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	)	**Case No. WA-2019-0185**
and Sewer Assets and for a Certificate	)	
Of Convenience and Necessity	)	

STAFF'S REPLY BRIEF

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Introduction

The purpose of a reply brief is to respond to the arguments made by opposing counsel.[1] It should leave the tribunal with a clear understanding of the reasons that the writer's client should win.[2] Five parties filed initial briefs in this case. In addition to the Applicants,[3] Staff wrote in support of the proposed transaction. Cedar Glen Condominium Owners Association, Inc. ("Cedar Glen"), the Joint Bidders,[4] and the Office of Public Counsel ("Public Counsel") wrote in opposition to the proposed transaction.

Throughout their Initial Briefs, Public Counsel, the Joint Bidders, and Cedar Glen urge the Commission that it must compare Osage Utility Operating Company, Inc.'s ("OUOC") Application to the proposal of the Joint Bidders when determining whether or not OUOC's acquisition of the Osage Water Company ("OWC") systems would be detrimental to the public interest.[5] While the parties opposing OUOC's Application raise various arguments as to why Commission approval of OUOC's Application would be detrimental to the public interest, the overarching theme appears to be potential future rate impact to the customers of the OWC systems.[6] Further, they weigh that potential rate impact against a hypothetical acquisition by the Joint Bidders, one that has not been properly presented to the Commission for its approval, as opposed to the current state of the systems.

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[1] *"How to Write An Effective Reply Brief,"* American Bar Association Section on Litigation (Winter 2012).
[2] R.C. Kraus, *"Crafting an Influential and Effective Reply Brief,"* Appellate Issues, Council of Appellate Lawyers (August 2012).
[3] Osage Utility Operating Company, Inc.
[4] Public Water Supply District No. 5 of Camden County, Lake Area Waste Water Association, Inc., and Missouri Water Association, Inc.
[5] *Joint Bidders' Initial Brief*, p. 4; *Public Counsel's Initial Brief,* p. 8; *Cedar Glen's Initial Brief,* p. 10
[6] *Cedar Glen's Initial Brief,* p. 16; *Public Counsel's Initial Brief,* pp. 7-13; *Joint Bidders' Initial Brief*, pp. 7-11.

However, while the opposing parties are apt to point out potential detriments, they fail to balance these detriments with the requisite benefits that would come with the acquisition of the OWC systems by OUOC. Perhaps, the opposing parties would have you believe there are no benefits; however, the weight of the evidence clearly indicates otherwise. When making its decision, Staff implores the Commission heed its own words as stated in its *Report and Order in* Case No. EM-2007-0374, *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc.,* "[t]he mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service."[7]

Based on the positions and arguments outlined in its *Initial Brief,* Staff shares OUOC's opinion that acquisition of the OWC systems by OUOC will not be detrimental to the public interest, and will not burden the Commission with repetition of those points. However, in response to the Initial Briefs of the other parties, Staff now lays out its points in opposition.

[7] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* 266 P.U.R.4th 1 (July 1, 2008)(quoting *Re Union Electric Company,* Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005)).

Argument

I.

Public Counsel's argument that OUOC's application is inherently deficient in that the statute at issue contemplates the seller seeking approval, not the buyer, is without merit.

As an initial matter, no party raised the sufficiency of OUOC's Application as an issue for Commission consideration, either in their lists of issues filed with the Commission prior to hearing, or at the evidentiary hearing. However, the Commission has heard this argument recently, more than once. In Case No. WM-2018-0116,[8] the Commission, in its April 25, 2018, *Order Denying Request to Joint Parties*, rejected a similar argument posed by Public Counsel. Public Counsel moved the Commission enjoin the various parties who wished to sell their water and sewer assets to Confluence Rivers Utility Operating Company.[9] However, the Commission denied Public Counsel's motion, stating:

> The plain language of the statute upon which OPC relies states that "…*Any person seeking any order under this subsection*…." Thus, the General Assembly contemplated that the seller of public utility assets is not the only party who can request relief under this subsection. This conclusion is consistent with the purpose of the statute, which is "… to ensure the continuation of adequate service to the public served by the utility." Furthermore, the relevant Commission rules do not require the assets'

[8] *In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. to Acquire Certain Water and Sewer Assets, For a Certificate of Convenience and Necessity, and, in Connection Therewith, To Issue Indebtedness and Encumber Assets.* In this matter, Confluence Rivers Utility Operating Company sought to acquire multiple regulated and nonregulated water and sewer utility systems.

[9] *In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. to Acquire Certain Water and Sewer Assets, For a Certificate of Convenience and Necessity, and, in Connection Therewith, To Issue Indebtedness and Encumber Assets,* Case No. WM-2018-0116, *Public Counsel's Response to Staff's Recommendation and Motion for Hearing,* Filed March 15, 2018, EFIS Item 22.

