

**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, Missouri to Sell its)	<u>File No. WM-2017-0342</u>
Water System Located in Christian County to the)	
City of Ozark, Missouri)	

**STATUS REPORT AND
MOTION FOR DETERMINATION ON THE PLEADINGS**

COMES NOW the Staff of the Missouri Public Service Commission, and hereby respectfully submits this *Status Report and Motion for Determination on the Pleadings (Report and Motion)* in the above-captioned matter. As the Applicant City of Ozark (City) has met all filing requirements, and Staff has previously recommended approval of the *Application* as not detrimental to the public interest; and, because the Office of the Public Counsel (Public Counsel) has not: timely filed any responsive pleading, argued the transfer is detrimental, requested an evidentiary hearing, or any other substantive relief, Staff respectfully moves the Commission to approve the Application on the pleadings under 4 CSR 240-2.117(2).

Procedural History

1. On June 19, 2017, the City of Ozark filed an Application for approval of a transfer of assets from the Public Funding Corporation of the City of Ozark to the City of Ozark, Missouri. On June 26, 2017, the City of Ozark filed its *First Amended Application (Application)*.

2. On June 27, 2017, the Commission issued its *Order Directing Notice and Setting Time for Filing*. In this Order, the Commission set an intervention deadline of July 18, 2017, and it ordered Staff to file a recommendation no later than July 27, 2017. No parties have filed to intervene in this matter.

3. On July 26, Staff requested, and the Commission granted, additional time to file a recommendation no later than September 27, 2017. Staff's request sought to allow time for PFC and the City of Ozark to hold a local public meeting with the customers who reside in Finley Valley.

4. The City held a local public meeting on September 14, 2017. Representatives of Staff and Public Counsel attended.

5. On September 27, 2017, Staff filed its *Recommendation*, recommending that the *Application* be approved, as there is no detriment to the public interest with the transfer. Because the drinking water system assets being transferred would continue to be owned and operated by the City (where, if approved, directly owned by the City, rather than through a municipally-owned non-profit funding corporation), thus the service and system operations would remain the same.

6. On October 2, 2017, Public Counsel filed a *Motion for an Order Directing a Local Public Hearing (Motion for LPH)*. Nothing in the Public Counsel's *Motion for LPH* recommended against, objected to, or opposed the transfer in any way.¹ Public Counsel's stated concern in the *Motion for LPH* was that the local public meeting was not a formal hearing, and therefore comments of the public were not testimony entered into this proceeding.² Nothing in the *Motion for LPH* objected to the *Application*, or sought an evidentiary hearing or sought other relief.

7. On October 19, 2017, the Commission held a procedural conference to develop a procedural schedule. At the beginning of that conference, the Regulatory Law

¹ See, WM-2017-0342, EFIS No. 8. *Motion for Order Directing a Local Public Hearing*.

² *Id.*, p. 2, ¶ 8.

Judge directly asked Public Counsel if it had a response to Staff's recommendation.

Public Counsel stated it was "still researching its position - - legal position."³

JUDGE JORDAN: Okay. Well, I've got a couple questions for the parties, let's start with OPC. Does the Office of Public Counsel have a position on this application? I didn't see a response to the recommendation.

MS. SHEMWELL: Public Counsel is still researching its position -- legal position.

JUDGE JORDAN: Okay.⁴

8. During that procedural conference, the Regulatory Law Judge explicitly requested that a proposed procedural schedule would include from Public Counsel a filing that "would take the form of a response to the application - - or response to the recommendation, something like that. I'd like to see that on a proposed procedural schedule."⁵ Public Counsel agreed.⁶

9. On November 9, 2017, Staff filed for the parties a Proposed Procedural Schedule that included a date certain for a local public hearing, as well as a deadline for Public Counsel to respond to the City's *Application* and Staff *Recommendation*. On November 11, 2017, the Commission entered its *Order and Notice of Local Public Hearing*. That order directed Public Counsel to file a responsive pleading by January 8, 2018.

10. On January 9, 2018, three weeks after the local public hearing, Public Counsel filed a *Motion to Dismiss City of Ozark's First Amended Application (Motion to*

³ WM-2017-0342, EFIS No. 12, *Transcript of Procedural Conference*, 6:2-3.

⁴ WM-2017-0342, EFIS No. 12, *Transcript of Procedural Conference*, 5:22 – 6:4.

⁵ *Id.*, 6:11 - 18

⁶ *Id.*, 6:19.

Dismiss). Nothing in the *Motion to Dismiss* objected to the sale as “detrimental to the public interest,” the legal standard for § 393.190 RSMo. The *Motion to Dismiss* only argued that because the ultimate owner of the utility assets—the City—was outside of the Commission’s jurisdiction, the Commission could not rule on the *Application*. It did not seek other relief or ask for an evidentiary hearing. It did not provide a responsive pleading to the *Application* or to the Staff *Recommendation* as agreed.⁷

11. On February 7, 2018, the Commission denied Public Counsel’s *Motion to Dismiss*.

12. Public Counsel has made no further filings in this matter except in April 2018 for the assigned counsel to withdraw.

Argument

13. Simply put, there is no factual basis before the Commission to deny the asset transfer, and the remaining question is that of law. Public Counsel has not argued—at any hearing, in any responsive pleading, or any other representation to the Commission—that the transfer is “detrimental to the public interest,” the applicable legal standard in an asset transfer case.⁸ It has not presented any material facts counter to the information presented in either the *Application* or Staff’s *Recommendation*. It has not created a contested case by seeking an evidentiary hearing, or requested any other substantive relief. Rather, Public Counsel has delayed, late-filed a procedural motion rather than a responsive pleading (denied as legally defective), and since February

⁷ Under the Missouri Rules of Civil Procedure, a motion to dismiss for “lack of jurisdiction over the subject matter” is a Rule 55.27(a)(1) pre-answer motion, and is not considered a “responsive pleading.” See, ***Olson v. Auto Owners Ins. Co.***, 700 S.W.2d 882, 885 (Mo.App. E.D. 1985)(finding that pre-answer motions are not responsive pleadings).

