

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
INITIAL BRIEF**

I. Introduction.

The application for acquisition of the Osage Water Company assets is unlike any the Commission has judged in the past. Instead of one qualified buyer there are two in this case both under contract for the same assets for the same price. Under the legal standard this body applies for asset purchases, the issue at root is which of the two will do the least harm to the public, or conversely, which will better serve the public. A substantial percentage of that public—the unit owners at Cedar Glen Condominiums---who will be customers of the applicant if the asset purchase is approved----object to OUOC’s acquisition of the OWC assets.¹ They justifiably foresee greater benefits as customers of a local nonprofit public corporation that has served neighbors in their community for over nine years.

The Commission has broad discretion in the factors it may consider in determining the benefits and detriments of the transaction which is at the center of the application. The instant parties, their relationship and the process that brought them here, which without serious argument can be claimed as unique, merit the widest evaluation of all relevant elements.

¹ As of the date this brief is filed seventy-seven public comments have been filed in this case and all disfavor the applicant and favor the other buyer under contract.

Cedar Glen Condominium Owners Association, Inc. maintains that the wide analysis indispensable to this matter will ultimately yield the conclusion that the application must be denied.

II. Background

Osage Water Company (“OWC”) obtained a certificate of convenience and necessity in 1989 to operate as a water and sewer utility in Commission Case No. WM-89-73, which authorized a regulated utility named Oak Trees, Inc. to sell and transfer its assets to OWC.² The Commission granted OWC a certificate of convenience and necessity to provide water and sewer service to Cedar Glen Condominiums on May 31, 1998, in Case No. WA-98-36.³ OWC also filed a number of cases seeking additional service areas.

A. The Receivership; and a Joint Application to Purchase Assets

By 2002, OWC was chronically failing to provide utility service at the standards required. On December 10, 2002, the Commission issued a Report and Order in Case No. WC-2003-0134, finding that OWC had been effectively abandoned by owners, and that it was unable or unwilling to provide safe and adequate service to its customers.⁴ Based upon counsel’s personal recollection, the Commission filed its petition to appoint a receiver shortly thereafter on December 31, 2002.⁵

On October 4, 2004, Missouri-American Water Company and both OWC and Environmental Utilities, L.L.C. applied to this Commission for authority for Missouri-American Water Company to acquire the water and sewer assets of both entities, and for the transfer of

² Ex. 100P, Dietrich Direct, Staff Recommendation Memorandum, p. 4.

³ *Id.*, at p. 6.

⁴ *Id.*, at p. 4.

⁵ *Public Service Commission of the State of Missouri v. Osage Water Company*, Case No. CV102-965CC, Circuit Court of Camden County, Missouri.

OWC's certificates of convenience and necessity to Missouri-American.⁶ Cedar Glen Condominium Owners Association, Inc. ("Cedar Glen") intervened. With respect to the OWC assets serving Cedar Glen, the application did not include a request for authority to sell the wastewater system; it sought authority only for the water system assets serving Cedar Glen.

Cedar Glen opposed the application. It contended that the OWC water system assets serving Cedar Glen, and the wastewater system assets as well, should be transferred to Cedar Glen for its separate management and operation.⁷ Clear title to the real property where the sewer system facilities serving the Cedar Glen Condominiums were located was in serious doubt and Missouri-American refused to modify the application to include purchase of those assets. On June 9, 2005, the Commission dismissed the joint application advising that it was "not willing to approve any sale transaction that does not dispose of all of Osage Water's operating assets."⁸

On October 21, 2005, the Circuit Court of Camden County placed the OWC assets in the custody of a Receiver who would operate the Company in accordance with Section 393.145 RSMo 2016.⁹ The Receiver marketed the OWC assets receiving multiple bids from 2014 to 2017. In the Receiver's report to the Camden County Circuit Court dated January 14, 2015, the Receiver reported the following bids: (1) Central States Water Resources, Inc., \$479,702.00; (2) Missouri American Water Company, \$250,000.00; (3) Cedar Glen Condominium Owners Association, Inc., Missouri Water Association, Inc., and Lake Area Waste Water Association, Inc. (in a joint

⁶ *In the Matter of the Joint Application of Missouri-American Water Company and Both Osage Water Company and Environmental Utilities, L.L.C. for Authority for Missouri-American Water Company to Acquire the Water and Sewer Assets of both Entities, and for the Transfer to Missouri-American Water Company of Certificates of Convenience and Necessity to Continue Operation of Such Assets as Water and Sewer Corporations Regulated by the Missouri Public Service Commission*, Case No. WO-2005-0086.

⁷ *Id.*, *Cedar Glen's Pretrial Brief*, January 20, 2005.

⁸ *Id.*, *Order Dismissing Joint Application*, June 9, 2005 at p.2.

