

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

In the Matter of application of the Public)	
Funding Corporation of the City of Ozark,)	<u>Case No. WM-2017-0342</u>
MO to Sell its Water System Located in)	
Christian County to the City of Ozark, MO)	

**STAFF'S FURTHER RESPONSE IN OPPOSITION TO
OPC'S MOTION TO DISMISS**

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Further Response in Opposition to OPC's Motion to Dismiss*, states as follows:

1. On June 19, 2017, the City of Ozark filed its *Application* seeking "an order and decision of this Commission approving the transfer of the assets of The Public Funding Corporation of the City of Ozark as herein described to the City of Ozark a fourth class City of the State of Missouri; authorizing Seller to discontinue providing service in its area and the immediate continuance of service by the Buyer and the release of the supervision and control of the Commission[.]"

2. On June 26, 2017, the City amended its *Application*.

3. The Public Funding Corporation of the City of Ozark owns a water system that was formerly owned by the Finley Valley Water Company, a water corporation and public utility that was regulated by the Commission, operating in Christian County, Missouri. The Public Funding Corporation is presently a utility regulated by the Commission. The Public Funding Corporation is wholly controlled by the City of Ozark.

4. On September 27, 2017, the Staff filed its *Recommendation*, advising the Commission to grant the *Amended Application*.

5. Staff repeats that it was only belatedly, first on January 9, 2018, and again on January 22, 2018, and after seeking and participating in a local public hearing regarding the merits of the application, that the Office of the Public Counsel (“OPC”), moved the Commission to dismiss this case for lack of subject matter jurisdiction, stating “Accordingly, this Commission does not have jurisdiction over the sale of an LLC to a fourth class city.” *OPC’s Motion to Dismiss*, p. 3.

6. OPC’s motion is founded upon its erroneous reading of § 393.190.1, RSMo., which states:

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 hereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it to do so.

7. Staff will be the first to admit that this provision is not a model of clarity. Nonetheless, no one except OPC has ever, in the more than a century of the Commission’s existence, read it in such a way as to conclude that the Commission lacks subject-matter jurisdiction over the sale of “the whole or any part” of a utility’s “franchise, works or system, necessary or useful in the performance of its duties to the public,” to a municipality. Indeed, such transactions have come before the Commission from time-to-time over the last century and the Commission has exercised jurisdiction over them, and no one has ever before argued that it should not do so.

8. As Staff pointed out previously, the primary object of statutory interpretation is to ascertain the intent of the legislature from the language used. ***United Pharmacal Co. of Mo., Inc. v. Mo. Bd. of Pharmacy***, 208 S.W.3d 907,

909 (Mo. banc 2006). In doing so, a court considers the words used in the statute in their plain and ordinary meaning. *Id.* at 910. Where the language of the statute is clear and unambiguous, there is no room for construction. ***Wolff Shoe Co. v. Dir. of Revenue***, 762 S.W.2d 29, 31 (Mo. banc 1988). “To determine whether a statute is clear and unambiguous, this court looks to whether the language is plain and clear to a person of ordinary intelligence.” ***Russell v. Mo. State Employees' Ret. Sys.***, 4 S.W.3d 554, 556 (Mo. App., W.D. 1999). The ordinary meaning of a word is usually derived from the dictionary when a word used in a statute is not defined therein. ***Preston v. State***, 33 S.W.3d 574, 578 (Mo. App., W.D. 2000). “Only when the language is ambiguous or if its plain meaning would lead to an illogical result will the court look past the plain and ordinary meaning of a statute.” ***Lonergan***, 53 S.W.3d at 126.

9. Staff explained in its initial *Response* that the statute in question states two distinct prohibitions in two parallel clauses, joined by the conjunction “nor,” as follows:

FIRST PROHIBITION: “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 . . . without having first secured from the commission an order authorizing it so to do.”

SECOND PROHIBITION: No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter . . . 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.”

10. OPC argues that “Merriam-Webster defines ‘nor’ as ‘a function word to introduce the second or last member or the second and each following member of a series of items each of which is negated.’” (citing to <https://merriam-webster.com/dictionary/nor>). OPC goes on to say, “[t]hus ‘nor’ within this statute merely introduces more actions that a corporation cannot take without commission approval. Thus, a corporation regulated by this Commission cannot ‘sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber’...*nor* can it ‘merge or consolidate such works or system...with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.’”

