

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 Nos. 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  
REPLY BRIEF**

Cedar Glen Condominium Owners Association, Inc. (“Cedar Glen”) submits the following in reply to the initial briefing in this matter. In submitting this reply, Cedar Glen does not abandon or waive any argument, position or issue it asserted in its initial brief.

**I. The Joint Bidders and the Proposed Division of the Osage Water Company (“OWC”) Assets.**

At page 2 of its brief, in the introductory segment, Osage Utility Operating Company, Inc. (“OUOC”) argues that “if the Commission decides to examine the Joint Bidders’ proposal, it needs to recognize that the proposal is not comprehensive and not equal in its treatment of the four OWC service areas.” Later, at page 20-21 of its brief, OUOC observes correctly that “the Joint Bidders’ proposal is NOT for all the Joint Bidders, as a group, to own and operate the entirety of the OWC service areas.” In the pages following, OUOC refers to the testimony at hearing of Mr. Goss and Mr. Stone and the history of Public Water Supply District No. 5’s (“the District”), Missouri Water Association’s (“MWA”) and Lake Area Waste Water Association’s (“LAWWA”) efforts at compliance with environmental regulation. At page 26 of its brief, OUOC contends that the Joint Bidders’ proposal is not equivalent to OUOC’s in regard to “technical, managerial and financial capabilities of the proposed purchasers, the environmental compliance history of the potential

owners, or the plans and estimates for rehabilitation of the systems.” OUOC’s contentions have no merit.

*A. Division of the OWC assets.*

The Joint Bidders’ proposal to divide the OWC assets is perfectly sensible, if not ideal, in that the ratepayers will be best served. The District’s purchase of the assets serving Cedar Glen and the District’s planned expansion to annex Cedar Glen into its service territory will migrate the unit owners into a customer base totaling 616. The rates paid by the unit owners would no longer subsidize the cost of serving the approximately 200 other OWC customers living in the smaller and less dense, and more cost intensive, Cimarron Bay, Chelsea Rose, and Eagle Woods/ Highway KK service areas. Ending that subsidy has been a chief objective of Cedar Glen throughout the duration of the receivership.

Upon MWA’s and LAWVA’s purchase of the assets serving the Cimarron Bay, Chelsea Rose, and Eagle Woods/Highway KK service areas, those 200 or so customers will be absorbed into larger customer bases over which costs of service can be more equitably distributed. MWA has around 1,110 customers. LAWVA has “a little over 2,800.”<sup>1</sup>

If OUOC purchases the OWC assets its customer base (90 or more of which publicly object to its purchase)<sup>2</sup> will be limited indefinitely to 432 and recovery of OUOC’s costs of improving facilities will be shouldered by them, and them alone, at rates for service that will be much more than, if not twice as much as, those charged by the District or MWA and LAWVA. The Joint Bidder’s purchase of the assets, unlike OUOC’s, will spread the costs of service over a broader customer count thus removing the prospect of the steep rates for service which OUOC would

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<sup>1</sup> Tr. at 458.

<sup>2</sup> See Public Comments in this docket. As of the date of the filing of this brief, 112 comments have been submitted most of which---90 or more---were authored by unit owners. The commenters have objected to OUOC’s purchase and recommend a purchase by the District.

ultimately charge to OWC's 432 customers. The Joint Bidders' proposal minimizes the risk of harm to the ratepayers and in comparison to OUOC's proposal provides them greater benefit.

*B. Technical, Managerial and Financial.*

OUOC argues that the District, MWA and LAWVA are not financially, technically or administratively qualified to provide water distribution and wastewater collection and treatment utility services notwithstanding:

- 1) the District's nine years of service to 400 or more customers, the District's unused bonding authority, and a record of compliance with environmental regulation which is satisfactory to the Missouri Department of Natural Resources to the degree that DNR intends to reorganize the District's debt at lower interest; and
- 2) MWA's and LAWVA's current service to 1,100 and 2,800 customers respectively, for 21 subdivisions (water) and 56 home owners associations or condominiums (wastewater),<sup>3</sup> and, as Mr. Goss has testified at hearing, their ongoing and conscientious efforts to remedy DNR notices of violation and their record of compliance with those notices.

To conclude as OUOC argues, the Commission would need to disregard the Joint Bidders' collective record of service and the extensive reach of that service. In essence the Commission would need to find that they do not exist.

Furthermore, if the Joint Bidders were not qualified to own and operate the OWC assets the first place where their proposal would be foreclosed was in bankruptcy court. Plainly, the bankruptcy trustee saw nothing in the joint proposal or the identity of those offering it which would disqualify the Joint Bidders from the auction. There are two qualified bidders for the OWC assets.

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<sup>3</sup> Tr. at 459-459.

**Whatever the outcome of this matter, the District, MWA and LAWVA will still be providing utility service in Camden County as continuing authorities with the encouragement and approval of their customers and DNR.**

## **II. Estimate for Interconnection.**

On page 3 of its brief, and again at page 21, OUOC claims that the District has not prepared an estimate of the costs of interconnecting the Cedar Glen water system to the District's. The record refutes this.

