

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

In the Matter of the Application of)	
Old National Bank for Authority to)	<u>File No. WM-2012-0314</u>
Seize the Assets of Tri-States Utility, Inc.)	

STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), by and through counsel, and submits its *Recommendation* as follows:

1. On March 21, 2012, Old National Bank ("Old National") filed with the Public Service Commission ("Commission") an *Application*, requesting authority to sell, transfer, and/or otherwise dispose of the property of Tri-States Utility, Inc. ("Tri-States").

2. On March 21, 2012, the Commission entered an *Order Directing Filings*, which directed Tri-States to file a response by April 20, 2012, Staff to file a recommendation April 27, 2012, and any party to file a reply to Staff's recommendation no later than May 9, 2012.

3. After three motions for extension of time were filed by Tri-States, the Commission entered an *Order Extending Time for Filing*, which directed Tri-States to file a response by July 6, 2012, Staff to file a recommendation by August 6, 2012, and any party to file a reply to Staff's recommendation no later than August 23, 2012.

4. On July 6, 2102, Tri-States filed its *Response of Tri-States Utility, Inc. In Opposition To Application*.

5. After a motion for extension of time was filed by Staff, the Commission entered an *Order Extending Time for Filings*, which directed Staff to file a recommendation on the *Application* no later than September 7, 2012. This filing complies with that *Order*.

6. Staff has completed its investigation and concludes that Old National's *Application* should not be approved. All applications filed before the Commission must comply with Commission Rule 4 CSR 240-2.060, and applications for authority to sell, assign, lease, or transfer assets must also comply with Commission Rule 4 CSR 240-3.065. Staff argues that Old National has substantially failed to comply with these Commission Rules. Furthermore, Old National has not met its burden to show that granting its request is not detrimental to the public interest. For these reasons, as more fully detailed in Staff's *Memorandum*, attached hereto and incorporated by reference as Appendix A, Staff cannot recommend that the Commission approve the *Application* of Old National.

WHEREFORE, Staff submits this *Recommendation* with Appendix A for the Commission's information and consideration and respectfully recommends that the Commission deny Old National's *Application*.

Respectfully submitted,

/s/ Rachel M. Lewis

Rachel M. Lewis Missouri Bar No. 56073

Amy E. Moore Missouri Bar No. 61759

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-6715 (Telephone)
(573) 751-9285 (Fax)
rachel.lewis@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or by electronic mail to all counsel of record on this 7th day of September, 2012.

/s/ Rachel M. Lewis

MEMORANDUM

TO: Missouri Public Service Commission Official Case File
File No. WM-2012-0314
Tri-States Utility, Inc.
Old National Bank

FROM: /s/ Jim Busch 9/7/2012
Water and Sewer Unit Date

/s/ Rachel Lewis 9/7/2012
Staff Counsel's Office Date

SUBJECT: Staff Recommendation Regarding *Application for Authority to Seize the Assets of Tri-States Utility, Inc.*

DATE: September 7, 2012

PROCEDURAL BACKGROUND

On March 21, 2012, Old National Bank (Old National or the Bank) filed an *Application* with the Missouri Public Service Commission (Commission) seeking authorization for “the sale, transfer, and/or other disposition” of utility assets owned by Tri-States Utility, Inc. (Tri-States or Company).

On March 21, 2012, the Commission issued an *Order Directing Filing*, in which, among other things, it set April 27, 2012, as the date by which the Staff should file a recommendation. The Commission issued subsequent orders on April 16, 2012, May 18, 2012, June 1, 2012, and August 7, 2012 extending that date ultimately to September 7, 2012. This Memorandum complies with those orders.

