

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

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

**PUBLIC COUNSEL’S RESPONSE TO
STAFF’S AND APPLICANT’S OPPOSITION TO PUBLIC
COUNSEL’S MOTION TO DISMISS**

COMES NOW the Office of the Public Counsel (“OPC”) and hereby respectfully responds to Staff’s and Applicant’s Motions in Opposition to OPC’s Motion to Dismiss as follows:

1. Staff complains that OPC brought its Motion to Dismiss “at this late date.” Mo. Opp. ¶5. However, “lack of subject matter jurisdiction is not subject to waiver; it can be raised at any time, even on appeal.” *McCracken v. Wal-Mart Stores East*, 298 S.W.3d 473, 476 (Mo. banc. 2009).

2. Additionally, the Public Service Commission’s “powers are limited to those conferred by statute either expressly or by clear implication as necessary to carry out the powers specifically granted.” *City of O’Fallon v. Union Electric Co.*, 462 S.W.3d 438, 443-44 (Mo. App. W.D. 2015) (internal citations omitted).

3. Staff cites to *City of O’Fallon* for the proposition that “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” and that “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.” Mot. Opp. ¶10, FN 1, citing *City of O’Fallon*, 462 S.W.3d at 443. However, *City of O’Fallon* evaluated the question of whether section 393.190.1 gives jurisdiction to “order [a utility] to sell street lights to the Cities without its consent.” *Id.* There, the question was whether the Commission has jurisdiction to compel a sale. Additionally, at issue was property owned by a utility, not the utility itself. The question of whether an entire utility may be sold to a municipality was not answered by *City of O’Fallon*.

4. Admittedly, there is some authority that would seemingly be adverse to OPC’s position. In an unpublished Eastern District opinion, the Court held that a condemnation of a utility by the city of Mexico falls under the Commission’s jurisdiction pursuant to section 393.190.1. *Missouri Cities Water Co. v. Hodge*, 1993 Mo. App. Lexis 1361 (Mo. App. E.D. 1993). However, an unpublished opinion is not binding upon this Commission and OPC asks for a ruling consistent with the plain language of the statute.

5. Staff and the Applicant both put forth a reading of the statute that section 393.190.1 has two separate and distinct prohibitions. They argue that the word “nor” separates subsection 1. The language is as follows:

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.

6. Staff and Applicant both misuse the word “nor.” 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.”¹ Thus “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.”

7. The “nor” joint two types of transactions: “sell, assign, lease, transfer, mortgage or otherwise dispose or encumber” introduces a category of transactions that involve transferring assets from one entity to another entity. The second type, “merge or consolidate” involves transactions where two become one. Thus, section 393.190.1 could be simplified to read as such: No corporation can transfer its assets nor merge its assets “with another corporation, person, or public utility, without having first secured from the commission an order authorizing it so to do.”

8. Staff is correct that the “primary object of statutory interpretation is to ascertain the intent of the legislature from the language used.” Staff Opp. ¶7. OPC’s reading of the statute is consistent with that intent. And, OPC’s statute is also consistent with the concerns of OPC, and the citizens of Finley Valley. The reason why the legislature would only permit the Commission to govern transactions to a “corporation, person or public utility” is because, as all parties have agreed, the Commission does not

have jurisdiction to regulate a municipally owned utility. The Commission exists to regulate monopolistic utilities. If 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 non-residents. 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.

¹ <https://www.merriam-webster.com/dictionary/nor>.

WHEREFORE, OPC respectfully requests that this Commission dismiss the First Amended Application.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 22nd day of January, 2017.

/s/ Curtis Schube