⁸ See, WM-2017-0342, entire case file. ***State ex rel. City of St. Louis v. Public Service Commission of Missouri***, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934)(“A property owner should be allowed to sell his property unless it would be detrimental to the public.”)

(after the denial) has remained silent. Where no showing has been made that a transfer of the assets is detrimental to the public interest, the Commission should approve such transfer.⁹ Based on the showing made by the *Application* and Staff's *Recommendation*, the conclusion is that the transfer is not detrimental to the public interest.

14. Public Counsel has stated that customers of the system are displeased at the prospect that utility service rates will increase after a transfer occurs. Customers at the local public hearing expressed those same concerns. However, it is currently equally true that service rates can increase now, by rate case, while operations are under the Commission oversight. If prudent investment is made into the system, rates correspondingly increase—regardless of Commission jurisdiction. If the City makes upgrades, rates will increase to cover those expenses.

15. Because under either scenario a rate increase is possible, the only remaining consideration to the public interest determination is whether there will be any substantial change to the nature of the operations and service provided. And because the City *is already the current utility service provider*, no such change will occur.¹⁰

16. The Commission has already reached this same conclusion in a remarkably similar case: SM-2018-0095, *In the Matter of the Application of Highway H Utilities, Inc. for Authority to Sell Certain Water and Wastewater System Assets to the City of Waynesville, Missouri, and Pulaski County Sewer District Number 1*. In the *Highway H Utilities Sale*, the Commission correctly approved the regulated utility's

⁹ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980) ("The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest").

¹⁰ See, *Application*, and Staff's *Recommendation*. Staff incorporates both pleadings as if set out fully herein.

application to transfer assets to a non-regulated municipality and public sewer district. There, like here, the regulated utility assets were a smaller system that would be subsumed into a larger, non-regulated operation. The customers served lived outside the serving municipality's city limits, and would receive the same rates as other customers served outside the city limits. There was a likelihood of a rate increase after the transfer.¹¹

17. There are only two differences between *Highway H* and the City of Ozark's *Application*. The first, unlike *Highway H*, is that the City already operates the subject assets and provides service. The second difference is in *Highway H*, Public Counsel affirmatively *objected* to the sale—but *has not* done so in this case. In *Highway H*, the Commission correctly ruled that, based on the pleadings, and because Public Counsel did not seek an evidentiary hearing or otherwise pursue any other remedy or relief, there was no basis to deny the application. The Commission should decide the same way in this case, because the City's *Application* and the Staff *Recommendation* establish that there is no detriment to the public interest. And Public Counsel has not denied any statement of fact, or filed a responsive pleading wherein to make such a denial.

18. Finally and importantly, Public Counsel has waived any further opportunity to late-file a responsive pleading. Since the filing of the case in June 2017—nearly a year ago—Public Counsel has had ample time and opportunity for advocacy. Upon the Commission's denial of the *Motion to Dismiss*, Public Counsel had exhausted the procedural time within which to file any responsive pleading to the *Application* or Staff

¹¹ Case No. SM-2018-0095, *In re Highway H Utilities*, EFIS No. 15, *Order Granting Authority to Transfer Assets*, p. 1-3

Recommendation.¹² To deny Public Counsel any further bites at the apple does not violate its due process under the Commission rules—it is a savvy party well aware of its rights and obligations, and has had a reasonable opportunity to exercise the same.¹³

Conclusion

As the Applicant City of Ozark has met all filing requirements, and Staff has recommended approval of the *Application*, and the face of both pleadings show the transfer is not detrimental to the public interest; and because Public Counsel has neither timely filed a responsive pleading, or requested an evidentiary hearing, nor sought any other substantive relief, Staff respectfully moves the Commission to approve the *Application* on the pleadings. The Commission has recently approved a similar case without a hearing. Neither Public Counsel nor the public is harmed by approval of the transfer.

¹² Commission Regulation 4 CSR 240-2.080(13): “[p]arties shall be allowed ten (10) days from the date of filing in which to respond to any pleading unless otherwise ordered by the commission.”

Here, Public Counsel not only did not file a responsive pleading ten days after the *Application*, it did not file a responsive pleading ten days after the *Recommendation*; and, when provided a date “otherwise ordered by the Commission” months later, Public Counsel filed a non-responsive motion. While Chapter 2 Commission rules are silent on the issue, Rule 55.27 provides that such a motion tolls the deadline provided to file a responsive pleading. But, even if the Commission granted Public Counsel another ten-day, or even thirty-day period after the denial of the motion to file the ordered responsive pleading, Public Counsel’s time and opportunity has run out, without basis for excusable neglect or good cause.

¹³ “Waiver” is defined as “the voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.” Black’s Law Dictionary 1574 (7th ed.1999). “The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it.” *Id.*

See also, **Jamison v. Dept. of Soc. Servs., Div. of Family Servs.**, 218 S.W.3d 399, 405 (Mo. banc 2007). (“Under both the federal and state constitutions, the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ This does not mean that the same type of process is required in every instance; rather, due process is flexible and calls for such procedural requirements as the particular situation demands.”)

Having had multiple opportunities to exercise its advocacy, it cannot be said that the Commission was inflexible with the Public Counsel.

WHEREFORE, Staff respectfully requests the Commission approve the *Application*, and issue an order granting any further relief as is just and warranted by the circumstances.

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 parties and or counsel of record on this 29th day of May, 2018.

/s/ Jacob T. Westen