During his examination of Mr. David Stone, Commissioner Kenney asked for clarification on the price the District had offered to pay for the assets serving Cedar Glen:

Q. I just want to clarify those numbers just so I have them of the dealing with the Davidson fixed income capital markets. Mr. Zitnik who provided a letter to the water district about that you have availability to borrow 1.4 million and that you're looking at 800,000 at 3.5 percent on a 20-year note. So the 800,000 is the original purchase price less the 160,000 from the other bidders. So 640,000 plus the 40,000 deposit?

A. Plus 40,000 we put in.

Q. Is that the other 120,000, are those the repairs that you show in your testimony?

A. It will be for the road bore and to connect the two systems and the repairs they have which we estimate between 40 and 60,000.

Q. That's what you laid out here?

A. Yes.<sup>4</sup>

## **III. Ratemaking Powers.**

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<sup>4</sup> Tr. at 404. If the Joint Bidder's obtain the OWC assets, the District's deposit will be credited to the purchase. Technically, provided the District commits \$800,000 to the transaction and repairs, there will be approximately \$180,000 to \$200,000 available for interconnection, the road bore and the estimated repairs.

Both the Staff and OUOC have inferred in their separate briefs that the OWC customers will be protected from unreasonable rates because of this Commission's oversight. In his opening statement counsel for OUOC remarked that the "[t]he opposition's arguments essentially are that this Commission will not do its job in the future to ensure that safe and adequate service is provided at just and reasonable rates."<sup>5</sup> To be clear, Cedar Glen is not suggesting that the Commission will forsake its duty to set reasonable rates in accordance with law. So far no contention has appeared suggesting that the District or MWA or LAWVA will not set reasonable rates in accordance with law. Yet even clearer is that rates approved as reasonable and just in this Commission (rates which are designed to yield a return on investment or a profit) would be unjust, unreasonable and **unlawful** if they were approved by the District or the nonprofit bidders. Upon comparison, rates for service approved as reasonable by the Commission for OUOC would be more than those set by the District or the nonprofit bidders for the same services.

#### **IV. Public Interest.**

At page 12-13 of its brief, Staff refers to, as Cedar Glen did in its own brief, the Commission's summary and interpretation of the *AG Processing* case as set out in the *AmerenCIPS* case.<sup>6</sup> Among other conclusions about the case, the Commission wrote:

[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.<sup>7</sup>

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<sup>5</sup> Tr. at 26.

<sup>6</sup> *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).

<sup>7</sup> *Id.*, at p. 43.

In arguing that the OUOC purchase of the OWC assets is not detrimental to the public interest Staff appears to draw heavily on this part of the Commission analysis. Staff contends at page 13 of its brief

it is proper to consider future ratemaking effects, however, a potential for an increase in rates alone is insufficient to deny an application where the transaction will, “remedy a deficiency that threatens the safety or adequacy of the service. [footnote omitted]”

In later sections of its brief, Staff recommends approval of the OUOC application due in large part to OUOC’s anticipated improvements to the OWC facilities.

There is another prong in the Commission’s statement of the standard. Staff’s brief begs the question of whether the OUOC purchase of the OWC assets will “confer a benefit equal to or greater” than the detriment of higher rates for service. Cedar Glen contends that it will not. The District and the nonprofit utility entities are as committed to safe and adequate service as OUOC and have the means and resources to bring the OWC assets into regulatory compliance. Is there any other benefit OUOC can supply which the District and the nonprofit utilities are not providing currently? Cedar Glen submits there are none. Paying higher rates to OUOC gains the ratepayers nothing. If the OUOC applied for transaction is approved, the customers will pay more for a benefit already available at a less cost and they will do so to their detriment.

Staff also have relied on the Commission’s report and order in *In the matter of the Application of UtiliCorp United Inc., d/b/a Missouri Public Service, for authority to sell a part of its franchise, works or system*, Case No. GM-97-435 (October 15, 1998). This case was cited by OUOC in moving to strike the Joint Bidders’ testimony and testimony submitted by Office of Public Counsel, and limiting the scope of this proceeding,<sup>8</sup> a motion previously denied by the

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<sup>8</sup> OUOC’s Amended Motion to Strike And/Or to Limit Scope of Proceeding (September 9, 2019).

Commission.<sup>9</sup> In that case the Commission concluded that evidence of offers to purchase part of, or one of, Utilicorp's pipelines--offers that had been withdrawn--which were more favorable to the one under review was not relevant to whether the sale was detrimental to the public interest.<sup>10</sup> On the basis of the Commission's decision in the case Staff argues at page 19 of its brief that "to speculate about the possibility of a different result arising out of nothing more concrete than a competing proposal [meaning the Joint Bidders' proposal] cannot be considered sufficient evidence such as to be considered detrimental to the public interest." Staff is correct that the Joint Bidder's proposal is concrete. Staff cannot seriously argue that it is mere "speculation."

