Commission's consideration.

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 3rd day of October, 2019.


