

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

**STAFF RECOMMENDATION**

**COMES NOW** the Staff of the Missouri Public Service Commission, and hereby respectfully submits this *Status Report* in the above-captioned matter.

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 (“PFC”) to the City of Ozark, Missouri, and the cancellation of the Certificate of Convenience and Necessity (“CCN”) authorizing PFC to provide water service to the public. On June 26, 2017, the City of Ozark filed its *First Amended 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.

5. Pursuant to Section 393.190, RSMo, no water corporation shall sell its franchise without first having secured from the Commission an order authorizing it to do so.

6. As discussed below, Staff supports the transfer and recommends the Commission adopt its legal recommendation that the Commission does not have jurisdiction to regulate this water system. Accordingly, Staff supports the sale/transfer and cancellation of the CCN.

### **Commission Jurisdiction**

7. Section 386.250(3) RSMo, provides:

...that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the service or rates of any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality.

8. In *City of Columbia v. State Public Service Commission*, the Court held that the Public Service Commission did not have the power to fix rates for municipalities.<sup>1</sup> While the *City of Columbia* case involved providing electric service, subsequent courts, the 67-6 Attorney General Opinion, and the 73-1 General Counsel Opinion<sup>2</sup> concur that City of Columbia effectively removed from Commission jurisdiction

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<sup>1</sup> 43 S.W.2d 813 at 817

<sup>2</sup> Formal Opinions of the Attorney General “do not become the law of the land” nor do they hold any more weight than that of any other attorney. *Gershman Inv. Corp v. Danforth*, 517 S.W.2d 33, 35 (Mo. 1974). Formal Opinions of the Public Service Commission General Counsel should be treated similarly.

all municipal regulation, including water and sewer service.<sup>3</sup> The Missouri Supreme Court has since twice reaffirmed its holding from *City of Columbia*.<sup>4</sup>

9. In *Forest City v. City of Oregon*, 569 S.W.2d 330 (Mo. App. 1978), the appellate court held that the language in the statute § 386.250(3) RSMo “is not effective alone to confer any power upon the Commission to regulate municipal utility rates, even with respect to water sold beyond the corporate limits.”<sup>5</sup> The court held “that the Missouri Public Service Commission does not have jurisdiction to regulate the rates charged by Oregon to [Forest] City or residents of Forest City.” While the language “not effective alone to confer” may be read as potentially suggesting that some other circumstance *could* with combination of the statute confer Commission jurisdiction, the *Forest City* court did not provide any insight into what other necessary element would be needed to grant jurisdiction. The *Forest City* court further noted that the cities were not allowed to simply consent to the Commission’s jurisdiction.<sup>6</sup>

### **Relevant Facts Related to Commission Jurisdiction**

10. PFC is an existing regulated water utility currently providing water service to a subdivision known as Finley Valley Estates, which is located outside of the City of Ozark. PFC exists as a financing arm of the City of Ozark, Missouri and was the owner of a water system that was leased to the City to operate and provide water service to the Finley Valley customers.

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<sup>3</sup> See, *Forest City v. City of Oregon*, 569 S.W.2d 330 (Mo. App. 1978); *City of Hamilton v. Public Water Supply Dist. No. 2 of Caldwell County*, 849 S.W.2d 96 (Mo. App. 1993); *Coursen v. City of Sarcoxie*, 124 S.W.3d 492 (Mo. App. 2004); Opinion of the Attorney General, 67-6; Opinion of the General Counsel, Missouri Public Service Commission, 73-1.

<sup>4</sup> *State ex rel. Union Elec. Light & Power Co. v. Pub. Serv. Comm’n*, 62 S.W.2d 742, 745 (Mo. 1933)(“municipal ownership of such utilities is still provided for and we have held that they do not even come within the regulation of the act.”); *State ex rel. City of Sikeston v. Pub. Serv. Comm’n of Missouri*, 82 S.W.2d 105, 110 (Mo. 1935)(quoting *State ex rel. Union Elec. Light & Power Co. v. Pub. Serv. Comm’n*).

<sup>5</sup> *Forest City* at 333.

<sup>6</sup> *Id.*

11. PFC has approximately 227 customers within the Finley Valley subdivision.

12. While the Finley Valley water system is not currently connected to the City of Ozark water system, the City of Ozark performs all operation and maintenance of the Finley Valley system, and it performs all the billing and collection of charges. PFC does not have any employees or water system assets within the Finley Valley subdivision, and it does not provide any oversight of the Finley Valley system.

13. Staff has been informed that the PFC – Finley Valley records stopped being separate from City records around 2011 and that the City does not and has not maintained separate records of the expenses of the system.

#### **Additional Items for Consideration**

14. The standard for the Commission's approval of an asset transfer is whether the transaction is not detrimental to the public interest. *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. Banc 1934).

15. The City of Ozark serves 1662 customers outside its city limits, including the Finley Valley customers.

16. The City of Ozark has a total of 8804 customers, including 7833 residential, 976 commercial, and 4 industrial customers.

17. If the Commission approves the sale, nothing would change operationally with the system. The City is already operating, maintaining, and providing billing services for the Finley Valley system and would continue to do so after an approved sale.

18. Currently, the customers within the Finley Valley subdivision are paying significantly lower rates than other City of Ozark customers, either within or outside of city limits: \$6.68 for the first 2000 gallons, and \$2.93 per 1000 gallons, up to 23,000 gallons thereafter. City of Ozark customers within city limits are paying \$12.50 for the first 1000 gallons and \$3.30 for each additional 1000 gallons. City of Ozark customers residing outside city limits pay a higher rate of \$18.74 for the first 1000 gallons, and \$4.95 for each additional 1000 gallons.

19. The Finley Valley system rates have not changed since PFC first obtained its CCN in 1995.<sup>7</sup>

20. Upon approval of the sale, the City of Ozark is proposing to adjust the Finley Valley customers' rates to the higher outside city limits rates.

21. Such an adjustment to the Finley Valley customers' rates would comply with the court's holding in *State ex rel. Laundry, Inc. v. Public Service Com'n*,<sup>8</sup> which requires equality in both service and charges among similarly situated customers.

22. Staff understands that the City has considered multiple options for implementing the higher rates for the Finley Valley customers, but because the system falls outside the Commission's jurisdiction, Staff has not taken a position as to which option should be implemented here.

23. In reviewing the totality of the circumstances, Staff's position is that this sale on the whole is not detrimental to the public interest.

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<sup>7</sup> See, Case No. WM-95-423

<sup>8</sup> 327 Mo. 93, 111, 34 S.W.2d 37, 45 (Mo. 1931). The court said, "But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference in service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."

## Discussion

24. Based on the facts known to Staff, and the holding in *Forest City*, the water system at issue in this case should not be regulated by the Commission, as it is essentially owned and operated by a municipality, which falls outside the Commission's jurisdiction. Moreover, a city may not voluntarily avail itself of Commission jurisdiction.

25. Non-city-resident customers of the City of Ozark, as well as Finley Valley customers, are able to address day-to-day service issues by contacting the city billing department. While the non-residents do not have an alderman, larger service issues are able to be brought to the City Board of Aldermen and the City Attorney's office. Further, they are able to contact their county commissioner or state representative or senator if they feel their needs are not adequately being met.

26. Accordingly, the sale should be approved, and the CCN should be canceled.

**WHEREFORE**, Staff respectfully submits this Staff Recommendation for the Commission's information and consideration, and requests the Commission grant the Public Funding Corporation of the City of Ozark the authority to sell and transfer water utility assets to the City of Ozark, Missouri, and cancel the Certificate of Convenience and Necessity authorizing it to provide water service to the public.

Respectfully submitted,

**/s/ Marcella L Forck**

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**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing were served electronically to all counsel of record this 27th day of September, 2017.

**/s/ Marcella L. Forck**

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

In the Matter of The Public Funding  
Corporation of the City of Ozark,  
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Located in Christian County to the  
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**Case No. WM-2017-0342**

**AFFIDAVIT OF JAMES A MERCIEL, JR., P.E.**

STATE OF MISSOURI

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COUNTY OF COLE

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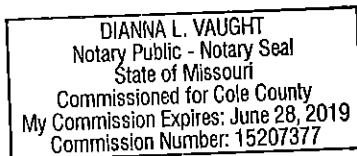
**COMES NOW JAMES A MERCIEL, JR., P.E.**, and on his oath declares that he is of sound mind and lawful age; that he contributed to the foregoing Staff Recommendation; and that the same is true and correct according to his best knowledge and belief.

Further the Affiant sayeth not.

  
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**JAMES A MERCIEL, JR., P.E.**

**JURAT**

Subscribed and sworn before me, a duly constituted and authorized Notary Public, in and for the County of Cole, State of Missouri, at my office in Jefferson City, on this 27th day of September, 2017.



  
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Notary Public