⁹ All statutory references are to RSMo 2016 unless otherwise specified.

bid), \$160,000.00; and (4) Gregory Williams, satisfaction of judgment obtained in Case No. 09CM-CC00413.¹⁰

In the Receiver's report to the Camden County Circuit Court dated December 24, 2015, the Receiver reported the following bids: (1) Central States Water Resources, Inc., \$458,000.00; (2) Missouri American Water Company, \$300,000.00 with a commitment to invest another \$350,000.00 over a five (5) year period; (3) Public Water Supply District No. 5 (Cedar Glen service area only), \$742,000.00; and (4) Gregory Williams, satisfaction of judgment obtained in Case No. 09CM-CC00413.¹¹

In the Receiver's report to the circuit court dated May 12, 2017, the Receiver reported the following bids: (1) Central States Water Resources, Inc., \$440,000.00; (2) Public Water Supply District #5 ("District No. 5" or "the District"), \$636,000.00 (Cedar Glen service area only); (3) Patrick Mitchell, \$5,000.00 (all assets except Cedar Glen service area); and (4) Gregory Williams, satisfaction of judgment obtained in Case No. 09CM-CC00413.¹²

None of the prepetition bids resulted in a sale.

On October 11, 2017, the Receiver, on behalf of OWC, filed a voluntary petition for Chapter 11 bankruptcy relief. On October 26, 2017, the United States Trustee appointed Jill Olson as the Chapter 11 Trustee.

B. The Bankruptcy Case and the Auction.

Shortly after her appointment Ms. Olson organized an auction of the OWC assets under a "stalking horse" bid method. During the hearing of this case there were several exchanges between the Commission and witnesses concerning the procedures employed in the auction and

¹⁰ Ex. 100P, Dietrich Direct, Staff Recommendation, Attachment B (Eric Johnson correspondence to Whitney Payne).

¹¹ Ex. 402.

¹² Ex. 403.

the timing of the bidding. These topics are covered well in a letter to Whitney Payne, Senior Staff Counsel, dated May 13, 2019 from Eric Johnson of Spencer Fane LLP, Kansas City, Missouri. Mr. Johnson's letter is identified as Attachment B to the Staff Recommendation sponsored in the direct testimony of Ms. Natelle Dietrich.¹³ Excerpts from Mr. Johnson's letter are below:

1. The Stalking Horse APA

After her appointment, the Trustee, either personally or through her counsel, contacted entities that expressed interest in the Debtor's assets. This communication resulted in the Trustee identifying Central States Water Resources, Inc. (the "**Stalking Horse Purchaser**") as a potential stalking horse purchaser.¹⁴ The proposed asset purchase agreement with the Stalking Horse Purchaser was negotiated over a period of time and ultimately the Trustee and the Stalking Horse Purchaser finalized an asset purchase agreement in the amount of \$465,000 (the "**Stalking Horse APA**").

* * *

On August 26, 2018, the Trustee filed her *Motion to Approve (A) the Sale of Substantially All of Debtor's Assets Free and Clear of All Liens, Interests, Claims and Encumbrances and Related Procedures and Bid Protection Pursuant to 11 U.S.C. § 363, (B) The Potential Assumption and Assignment, or Rejection, of Certain Executory Contracts and Unexpired Leases, and Related Procedures, Pursuant to 11 U.S.C. § 365, and (C) Related Relief Pursuant to 11 U.S.C. §§ 102 and 105* (Doc. 115) (the "**Sale Motion**"). In the Sale Motion, the Trustee sought approval of Stalking Horse APA, bidding and auction procedures (the "**Bidding Procedures**"), and setting a schedule to confirm the ultimate sale of the assets.

* * *

On September 19, 2019, the Bankruptcy Court entered its *Order Approving Procedures for the Solicitation of offers for (A) the Sale of Substantially All of Debtor's Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; (B) the Possible Assumption and Assignment, or Rejection, of Certain Executory Contracts and Unexpired Leases; and (C) Related Relief* (the "**Bid Procedures Order**"). In the Bid Procedures Order, the Bankruptcy Court found the Stalking Horse APA and the Trustee's selection of the Stalking Horse to be fair, reasonable, and appropriate, and designed to maximize the value of the Debtor's bankruptcy estate.

¹³ Ex. 100P, Dietrich Direct, Staff Recommendation, Attachment B.

¹⁴ The criteria used by Ms. Olson to select Central State Water Resources, Inc., rather than the Joint Bidders, as the Stalking Horse Purchaser is unknown.

* * *

After entry of the Bid Procedures Order, the Trustee reached out to prior interested parties including Lake Area Waste Water Association, Inc., Missouri American Water Company, Public Water Supply District #5, Missouri Water Association, Inc., Liberty Utilities, and Cedar Glen COA, Inc. Each of these parties were provided with the Bid Procedures Order.