The issue before the Commission is whether or not a transfer of utility assets, as requested in the *Application*, is not detrimental to the public interest and should be approved. However, this proposed transfer of assets is not an action that is agreed between a buyer and a seller, rather it is an action requested by one party under the objection of the other party that is purportedly authorized by a court decision. The reason this case is before the Commission is because Old National received a judgment in its favor that resulted from a contract dispute related to a Lease Purchase Agreement Tri-States entered with First Security Leasing, Inc., who assigned all rights, title, and interest in the agreement to Old National.¹ As a result of that judgment, Old National asserts that it is entitled to

¹ See *Application*, Appendix A page 3 of 8.

levy upon the property owned by Tri-States and, in an effort to do so, has filed this *Application* with the Commission. Tri-States objects to the *Application*.²

COMPANY AND SYSTEM BACKGROUND

Tri-States is a water utility serving approximately 3,468 customers. Tri-State Utility and Engineering Company, owned by Mr. Harold Epps, obtained a Certificate of Convenience and Necessity (CCN) in Case No. 16,057. Over the years, Mr. Epps caused the water utility assets to be transferred to various other companies as well as having operated the water system as an individual with a fictitious name, all with appropriate Commission approval in various cases. Most recently, Tri-States received a CCN in Case No. WO-92-257 under Mr. Epps' ownership. Mr. Epps sold a percentage of the stock of Tri-States to J&J Equities, LLC and McB Investments, LLC in Commission Case No. WF-2009-0018.

Tri-States' last rate case, Commission Case No. WR-2011-0037, resulted in a Unanimous Agreement and an increase in annual operating revenues. Prior to that case, Tri-States made improvements to the system including replacing mains and service lines. Tri-States has paid the first quarterly assessment for Fiscal Year 2013 to the Commission and filed its annual reports with the Commission.

Several years ago, as part of its normal course of business, Tri-States undertook a meter replacement program and, in the process, went to "radio read" meter heads including hardware and software for computerized meter reading and billing information. The meters themselves worked, were in service, and were read manually but the radio reading system and computer handling of the data did not work for Tri-States. Tri-States purchased the automated meter readers from Water Products; Water Products then filed suit against Tri-States, but the suit was subsequently dropped. Tri-States then sued the manufacturer of the meters, among others, in Federal Court in Missouri. As Staff understands, a settlement was reached with Tri-States and some of the Defendants in that case, but as a result of the conditions of that settlement not being met, Old National filed a counter claim against Tri-States to collect the money it deemed it was owed by Tri-States. Ultimately, Old National received a judgment issued in its favor against Tri-States for damages, which includes \$848,288.11, plus late fees of \$6,157.70 and interest on those amounts at a rate of ten percent (10%) per annum from November 19, 2009.³ This *Application* is Old National's attempt to collect on that judgment by seizing and acquiring the assets of Tri-States.

STAFF'S INVESTIGATION, FINDINGS, AND CONCLUSIONS

Staff member Jim Merciel from Staff's Water and Sewer Unit and Amy Moore of Staff Counsel's office worked jointly with the signatories name above to prepare this Memorandum. As part of

² See *Response of Tri-States Utility, Inc. in Opposition to Application* filed July 6, 2012.

³ See *Application* Appendix B

Staff's investigation, Staff reviewed materials filed by Tri-States and Old National, reviewed the parties' responses to data requests Staff submitted to both parties, and participated in telephone conferences to discuss this situation. There are legal considerations to this matter including, but not limited to, compliance with filing requirements, including Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.065. In its review, investigation, discovery and analysis, Staff has received insufficient information to recommend that this transfer is not detrimental to the public interest. Therefore, Staff cannot recommend that the Commission approve this *Application*.

FAILURE TO MEET REQUIREMENTS FOR FILING AN APPLICATION WITH THE COMMISSION

Old National did not meet the necessary requirements found in the Commission's Rules, nor did it seek waiver of those requirements, therefore the *Application* should be denied. Any party filing an application shall comply with the requirements of Commission Rule 4 CSR 240-2.060. When the application is for authority to sell, assign, lease or transfer assets, Commission Rule 4 CSR 240.3.065 also applies. Staff's analysis, based primarily on the requirements of Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.065, follows and concludes that Old National substantially failed to meet those requirements in its *Application*.