> sellers to be parties in the case. Confluence Rivers' application for relief under Section 393.190 RSMo is not insufficient due to the sellers not being parties. For these reasons, the Commission will deny OPC's request. (Internal citations omitted).[10]

Most recently, in Case No. WA-2019-0299,[11] the Commission again ruled on this issue. The Commission, in its June 24, 2019, *Order Addressing Motions,* responding to the Lake Perry Lot Owners' Association's argument that only the seller, not the buyer, may file case to transfer ownership of the utility, ruled as such:

> The Commission previously decided this issue in File Number WM-2018-0116, also involving a purchase of water systems by Confluence Rivers (including Port Perry). In its *Order Denying Request to Join Parties* the Commission denied OPC's request to enjoin the proceedings until the sellers are made parties to the case. The Commission noted the statute relied upon in the motion, Section 393.190.1, RSMo, also states "… *Any person seeking any order under this subsection* …" (emphasis in original order). The Order concludes that the "General Assembly contemplated that the seller of public utility assets is not the only party who can request relief under this subsection."
>
> A prior Commission decision is not binding precedent on later Commission decision. However, consistency between cases, when appropriate, is beneficial and preferred. While not bound by the order in File Number WM-2018-0116, the Commission finds no fault with the reasoning, and finds no new arguments on the issue. Therefore, the Commission will deny the motion to dismiss. (Internal citations omitted).[12]

Since the issuance of the Commission's June 24, 2019, *Order Addressing Motions* in WA-2019-0299, no amendments to Section 393.190, RSMo, have been passed by the

[10] *Id. Order Denying Request to Join Parties*, Issued April 25, 2018, EFIS Item 39.
[11] *In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. for Authority to Acquire Certain Water and Sewer Assets, and for a Certificate of Convenience and Necessity.* In this matter, Confluence Rivers Utility Operating Company filed for authority to acquire Port Perry Service Company, a water and sewer utility currently regulated by this Commission.
[12] *In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. for Authority to Acquire Certain Water and Sewer Assets, and for a Certificate of Convenience and Necessity,* Case No. WA-2019-0299, *Order Addressing Motions*, Issued June 24, 2018, EFIS Item 15.

legislature. Further, no amendments to Commission Rule 20 CSR 4240 10.105,[13] nor any new rules concerning the sale of utility assets, have been promulgated by this Commission. Therefore, just as it did in the prior instances outlined supra, the Commission should give this argument no weight, as the plain language of Section 393.190, RSMo, is clear, and the Commission has no rule requiring the seller of an asset to be a party to this case.

II.

The arguments raised by Public Counsel, the Joint Bidders, and Cedar Glen in regard to public detriment are without merit.

In applying the 'no detriment' standard, the parties opposed to the approval of OUOC's application generally raise the specter of an inappropriate rate increase directly resulting from the sale of the OWC systems to OUOC. Within that overarching theme, the parties raise several arguments, three of which Staff will take up in order below:

1) The Commission must compare the OUOC Application to the proposal of the Joint Bidders and Cedar Glen in order to determine whether a detriment would occur as a result of the acquisition;[14]
2) The estimated costs of the preliminary improvements as proposed by OUOC are excessive;[15] and

[13] Filing Requirements for Electric, Gas, Water, Sewer, and Steam Heating Utility Applications for Authority to Sell, Assign, Lease, or Transfer Assets.
[14] *Cedar Glen's Initial Brief*, p. 10; *Joint Bidders' Initial Brief* p. 4; *Public Counsel's Initial Brief*, p. 8.
[15] *Public Counsel's Initial Brief,* p. 8; *Joint Bidders' Initial Brief*, p. 4; *Cedar Glen's Initial Brief,* p. 17.

3) The history of CSWR affiliates requesting relatively high costs of debt is a detriment to the public.[16]

A.

Consideration of competing bids

Comparison of bids

In its *Initial Brief*, OUOC states that its acquisition of the water and sewer assets of OWC is "not detrimental" to the public interest, and is, in fact, a benefit to the OWC systems, customers and public interest *as compared to the status quo*.[17] Staff agrees with this statement. The existence of other interested purchasers of this system, even those that would not include a return on equity in their rates, does not necessarily cause OUOC's Application to be detrimental to the public interest. The other parties, however, view otherwise. The Public Counsel goes as far in its *Initial Brief* to state, "[t]he OUOC's application is detrimental to the public interest because it forecloses other potential operators who can provide safe and adequate service at a more efficient cost."[18] Cedar Glen states that "the issue at root is which of the two [referring to the proposals of OUOC and the Joint Bidders] will do the least harm to the public, or conversely, which will better serve the public."[19] The Joint Bidders, in their *Initial Brief,* state that the Commission is necessarily required to "compare the OUOC's application, proposed improvements and

[16] *Cedar Glen's Initial Brief*, p. 14; *Public Counsel's Initial Brief*, p. 11; *Joint Bidders' Initial Brief*, p. 11.
[17] *OUOC's Initial Brief*, p. 2.
[18] *Public Counsel Initial Brief*, p. 7.
[19] *Cedar Glen's Initial Brief*, p. 1.

anticipated rates and profit to those of the Joint Bidders, as presented in the evidence before the Commission."[20]

Staff recognizes the unique nature of this case; typically, a transfer of assets case before the Commission involves a transaction between a willing seller and a willing buyer. However, the matter before the Commission has the added wrinkle of a bankruptcy proceeding, and a further wrinkle of the OWC assets being disposed of via auction. Staff fully recognizes that there were multiple bidders at this auction,[21] however, the bankruptcy trustee declared CSWR the successful purchaser at auction, and the bankruptcy court approved the sale of the assets to OUOC.[22] While the Joint Bidders have a contingent contract to purchase the OWC systems,[23] it is important to remember that their contract is not valid unless and until the Commission denies OUOC's Application. Requiring a comparison of OUOC's Application to the Joint Bidders' proposal effectively moves the goalposts. As stated supra, Cedar Glen has presented the issue of comparing proposals in order to determine "which will better serve the public." This is clearly a misapplication of the "no detriment" standard; Cedar Glen, and the other opposing parties, essentially state that the Commission must determine which proposal confers the largest benefit to the public. However, as stated by the Missouri Supreme Court in *State ex rel. St. Louis v. Public Service Commission*,[24] that is not the Commission's role in these cases:

[20] *Joint Bidders' Initial Brief*, p. 4.
[21] Ex. 100C, Dietrich Direct Schedule ND-d2, pp. 10-13.
[22] *Id.* at p. 13.
[23] *Id.* The Joint Bidders were designated the first Back-Up Bidder by the Bankruptcy Trustee. It is interesting to note that Missouri American Water Company ("MACW") also submitted bids to acquire the systems, and was designated by the Bankruptcy Trustee as the second Back-Up Bidder. However, Public Counsel, Cedar Glen, nor the Joint Bidders reference this fact in their *Initial Briefs,* much less incorporate a consideration of MAWC's bid in determining potential detriment to the public interest.
[24] 73 S.W.2d 393 (Mo. 1934).

> It is not [the Public Service Commissions'] province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment…[25]

Public Counsel's reliance on Intercon Gas is misplaced.

In support of its contention that the Commission must consider other potential purchasers when determining whether a sale of assets would be detrimental to the public interest, Public Counsel relies on the *Intercon Gas* case.[26] However, *Intercon* is easily distinguishable to the case at hand. First and foremost, the *Intercon* case was a request for a new Certificate of Convenience and Necessity to construct, own, operate, and maintain intrastate natural gas pipelines across the state of Missouri, not a request to dispose of assets.[27] As stated in Staff's *Initial Brief*, while the applicable standard for awarding a CCN is rooted in a public interest determination, it is not a "no detriment" standard. The court in *Intercon,* in explaining the standard to apply in CCN cases, stated:

> The term "necessity" does not mean "essential" or "absolutely indispensable," but that an additional service would be an improvement justifying its cost. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate.[28]

[25] *Id.* at 400.
[26] *Public Counsel Initial Brief,* p. 6.
[27] *State ex rel. Intercon Gas, Inc., v. Public Serv. Com'n of Mo., et al.* 848 S.W.2d 593 (Mo. App. 1993).
[28] *Id.* at 597-98.

While Public Counsel is correct when it states the Commission considered competing offers in *Intercon,* it omits other pertinent details. Of note, the *Intercon* case involved several applications for CCNs from parties wishing to secure authority from the Commission to construct *new* natural gas pipelines in close proximity to each other, applications which were consolidated for the Commission's joint consideration at the evidentiary hearing.[29] Here, the Commission has no alternative application to consider or conjoin with OUOC's. Additionally, the Commission in the *Intercon* case applied the standard of necessary or convenient for the public service to determine whether the public interest would be served by the construction of *new* pipelines.[30] In the matter at hand, there is no new system to be constructed; the systems at issue already exist. As stated by OUOC in its *Initial Brief,* it makes sense in the context of an application for a CCN for the Commission to consider providers of the same or similar utility service available in the service area requested, because, only in extraordinary situations would the Commission want to authorize new construction that would overlap existing utility systems.[31] However, there is no danger of that happening here, as OWC is currently the only utility authorized to serve the service area at issue in this case; a CCN has already been granted by this Commission, and thus the service is already "necessary or convenient for the public service." For these reasons, the *Intercon* case can be distinguished from the issues presented to the Commission in this matter. The Missouri Court of Appeals along with this

[29] *State ex rel. Intercon Gas, Inc., v. Public Serv. Com'n of Mo., et al.* 848 S.W.2d 593 (Mo. App. 1993).
[30] *Id.* at 597-598.
[31] *OUOC's Initial Brief*, p. 17.

Commission have consistently applied the standard of "not detrimental to the public interest" to all cases involving the transfer or sale of water and sewer utility assets.[32]

Case No. EO-2008-0046, In the Matter of the Application of Aquila, Inc., d/b/a Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operational Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc. is distinguishable.

Public Counsel also points to Case NO. EO-2008-0046,[33] as support for its contention that the Commission must consider 'hypothetical' transactions to measure potential detriment to the public interest.[34] However, the Aquila MISO/SPP Case is unique in its own way and concerns a situation much different than that in this case. The following findings of fact included in the Commission's *Report & Order* in that case provide background:[35]

> 5. Aquila is already a member of Southwest Power Pool. Its predecessor companies, Missouri Public Service Company and St. Joseph Light and Power joined that organization in 1951 and 1958, respectively. Aquila currently contracts with Southwest Power Pool for certain services. Specifically, Aquila receives tariff administration, OASIS administration, available transmission capacity and total transmission capacity calculations, scheduling agent, and regional transmission planning from Southwest Power Pool. Aquila does not, however, participate in Southwest Power Pool's EIS market.[36]

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[32] *Staff Initial Brief,* pp. 9-15.
[33] *In the Matter of the Application of Aquila Networks-MPS and Aquila Networks-L&P for Authority to Transfer Operation Control of Certain Transmission Assets to the Midwest Independent Transmission System Operator, Inc.* Case No. EO-2008-0046, *Report and Order*, Issued October 9, 2008, EFIS Item 119.
[34] *Public Counsel's Initial Brief*, p. 6.
[35] *Aquila MISO/SPP*, *Report and Order.*
[36] *Id.* at 6.

8. In 1999, Aquila, then known as UtiliCorp, agreed to merge with St. Joseph Light & Power Company. That proposed merger required the approval of both this Commission and FERC. In its order approving the merger, FERC required the merged company to file a plan to join an RTO. At the time, Midwest ISO was the only FERC approved RTO in the area, so Aquila entered into an agreement to join Midwest ISO on July 16, 2001.[37]

* * *

13. In its testimony, Aquila confirmed that it filed the application currently before the Commission to satisfy its obligation under the 2003 FERC settlement with Midwest ISO. At the hearing, Aquila's witness, Dennis Odell, indicated Aquila's concern that it would be required to pay financial penalties to Midwest ISO if it breached its contractual obligation to again apply for membership in Midwest ISO. When asked at the hearing whether Aquila would have applied for membership in Midwest ISO in the absence of its obligation under the 2003 settlement, Odell replied that he did not know.[38]

* * *

14. As part of its application, Aquila submitted the results of a cost-benefit analysis performed by CRA International. CRA is an independent consulting firm hired by Aquila to analyze the costs and benefits of Aquila's various options for joining, or not joining, an RTO. After consulting with a stakeholder group that included Midwest ISO, Southwest Power Pool, Staff, and Public Counsel, Aquila instructed CRA to consider three scenarios: membership in Midwest ISO; membership in Southwest Power Pool; and a move to a stand-alone status in which Aquila would perform transmission and reliability related functions on its own. CRA completed the study on March 28, 2007, and Aquila submitted a copy of the study as part of its application, and as an attachment to Dennis Odell's direct testimony.[39]

* * *

[37] *Id.* at 7.
[38] *Id.* at 8.
[39] *Id.* at 9.

> 25. One other development that occurred during the course of this case will have a definite impact on the possible benefits to Aquila from joining Midwest ISO. On July 1, 2008, in Case No. EM-2007-0374, the Commission approved the acquisition of Aquila by Great Plains Energy Incorporated, the parent company of Kansas City Power & Light Company (KCPL). KCPL is currently a member of Southwest Power Pool.[40]

The Commission's decision also included the following:

> Nevertheless, Aquila has asked for permission to join Midwest ISO. Under other circumstances, the Commission might be inclined to defer to the business judgment of Aquila if there were a good reason to do so. However, it is clear that the only reason Aquila has applied to join Midwest ISO instead of Southwest Power Pool is its obligation to do so under a six-year-old agreement with Midwest ISO in a case before FERC.[41]
>
> Aquila is now free to apply to the Commission for authority to join whichever RTO best meets its needs.[42]

It is important to note that Aquila was already a member of SPP, the agreement to join MISO had arisen many years before and under much different circumstances, Aquila itself provided the evidence of the various options it had for RTO membership, and, more recently, Aquila and KCPL had announced a transaction where Aquila would be purchased by KCPL, an existing member of SPP. This current case bears little resemblance to the asset transfer case that was before the Commission in Case No. EO-2008-0046, and should not be relied upon.

The Commission should of course heed the guidance of the Court in *AG Processing,*[43] and consider and decide all necessary and essential issues; should the

[40] *Id.* at 13-14.
[41] *Id.* at 18.
[42] *Id.* at 19.
[43] *State ex rel. AG Processing, Inc. v. Public Service Commission of the State of Missouri*, 120 S.W.3d 732 (Mo. Banc 2003).

Commission believe aspects of the Joint Bidders' proposal shows detriment in regard OUOC's Application, it should consider them in making its decision. However, again, it is not the role of the Commission in this matter to choose the most beneficial outcome by weighing competing proposals against each other; as stated in *Stated ex rel. City of St. Louis*, "it is not [public service commissions'] province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment."[44] What the Commission must do is consider all possible benefits and detriments to approval of OUOC's Application on its own merits, and determine whether the proposed transaction is likely to be a net benefit, or a net detriment to the public.[45]

B.

Costs of Proposed Improvements

Public Counsel, Cedar Glen, and the Joint Bidders challenge OUOC's estimated costs of improvements to the OWC systems to varying degrees.[46] While Cedar Glen, in its *Initial Brief*, opines generally on the potential negative impact the cost of OUOC's proposed improvements may have on customer rates, it focuses much of its discussion on linking Public Water Supply District No. 5's ("PWSD#5") and Cedar Glen's water systems. Cedar Glen references the value of interconnecting the systems, permitting a

[44] 73 S.W.2d 393, 400 (Mo. 1934).
[45] *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions,* Case No. EO-2004-0108. (October 6, 2004), p. 42.
[46] *Public Counsel's Brief*, p. 8-9; *Cedar Glen's Initial Brief*, pp. 14-18; *Joint Bidders' Initial Brief*, p. 7-9.

backup water source for each of the systems, and criticizes OUOC for not including the cost of a secondary water source at Cedar Glen in its initial estimates for the costs to improve the OWC assets.[47] However, PSWD#5, nor the Joint Bidders, have provided estimates for interconnection and road crossing proposed by the Joint Bidders.[48] Further, PWSD#5's own witness suggested at hearing that, in his professional judgement, the project could take longer than 24 months to complete.[49] As explained by OUOC witness Thomas in his surrebuttal testimony, the ultimate expense associated with such an interconnection would be tied to the number of easements required, the length of the main, any solid rock excavation, and boring an encasement necessary.[50] As noted in OUOC's *Initial Brief,* none of these costs have been taken into account in the Cedar Glen estimates provided by PWSD#5.[51]

The Joint Bidders, in their *Initial Brief*, also focus nearly all of their attention on OUOC's proposed improvements to the Cedar Glen systems,[52] specifically implying that OUOC's cost estimates too high. However, it is important to consider these statements in conjunction with the fact that the Joint Bidders have provided no estimates for the rehabilitation of the other OWC systems. As stated by their witness Neddie Goss, there is still much uncertainty as to the necessary repairs to the Eagle Woods, Cimmaron Bay and Chelsea Rose systems.[53] Conversely, Staff witness Roos testified at hearing that in

[47] *Cedar Glen Initial Brief,* p. 17-18.
[48] Tr. 255: 1-7, Roos; Tr. 340: 18-341: 5, Krehbiel.
[49] Tr. 340: 8-12; 364: 12-17; 365: 1-11, Kriehbiel.
[50] Ex. 7, Thomas Sur., pp. 16-17
[51] *OUOC's Initial Brief,* pp. 23-24
[52] *Joint Bidders' Initial Brief*, p. 7-9.
[53] Tr. 312:3-313:12, where Mr. Goss responded that his company had not investigated the systems to determine necessary repairs in response to counsel's question regarding the necessary repairs to be made at the three systems his company would be operating; *See* Ex. 401 Goss Direct pp. 4:1-4; 4:20-5:2; and 5:18-23.

his opinion, the improvements proposed by OUOC are reasonable,[54] and the Company has provided "a complete preliminary proposal with cost estimates,"[55] which "is a good road map for safe and adequate service."[56] The same cannot be said for the Joint Bidders.[57]

Public Counsel states in its *Initial Brief* that, while OWC has not met the "requisite 'safe and adequate' standard to serve its customers for at least 14 years[,]" "not safe does not mean imminent harm," and suggests that the necessary repairs to the system are cosmetic in nature.[58] Staff finds this argument concerning, especially considering that no representative of Public Counsel actually visited the OWC systems or performed a review of the necessary improvements to the systems.[59] In fact, Public Counsel's single witness testified at hearing that she does not hold the qualifications necessary to review the proposed repairs or improvements to the systems,[60] and by her own admission, did not conduct an audit or investigation related to this proceeding.[61] Public Counsel dismisses Staff's use of the TMF criteria in its investigations of acquisitions as "framework" while at the same time failing to acknowledge that they are statutory mandates for Community Drinking Water systems in Missouri.[62] Staff is unclear what more definitive guidance Public Counsel could find necessary than our state's statutes. In support of its assertion that OUOC's cost estimates are excessive, Public Counsel offers that its witness, Ms.

[54] Tr. 256: 8-12.
[55] Tr. 252: 1-8.
[56] Tr. 252: 24-253: 2.
[57] Tr. 252: 9-10; Tr. 253: 18-22.
[58] *Public Counsel's Initial Brief,* p. 3.
[59] Tr. 311:1-5.
[60] *Id.*
[61] Tr. 309:5-10.
[62] Section 640.115, RSMo.

Roth, has lived in Jefferson City for several years and has never "heard of any public health scare or imminent harm for current OWC customers that would necessitate extreme repairs."[63] It bears repeating that Ms. Roth was the only witness Public Counsel provided in this proceeding; Ms. Roth's education is as an auditor, not as an engineer. Public Counsel's witness is in no way qualified to testify as to the health dangers resulting from a dysfunctional water or wastewater system. Public Counsel's arguments are especially concerning considering the testimonies of OUOC witness Thomas and Staff witness Roos that they have personally observed wastewater bypassing treatment processes at the Eagle Woods and Chelsea Rose systems. Staff fails to see any value in Public Counsel's arguments considering its lack of any individual investigation into the systems, and its cavalier approach in considering possible public health concerns.

While Staff understands that customers generally do not favor rate increases, it is important to consider, that while a future rate increase may be likely, OUOC is not seeking an immediate rate increase in this proceeding. Further, it has a clear plan for improvements to the systems which are necessary to ensure safety and quality services to the customers of the OWC systems.[64] While Public Counsel, Cedar Glen, and the Joint Bidders have questioned the necessity and cost of OUOC's proposals, they fail to acknowledge the Joint Bidders incomplete plans for improvements for three of the four OWC service areas.[65] OUOC has a complete plan, subject to refinement, for improvements to all of the OWC systems, not just to the Cedar Glen systems.[66] Its

[63] *Public Counsel's Initial Brief*, p. 9; Tr. 319:11-20.
[64] Ex. 6 Thomas Direct, pp. 4-23.
[65] *Joint Bidders Initial Brief,* p. 7.
[66] *See* Ex. 6 Thomas Direct, pp. 4-23.

affiliates have a history of providing safe and adequate service,[67] and have proven they have the technical, managerial and financial capability to operate water and sewer systems with a troubled history.[68] Further, a regulated system is subject to Commission oversight so there will be opportunities to review any improvements or other costs which are sought to be included in rates going forward.[69] Considering these benefits, along with the preliminary cost estimates for necessary repairs to the OWC systems, Staff fails to see a net detriment.

C.

OUOC Financing

Public Counsel contemplates the rate of debt at which OUOC could, in the future, secure from the Commission as a potential detriment to the public interest.[70] As evidence of potential detriment, OPC references the financing requests of OUOC's affiliates.[71] It is important to note that OUOC has not included a request for financing in this case, however, OUOC may request long-term financing at some point in the future. However, Public Counsel ignores the reality that should the Commission approve OUOC's Application, any future request for secured long-term debt must necessarily be approved by this Commission before its issuance.[72] Further, any recovery of the costs of such debt will be reviewed by this Commission in a future rates case. Public Counsel also ignores

[67] *Staff's Initial Brief,* fn. 52.
[68] *Staff's Initial brief,* p. 16.
[69] Section 393.190, RSMo.
[70] *Public Counsel's Initial Brief,* p. 9-11.
[71] *OPC Initial Brief* P. 10.
[72] *See* Section 393.200, RSMo.

OUOC's own estimates for its potential cost of debt,[73] and the fact that OUOC's parent company, CSWR, has a new ownership structure since the filing of the affiliate cases referenced by Public Counsel.[74] This obliviousness is curious, considering Public Counsel was a signatory to a unanimous stipulation and agreement in Case No. WM-2018-0116 outlining CSWR's current ownership structure.[75] That the case involved the acquisition of 18 separate water and sewer systems by Confluence Rivers Utility Operating Company, an OUOC affiliate, and the unanimous agreement included express representations by Confluence Rivers that its new ownership structure should facilitate (i) a move toward a 50-50 mix of equity and debt for its capital structure in a future rate case; (ii) obtaining debt financing that will result in a lower cost of debt than the rate contained in Confluence's original filing, and (iii) obtaining debt financing that does not contain a make whole penalty.[76] Further, the Commission itself, in its *Order Approving Stipulation and Agreement and Granting Certificates of Convenience and Necessity,* found that the Company's ownership restructuring, as set forth in the Agreement, has improved the Company's financial status, and should facilitate the accomplishment of the representations made by the Company in the unanimous agreement.[77]

[73] Tr. 103: 4-9.
[74] *See In the Matter of the Application of Elm Hills Utility Operating Company, Inc., and Missouri Utilities Company for Elm Hills to Acquire Certain Water and Sewer Assets of Missouri Utilities Company, for a Certificate of Convenience and Necessity, and, in Connection Therewith, to Issue Indebtedness and Encumber Assets,* Case No. SM-2017-0150, Notice*,* filed November 29, 2018, EFIS Item 48.
[75] *See In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. to Acquire Certain Water and Sewer Assets, For a Certificate of Convenience and Necessity, and, in Connection Therewith, To Issue Indebtedness and Encumber Assets* SM-2017-0117 and WM-2018-0116, *Unanimous Stipulation and Agreemen*t, filed December 14, 2018, EFIS Item 85.
[76] *Id*.
[77] *Id. Order Approving Stipulation and Agreement and Granting Certificates of Convenience and Necessity*, Issued February 14, 2019, EFIS Item 92.