1. [sic] The Auction

The Trustee ultimately received two qualified bids: (i) a joint bid by Public Water Supply District No. 5 of Camden County, Missouri and Lake Area Waste Water Association, Inc. (collectively, the “**Joint Bidders**”) and (ii) Missouri American Water Company (“**MAWC**”). The Auction was set to take place on October 24, 2018. The auction participants were the Stalking Horse Purchaser, the Joint Bidders, and MAWC (collectively, the “**Auction Participants**”). Prior to the Auction, further instructions were provided to each of the Auction Participants including that the Auction would be commenced in two phases in light of the Stalking Horse Purchaser's matching rights. *[A sentence referring to an exhibit is omitted.]*

On October 24, 2018, the Trustee convened the Auction. Instructions were once again given to the Auction Participants and Phase 1 of the Auction was commenced. Phase 1 of the Auction was between the Joint Bidders and MAWC. Ultimately, the Joint Bidders were determined to have the winning Phase I Bid and proceeded to Phase 2 of the Auction.

In Phase 2 of the Auction, the Stalking Horse Purchaser successfully matched each offer by the Joint Bidders until the Joint Bidders failed to make a competing higher offer. Accordingly, the Stalking Horse Purchaser was declared the successful purchaser with a bid of \$800,000. The Joint Bidders were designated the first Back-Up Bidder and MAWC was designated the second Back-Up Bidder. *[A copy of the Notice of Auction Results and along with revised asset purchase agreements (taking into account the Auction) were attached as exhibits to Mr. Johnson's letter.]*

* * *

Pursuant to the Bidding Procedures each Auction Participant was deemed to have agreed to keep its final bid made at the Auction open through 180 days after the entry of the Sale Order, i.e. May 13, 2019. Given the circumstances related to the Application, the Trustee has requested that the Back-Up Bidders confirm that their back-up bids will remain open for additional time pending the Commission's approval process. If the sale does not close with the Stalking Horse Purchaser or the Trustee is unable to enforce the back-up bids, then the Trustee is concerned that she will be required to recommence sale proceedings or engage in further litigation thereby further extending the bankruptcy proceedings and the continued unsettled

state of affairs related to water and sewer assets in the effected service areas of the Debtor.¹⁵

As abridged, the auction process can be reported as: The Joint Bidders bid \$800,000 for the OWC assets first. Central States Water Resources, Inc. (“CSWR”) matched the Joint Bidders' bid and was declared the “successful” purchaser. The Joint Bidders were designated the first “Back-Up Bidder.” The purchase contracts are identical except to take into account the auction results.

On December 19, 2018 Osage Utility Operating Company (“OUOC”), an affiliate of CSWR, filed its application with this Commission to purchase the OWC water distribution and wastewater treatment and collection assets (“OWC”).¹⁶ Cedar Glen’s application to intervene was approved by the Commission on January 29, 2019.

In addition to setting out the facts and circumstances leading to the filing of the instant application, the chronicle above also establishes that Cedar Glen’s long held interest in dissociating from regulated utility service is not a mere curiosity or overnight invention. During the preceding fourteen years Cedar Glen has taken deliberate steps at every available opportunity to obtain an alternative to water and sewer service from a regulated utility, including purchasing the operating assets itself. Its appearance, its position and its participation in this matter all follow in train.

III. The Issues

Cedar Glen joined other parties in submitting to the Commission a separate list of issues that identified three issues, one of which had subparts. Of those three issues Cedar Glen takes a position on a subparagraph of the second which was expressed as follows:

¹⁵ Ex. 100P, Dietrich Direct, Staff Recommendation, Attachment B, pp.3-5.

¹⁶ OUOC filed an amended application on February 19, 2019.

Would the sale of Osage Water Company's certificates of convenience and necessity and its water and sewer assets to Osage Utility Operating Company be detrimental to the public interest?

Cedar Glen contends that such a sale to OUOC would be highly detrimental to the public interest and therefore, its application should be rejected.

IV. Discussion

A. *The Standard of Review*

1. *AG Processing*

In *State ex rel. AG Processing, Inc. v. Public Service Commission of the State of Missouri*, 120 S.W.3d 732 (Mo. Banc 2003), the Missouri Supreme Court reviewed the Commission's approval of the merger of UtiliCorp United, Inc. ("UtiliCorp") and St. Joseph Light & Power Company ("SJLP"). The appellant AG Processing, Inc. ("AGP") contended as one of its three points of appeal that the Commission's approval of the merger was not supported by competent and substantial evidence upon the whole record because "when determining that the merger was not detrimental to the public, the PSC rejected the unrefuted and contrary evidence of its own staff and refused to consider the recoupment of the acquisition premium."¹⁷ In response the Commission argued that considering recoupment of the acquisition premium while considering approval of the merger amounted to "prejudging a ratemaking factor outside a ratemaking case."¹⁸

The Supreme Court reversed and held:

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger-related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public.[footnote omitted] **The PSC's refusal to consider this issue** in conjunction with the other issues raised by the PSC staff **may have**

¹⁷ *Id.*, at p. 735.

¹⁸ *Id.*, at pp 735-736.

substantially impacted the weight of the evidence evaluated to approve the merger.[footnote omitted] The PSC erred when determining whether to approve the merger because **it failed to consider and decide all the necessary and essential issues**, primarily the issue of UtiliCorp’s being allowed to recoup the acquisition premium.¹⁹ [emphasis added]

2. *AmerenCIPS*

In the first contested case under Section 393.190.1 after the opinion in *AG Processing*, the Commission provided a lengthy summary of the “not detrimental to the public interest” standard in its Report and Order for the *AmerenCIPS* case,²⁰ pertinent portions of which are quoted below:

Public Counsel urges the Commission to ignore UE’s quotations of erroneous language from past Commission orders that approval must be granted unless “compelling” evidence shows that a “direct and present” detriment is “likely” to occur. Instead, as recently articulated by the Missouri Supreme Court in *AG Processing*, and restated by the Commission itself, **“a detriment to the public interest includes a risk of harm to ratepayers.”**²¹

* * *

The Missouri Supreme Court did not announce a new standard for asset transfers in *AG Processing*, but rather restated the existing “not detrimental to the public” standard. In particular, the Court clarified the analytical use of the standard. What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The *AG Processing* decision does not, as Public Counsel asserts, require the Commission to deny approval where a risk of future rate increases exists. Rather, it requires the Commission to consider this risk together with the other possible benefits and detriments and determine whether the proposed transaction is likely to be a net benefit or a net detriment to the public. **Approval should be based upon a finding of no net detriment.**²² [emphasis added]

¹⁹ *Id.*, at 736. See also, *State ex rel. Praxair, Inc. v. Missouri Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. 2011):

“Reasonableness turns on the standard used to evaluate a merger subject to approval by the PSC, which is whether or not the merger would be ‘detrimental to the public.’ *State ex rel. AG Processing*, 120 S.W.3d at 735. In the merger context, a PSC decision will be held unreasonable if the PSC erroneously ignores evidence that “may have substantially impacted the weight of the evidence evaluated to approve the merger.” *Id.* at 736.

²⁰ *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).

²¹ *Id.*, at 41.

²² *Id.*, at 42.

* * *

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof. That burden does not shift. Thus, a failure of proof requires a finding against the applicant.²³

In view of the case authorities above, and the interpretation placed upon them by the Commission, the existence of viable and less costly water and wastewater service providers, which are under contract to purchase the OWC operating assets on the same terms and at the same price as OUOC, is unquestionably a necessary and essential factor in determining the harm to OWC's ratepayers that may arise from approval of OUOC's application.

B. District No. 5 and OUOC Compared; Rate Forecasts; Net Detriment

1. District No. 5

District No. 5 was organized under the provisions of Chapter 247. It is a political corporation of the state. Section 247.020. It was organized in 2010.²⁴ It has served its customers for nearly a decade. The District's powers and duties are established by statute. Section 247.050. It is governed by a five member board that is elected by voters within the District boundary. Section 247.060. The business of the District is held in the sunshine. The deliberations of the board are reduced to written minutes that are subject to public disclosure as evidenced by the package of its meeting minutes introduced at hearing as Exhibit 414. The board receives no compensation.

The board is charged with fixing the rates for District service under limitations prescribed by statute.

The rates or charges to be so fixed shall, at all times, be reasonable, but in determining the reasonableness of rates or charges, the board shall take into consideration the sum or sums required to retire outstanding special obligation bonded indebtedness of the district and the interest accruing thereon, the need for

²³ *Id.*, at 43.

²⁴ Tr. at 406.

extensions of mains, repairs, depreciation, enlargement of plant, adequate service, obsolescence, overhead charges, operating expenses, and the need of an operating fund out of which the district may protect itself in emergencies and out of which the incidental expenses of the district may readily be met.

Section 247.110. The District is prohibited from profit making and thus not entitled to a return on its investment in facilities. It has been pointed out by others that it cannot charge an acquisition premium. It is subject to audit by the state auditor's office pursuant to procedures set out in Section 29.230.

The District has the power to issue general or special obligation bonds after submitting the ballot measure to voters in the District. Section 247. 130. Currently District No. 5 has \$1,426,000 of voter authorized but unissued bonding authority.²⁵ Its bonds are tax exempt. It is exempt from tax on its real and personal property.²⁶

As a party in the back up joint bid for the OWC assets, District No. 5 has agreed to pay \$640,000 for the facilities in the Cedar Glen service area.²⁷ Acquiring those facilities is consistent with the District's expansion plans.²⁸ It has also estimated that \$120,000 would cover much of the cost of interconnecting the District water facilities and the Cedar Glen water facilities, and the other upgrades for the facilities.²⁹ District No. 5's current combined monthly rate for water and sewer service is \$78. District No. 5's expenditure of \$640,000 for the OWC's water and sewer assets serving Cedar Glen, and expenditure of the \$120,000 estimated for interconnection and facility upgrades, a total of \$800,000, **will not require an adjustment of that rate.**³⁰

2. *OUOC*

²⁵ Ex. 400, Stone Direct, Exhibit DLS.

²⁶ Art. 10, § 6, Mo. Const.

²⁷ Ex. 400, Stone Direct at p.2; Tr. 404.

²⁸ Ex. 400, Stone Direct at p 5-6.

²⁹ Tr. 404.

³⁰ Ex. 400, Stone Direct, Exhibit DLS

OUOC is a Missouri general business corporation and organized for profit. It is newly formed and was organized for the purpose of purchasing and operating the OWC systems.³¹ OUOC is a subsidiary of CSWR, LLC which is managed by CSWR. Mr. Josiah Cox became President of CSWR approximately four and a half years before filing his direct testimony in this matter,³² and it is fair to assume that the corporation was formed in 2014.

OUOC has authority to issue shares including preferred classes of shares and declare dividends. It is governed by a board of directors who are elected by the shareholders and not its business customers. Meetings of the board and its deliberations are not required to be open to the public. Its meeting minutes are private and not subject to a Sunshine Law request.

If it should become a regulated public utility it will be managed by a corporate entity located in St. Ann, Missouri and much of the monitoring of system performance will be done remotely. OUOC's rates for service must be approved by the Commission. As a for profit entity, its rate structure will include a fair return on its investment in facilities, the cost of any debt associated with its operations and ownership, real property and personal property taxes and an amount for the Commission's annual assessment. With respect to debt for which OUOC may qualify, the terms of the loan would be determined in part by the commercial lending rates then prevailing in the market, unless OUOC had access, which it presumably has, to a private equity investor or lender with more favorable terms. Nonetheless, its bonds, if ever an issuance were authorized by the Commission, would not be tax exempt instruments. Its rates may also include a component to cover compensation and benefits for its managing officers.

3. *OUOC rate forecasts*

³¹ Ex. 100P, Dietrich Direct, Staff Memorandum, p. 5 of 24.

³² Ex. 1, Cox Direct at p. 3.

CSWR manages other certificated water and sewer utilities in the state. Those it manages include Indian Hills Utility Operating Company, Inc. (water only) (“Indian Hills”) and Hillcrest Utility Operating Company, Inc. (water and sewer) (“Hillcrest”). Both of these companies were distressed companies and were acquired by CSWR or the parent company it manages. After making improvements to each system the companies filed for rate adjustments before the Commission. These cases were filed and decided within the last three years.

In the Indian Hills rate case,³³ residential water customers had been paying a monthly minimum water rate of \$10.81 and a commodity charge of \$1.89 per thousand gallons.³⁴ A residential customer using 4,000 gallons a month paid \$18.37 per month for service. The Commission approved tariffs which authorized a monthly minimum charge of \$50.90 and a summer commodity charge of \$11.55 per thousand gallons (April through September) and a winter commodity charge of \$7.70 (October through March). For the average residential customer using 4,000 gallons of water per month the bill for service in summer is now \$97.10 and in winter \$81.14, increases of 528% and 441% respectively.

In the Hillcrest rate case,³⁵ Mr. James Russo, on behalf of the Office of Public Counsel, testified that the typical Hillcrest customer was paying monthly \$10.63 for water and \$14.63 for sewer, a combined monthly bill of \$25.26.³⁶ The Commission approved tariffs which authorized a monthly residential water charge of \$40.48, a commodity charge of \$7.35 per thousand gallons, and a monthly residential sewer charge of \$83.56.³⁷ For the average Hillcrest residential customer

³³ *In the Matter of the Rate Increase Request of Indian Hills Utility Operating Company, Inc.*, Case No. WR-2017-0259.

³⁴ Ex. 101, Gateley Direct, a p.5, Case No. WR-2017-0259.

³⁵ *In the Matter of the Water Rate Increase Request of Hillcrest Utility Operating Company, Inc.*, Case No. WR-2016-0064.

³⁶ OPC Ex. 5, Russo Direct, p.12 Case No. WR-2016-0064.

³⁷ *Order Approving Compliance Tariffs*, October 10, 2016, Case No. WR-2016-0064.

who uses 4,000 gallons of water a month, the combined monthly water and sewer bill as a result of the increase is now \$153.48, a 600% increase.³⁸

The Indian Hills and Hillcrest rate cases are but two illustrations (there are undoubtedly others—CSWR owns or controls several other distressed companies) of a pattern or trend developing with CSWR ownership or management of distressed water and sewer companies: Capital improvements to remediate compliance violations are made at a great cost. Rate relief is sought quickly after the improvements are in service and usage rates for customers are approved to cover associated debt service among other costs, in line with capital structures in which debt significantly exceeds equity. Customer usage rates increase dramatically, and in the case of the Hillcrest customers, by record high percentages. That same pattern is emerging in the instant case.

OUOC expects to invest nearly \$3,000,000 in its purchase and upgrades to the OWC assets.³⁹ During its initial operation of the OWC systems OUOC will charge OWC's currently approved rates. It is no surprise that after OUOC makes the improvements to the systems it will apply to the Commission for rate relief.⁴⁰ Mr. Cox was cross examined in camera concerning entries on Schedule JC-3C⁴¹ which was attached to his direct testimony. The schedule set out a weighted cost of capital projected cash flow statement for OUOC.

Q. Could you turn to I think it's Exhibit 3C, your confidential schedule that's been marked Schedule JC-3C on your direct testimony?

A. I'm there, sir.

³⁸ During his cross examination, Mr. Cox testified that he participated in the Hillcrest rate case but could not recollect the rates charged to customers at the time CSWR acquired the company and could not recall the results and approvals in the rate case. Tr. 95.

³⁹ Tr. at p. 88.

⁴⁰ Tr. 87-88.

⁴¹ Ex. 3C.

Q. And this would represent the weighted average cost of capital projections or cash flow statement for your company; is that correct?

A. That is correct. Those are our pro forma statements.

Q. Join me in looking at the customer revenue that you've set aside for years one, two and three on this schedule. You have noted that the revenue for year one will be ** \$ _____ **; is that correct?

A. That is correct.

Q. And that represents what you would be getting in revenue from the current rate structure for Osage Water Company and I think Reflections is involved in this as well?

A. That is correct, it's a combination of both. You are correct, it's using the existing rate structure.

Q. Do you have any ideas now about how much of that revenue was from Reflections?

A. I do not. And I don't have a breakout either of the capital improvement that was Reflections versus Osage Water.

Q. With respect to year two, you have projected revenue of ** _____ ** is that correct?

A. That is what is represented here.

Q. And the same thing for year three?

A. Yes, sir.

Q. With Reflections in the mix, my math would be 475 customers would be involved in producing this revenue for you. Would that be correct?

A. I don't remember the exact count. I think it's maybe 480. That's both water and sewer. This is a combination of both water and sewer.

Q. All right. Do you have a calculator with you? Would you divide **\$ _____ ** by 480 and then divide that figure by 12?

A. Hold on. Sorry, sir. I got a double zero here I hit. So bear with me. Not doing very good on my calculator skills today. Got it, sir.

Q. Can you come up with a quotient for me?

A. Yeah. It would be **\$_____** per service per customer.

Q. So there would be **____**, maybe **\$_____** combined?

A. That is correct, sir.

Q. Per month? Per month?

A. Per month, that's correct, sir.

Q. Although this is a pro forma statement, are you anticipating that in year two of your operations rates will be set to achieve this revenue level?

A. Probably not. It takes longer to do a rate case and it will take longer to do the improvements. This is kind of a simple cash flow statement. So it would be much further into year two before there would be anything like that. So that probably has overstated the total revenue.

Q. But by year three the rates will be established to achieve that revenue?

A. That is correct, notwithstanding our plan is to potentially purchase other systems inside Osage.

Q. And those might affect the overall rate?

A. That is correct.⁴²

If CSWR's pattern is to repeat itself, and it appears highly likely it will, then assuming OUOC acquires the OWC assets, Cedar Glen unit owners should confidently anticipate paying within three years of the closing combined water and sewer **rates that are double, if not more than double, of the combined water and sewer rates paid by their neighbors for the same services.** For Cedar Glen unit owners the outlook is very grim.

4. *Linking District No. 5's and Cedar Glen's water systems; Secondary source of water.*

⁴² Tr. at pp. 98-100.

In his direct testimony, Mr. David Krehbiel,⁴³ who serves as a consulting engineer for District No. 5, discussed the feasibility of interconnecting District No. 5's water distribution system to Cedar Glen's. A connection utilizing the appropriate appurtenances such as valves and couplings would be installed at each well site. He provided the location of the proposed interconnection and the well sites on a map attached to his testimony as DGK Schedule 1.⁴⁴ He added that:

[T]his interconnection will bring both systems unquestionably into compliance with rules and regulations adopted by the Missouri Department of Natural Resources pertaining to backup facilities. According to Department of Natural Resources ("MoDNR") *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.

MoDNR calculates that there are 3 persons to a condominium unit and by that measure there are 500 or more people at Cedar Glen being served by one well. The water system at Cedar Glen Condominiums will require that second source of water which the interconnection to the District can supply. The water source in Cedar Glen in turn would provide the backup to PWSD #5's system.

