

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

PUBLIC COUNSEL’S APPLICATION FOR REHEARING

The Office of the Public Counsel (OPC) requests a rehearing before the Missouri Public Service Commission (Commission) pursuant to Section 386.500, RSMo.¹ The Commission should grant this request to rehear issues of fact and law to cure the Commission’s Report and Order. Those issues justifying a rehearing are as follows:

I. Introduction

1. Commission Orders on appeal are judged under a two-pronged standard. Accordingly, Commission Orders must be both lawful and reasonable. Lawfulness is found by an Order acting within the bounds of laws passed by Missouri’s Legislature.² A Commission Order is reasonable when it is based on “substantial, competent evidence on the whole record” rather than being arbitrary or capricious or an abuse of discretion.³

2. An acquisition of a public utility asset is premised on the “detriment to the public interest” standard whereby the Commission may approve the transfer or sale of regulated utility assets provided that such a transfer or sale is not detrimental to the public interest.⁴ Section

¹ All statutory references are to the 2019 rendition by the Missouri Revisor of Statutes unless otherwise noted.

² *State ex rel. Utility Consumers Council v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 49 (Mo. 1979); *Pub. Serv. Comm’n v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. Ct. App. 2012).

³ *State ex rel. Praxair, Inc. v. Pub. Serv. Comm’n*, 344 S.W.3d 178, 184 (Mo. banc 2011).

⁴ *State ex rel. St. Louis v. Pub. Serv. Comm’n*, 73 S.W.2d 393, 400 (Mo. 1934).

393.190, RSMo further instructs that no water corporation shall “sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system . . . without having first secured from the commission an order authorizing it so to do.”⁵ Any transfer not in accordance with Section 393.190, RSMo “shall be void and of no effect.”⁶

3. Osage Utility Operating Company (OUOC), an affiliate of Central States Water Resources (CSWR), filed its application for a transfer of a certificate of convenience and necessity (CCN) from the Osage Water Company (OWC) to itself on December 19, 2018. The OWC systems include four water and sewer service areas at the Lake of the Ozarks: Cedar Glen, Chelsea Rose, Cimarron Bay, and Eagle Woods.⁷ The OUOC conjoined its CCN application with a request for an acquisition incentive in the form of a rate of return premium and debit acquisition adjustment amounting to the difference between OUOC’s purchase price and OWC’s rate base value. In support of its acquisition incentive request, the OUOC maintained that it would not purchase and operate the OWC systems without an added incentive above the return provided as a public utility.

4. The Public Water Supply District #5 of Camden County, Missouri (PWSD #5), Lake Area Waste Water Association (LAWWA), and Missouri Water Association (MWA) (collectively Joint Bidders) intervened in this case. They ask the Commission to reject OUOC’s application in order for their alternative proposal to remain viable. The Joint Bidders have an outstanding contract to purchase the OWC systems in the event that the OUOC does not obtain the CCN and associated OWC systems. The Joint Bidders plan to operate the OWC systems in a tripartite manner. Part of the public being served by the OWC, the Cedar Glen Condominium Owners Association (Cedar Glen), intervened to support the Joint Bidders’ proposal.

⁵ Mo. Rev. Stat. § 393.190.

⁶ *Id.*

⁷ *Amended Application and Motion for Waiver*, WA-2019-0185 (Feb. 19, 2019).

5. The Staff of the Public Service Commission (Staff) supported the OUOC's application.

6. The Commission held an evidentiary hearing to hear this matter on September 17 and 18, 2019. All parties then briefed their position on the OUOC's application, with briefing being finalized on October 17, 2019. The Commission issued its Report and Order approving the CCN transfer, but denying an acquisition incentive, on April 8, 2020.

II. The Commission Order Unlawfully Approves the Transfer of a CCN Contrary to Statute.

7. The Commission's Order approves OUOC's CCN application pursuant to Section 393.190, and yet the actual owner of the OWC assets in question was not a party to the case. The OUOC made no attempt to join the OWC or the bankruptcy trustee to this proceeding.

8. Section 393.190 clearly states that no water corporation:

“shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or 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 authorized it to do so.”⁸

9. The statute is not written such that a proposed buyer may apply alone, but that the owner must seek permission before selling its assets. As Missouri Courts have observed, “the applicant seeking authorization for sale of a utility's property must be the utility itself,” and not a potential buyer alone.⁹ The presence of the seller is crucial for the validity of any application because, “Section 393.90 grants the Commission the statutory authority to approve a sale only where the seller has agreed to sell its property and sought the Commission's approval, because it refers to approval after an affirmative, voluntary act by the seller, *i.e.*, *the seller's petition and*

⁸ Mo. Rev. Stat. § 393.190.

⁹ *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 443 (Mo. App. W.D. 2015).

securing the Commission's order authorizing the sale."¹⁰ The OUOC's application is not a petition by the seller, but by a buyer.

