

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

In the Matter of application of the Public)
Funding Corporation of the City of Ozark,)
MO to Sell its Water System Located in)
Christian County to the City of Ozark, MO)

Case No. WM-2017-0342

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

5. Now at this late date, on January 9, 2018, the Office of the Public Counsel (“OPC”) moves 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 is, frankly, wrong; its reading of the pertinent statute is incorrect.

7. 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.

8. Section 393.190.1, RSMo., states in pertinent part:

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 thereof, with any other

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

9. The sentence 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 misreads the admittedly complex 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.¹ “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).

¹ 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.

11. 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.

12. The Commission has previously approved sales of utility systems to municipalities.

WHEREFORE, Staff prays the omission 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 b the Commission's Data Center, on this 17th day of January, 2018.

/s/ Kevin A. Thompson