

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) Case No. WA-2019-0185
Water and Sewer Assets and for a Certificate of) and SA-2019-0186
Convenience and Necessity)

**CEDAR GLEN CONDOMINIUM OWNERS ASSOCIATION, INC.’S
RESPONSE TO STAFF RECOMMENDATION, AND
MOTION TO SCHEDULE A PROCEDURAL CONFERENCE**

COMES NOW Cedar Glen Condominium Owners Association, Inc. (hereinafter sometimes referred to as “Cedar Glen”), and submits this response to the Staff’s Recommendation filed in this matter on May 24, 2019 (“the Staff Recommendation”). Additionally, Cedar Glen respectfully requests that the Commission schedule a procedural conference further directing the parties to develop a procedural schedule and establish proposed dates for an evidentiary hearing.¹

Background

A. Circuit Court Receivership

On December 31, 2002, the Commission filed its Petition for the Appointment of a Receiver for Osage Water Company (“Osage”). In the months that followed the case experienced a stormy procedural history including a series of continued hearings, a filing in bankruptcy court that predated its most recent trip to that venue, and an unsuccessful effort by Osage to sell its assets to Missouri American Water Company. Ultimately, on October 21, 2005, after an evidentiary hearing March 8-9, 2004, and after subsequent arguments supplied by counsel, the circuit court appointed a receiver to operate Osage in accordance with Section 393.145 RSMo 2016.

¹ Undersigned counsel is aware that at the prehearing conference held on February 20, 2019 the parties expected that a procedural conference would convene at some date subsequent to the filing of any responses to the Staff Recommendation.

In the ensuing 14 years the appointed receiver supervised renewed collection of authorized rates and charges, addressed and satisfied judgments against Osage and attended to capital improvements to the systems within Osage's service territory to achieve, or try to achieve, compliance with restrictions imposed by environmental regulators. On October 23, 2008, the receiver requested a Small Company Rate Increase pursuant to Commission's rules which was approved by the Commission and effective on August 22, 2009.² The Commission approved tariffs in which the Company was authorized to charge \$24.76 per month as the minimum rate for water service and \$29.02 per month as the minimum rate for sewer service. The rates approved in File No. WR-2009-0149 are still in effect.

B. Bankruptcy 2017

On October 11, 2017, the Receiver, on behalf of Osage, filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Western District of Missouri. On October 26, 2017, the United States Trustee appointed the trustee. The "stalking horse" auction process which was implemented to sell the Osage assets is thoroughly described in a letter to Ms. Whitney Payne, Commission Senior Counsel, from Mr. Eric Johnson of Spencer Fane LLP, Kansas City, Missouri which is attached to Staff's Recommendation. Although the details will not be repeated here there are several highlights of that procedure which should be given attention.

First, contrary to what may be implied by Mr. Johnson's letter, there was no "highest and best" bid or offer. As noted by Mr. Johnson, the "Stalking Horse Purchaser"³ *matched* the earlier joint bid of \$800,000 submitted by Public Water Supply District No. 5 of Camden County, Missouri and Lake Area Waste Water Association, Inc. ("the Joint Bidders"). The Staff

² *Order Approving Unanimous Disposition Agreements And Authorizing Tariff Filings*, File No. WR-2009-0149.

³ Presumably Osage Utility Operating Company, Inc. ("OUOC") is the subsidiary of Central States Water Resources, Inc. which was approved as the Stalking Horse Purchaser.

Recommendation agrees.⁴ It should be emphasized that the bids considered by the bankruptcy trustee for purchase of the Osage assets were *equal*.

Second, the auction conducted by the bankruptcy trustee has presumptively established the fair value of the assets at stake and the Joint Bidders are prepared to pay that price. By agreement with the trustee the bid submitted by the Joint Bidders is still open. The fact that the Joint Bidders are committed to purchase the Osage assets should not be lost as the Commission scrutinizes the Staff Recommendation and this case otherwise progresses.

Finally, the bankruptcy trustee's declaration that Central States Water Resources, Inc. was the successful bidder does not affect the Commission's statutory authority to disapprove the sale to OUOC.

C. The Staff Recommendation

After its investigation of the Osage water and sewer assets and review of the auction conducted in bankruptcy the Staff found that "should the Commission approve OUOC's request to acquire the Osage water and sewer assets it would not be detrimental to the public interest."⁵ This standard of review is described in *Environmental Utilities, LLC v. Public Service Commission of Missouri*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007), as follows:

The standard governing the Commission's review of an application for sale of assets is set forth in *Fee Trunk Sewer, Inc. v. Litz*: "The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."

The standard of review can be expressed just as meaningfully, and perhaps with sharper focus, as "will the proposed sale work a detriment to the public?" Cedar Glen contends that it most definitely will.

⁴ *Staff Recommendation*, ¶3.

⁵ *Id.* ¶2.

The disposition of this case should not rest on the Staff Recommendation alone. The Commission must engage in an analysis of a multitude of factors--not the least of which is how the standard of review is applied where two qualified rivals compete for the same purchase--after a thorough hearing on the record.

Cedar Glen

As the Memorandum to the Staff Recommendation will attest 216 of the 420 customers served by Osage reside at Cedar Glen Condominiums. A great measure of the “public” which has an important interest in the outcome of this matter is represented by those 216 customers. It has long been the contention of Cedar Glen that the rates charged by Osage for water and sewer service to the unit owners have been unjust and unreasonable because they produce a lucrative and unfair subsidy which supports the other systems within the Osage footprint. Osage’s current rates and charges are significantly above Osage’s cost for serving Cedar Glen’s unit owners.