The cost of a secondary water source at Cedar Glen was not included in OUOC's initial estimate of the costs to improve the OWC assets apparently because at the time OUOC was under the impression that there were less than 500 customers served by the water system. However, at hearing Mr. Cox in Schedule JC-S3 of his surrebuttal testimony⁴⁵ and Mr. Thomas on cross examination⁴⁶ acknowledged that after inspection of the public water supply at Cedar Glen MoDNR inspectors have noted: "PWS needs a second well (Serves more than 500 people)." That

⁴³ Mr. Krehbiel is the only Professional Engineer who testified in this matter.

⁴⁴ Ex. 300, Krehbiel Direct, at p. 4.

⁴⁵ Ex. 5, Cox Surrebuttal, Schedule JC-S3.

⁴⁶ Tr. at 166-167.

MoDNR has already concluded Cedar Glen should have a secondary water source should silence further debate on the issue. MoDNR will ultimately insist on a secondary water source for Cedar Glen.

Mr. Cox estimates that a new well for Cedar Glen might cost \$100,000.⁴⁷ The District estimates the cost of interconnection to be much less as discussed above. However, if an interconnecting line is installed between District No 5's water system and Cedar Glen's the costs of digging a second well to serve Cedar Glen unit owners and digging a second well to serve District No. 5's customers are avoided. Otherwise, duplicate secondary wells will be dug unnecessarily.

5. *Cedar Glen unit owners.*

In his rebuttal testimony, Mr. Ken Hulett, President of the Cedar Glen Condominium Owner's Association, Inc., offered support for Mr. Krehbiel's recommendation of an interconnection between District No. 5's water system and Cedar Glen's. He went on to confirm that:

the Association board of directors has authorized the voluntary annexation of the condominiums into PWSD#5. The board has determined that for the long term condominium unit owners are better served by PWSD#5 water and wastewater services. At this time approval of OUOC's application would effectively overlay a regulated public utility on PWSD#5's anticipated expanded service territory all to the detriment of the District's plan for future service growth and to the detriment of Cedar Glen's unit owners. At present there is no need for a regulated public utility in our area which will essentially duplicate services already supplied, or services which could be easily extended, by an existing and fully qualified nonprofit and publicly supported provider of those services.⁴⁸

⁴⁷ Tr. at 113.

⁴⁸ Ex. 302, Hulett Rebuttal, at p. 3.

Mr. Hulett also testified about the adverse effects of a possible combined rate for water and sewer service that is double that of the District's, particularly the effects of such a difference in rates on the value of the Cedar Glen condominium units.

Q. Are there other condominium projects in the vicinity of Cedar Glen?

A. Two that I consider neighbors are Cedar Heights Condominiums and Clearwater Condominiums. Cedar Glen, Cedar Heights and Clearwater were built and organized by the same developer.

Q. How are water and sewer services provided to the unit owners at Cedar Heights and Clearwater?

A. The unit owners in those condominium projects are customers of PWSD#5. This raises another factor which reinforces that OUOC's proposed purchase of the Osage Water Company assets is detrimental to the public interest. If OUOC's rates reach the level it has projected, as explained by Mr. Krehbiel, the rates for utility service at Cedar Heights and Clearwater will be approximately half of what Cedar Glen unit owners pay, a situation which I consider unfair and which will unquestionably lead to objections and complaints.

Q. Is the cost of utilities a factor in the value of a condominium unit?

A. Yes, it is. It is just one of a number of cost factors that would influence the value of a condominium unit to a prospective purchaser. Other cost factors would include the amount of the annual assessment and real estate taxes.

Q. If OUOC's combined rate for water and sewer service should rise to twice PWSD#5's rate, will this have an effect on the value or marketability of units at Cedar Glen?

A. It is entirely possible that the value of units at Cedar Glen would decrease while the value of units at Cedar Heights and Clearwater would increase because of the large difference in the rates for water and sewer services.⁴⁹

At the conclusion of his rebuttal, Mr. Hulett offered his recommendation to the Commission:

On behalf of the board of directors I recommend that the Commission reject the OUOC's application and approve a sale of the Osage Water Company assets to PWSD#5, Missouri Water Association, Inc. and Lake Area Waste Water

⁴⁹ Ex. 302, Hulett Rebuttal, at pp. 5-6.