10. The history of judicial review of Section 393.190 reveal that when the hopeful buyer was an applicant, valid applications were joined with concurrent petitions from the willing seller. Such is the case when Kansas City Power & Light and Aquila jointly filed an application for the takeover of Aquila,¹¹ and again when UtiliCorp sought to acquire St. Joseph Light & Power Company's assets.¹² A previous attempt to sell the OWC systems also involved a joint application with the aforementioned OWC.¹³ As another example, consider that when Ameren Missouri wanted to sell certain steam assets, it applied to the Commission itself rather than have the purchaser apply in its stead.¹⁴

11. The OPC's brief noted the fundamental statutory flaw in the OUOC's application of not including the owner of the OWC assets, but the Commission's Order simply ignores that point.¹⁵ A rehearing is justified to consider this issue, and to issue an order in accordance with statute.

III. The Commission's Order Arbitrarily Dismisses the Joint Bidders' Proposal.

12. The Commission's Order dismisses the Joint Bidder's proposal in an arbitrary manner by judging the proposal as "incomplete," when there was no full review of said proposal.¹⁶ By not properly considering relevant evidence before the Commission on whether an alternative proposal better promotes the public interest, the Commission's Order is unreasonable, and because

¹⁰ *Id.* (emphasis added).

¹¹ *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 344 S.W.3d 178, 183 (Mo. 2011).

¹² *State ex rel. Ag Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 733 (Mo. 2003).

¹³ *Envtl. Util., LLC v. Pub. Serv. Comm'n*, 219 S.W.3d 256, 258 (Mo. App. W.D. 2007).

¹⁴ *Love 1979 Partners v. Pub. Serv. Comm'n*, 715 S.W.2d 482, 485 (Mo. 1986).

¹⁵ *Public Counsel's Initial Post-Hearing Brief*, WA-2019-0185 p. 4 (Oct. 3, 2019).

¹⁶ *Report and Order*, WA-2019-0185 p. 31 (Apr. 8, 2020).

the Commission does not consider all relevant factors on a matter that will clearly impact rates, the Commission's Order is also unlawful.

13. The Commission's Order recognizes that its Staff "did not do in-depth cost studies or review in-depth the Joint Bidders' proposal."¹⁷ Given this lack of analysis, there is no sufficient basis to conclude that the Joint Bidder's proposal is insufficient or would not provide safe and adequate service. The OPC rhetorically asks how anyone can conclude definitively that the Joint Bidders' proposal is not credible or that it is not complete when it received no independent review from Staff.

14. The Commission's Order describes the OUOC's application as "comprehensive" while denying such a designation for the Joint Bidders.¹⁸ However, without an actual review on par with what Staff entertained for the OUOC, we do not have any true comparison to judge whether the Joint Bidders' proposal is comprehensive or if the OUOC's is beyond what is necessary for safe and adequate service.

15. The Commission Order describes the Joint Bidders' supposed failure to calculate "system upgrades or replacements that may be needed to proactively maintain the systems to avoid future more costly repairs" as a deficiency, but this is not the standard at issue.¹⁹ Recall, however, that the OUOC's own evidence offered at the evidentiary hearing described necessary repairs as minor and cosmetic.²⁰ It is then arbitrary to rule that the Joint Bidders should have prepared more.

16. Furthermore, if the Commission did desire a more complete application from the Joint Bidders to judge alongside the OUOC, then a rehearing is the perfect avenue to meet that

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 30 & 33.

¹⁹ *Id.* at 33.

²⁰ Exhibit 11.

desire. The Commission's Order is incorrect when it claims that "the Commission, nor Staff, have had the opportunity to truly vet the Joint Bidders' proposal."²¹ The Commission Staff (Staff) had the opportunity to vet the Joint Bidders' proposal, but chose to not do so.²² This Commission still has the opportunity to judge the Joint Bidders' proposal with a rehearing. There was literally half a year of time between when briefing was completed, and when this Commission issued its Order. There is no reason why now the window of opportunity to adequately review the Joint Bidders' proposal must be foreclosed when inaction was previously tolerable.

IV. The Commission's Order Arbitrarily Dismisses Concerns as to Rising Customer Rates Under the OUOC as Opposed to the Joint Bidders' Management.

17. The Commission's Order acknowledges public concerns about rising rates and admits that the OUOC's proposed rates are a potential public detriment, but dismisses any concerns because such an increase under the OUOC's management would occur only after a rate case under the Commission's purview.²³ The Commission compares the OUOC's ability to raise rates following a rate case to what the Joint Bidders could do, and claims that the Joint Bidders may raise rates immediately before repairs are completed. This behavior is arbitrary because it admits that a Commission finding that the OUOC may seek more investments than necessary, precisely what the Joint Bidders, Cedar Glen, and the OPC argued, but then maintains that a future increase, even if it is a detriment, is better than paying more now under the Joint Bidders management. This is comparable to claiming that it is better to delay paying down a credit card obligation because it forestalls monthly payments now. Such reasoning discounts rising interest obligations, and

²¹ *Report and Order*, p. 35.