While several parties in their Initial Briefs focus their arguments on the fact that there is a potential for a rate increase in the future should OUOC be granted the authority to acquire the OWC assets, these parties all fail to acknowledge that the determination of whether an application is **"not detrimental to the public interest"** involves a balancing test of the net benefits and net detriments that could or will result from approving a specific application of acquisition.[78] In fact, these parties fail to identify any potential benefits, despite the track record of CSWR affiliates rehabilitating distressed systems in this state. Regardless, the benefits of approving OUOC's application are clear. They include: 1) the *Application* is presently before the Commission and will result in immediate acquisition once the Commission approves it;[79] 2) OUOC has a complete plan, subject to refinement, for improvements to all of the OWC systems, not just to the Cedar Glen systems;[80] 3) OUOC's affiliates have a history of providing safe and adequate service;[81] 4) OUOC's affiliates have proven they have the technical, managerial and financial capability to operate water and sewer systems with a troubled history;[82] and 5) a regulated system is subject to Commission oversight so there will be opportunities to review any improvements or other costs which are sought to be included in rates going forward.[83] As stated supra, the mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that

[78] *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions,* Case No. EO-2004-0108. (October 6, 2004), p. 42.
[79] Ex. 1 Cox Direct P. 14:3-11.
[80] Ex. 6 Thomas Direct Pp. 4-23.
[81] *Staff's Initial Brief,* fn. 52.
[82] *Staff's Initial Brief,* p. 16.
[83] Section 393.190, RSMo.

threatens the safety or adequacy of the service.[84] In the matter at hand, the benefits of the acquisition, clearly outweigh any detriment.

III.

Public Counsel's claim that the Commission's Incentives for Acquisition of Nonviable Utilities Rule lacks legal authority is without merit.

Staff, in its *Initial Brief,* laid out each criterion to meet Commission rule 20 CSR 4240-10.085 and provided its support for finding that OUOC had met each of those criteria,[85] and will not further burden the Commission with repetition of those points. That being said, Staff will respond to Public Counsel's argument that there is insufficient legal basis for the Commission's acquisition incentive rule. In its *Initial Brief,* Public Counsel questions the Commission's authority to provide acquiring utilities both a rate of return adjustment, and a debit acquisition adjustment.[86] It states that, regardless of form, either acquisition incentive allowed by the rule represents isolated ratemaking treatment outside of a rate case; in other words, 'single-issue ratemaking.'[87] First, Staff would question why Public Counsel raises this point now, when the rule was implemented January 30, 2019. While Public Counsel participated in the rulemaking process, and voiced concern regarding the legal basis for the rule then, Public Counsel chose to not challenge the

[84] *In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief.,* 266 P.U.R.4th 1 (July 1, 2008)(quoting *Re Union Electric Company,* Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005)).
[85] *Staff's Initial Brief* Pp. 19-20.
[86] *Public Counsel's Initial Brief*, p. 21.
[87] *Id.*

promulgation of the rule. Second, Public Counsel's assertion that the Commission acquisition incentive rule constitutes single issue rate making is clearly incorrect.

Single issue rate making occurs when a utility's rate is adjusted on the basis of a single factor, without consideration of all relevant factors.[88] Public Counsel is correct in stating that single issue ratemaking is generally prohibited in Missouri, however, while 20 CSR 4240-10.085 requires a utility to request an acquisition incentive at the beginning of a case seeking authority under sections 393.190 or 393.170, RSMo, the rule contemplates application of an acquisition incentive in the requesting utility's next general rate proceeding. Further, the rule states that the Commission may apply the acquisition incentive if the Commission determines that it will not result in unjust or unreasonable rates.[89] The timing of these requirements are clear. First, the requirement to request an acquisition incentive at the onset of a case seeking authority under sections 393.190 or 393.170, RSMo, adheres to the guidance provided by the Court in *AG Processing,* and ensures that the approval of a transfer of assets, or the granting of a CCN after the purchase of an unregulated system, includes consideration of the possibility of an acquisition incentive. Second, the requirement that the acquisition incentive actually be applied during the pendency of a general rate case assures that the Commission will consider an acquisition incentive, not as a single issue, but in the context of *all relevant factors.*

Public Counsel goes on to state that the statutes listed as authority for the Acquisition Incentive rule do not grant the Commission the authority to enact an acquisition premium

[88] *State ex rel. Public Counsel v. Public Service Commission*, 397 S.W.3d 441, 448 (Mo. Ct. App. 2013).
[89] *See* 20 CSR 4240-10.085(2).

program for water and sewer systems or any other utility,[90] and that any assertion of legality is thus extra-textual and is founded on implication.[91] However, Public Counsel fails to consider the Commission's duty to value utility property for rate making purposes.[92] In furtherance of this duty, the Commission could very well determine there to be justification for valuing utility property at a level in excess of the net book value of the asset.[93] The contemplation of a debit acquisition adjustment by Commission Rule 20 CSR 4240-10.085 is simply a furtherance of this principle. In that vein, what exactly is an Acquisition Adjustment? Staff would refer to the explanation outlined by the Commission in the *Report and Order* for *In Re Utilicorp United, Inc.*

> For regulatory purposes, an acquisition adjustment is simply the difference between the consideration that the purchaser pays for the assets and the net book value of those assets. As a general rule, only the original cost of utility plant to the first owner devoting the property to public service, adjusted for depreciation, should be included in the utility's rate base. That principle is known as the net original cost rule. The net original cost rule was developed in order to protect ratepayers from having to pay higher rates simply because ownership of utility plant has changed, without any actual change in the usefulness of the plant. If a utility were allowed to revalue its assets each time they changed hands, it could artificially inflate its rate base by selling and repurchasing assets at a higher cost, while recovering those costs from its ratepayers. Thus, ratepayers would be required to pay for the same utility plant over and over again. The sale of assets to artificially inflate rate base was an abuse that was prevalent in the 1920s and 1930s and such abuses could still occur.
>
> An acquisition adjustment can be either positive or negative. In other words, when a utility purchases an asset, it may pay more or less than the net

[90] *Public Counsel Initial Brief*, p. 21.
[91] *Id.* at 22.
[92] *See* Section 393.230, RSMo.
[93] *See State ex rel. Martigney Creek Sewer Co. v. Pub. Serv. Comm'n,* 537 S.W.2d 388, 399 (Mo. banc 1976) (stating that, for ratemaking purposes, recovery of the cost of an asset acquired from another utility depends on the reasonableness of the acquisition, considering the factors of whether the transaction was at arm's length, if it resulted in operating efficiencies, and if it made possible a desirable integration of facilities).

> original cost of the asset. When the utility pays more than net original cost, it is said to have paid an acquisition premium. But, in some circumstances, a utility may be able to purchase assets at less than net original cost. In that situation, the utility has a negative acquisition adjustment.
>
> Missouri has traditionally applied the net original cost standard when considering the ratemaking treatment of acquisition adjustments. That means that the purchasing utility has not been allowed to recover an acquisition premium from its ratepayers. But it also means that ratepayers do not receive lower rates through a decreased rate base when the utility receives a negative acquisition adjustment. Even if a company acquires an asset at a bargain price, it is allowed to put the asset into its rate base at its net original cost. Similarly, ratepayers do not share in the gains a utility may realize from selling assets at prices above their net original cost. Those gains flow only to the utility's shareholders.[94]

However, Public Counsel also contends that the Commission is prohibited from awarding a rate of return adjustment, as contemplated by the Rule. It cites to Section 393.146, RSMo, which authorizes the Commission to order a 'capable public utility' to acquire a small water or sewer corporation in certain circumstances. Public Counsel argues that the existence of this statute actually bars the rate of return acquisition incentives as envisioned by 20 CSR 4240-10.085. However, Public Counsel again fails to consider a rudimentary function of the Commission; the setting of just and reasonable rates.[95] In setting just and reasonable rates, the Commission must at least afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.[96] It does this through determining an appropriate rate of return. Two leading United States Supreme Court decisions are instructing in understanding the

[94] *In Re Utilicorp United Inc., Report and Order*, No. EM-2000-292, 2004 WL 431561 (Feb. 26, 2004).
[95] *See* Section 393.140, RSMo.
[96] *Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

Commission's duty in setting rate of return, in the context of just and reasonable rates. Pursuant to *Bluefield Water Works:*[97]

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings **which are attended by corresponding risks and uncertainties**; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. (emphasis added).

Further, *Hope Natural Gas*[98] states:

> The rate-making process under the Act, i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests.... It is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. **By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks.** That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise. (citations omitted)(emphasis added).

Inherent in the Commission's consideration of rate of return, is a recognition of the risk of investment. While it is true that Section 393.146, RSMo, specifically contemplates a rate of return adjustment, it is limited to a very specific instance, wherein the Commission has ordered a utility to acquire another, and should not be seen as a

[97] *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679, 692–93, 43 S.Ct. 675, 678–79, 67 L.Ed. 1176 (1923).
[98] *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602–03, 64 S.Ct. 281, 287–88, 88 L.Ed. 333 (1944)

limitation on the Commission's duty to determine an appropriate rate of return in other circumstances. The contemplation of a rate of return premium by 20 CSR 4240-10.085 is simply a codification of the consideration of investment risk in the context of the acquisition of a troubled system. This can clearly be seen in the Rule's definition of rate of return premium:

> Additional rate of return basis points, up to one hundred (100) basis points, applied to either the acquiring utility's entire rate base or to the newly acquired rate base, awarded at the commission's discretion **in recognition of risks involved in acquisition of nonviable utilities and the associated system improvement cost.** (emphasis added).

As such Public Counsel's arguments as to the legal basis for the Commission's acquisition incentive rule should be disregarded.

IV.

Conclusion

The OPC, Cedar Glen and the Joint Bidders in their initial briefs center their arguments regarding whether OUOC's acquisition of OWC would be detrimental to the public interest on a potential future rate increase. However, when the requisite benefits are considered, OUOC's acquisition of the OWC assets and CCNs is not detrimental to the public interest, and should be approved by the Commission subject to the conditions recommended by Staff.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been electronically mailed to all parties and/or counsel of record on this 17th day of October, 2019.

/s/ Mark Johnson