Association, Inc. as each has agreed with the trustee in bankruptcy for the reasons set out in my testimony. As this relates to Cedar Glen, to approve OUOC's application would be detrimental to the public interest. PWSD#5 is prepared to annex Cedar Glen into its service territory and the board of directors of the Association has agreed to voluntary annex if the sale is approved. PWSD#5 can purchase the Cedar Glen assets without altering its current combined rate of \$78 per month. PWSD#5's water system and Cedar Glen's water system can be interconnected at a reasonable cost. The District can make needed improvements to the Cedar Glen water and wastewater facilities at a much lower cost than OUOC. Annexation of and interconnection with Cedar Glen water facilities is consistent with the District's expansion plan and with Cedar Glen's preferred long range preferences. Unit owners of neighboring condominium projects are already customers of the District. The public interest is served by rates for service at Cedar Glen which are the same as those charged to unit owners in those neighboring condominium projects. If OUOC's application is approved its rate for service at Cedar Glen could be twice that of the District's, if not more. The public utility that was approved and authorized to provide water and sewer service to Cedar Glen proved to be insolvent and unreliable, and the Cedar Glen unit owners lived with questions about the adequacy of water and sewer service through a lengthy receivership proceeding. The board of directors of the Association places great confidence in the District's financial condition and its abilities to provide reliable and adequate service.⁵⁰

6. *The Public Comments*

As mentioned in the Introduction, seventy-seven unit owners at Cedar Glen Condominiums submitted public comments in this docket and each without exception opposed the purchase of the OWC assets by OUOC and supported the District's proposal to purchase the OWC assets serving Cedar Glen. Their opposition to the application is a powerful message that should not be discounted by the Commission. From what has been written above, the unit owners have undeniably valid objections. If the Commission approves the sale to OUOC, the unit owners will no longer have the certainty of steady rates available from District No. 5 for its services, and will not have the opportunity to participate in a public forum **in their locality** as rate level decisions are made, but will instead have the uncertainty of rate proceedings before this Commission, which despite their intervention, or Cedar Glen's intervention, at substantial

⁵⁰ Ex. 302, Hulett Rebuttal at pp. 7-8.

expense, will generate---with certainty---rates for utility service above those District No. 5 charges.

The unit owners' dissatisfaction with regulated rate of return public utility water and sewer service is historic and well entrenched. When OWC commenced services to Cedar Glen Condominiums the service area became a profit center for the company at the unit owners' expense. As the comments reflect, the unit owners believe once is enough.

7. *Efficient Utilization of Public Resources*

Section 386.610 provides in part that “[t]he provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities.” District No. 5 has acquired operating water and sewer facilities in order to fulfill public duties assigned to it by law. In connection with its responsibilities it submitted to the voters in the District a proposition to incur long term debt. That debt was authorized and bonds were marketed and sold. Bonding capacity has not been exhausted at this time. District No. 5 has made a determination that incorporating Cedar Glen Condominiums into the District is a natural extension of its service territory and providing service to the Cedar Glen unit owners is a needed complement to its customer base. Additionally, and perhaps most importantly: 1) the interconnection of the District’s water system and Cedar Glen’s water system dispenses with the digging of a second District well and the costs and expenses incurred as part of the undertaking; and 2) qualifies the District for the refinancing of its long term debt at a lower interest rate.⁵¹

If the Commission were to approve OUOC’s application, an opportunity to further regionalize the public water systems in this vicinity would be lost; public funds would be used

⁵¹ See Mr. Stone’s discussion with Commissioner Kenney about the District’s favorable refinancing potential. Tr. 405-406.

unnecessarily to build duplicate facilities; and a public debt could not be reorganized to reduce the burden on its obligor(s) and reduce the cost of service. In the interest of:

- 1) the public welfare and substantial justice; and
- 2) the efficient use of assets and resources, including financial resources, already devoted to public service; and
- 3) comity with a political subdivision of this state and respect for its strategic plan, OUOC's application should be denied.

V. Conclusion

The detriments to the public and the public interest that attend the granting of OUOC's application are not speculative. When compared to the utility service alternatives already in place within the OWC service area, the service supplied by a rate of return regulated, profit centered water and sewer utility is detrimental and harmful to ratepayers. The detriments outweigh any benefits. On the basis of the above and foregoing, the Commission should deny Osage Utility Operating Company, Inc.'s application.

Respectfully submitted,

NEWMAN, COMLEY & RUTH P.C.

By: /s/ Mark W. Comley
Mark W. Comley #28847
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(573) 634-2266
(573) 636-3306 (FAX)
comleym@ncrpc.com

Attorneys for Cedar Glen Condominium Owners Association, Inc.

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 October, 2019, to:

General Counsel's Office at staffcounsel@psc.state.mo.us;
Office of Public Counsel at opcservice@ded.state.mo.us;
Dean L. Cooper at dcooper@brydonlaw.com;
Diana C. Carter at dcarter@brydonlaw.com;
Sue A. Schultz at sschultz@sandbergphoenix.com;
Joseph A. Ellsworth at ellsworth@lolawoffice.com;
Charles McElyea at cmcelyea@pmcwlaw.com;
Christopher I. Kurtz at ckurtz@rousepc.com; and
Stanley N. Woodworth at swoodworth@rousepc.com.

/s/ Mark W. Comley