Pursuant to 4 CSR 240-2.060(1), all applications shall include specific enumerated requirements labeled (A) through (M), many of which Old National did not meet as follows:

(A) The legal name of each applicant, a brief description of the legal organization of each applicant, whether a Missouri corporation, foreign corporation, partnership, proprietorship, or other business organization, the street and mailing address of the principal office or place of business of each applicant and each applicant's electronic mail address, fax number and telephone number, if any.

To meet this requirement, Old National asserts:

Old National is a national banking association organized under the laws of the United States. Old National is headquartered in Evansville, Indian, and has branches in approximately 180 locations in Indian, Illinois, Kentucky and Ohio. Old National does not conduct business in the State of Missouri.⁴

Old National does not explicitly state it is a foreign corporation and fails to provide a street or mailing address of the principal place of business, electronic mail address, fax number and telephone as required by (A) above.

⁴ See Paragraph 1 of *Application*.

Under Paragraph (C), if an applicant is a foreign corporation, it must provide “a certificate from the secretary of state that it is authorized to do business in Missouri.” Old National failed to provide any such certificate with its *Application*. Staff’s independent search of the Missouri Secretary of State’s website reveals that no records were found for an entity with the name Old National. As such, Old National fails to meet the requirements of Paragraph (C).

Old National does not reference Paragraph (L), which requires a “statement that no annual report or assessment fees are overdue.” This would be easy to deny since Old National is not subject to the Commission’s requirement that regulated entities file annual reports and pay annual assessment fees to the Commission. However, Old National does not address this requirement in its *Application*.

Of the thirteen requirements found in Commission Rule 4 CSR 240-2.060, Old National only cited one in its *Application*, but met three of the requirements that are applicable and failed to meet or address three applicable and relevant requirements.

Old National also must meet the requirements of Commission Rule 4 CSR 240-3.605, which is specific to water utility applications for authority to sell, assign, lease or transfer assets. Old National sought a waiver of “the remaining provisions of Commission Rule 4 CSR 240-3.605(1), as these filing requirements are not applicable to this *Application*.”⁵ Old National did not specify which requirements it deemed inapplicable and did not seek a waiver of any of the applicable ones that it failed to meet, as demonstrated below.

Applications to sell, assign, lease or transfer assets shall include:⁶

- (A) A brief description of the property involved in the transaction, including any franchises, permits, operating rights or certificates of convenience and necessity;

Old National does not specify any utility properties it seeks to acquire, in order to satisfy the debt. It also does not request any CCN, or request cancelation of any CCNs, or transfer of any operating rights or permits. It is not clear to Staff whether or not Tri-States will remain as the regulated utility, and if so, how that Company will be authorized to continue to use property that is necessary to provide safe and adequate water service. If Tri-States will not be the utility, then the question of who will be the utility that will use the assets to provide service to Tri-States’ existing customers is completely ignored in this case thus far.

Staff attempted to ascertain this information through Data Requests, but was unable to get more information from either party. Staff received the following response from Old National:

⁵ See Paragraph 12 of *Application*

⁶ 4 CSR 240-3.605(1)

1. Please describe, or state by listing, what assets Old National Bank intends to acquire from Tri-States Utility, Inc., including any permits, easements, operating rights, or certificates of convenience and necessity.

RESPONSE: Old National does not know the assets possessed by Tri-States Utility, Inc. ("Tri-States"). As stated in the Application filed herein by Old National, judgment was issued in United States District Court for the Western District of Missouri Case No. 6:09-CV-03388-DGK on September 23, 2011, in favor of Old National and against Tri-States in the amount of \$848,288.11, plus late fees of \$6,157.70, interest on those amounts at the rate of 10% per annum from November 19, 2009, Old National's attorney fees and expenses of \$14,226.29, and court costs. As also stated in the Application filed herein, Old National seeks generally to execute on its valid judgment, and, in this regard, seeks authority from the Commission for the sale, transfer, and/or other disposition of all tangible assets of Tri-States, including all real and personal property. (Emphasis added.)

2. Please state whether Old National Bank expects that the above described or listed assets will include: 1) all assets of Tri-States Utility, Inc. that are used to provide water service, 2) only some such assets that are used to provide water service, or 3) other assets owned by Tri-States Utility, Inc. that are not used to provide water service.

RESPONSE: Old National does not know the assets possessed by Tri-States. Specifically, Old National does not know if Tri-States Utility has sufficient assets not used to provide utility service which would satisfy the judgment described in the Application filed herein.

As demonstrated in the discovery responses, Old National does not know the assets it seeks to acquire in this *Application*, it cannot ascertain if any such assets are enough to cover the judgment against Tri-States, and seemingly has not attempted to identify any such assets that would cover the judgment. Old National has not identified to Staff any utility properties it seeks to acquire in order to satisfy the debt and failed to meet this requirement.

(B) A copy of the contract or agreement of sale;

There is no agreement or contract to sell in this situation, so this requirement is inapplicable. In lieu of such an agreement, Old National included as Appendices to the *Application* documents related to the court proceeding that purports to give Old National authority to acquire the assets of Tri-States.

(C) The verification of proper authority by the person signing the application or a certified copy of resolution of the board of directors of each applicant authorizing the proposed action;

Old National included the Verification of its Vice President and Associate Counsel, Tom Washburne, with its *Application*. Old National also attached an Order Granting Motions for Summary Judgment, Order Regarding Damages, and Judgment filed in the United States District Court for the Western District of Missouri, Southern Division, in Case No 6:09-CV-03388. Staff notes that the Court's order is focused on the damages it found Old National is entitled to collect; it does not detail the manner in which this amount should be collected or any possible effects on Tri-States' operations as a regulated utility.

(D) The reasons the proposed sale of the assets is not detrimental to the public interest;

Old National states in paragraph 12 of its *Application*,

It is the information and belief of Old National that the granting of its requested relief will not be detrimental to the public interest, in that Old National simply seeks to execute upon the judgment issued by the United States District Court for the Western District of Missouri in its Case No. 6:09-CV-0388-DKG. Further, any sale, transfer, and/or other disposition of the assets of Tri-States may be accomplished in such a manner as not to negatively impact the provision of safe and adequate water service to the customers of Tri-States.

These self-serving statements by Old National are just that; there is nothing to support the statement that the granting of the requested relief will not be detrimental to the public interest. In fact, when Staff inquired into Old National's intentions in this case through Data Request, the repeated response was "Old National does not know the assets possessed by Tri-States."⁷ If it cannot ascertain the assets, then neither Old National nor Staff can ascertain whether acquiring the property of a regulated utility will negatively impact the provision of safe and adequate service. Old National provides no explanation of who will be able to operate the utility assets - Tri-States, Old National, or other unknown third parties, - nor does it explain how the utility's operations will be accomplished should this *Application* be approved by the Commission. Specifically, Staff submitted the following Data Request and received the following response from the Bank:

3. Please state Old National Bank's plans regarding disposition of any acquired assets, and how it, and/or a subsequent owner, will use any acquired assets to provide water utility service to current customers of Tri-States Utility, Inc.

7 Source: Old National's Response to Staff's Data Request Nos. 1, 2, 3, 6 and 9.

RESPONSE: Old National has no specific plans in this regard. By virtue of the judgment attached to the Application filed herein, Old National has certain rights and remedies pursuant to Federal Rules of Civil Procedure 64 and 69 and Missouri Rules of Civil Procedure 74.08 and 76. In general, Old National, through the sheriff of any county in which property owned by Tri-States is located, is entitled to levy upon the real estate owned by Tri-States and seize the personal property owned by Tri-States.

Staff asserts that Old National does not have enough information to assert that this transfer of assets is not detrimental to the public interest. At this time, Old National seeks to seize unspecified property, real and personal, owned by Tri-States, but has no specific plans on whether those assets will be used to provide water utility service. Staff argues that any transfer to Old National at this time is detrimental to the public interest because it might leave the customers of the utility with uncertain water service in the future. Staff further argues that it is likely that safe and adequate service will be negatively impacted should Old National obtain any utility assets used in the provision of that safe and adequate service. Old National does not have prior experience or knowledge about regulated utilities. Old National fails to meet this requirement.

(E) If the purchaser is subject to the jurisdiction of the commission, a balance sheet and income statement with adjustments showing the results of the acquisitions of the property; and

Old National is presently not a regulated utility, so Staff agrees that this provision does not apply in this case.

(F) A statement of the impact, if any, the sale, assignment, lease or transfer of assets will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the companies involved in that sale are located.

Old National states in paragraph 11 of its *Application* that it does not anticipate any impact upon tax revenues of political subdivisions where Tri-States assets are located. Given the nature of court judgments and property seizure associated with debt collection, Staff is unable to discount the possibility of Tri-States' properties being liquidated by Old National, and Staff respectfully points out that if a municipality or a public water supply district ultimately acquired the assets, then there could be a tax impact.

(2) If the purchaser is not subject to the jurisdiction of the commission, but will be subject to the commission's jurisdiction after the sale, the purchaser must comply with these rules.

This means that if the purchaser or subsequent owner of the assets uses them to provide utility service, then the purchaser could be subject to the jurisdiction of the Commission, in which case it may be necessary for the Commission to grant or transfer a CCN. At this time, Old National does not know if Tri-States possesses sufficient assets not used to provide utility service that would satisfy the judgment described in the *Application*.⁸ Likewise, Tri-States asserts that it does not have an expectation of which assets Old National seeks to acquire in this case to satisfy the judgment, as evidenced by its responses to discovery requests.⁹ This lack of information suggests that neither party to this *Application* has knowledge of which Tri-States' assets will be transferred or acquired if this *Application* is approved. Such lack of knowledge is dangerous to the customers and the system, as it is unclear how service would continue to be provided.

(3) If any of the items required under this rule are unavailable at the time the application is filed, they shall be furnished prior to the granting of the authority sought.

Staff continues to hold itself out as willing to study any plans regarding how the assets, after seizure, would be used to provide utility service to existing customers. However, to date, no such information has been provided to Staff, despite its efforts to request and obtain this information. Old National has failed to provide updated information to meet this requirement, thus its request should not be granted.

Old National has not provided any details regarding any involved property it seeks to acquire or have transferred nor has it provided details on what will occur if such transfer or acquisition occurs. Likewise, Tri-States is unable to provide sufficient information on what assets it could use to satisfy the judgment and prevent the transfer of assets. Old National has not met the requirements of Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.065, and its *Application* should be denied on those grounds. Additionally, the *Application* should be denied because Old National has not demonstrated that such action is not detrimental to the public interest.

In addition to not meeting the specific filing requirements, the *Application*'s wherefore clause seeks authority to proceed with its collection efforts against Tri-States by the sheriffs of all counties in which Tri-States has real and/or personal property. Old National is not seeking permission to act upon its own behalf, but rather is relying on Missouri Circuit Court Rule 76 which allows the sheriff to execute a levy. So, even in its *Application*, Old National does not assume responsibility for the assets or acquisition, but leaves it up to the sheriffs of the counties wherein Tri-States properties are located. The Commission does not oversee the actions described in Rule 76. While that may be the proper relief under circuit court rules, it is impractical to have a sheriff levy real estate related to a public utility subject to regulation by the Commission, particularly through an *Application* to acquire assets. In seeking such relief, Old National strengthens Staff's argument that approval of this *Application* is

⁸ See Old National's Response to Staff's Data Request 2

⁹ See Tri-States Response to Staff's Data Request 2

detrimental to the public interest, and weakens Old National's argument that this *Application* is not detrimental to the public interest.

Staff does not condone Tri-States' actions of not paying its debts and judgments, however, Staff cannot recommend that any assets owned and used by Tri-States for the utility's operations be transferred to Old National. Old National has no ties to the state of Missouri, outside the judgment issued in Case No. 6:09-cv-03388; Old National is not involved in the regulated utility business; and Old National has not expressed any interest in being part of the regulated utility business. Old National's only interest is in receiving the damages it has been awarded in the above referenced case. Should the Commission approve this *Application*, it is possible, and perhaps likely, that Old National would liquidate any properties presently used by Tri-States for the provision of utility service and that the customers could then be left without safe and adequate service. If such activity were to occur, then the transfer would be detrimental to the public interest.

At this point, there is insufficient information as to what Old National seeks to gain or how it plans to proceed after filing this *Application*, and such uncertainty is detrimental to the public interest. Staff asserts that Old National and Tri-States may benefit from the Commission's alternative dispute procedures found in Commission Rule 4 CSR 240-2.125.

CONCLUSION

After review of available information and of answers to questions sent to Old National and Tri-States, Staff is unable to determine what assets presently used or owned by Tri-States will be involved in the transfer for which Old National seeks Commission approval. While Staff has no desire to deny Old National reasonable civil remedies regarding collection of a judgment, Old National has not provided sufficient information to demonstrate that acquiring utility assets from Tri-States is not detrimental to the public interest and has failed to meet the requirements enumerated in Commission Rules 4 CSR 240-2.060 and 4 CSR 240-3.065.

The case as it has been presented leaves Staff with many more questions than it does answers. It is unknown whether Tri-States will still be able to provide safe and adequate water service to its customers after any such transfer occurs. It is also unknown whether Old National will retain the assets and use them to provide safe and adequate service to the customers, or if the assets might be liquidated or subsequently transferred to other unknown parties. Either of these scenarios creates uncertainty for the system and its customers. Staff concludes that Old National has not met any reasonable showing regarding the absence of any detriment to the public interest. Therefore, at this time, Staff must respectfully recommend that the Commission deny the request to transfer utility assets currently owned and used by Tri-States because it has the serious potential to be detrimental to the public interest.

Staff has not been involved in any negotiations that are or have been taking place between the parties, and will not attempt to outline or speculate on various scenarios that could occur with respect to seizure of assets at this time. Staff does not bear that burden and is uncertain how Old National, an entity that has not even established a list of assets it may acquire or a plan of what will happen once those assets are acquired, could be granted the ability to acquire assets of a regulated utility at this time. This *Application* is detrimental to the public interest and should be not approved by the Commission.

STAFF'S RECOMMENDATIONS

Staff recommends the Commission deny Old National's *Application*. Staff specifically recommends the Commission issue an order that includes the following:

1. Denies the *Application* filed by Tri-States on March 21, 2012, based on Old National's failure to adhere to the requirements of such a filing and for failure to establish that the approval of such *Application* is not detrimental to the public interest.
2. Establishes a mediation date for the parties to participate, along with Staff, in an effort to resolve the matters amicably under Commission Rule 4 CSR 240-2.125 with the Commission.
3. Sets a prehearing conference to discuss alternative solutions to the situation, which include plans to operate and provide service to the customer by Tri-States, Old National, both together, or by a third party.
4. Makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of the certificate, including future expenditures by Tri-States or Old National or a successor, in any later proceeding.

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

In the Matter of the Application of Old)
National Bank for the Authority to Seize the)
Assets of Tri States Utility, Inc.) File No. WM-2012-0314

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

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

James A. Merciel, Jr., P.E., of lawful age, on his oath states: (1) that he is the Assistant Manager – Engineering in the Water and Sewer Unit of the Missouri Public Service Commission; (2) that he participated in the preparation of the foregoing *Staff Recommendation Regarding Application for Authority to Seize the Assets of Tri-States Utility, Inc. (Staff Recommendation)*, in memorandum form; (3) that certain information in the *Staff Recommendation* was provided by him; (4) that he has knowledge of matters set forth in the *Staff Recommendation*; and (5) that such matters set forth in the *Staff Recommendation* are true and correct to the best of his knowledge, information and belief.



James A. Merciel, Jr., P.E.

Subscribed and sworn to before me this 7th day of September 2012.



Notary Public

SUSAN L. SUNDERMEYER Notary Public - Notary Seal State of Missouri Commissioned for Callaway County My Commission Expires: October 03, 2014 Commission Number: 10942086
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