Cedar Glen in the past has joined in a bid to purchase the Osage assets, particularly the deep well and wastewater collection and treatment facilities that Osage now uses exclusively for service to the Cedar Glen’s unit owners. If those assets were owned and operated by Cedar Glen, the charges to unit owners would reflect actual costs and free them from subsidizing other Osage customers who have made the decision to live in subdivisions where costs of water treatment and wastewater collection and treatment are much higher than in condominium projects.

If OUOC’s application is approved the subsidy will not end. Apparently OUOC will charge uniform rates for all customers irrespective of the dramatic differences in cost of service between the condominium and the outlying subdivisions. As a result, the rates charged by OUOC to Cedar Glen unit owners will cover not only the costs for operation and maintenance of, and the improvements to, the facilities serving their units but also will cover a greater proportion of the

debt related to and other costs of operating and improving all the other systems. Continuation of the subsidy is detrimental to this larger segment of the rate paying public.

Additionally, approval of OUOC's application will subject Cedar Glen's unit owners, as well as the balance of Osage's customers, to rate increases which, by comparison to rates charged by other water and sewer utilities in Camden County, are unquestionably exorbitant. Although OUOC intends to charge Osage's current rates for its first year of operation and ownership of the assets, by year 2 it projects an overwhelming increase in rates. In its response to Staff Data Request 14 OUOC attached an Excel Spreadsheet setting out OUOC's WACC Projected Cash Flow. In year 2 OUOC projects revenue of * * . * This translates to a monthly rate per customer (using 479 as the number of customers) of approximately * * for water and sewer service combined, a * * increase in the minimum rates for service. Based upon counsel's information and belief, if Cedar Glen unit owners were customers of Public Water District No. 5 ("the District") their monthly rate for water and sewer service combined would be no more than \$78.

The Joint Bidders

The Joint Bidders share some common characteristics that differ from OUOC's and which by comparison reduce their cost of providing service. They are unregulated. They pay no annual assessment to the Commission and receive no yield or rate of return on investment. The District, as a political subdivision with powers, duties and responsibilities defined by law, has access to forms of public finance, such as bonding authority, which have the potential to, and often do, reduce the cost of debt below rates in the private lending marketplace. Debt service paid by the District for improvements to facilities would be less than OUOC's cost. Although it may not have access to public financing devices, nonetheless Lake Area Waste Water Association, Inc. is

member governed and operates on a nonprofit basis which in turn drives its rates for utility service to actual cost.

There has been no suggestion in the bankruptcy auction or in this proceeding that the Joint Bidders are not qualified to provide safe, reliable and adequate service to the customers connected to the Osage assets.

Cedar Glen Condominiums can conveniently be served by the District and Cedar Glen contends that it would be in the public interest for the Commission to approve the sale of the Osage assets exclusively serving Cedar Glen to the District. As District customers the unit owners would have the benefits of its public entity status, its contracted staff and support of its existing infrastructure for purposes of achieving regulatory compliance.

Although OUCO does not identify the need or the cost in its application and appendices, and the Staff has not mentioned it in its recommendation, the water system serving Cedar Glen will be required to obtain a secondary well in order to comply with Missouri's Safe Drinking Water Law. According to Department of Natural Resources *Minimum Design Standards for Missouri Community Water Systems*, Section 3.2.1.2. b:

All public water systems that require continuous service and serve 500 or more people shall have more than one well and shall be capable of meeting design average day demand with the largest producing well out of service or an alternate approved source of water capable of meeting the design or actual average day demand.

Using the key of 3 persons to a condominium unit⁶ there are 500 or more people at Cedar Glen being served by one well.

OUCO proposes improvements to Cedar Glen's water system at a cost of \$377,750⁷ but its estimate does not include the installation of a second well. Cedar Glen believes that the District's

⁶ Refer to Table 1—Per Unit Occupancies, *Minimum Design Standards for Missouri Community Water Systems*.

⁷ Staff's Memorandum annexed to the Staff Recommendation at page 7.

contracted staff and employees can make OUOC's proposed improvements at a far lower cost and the District can install a connection from its well and storage facility as an alternate source thus dispensing with the need to install a second well, an unnecessary duplication of facilities. OUOC proposes improvements to Cedar Glen's sewer system at a cost of \$281,950.⁸ Like the proposed improvements to the water system, Cedar Glen believes that the District's contracted staff and employees can make OUOC's proposed improvements to the sewer system at a far lower cost.

Conclusion

What appears from OUOC's application and the facts brought to light in the initial stages of discovery is that Osage customers face significantly increased rates for service if OUOC obtains the Osage assets. Those rate increases are unnecessary given the existence of qualified utilities in the same area that 1) have facilities in place which might spare needless duplication of others; 2) operate on a not-for-profit basis at least cost; and 3) are ready and able to pay the purchase price.

On the basis of the foregoing, Cedar Glen submits that the Staff Recommendation should be rejected by the Commission. Additionally, the Commission should schedule a procedural conference and further direct the parties to develop a procedural schedule and establish proposed dates for an evidentiary hearing.

⁸ *Id.* at page 8.

Respectfully submitted,
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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 3rd day of June, 2019, to:

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