The list of material facts that are definite about the Joint Bidders and their proposal is long:

1. The Joint Bidders have deposited at risk \$40,000 with the trustee in bankruptcy to participate in the auction process.
2. The Joint Bidders are the "First Back-up Bidder."

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<sup>9</sup> Tr. at 15.

<sup>10</sup> The reasoning in Case No. GM-97-435 has not been faithfully followed by the Commission. In deciding whether to grant a certificate of convenience and necessity the Commission has considered whether alternative providers of the service are available. See, *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n of Missouri*, 848 S.W.2d 593, 595 (Mo. App. W.D. 1993).

In Case No. WO-2005-0086, the Commission dismissed an application to purchase the OWC assets because the wastewater treatment facilities serving Cedar Glen were excluded from the proposed sale. On appeal that decision was affirmed with the Court observing:

The exclusion of the sale of the Cedar Glen assets raised a number of concerns for the Commission. The Cedar Glen customers constituted the bulk of Osage Water's sewer customers and their exclusion would mean that any rate increase to cover any proposed rate base would be spread across a much smaller pool of customers. The staff of the Commission noted that the remaining customers could see their rates at least double in order to provide recovery of the overall cost of sewer service.

*Envtl. Utilities, LLC v. Pub. Serv. Comm'n*, 219 S.W.3d 256, 260–261 (Mo. App. W.D. 2007). In the case presently before the Commission the Staff does not appear to be the least concerned about a doubling the rates for service.

3. Their written contract to purchase the OWC assets is valid, binding upon the parties and enforceable against each in accordance with its terms. The contract contains a firm, not modifiable, price for the assets.
4. Acquisition of the OWC assets serving Cedar Glen is part of the District's expansion plan.
5. District acquisition of the OWC assets serving Cedar Glen and additional expenditure up to \$800,000 in total will not affect the District's combined rate for water and sewer service.
6. Continued implementation of CSWR's business plan means rates for service at significantly higher levels. This trend is traceable.
7. The District and MWA and LAWVA are prohibited from charging profit based rates.
8. Cedar Glen unit owners, who represent 216 of the OWC customer accounts, are opposed to OUOC's service.

There is no guesswork or mindreading involved with the Joint Bidders' proposal; the stage is already set for the Joint Bidders to close on the deal subject to Commission approval.

## **V. Public Comments**

As of the date this brief is filed, approximately 90 Cedar Glen unit owners have filed comments objecting to the approval of OUOC's application. All express a preference for District ownership and operation of the utility assets serving Cedar Glen.

OUOC and the Staff have both omitted any discussion of the unit owners' 90 comments. That OUOC omitted any reference to the protests of those prospective customers is not a surprise. It would be contrary to OUOC's arguments to highlight the extent of customer resistance to the application that is represented by this high number of comments.



The Staff on the other hand was directed by the Commission to render a recommendation respecting approval of the application and as part of that recommendation it was expected to evaluate the detriments to the public if it were granted. Staff elected not to examine potential detriments to Cedar Glen residents. In its supporting memorandum to the recommendation Staff stated that “[f]or its reviews, Staff also considers whether or not other utility entities are available to provide similar service.”<sup>11</sup> Ms. Dietrich explained at hearing that this type of review was limited in this case to whether other utilities were available to serve the residents of Reflections Condominiums not whether other utilities were available to serve Cedar Glen, although the Staff over the years has known about Cedar Glen’s history with OWC and its interest in owning the assets itself.<sup>12</sup> Staff also made no effort to contact Cedar Glen’s president or the residents there in reaching its recommendation. Ms. Dietrich explained that this was because “Staff considered the application that was before the Commission.”<sup>13</sup> It was not explained why that made any difference to Staff’s general procedure of considering “whether or not other utility entities are available to provide similar service.”

In the process of assigning a limit to its review, Staff has ignored those who would directly bear the impact of a decision in this case. Staff also disregards the alternative service providers in the area which could efficiently serve those customers on a nonprofit basis. In brief, the Staff has concluded the comments and preferences of the unit owners have no weight or meaning, or are discardable at best. Cedar Glen trusts that the Commission will conclude otherwise.

## **V. Conclusion.**

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<sup>11</sup> Ex. 105, Dietrich Supplemental Testimony, Staff Memorandum (with marked text) at p.20 of 26.

<sup>12</sup> Tr. at 211.

<sup>13</sup> Tr. at 212.

The unit owners at Cedar Glen are aware, as demonstrated by their comments, that they are more than likely the main mark of Central State Water Resources, Inc.'s ("CSWR") unfolding purposes. If CSWR's business plan should follow its developing trend the Cedar Glen unit owners will pay rates for utility service that are double, or more than double, of those charged by the District for the same services. The highest measure of detriment will fall on them if the Commission approves OUOC's application.

The Commission should deny Osage Utility Operating Company, Inc.'s application.

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 17th day of October, 2019, to:

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