²² *Public Counsel's Reply Brief*, WA-2019-0185 p. 9-12 (Oct. 17, 2019).

²³ *Report and Order*, p. 32.

likewise this Commission Order discounts that the Joint Bidders' immediate investments are projected to cost far less than what the OUOC is proposing.²⁴

18. Remember that the OUOC has already attempted to charge the OWC customers more for the same service in the form of an acquisition incentive. It is not mere speculation to fear that the OUOC may seek further unjustified customer obligations. Consequentially, the Commission should appropriately weigh the public's concerns for rising rates especially when Cedar Glen endorses the Joint Bidders' option.

19. The Commission's Order's reasoning that paying more later is better also disregards that only one increase is endorsed by the public that would pay for that increase and is actually being served by the OWC, and the option offered by the OUOC is not. The public that spoke out against the OUOC's purchase, Cedar Glen, represents over half of the OWC's water and sewer customer base.²⁵

20. Cedar Glen residents provided over seventy public comments in favor of the Joint Bidders' proposal to have PWSD #5 be its service operator, amounting to nearly 17% of the OWC's total customer base and close to a third of Cedar Glen itself.²⁶ To look past them to put more weight upon the assertion that the OWC's customers would be better served by a Commission regulated public utility is dismissive of the concerns raised by the very citizens that will have to live with the Commission's decision indefinitely, and with no practical alternative to receive water service from another provider.²⁷ This Commission should not place more weight upon its jurisdiction versus service options that occur outside its domain. To do so arbitrarily

²⁴ *Public Counsel's Initial Post-Hearing Brief*, p. 8.

²⁵ Exhibit 302, *Rebuttal Testimony of Kenneth Hulett*, WA-2019-0185 p. 2 (Aug. 13, 2019).

²⁶ Transcript of Proceedings, p. 69.

²⁷ *Report and Order*, p. 33.

disregards that the Missouri General Assembly has not endorsed a public policy of eradicating public water supply districts, cooperatives, or other public utility alternatives.

21. It is also not enough to rest on assurances that this Commission may only approve rates that are “just and reasonable” as the Commission’s Order does.²⁸ “Just and reasonable” in that context are the legal pretense for what Commission actions will survive appeal. They do not assure that Cedar Glen and the other OWC customers are being provided with their best option. The law is meant to serve the people; the people should not be forced to serve the law of “just and reasonable” when more economic alternatives are available. Moreover, if the relevant evidence shows Joint Bidder’s proposal is more economic and, all else being equal more likely to promote the public interest, that evidence could dictate whether the petitioner’s proposal is reasonable and whether it promotes the public interest.

22. Consider the resolution of Confluence Rivers Utility Operating Company’s (Confluence) latest rate proceeding. Confluence is another arm of CSWR. After Confluence made several acquisitions and upgrades, Confluence customers will soon pay for a 201% and 173% increase in water and sewer system revenues, respectively.²⁹ The OPC did agree to that result through a unanimous disposition because it believed it to be a suitable end given the circumstances. But the circumstances need not be the same for the OWC customers. Having a rehearing to reconsider the evidence, and providing an avenue for a proper alternative proposal from the Joint Bidders, can change the trajectory of the OWC’s future rate obligations.

V. Conclusion

²⁸ *Id.*

²⁹ *Order Approving Unanimous Disposition Agreement and Small Company Rate Increase with Accompanying Tariffs*, WR-2020-0053 (Apr. 8, 2020).

23. The OPC recognizes that this case presents some struggles to this Commission. The OWC needs investments to return to the level of safe and adequate service, and current rates will invariably have to rise. Rising rates are never popular, and sometimes public servants may have to make decisions that erupt public ire. However, if government is to assert itself as the deciding voice for the course of action against the expressed wishes of the public, there needs to be compelling reason. No such compelling reason exists now to foreclose the option offered by the Joint Bidders.

24. Lake Ozark Water and Sewer has been operating the OWC with no apparent public health catastrophe, and there is no reason why that could not continue as this Commission holds a rehearing and enables the Joint Bidders to present its separate application.

WHEREFORE, the OPC requests that the Commission grant a rehearing on this case to reconsider the aforementioned issues of fact and law.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Caleb Hall

Caleb Hall, #68112

Senior Counsel

200 Madison Street, Suite 650

Jefferson City, MO 65102

P: (573) 751-4857

F: (573) 751-5562

Caleb.hall@opc.mo.gov

**Attorney for the Office of the Public
Counsel**

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 7th Day of May, 2020, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall