

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

In the Matter of the Application of)
Osage Utility Operating Company, Inc.)
to Acquire Certain Water and Sewer)
Assets and for a Certificate of)
Convenience and Necessity)

Case Nos: WA-2019-0185 &
SA-2019-0186

PUBLIC COUNSEL’S REPLY BRIEF

Respectfully submitted,

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I. Introduction and General Reply

The Osage Utility Operating Company (OUOC or Company) fails to demonstrate that its acquisition of the Osage Water Company (OWC) water and wastewater assets will not be detrimental to the public interest, nor does the Company’s assertions warrant an acquisition incentive under 20 CSR 4240-10.085. Although the Staff of the Public Service Commission (Staff) does not normally bear a burden of proof, the OPC judges the Staff’s argument as if it were a proponent given its alignment with the OUOC’s argument. Accordingly, Staff also fails to meet its burden of persuasion. The Public Water Supply District #5 of Camden County, Missouri (PWSD #5), the Missouri Water Association (MWA), and the Lake Area Waste Water Association (LAWWA) (collectively the Joint Bidders) option to purchase the OWC assets and operate them at lower costs to consumers puts significant doubt into the OUOC’s case. The Cedar Glen Condominium Association (Cedar Glen) endorsing the Joint Bidders’ proposal compounds that doubt. Cedar Glen is the only party in this docket that will personally use the OWC systems on a daily basis. Therefore, they have the most vested interest in providing safe and adequate service. What Cedar Glen says should have due weight, but instead the OUOC and Staff think they know better about what is good for Cedar Glen. The origins of this paternalistic attitude are unknown, but its impact of disregarding the public’s voice is apparent from OUOC and Staff’s arguments.

II. Reply to Osage Utility Operating Company

The OUOC fails to meet its burden of proof as to both its requested CCN and acquisition incentive because the weight of the evidence does not support the OUOC's acquisition of the OWC assets not being a detriment to the public interest, and the OWC's acquisition not occurring but for an added incentive. The OUOC's arguments particularly fail because the Company overemphasizes the desires of the absent property owner, undermines its own interpretation of the public interest, throws unsubstantiated attacks upon the Joint Bidders, and does not present adequate evidence as to the necessary elements of the Public Service Commission's (Commission) acquisition incentive rule.

A. The OUOC Overemphasizes the Property Owner's Desires Despite the Property Owner Being More than Willing to Sell the OWC Assets to the Joint Bidders.

Despite failing to join the property owner in this proceeding, the OUOC makes property rights a key theme of its argument. When describing its view of the applicable legal standard, the OUOC quotes, and underlines, the prescient Missouri Supreme Court quote that, "A property owner should be allowed to sell his property unless it would be detrimental to the public."¹ The subtext of the OUOC's position being that to deny its CCN application is akin to denying a property owner his or her property rights.

However, denying the CCN at issue does not interfere with the property owner's desires whatsoever. The OWC assets were sold by the bankruptcy trustee at auction.² The bankrupt, former owner, has no say in the disposition of the OWC assets, and the bankruptcy trustee simply wants to close her sale. In fact, the trustee is apparently so eager to dispose of the OWC assets that

¹ *OUOC Initial Brief*, WA-2019-0185 p. 13 (Oct. 3, 2019) (quoting *State ex rel St. Louis v. Pub. Serv. Comm'n*, 73 S.W.2d 393, 400 (Mo. 1934)).

² Exhibit 100, *Direct Testimony of Natelle Dietrich*, WA-2019-0185 ND-d2, p. 10-13 (July 11, 2019).

she executed a simultaneous contract for the Joint Bidders to purchase the OWC assets provided that OUOC's application is denied.³ The property owner's interest is just as served by the Joint Bidders acquiring the OWC assets as the OUOC getting them. Therefore, the OUOC's reliance on that interest is overemphasized and misplaced.

B. The OUOC's Discussion of What is the Public Interest Undercuts its Request

The OUOC relies upon one Commission order to describe the public interest. That one order undercuts its own position, and actually demonstrates why the OUOC's Application is a detriment to the public interest. The Commission's Report and Order for the EM-2007-0374 docket reads that, "The public interest is found in the positive, well defined expression of the settled will of the people."⁴ The OUOC unironically offers this quote to support its argument that its acquisition of the OWC assets serves the public interest. But the public has manifestly expressed its will against the OUOC's proposal. The settled will of Cedar Glen is to be served by the Joint Bidders' option. Accordingly, the OUOC's Application does not serve the public interest.

Another portion of the Commission quote that the OUOC relies upon reiterates that the OUOC's Application is detrimental to the public interest. The OUOC reprints the Commission's words that when deliberating on the public interest "the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public."⁵ This balancing of public interest makes sense for a rate case or larger acquisition case where the needs of many may outweigh the interests of the few. However, in this case Cedar Glen is the only party representing the "public served." There is no larger public to weigh its interests against. The balancing should

³ Transcript of Proceedings, Evidentiary Hearing, WA-2019-0185 p. 74 (Sep. 17-18, 2019).

⁴ *OUOC Initial Brief*, p. 14 (quoting *Report and Order*, EM-2007-0374 p. 232 (July 1, 2008)).

⁵ *Id.* at 15 (quoting *Report and Order*, EM-2007-0374 p. 233-34).

instead be Cedar Glen's interest against itself. As the actual public being served, Cedar Glen is the party with the strongest claim to desiring safe and adequate service. Cedar Glen's decision to support the Joint Bidders' proposed acquisition should then be instructive. Rather than respecting the public's will though, OUOC thinks it knows better about what is good for Cedar Glen. The Commission should not similarly disregard the public under the pretense of "public interest."

C. The OUOC's Attacks Upon the Joint Bidders are Misleading.

The OUOC attacks the reputation of the Joint Bidders and their ability to provide safe and adequate service. This is a noticeable change in tactics from OUOC's prior position that this Commission should not be allowed to consider the Joint Bidders competing offer.⁶ Nonetheless, the OUOC now attempts to malign the Joint Bidders' competency based on several Missouri Department of Natural Resources (MDNR) documents. The OPC largely already addressed the OUOC being unpersuasive in this attempt.⁷ The alleged deficiencies and notices of violations within OUOC witness Todd Thomas' schedules relate to systems not operated by the Joint Bidders⁸ or predate the most recent compliance reports.⁹ Furthermore, nothing in the record proves that the alleged violations negatively impacted human or environmental health.

The OPC only dwells on this subject further to highlight one additional part of the OUOC's brief. The OUOC basis its competency to provide safe and adequate service on its use of a contract operator "as it does with all of its water and wastewater systems."¹⁰ If merely hiring a contractor is required, then there is no reason why the contractee must be OUOC. The Joint Bidders could

⁶ See *Amended Motion to Strike and/or Limit Scope of Proceedings*, WA-2019-0185 (Sept. 9, 2019).

⁷ *Public Counsel's Initial Post-Hearing Brief*, WA-2019-0185 p. 11-13 (Oct. 3, 2019).

⁸ *Id.*

⁹ Compare Exhibits 404, 405, & 407 with Exhibit 7, *Surrebuttal Testimony of Todd Thomas*, WA-2019-0185 (Sep. 4, 2019).

¹⁰ Brief, p. 11.

just as easily contract with the same or same quality of operator. There is nothing special about the OUOC that makes the money it pays an operator more magical than the money the Joint Bidders could pay an operator.