11. Staff agrees with OPC’s description of the function of the word “nor” in the statute, but that does not get OPC to the result it wants. The phrase “any other corporation, person or public utility” – on which OPC’s subject-matter jurisdiction argument is founded – occurs only in the second part of the cited section (described by OPC as “more actions that a corporation cannot take without commission approval”). Pursuant to the well-established rule of the last antecedent, therefore, the limiting phrase applies only to mergers and consolidations and not to sales or transfers. The Missouri Supreme Court has explained:

“By what is known as the doctrine of the ‘last antecedent,’ relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote. This rule is, however, merely an aid to construction and will not be adhered to where extension to a more remote antecedent is clearly required by consideration of the entire act. Slight indication of legislative intent so to extend the relative term is sufficient. Where several words are followed by a clause as much applicable to the

first and other words as to the last, the clause should be read as applicable to all.”¹

Section 393.190.1, RSMo., illustrates both a situation where the doctrine of the last antecedent applies, namely, to the phrase “any other corporation, person or public utility,” and one where it does not apply, to the phrase “without having first secured from the commission an order authorizing it to do so.”

12. As Staff explained previously, OPC misreads the statute, conflating the first prohibitory clause – applicable to this case – with the second, which is not applicable to this case. The first prohibitory clause prohibits the sale, etc., of useful assets, or the whole or any part of a utility system, without prior authorization from the Commission, without regard for the identity of the purchaser.² “Thus, Section 393.190 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 petitioning and securing the Commission's order authorizing the sale.” ***City of O'Fallon v. Union Elec. Co.***, 462 S.W.3d 438, 443 (Mo. App., W.D. 2015).

13. OPC argues that the intent of the statute is to prevent sales to municipalities because:

the Commission does not have jurisdiction to regulate a municipally owned utility. The Commission exists to regulate monopolistic utilities. If

¹ ***Norberg v. Montgomery***, 351 Mo. 180, 187, 173 S.W.2d 387, 390 (banc 1943); *quoting* 59 C.J. 985, § 583. See discussion in ***Spradling v. SSM Health Care St. Louis***, 313 S.W.3d 683, 688 (Mo. banc 2010).

² See, e.g., Judge Hardwick's paraphrase of the first prohibitory clause, which makes this clear: “Specifically, the statute states that no utility can sell any part of its franchise, works, or system that is necessary or useful in the performance of its duties to the public without first securing an order from the Commission authorizing such a sale. § 393.190.1.” ***City of O'Fallon v. Union Elec. Co.***, 462 S.W.3d 438, 443 (Mo. App., W.D. 2015). The first clause of the statute simply does not care who the buyer might be; it is focused on the seller.

the city of Ozark were to purchase the Public Funding Corporation of the City of Ozark, the citizens of Finley Valley would be left with an unregulated utility service. It is understood that many citizens are provided utilities by an unregulated municipality, but what makes Finley Valley unique is that they are nonresidents. If the City of Ozark were to take over the Public Funding Corporation, Finley Valley would be left with no recourse if something went wrong with their service or had some other complaint. They could not make a complaint to the PSC. They could not vote in local elections to influence the city officials. Thus, the City of Ozark would become an unregulated monopoly, free to set its own rates, without any recourse for the consumer. It is for this reason that Section 393.190.1 does not include transactions with municipalities. For that matter, it is why this sale is detrimental to the public interest.

14. This argument is absurd. The legislature has allowed municipalities to serve persons outside of the municipality's boundaries without regulation. If the Finley Valley ratepayers are mistreated, they can complain to their representatives.

15. Moreover, the outcome of OPC's argument is logically problematic. The Public Funding Corporation of the City of Ozark *is* an arm of the City of Ozark. OPC's argument is essentially, then: the Commission does not have jurisdiction to authorize a transfer to a municipality, therefore, the municipality's utility operations outside of the Commission's jurisdiction must remain within Commission jurisdiction. This conclusion is completely counter to OPC's emphatic stance.

16. Finally, OPC's argument runs afoul of the property right holding in *State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Missouri*. In that case, the Missouri Supreme Court established the standard of "no detriment to the public interest" for transfer cases before the Commission.³ It based in part its determination of that standard upon the acknowledgment that restricting property owners from being able to

³ *State ex rel. City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. 1934) ("A property owner should be allowed to sell his property unless it would be detrimental to the public.")

sell their property was a violation of those owners' property rights: "To deny them that right would be to deny to them an incident important to ownership of property."⁴

17. When properly construed, § 393.190.1, RSMo., can be recognized as directly controlling this case. Nothing in the statute prevents the Commission from approving a sale to any buyer, of any description.

WHEREFORE, Staff prays the Commission will **DENY** OPC's *Motion to Dismiss* and will forthwith approve the *Amended Application* as recommended by Staff.

Respectfully submitted,

/s/ Kevin A. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been served on all parties of record or their representatives pursuant to the Service List maintained for this case by the Commission's Data Center, on this 1st day of February, 2018.

/s/ Kevin A. Thompson

⁴ *Id.*