D. The OUOC Fails to Meet the Requisite Elements of the Commission's Acquisition Incentive Rule.

The Commission's acquisition rule requires the applicant prove up certain enumerated claims. Two of those enumerated requirements for a utility to receive an acquisition incentive are that the subject acquisition be in the public interest, and that the acquisition be "unlikely to occur without the probability of obtaining an acquisition incentive."¹¹ The thrust of the OUOC's benefit to the public interest argument is that repairs are needed "given the condition of the OWC systems."¹² The need for repairs is not in dispute though. The OUOC forewarns that "should the Joint Bidders' position prevail, we are at a minimum, another Commission proceeding away from a possible purchase."¹³ The OUOC appears to be implying that any delay would impugn the public interest, and therefore the Commission should rush to give the OUOC what it wants. There is no need to rush to judgement though. The OWC system has been in receivership for 14 years. Nothing in the record states that those 14 years were beset with boil orders, public health warnings, or any other imminent hazard to human and environmental health justifying immediate action. There is no reason why suddenly now there is no time to carefully consider whether safe and adequate service can be provided at a more efficient cost.

The OUOC's evidence that the acquisition would be unlikely to occur without an added incentive is similarly lacking. The only evidence the OUOC cites to on this point is the word of

¹¹ 20 CSR 4240-10.085(4).

¹² *OUOC's Initial Brief*, p. 28.

¹³ *Id.*

OUOC witness Josiah Cox that the Company would need to “reevaluate” its business model in Missouri.¹⁴ The word of an individual who stands to personally benefit from the incentive is insufficient without supporting evidence that Central States Water Resources (CSWR) would suddenly change its multi-state acquisition strategy. It is especially insufficient in light of CSWR negotiating its stalking horse bidder position as to the auction for the OWC assets, and CSWR’s repeated previous attempts to purchase the OWC assets.¹⁵ It is also insufficient given that the Joint Bidders will buy the systems if this Application fails, and the fact that Missouri American Water Company bid on the assets as well.¹⁶

Furthermore, if the Commission grants the OUOC’s CCN, it will make money on the OWC systems just as CSWR’s affiliates have done with other water and sewer systems. It is thus clear from the evidence that an added incentive is not required for this acquisition to occur.

III. Reply to the Staff of the Public Service Commission

Staff’s approach to this controversy is disappointing in that it does not apply the applicable standard of review to the case’s facts, over-relies on one Commission order, misrepresents its own amount of analysis done, and inconsistently argues that the OUOC deserves an acquisition incentive.

A. Staff Appropriately Recounts the Standard of Review, but then does Not Apply it to the Facts at Issue.

When describing the “not detrimental to the public interest” standard that controls the OUOC’s requested CCN, Staff noticeably recounts the standard correctly but fails to follow it. Staff quotes one Commission order from 2005, where the Commission relied upon Missouri

¹⁴ *Id.* at 27.

¹⁵ *Public Counsel’s Initial Post-Hearing Brief*, p.15-16.

¹⁶ *Id.*

Supreme Court guidance to articulate that a CCN case requires a “cost-benefit analysis in which all of the benefits and detriments in evidence are considered.”¹⁷ Staff’s brief puts particular emphasis on this consideration of “all” evidence by bolding the entire sentence. Staff further quotes the 2005 order where it states that a detriment to the public interest can be found in a transaction “which tends to make rates less just or less reasonable.”¹⁸

Despite recognizing that the applicable standard requires consideration of all evidence, including potential rate increases, Staff noticeably does not rely upon all of the evidence of detriments and benefits available. Staff pushes aside considerations of the OWC rates being higher under the OUOC’s management than the Joint Bidders by refusing to consider that evidence. Staff instead elects to look at that issue later in a rate case.¹⁹ Staff witness Natelle Dietrich also readily admitted that Staff did not engage with Cedar Glen to consider the evidence of what the public desires, “did not review” the OUOC’s repair estimates, and did not consider whether other entities could adequately provide service to the OWC.²⁰ Staff witness David Roos told the Commission Chair that he “did not do a thorough review” of the Joint Bidders’ ability to provide safe and adequate service.²¹ Staff’s superficial review simply does not follow the model of a cost-benefit analysis considering all evidence.

Staff Counsel defends the Staff’s work by stating that Staff would have analyzed the Joint Bidders had they also filed a competing application.²² This response admits again that Staff did not consider all the evidence before it when making a public interest determination.

¹⁷ *Staff’s Initial Brief*, WA-2019-0185 p. 12 (Oct. 3, 2019) (quoting *Report and Order on Rehearing*, EO-2004-0108 p. 48 (Feb. 10, 2004)).

¹⁸ *Id.* at 13 (quoting *Report and Order on Rehearing*, EO-2004-0108 p. 49).

¹⁹ *Id.* at 16.

²⁰ Transcript, p. 212-13 & 226-27.

²¹ *Id.* at 251.

²² *Staff’s Initial Brief*, p. 17.

As a brief aside, let us consider the practical reality had Joint Bidders filed a separate CCN application competing with OUOC's. Even if the Joint Bidders had filed the necessary paperwork into the Commission's filing system, the OUOC would likely oppose merging the Joint Bidders' docket with this one given the Company's previous resistance to this Commission even considering the Joint Bidders' acquisition.²³ Given that the Staff did not revise its Recommendation until the OPC moved for the Commission to order Staff to do so, it is also doubtful that Staff would have proactively worked to merge the hypothetical Joint Bidders' docket with the OUOC's.²⁴ Therefore, the OUOC's Application would likely proceed before this Commission first simply because the OUOC filed its Application first. The implication of Staff's position of only considering evidence if parties file paperwork means that cases are not judged on their merits, but on the grounds of who got to the electronic filing system first. Staff's excuse that it would have considered the Joint Bidders' evidence if they filed a separate application is thus no excuse.

B. Staff Over Relies on a Misapplication of a Prior Commission Order.

Staff concludes the portion of its brief on the contested CCN by relying on a Commission order regarding the sale of a pipeline. Staff notes the Commission's prior disregard for competing service possibilities, relying upon the quote, "the record is clear that these proposals had been withdrawn," and argues that this Commission should similarly disregard the Joint Bidders' proposal.²⁵ OPC fails to see the applicability of Staff's analogy because, as Staff identifies, the competing proposal in *In re Utilicorp United* "had been withdrawn." That is not analogous to the current matter before this Commission. There is a currently existing contract for the Joint Bidders

²³ See *Amended Motion to Strike and/or Limit Scope of Proceedings*, WA-2019-0185

²⁴ See Transcript, p. 303-04.

²⁵ *Staff's Initial Brief*, p. 18 (quoting *Report and Order*, GM-97-435 (Oct. 15, 1998)).

to purchase and begin operating the OWC systems should OUOC's application fail. *Utilicorp* is simply not dispositive to this matter.

Staff attempts to twist the phrase "had been withdrawn" to its favor, but does so unsuccessfully. Staff maintains that the Commission "did not stop its statement with that fact. Rather it went on to state that the competing proposals had no bearing on the matter at hand."²⁶ Exactly though. The competing proposals in *Utilicorp* had no bearing because they had been withdrawn, which is not the case for the OWC assets.

Of course even if applicable, one Commission order does not outweigh the case law and other Commission orders endorsing an analysis of competing offers and more complete reviews of the rate implications of CCN proposals.²⁷ The Commission decided *Utilicorp* based on the particular facts it had before it. It does not control this docket.

C. Staff Misrepresents the Level of Analysis it Undertook Before Endorsing OUOC's Application.

Staff maintains that its analysis was adequate and proper to conclude that the OUOC's CCN application be approved, and that the Company should be granted an acquisition incentive. Simultaneously, Staff Counsel justifies Staff's decision to not consider all relevant evidence with the following excuse:

"Staff has only those resources available to it to review an existing application and therefore, cannot perform an investigation of a competing proposal."²⁸

Staff is a nearly two hundred person agency that devoted nine separate coauthors²⁹ to its Recommendation along with two different Staff attorneys being engaged during the evidentiary

²⁶ *Id.* at 19.

²⁷ *Public Counsel's Initial Brief*, p. 4-7.

²⁸ *Staff's Initial Brief*, p. 17.

²⁹ Although only eight authors wrote Staff's Revised Recommendation, James Merciel contributed to the first version.

hearing. The idea that its personnel of engineering specialists, accountants, and customer experience specialists could not have reviewed all evidence is unconvincing.

What review Staff did was minimal and does not justify its conclusion that the public interest will not be harmed by the OUOC's proposed acquisition. Staff Counsel relies upon Staff witness David Roos who supposedly "conducted a review of the OWC systems and found the improvements proposed by OUOC to be reasonable."³⁰ However, Roos' statement is directly contradicted by his superior's determination that Staff "did not review" OUOC's proposed repairs.³¹ Staff Counsel also claims that "Staff conducted a review of the proposed improvements and found them to be proper and consistent with the improvements of other water and sewer utilities."³² Notwithstanding Ms. Dietrich's testimony to the contrary, whatever "review" Staff undertook was surface-level though. Mr. Roos admitted at the evidentiary hearing that Staff did not send a single data request to Joint Bidders or Cedar Glen to audit the Joint Bidders' proposal or use the Joint Bidders' estimates to gauge the OUOC's.³³

Staff's brief also argues that "OUOC's plan for its proposed improvements at this point is generally reasonable," but that conclusion is impossible without comparing other available options.³⁴ "Reasonable" is a relative term, requiring relative comparisons in order for the word to have meaning. Given Ms. Dietrich's testimony that Staff did not consider other service alternatives for the OWC systems, it is impossible to know that the OUOC's plan is reasonable.³⁵

Defensive to criticism, Staff attacks the OPC for supposedly not performing "its own independent review of current proposed improvements" and for OPC witness Keri Roth not

³⁰ *Staff's Initial Brief*, p. 4.

³¹ Transcript, p. 212-13.

³² *Staff's Initial Brief*, p. 15.

³³ Transcript p. 256.

³⁴ *Staff's Initial Brief*, p. 6.

³⁵ Transcript, p. 226-27.

conducting a “visual inspection” of the OWC assets.³⁶ Ms. Roth’s review of the Application and Staff’s Recommendation is an independent review though. There may also be practical reasons why the OPC’s sole witness available for this case would be unavailable for a site visit. Furthermore, it is important to remember that Staff is making these criticisms of inadequacy at a party that does not bear the burden of proof. The OUOC must prove its case, and Staff has chosen to join the OUOC in that endeavor. Maligning the OPC for not proving up a case misses the point.

Staff Counsel also claims that the “OPC’s only argument against OUOC and in favor of the Joint Bidders appears to be the testimony of the Joint Bidders that their rates may be lower than the future rates of OUOC.”³⁷ But simply reading Ms. Roth’s testimony proves Staff’s statement to be false. Ms. Roth noted that another, independent intervenor determined that OUOC would not provide the most efficient, lowest cost option for consumers. As Ms. Roth quotes Great Southern Bank witness Anthony Soukenik, “Based upon the testimony and data request responses that have been filed and issued by the various parties in the matter to date, it became apparent that Osage Utility Operating Company, Inc. would not provide the least cost, capable utility service.”³⁸

Staff’s interpretation of the OPC only relying upon the Joint Bidders also ignores OPC Counsel’s opening statement. Therein the OPC considered the future impact that OUOC’s ownership of the OWC may have based on the Company’s history of asking for financing with extraordinarily high costs of debt.³⁹

Staff Counsel also argues that “unlike Staff’s investigation” OPC did not research “compliance records.”⁴⁰ This is a misrepresentation of the record. Staff witnesses Ms. Dietrich and

³⁶ *Staff’s Initial Brief*, p. 16.

³⁷ *Id.*

³⁸ Exhibit 203, *Surrebuttal Testimony of Keri Roth*, WA-2019-0185 p. 4 (Sep. 4, 2019).

³⁹ Transcript, p. 44.

⁴⁰ *Staff’s Initial Brief*, p. 16.

Mr. Roos' confession that Staff did not consider alternative operators for the OWC systems, and Staff not inquiring as to the Joint Bidders' environmental fitness, dispute the claim that Staff's investigation actually involved compliance records. Staff Counsel's basis for OPC supposedly not reviewing such records is Ms. Roth's acknowledgement that she did not personally review compliance records. That does not mean that the OPC's office did not review compliance records. As Ms. Roth clearly stated at the hearing, "internal discussions within our office" were had regarding compliance records.⁴¹ Whereas the OPC used its resources to consider all evidence, Staff uses post hoc excuses for why it did not consider all available information.

D. Staff's Assurance that OUOC Met Every Requirement of the Acquisition Incentive Rule is Contradicted by its own Witnesses, and is Based Merely on OUOC's Word.

Staff's maintenance of its recommendation that the OUOC should receive an acquisition incentive is contradicted by the record. Staff's brief states that the "OUOC has met each of the qualifications of 20 CSR 4240-10.085."⁴² One such qualification for an incentive is that the acquisition would be unlikely to occur without the probability of obtaining an acquisition incentive.⁴³ Staff's answer to this qualification is that the "OUOC has testified that the acquisition would be unlikely to occur with the probability of an acquisition incentive and Staff has not found evidence contrary."⁴⁴

Staff's unawareness of contrary evidence is not surprising because, as already discussed, Staff did not look at all available evidence. As Ms. Dietrich explained to Staff Counsel on redirect, "Staff did not make a determination on its own. Whether acquisition would have occurred or not,

⁴¹ Transcript, p. 316.

⁴² *Staff's Initial Brief*, p. 21.

⁴³ 20 CSR 4240-10.085(4).

⁴⁴ *Staff's Initial Brief*, p. 22.

Staff accepted Mr. Cox's statement."⁴⁵ Staff witness Kim Bolin likewise does not characterize her testimony as concluding that the OUOC met that element.⁴⁶ Staff accepted the OUOC's statement despite it also believing that it has "no way of independently verifying that though."⁴⁷ If it is truly impossible to independently verify an element of a claim, then logically the OUOC as proponents cannot meet any burden of proof to obtain the incentive.

Staff's argument that an essential element of the acquisition incentive request cannot be verified wholly negates Staff Counsel's argument that the OUOC met every element. Consequentially, Staff is recommending that the OUOC get an added return via an incentive, without personally knowing that the OUOC met all of the elements, because Staff believes the rule does not require "Staff to make that finding" as to whether the acquisition would occur regardless of an incentive.⁴⁸ Since Staff did not make that finding, Staff Counsel cannot now claim that the OUOC met every element of the Commission's rule.

IV. Conclusion

The OUOC fails to demonstrate that its acquisition of the OWC assets will not be a detriment to the public interest. The Joint Bidders' proposal and Cedar Glen's wishes present significant doubt to that effect. This Commission should consider all evidence before it, and reject the OUOC's application on the grounds that a more cost-effective path forward for the OWC to reach environmental compliance status is possible.

The OUOC's Application also fails to meet every requisite element of the acquisition incentive rule. Beyond not showing that the OUOC's acquisition positively serves the public

⁴⁵ Transcript, p. 238; *see also* Exhibit 200.

⁴⁶ Transcript, p. 265.

⁴⁷ *Id.* at 219.

⁴⁸ *Id.*

interest, the OUOC's evidence that the OWC purchase would not occur but for an incentive is far outweighed by contrary considerations.

WHEREFORE, the OPC presents its Reply Brief, and renews its request for the Commission to deny OUOC's requested CCN transfer and acquisition incentive.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this 17th day of October, 2019, with notice of the same being sent to all counsel of record.

/s/ Caleb Hall