

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

In the Matter of the Application of Osage)
Utility Operating Company, Inc. to)
Acquire Certain Water and Sewer Assets) **Case No. WA-2019-0185**
and for a Certificate of Convenience and)
Necessity)

RESPONSE TO INTERVENERS' MOTION TO DISMISS

COMES NOW Osage Utility Operating Company, Inc. ("OUOC" or "Company"), and for its Response to Interveners' Motion to Dismiss states as follows to the Missouri Public Service Commission ("Commission"):

Background

On December 19, 2018, OUOC filed an *Application and Motion for Waiver* ("*Application*") proposing to purchase all water and sewer assets owned by Osage Water Company; (ii) proposing to purchase all water and sewer assets serving Reflections Subdivision Master Association, Inc., and Reflections Condominium Owners Association, Inc.¹; requesting certificates of convenience and necessity ("CCN") authorizing it to operate the Associations' systems and provide service to the public; and seeking acquisition incentives authorized under 4 CSR 240-10.085. The Application was amended on February 19, 2019, to correct the descriptions of the water and sewer systems

¹ Reflections Subdivision Master Association, Inc., and Reflections Condominium Owners Association, Inc., are referred to jointly hereafter as the "Associations."

and number of customer connections within the Reflections subdivision, as well as clarifying the stated costs for infrastructure upgrades to the water and sewer systems are estimates (“*Amended Application*”). Included with the *Application* and the *Amended Application* was Appendix D-C, an executed copy of the *Amended And Restated Agreement For Sale of Utility System* (“*Agreement for Sale*”) between the Associations, Great Southern Bank (“GSB”), and Central States Water Resources, Inc. (“CSWR”), to purchase the assets pertaining to the provision of water and sewer service in the Reflections subdivision.

On September 6, 2019, the Associations and GSB jointly filed a *Motion to Dismiss or, in the Alternative, Motion to Modify Osage Utility Operating Company, Inc.’s Amended Application* (“*Motion to Dismiss*”). On September 9, 2019, the Office of Public Counsel (“OPC”) filed a motion supporting the *Motion to Dismiss*. The *Motion to Dismiss* alleges that Great Southern Bank and the Associations have allegedly terminated the *Agreement for Sale* and “sold” the utility systems to third parties. However, there is no evidence provided with the Motion indicating that a closing of the alleged third-party transaction has taken place. The *Motion to Dismiss* included Exhibits A and B, but neither of those constitutes evidence of a concluded sale. And the Company’s review of Camden County records does not reveal any deed

having been recorded that purports to transfer ownership of the systems from the Associations to any third-party.

The Associations and GSB allege that CSWR no longer has a contractual right or interest to purchase or operate the systems, and therefore, the Commission should dismiss OUOC's entire *Amended Application*, or in the alternative, dismiss the portion of the *Amended Application* that relates to the systems serving the Reflections subdivision. The *Motion to Dismiss* is devoid of merit and should be denied for the reasons discussed herein.

Standard

While not articulated in the *Motion to Dismiss*, the legal standards governing motions to dismiss are well known. A motion to dismiss is solely a test of the adequacy of the plaintiff's petition (in this context, OUOC's *Amended Application*). *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993). In applying that standard, the *Amended Application* is to be liberally construed and all alleged facts must be accepted as true. *Hedrick v. Jay Wolfe Imports*, 404 S.W.3d 454, 457 (Mo. App. W.D. 2013). The Commission is not allowed to consider the validity of the applicant's allegations or to consider evidence outside the four corners of the *Amended Application* that might challenge their validity. *Id.* "If the petition [in this

case the *Amended Application*] sets forth any set of facts that, if proven, would entitle the plaintiff to relief, then the petition states a claim.²

Accordingly, when ruling on the pending motion, it is not appropriate for the Commission to consider any factual allegations made by the Associations, GSB, and OPC in support of the *Motion to Dismiss*.

Argument

The Commission cannot consider the allegations made in the *Motion to Dismiss* or other alleged information and opinions submitted in support of the *Motion to Dismiss*. As noted, the law prohibits consideration of information outside the four corners of the *Amended Application* in determining whether a motion to dismiss can be granted. Consequently, the untested factual allegations and opinions included in the *Motion to Dismiss* are irrelevant. Instead, the only question is whether the allegations in OUOC's *Amended Application*, taken as true, fail to present any proper issue to the Commission for determination.

Indeed, the *Motion to Dismiss* does not claim that the *Amended Application* fails to present an issue within the Commission's jurisdiction for

² See also *Staff v. Aspen Woods Apartment Associates, LLC, et al.*, Order Denying Motions to Dismiss, WC-2010-0227 (April 14, 2010) (“A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.”).

determination. For that reason alone, the *Motion to Dismiss* must fail, and OUOC's *Amended Application* must be decided on the merits after evidence has been adduced in the evidentiary hearings that are scheduled to occur in just six (6) days from now.

Further, the *Motion to Dismiss* fails to distinguish between the legal significance of granting a CCN based upon a determination that the proposed project is "necessary or convenient for the public service" and the validity of the *Agreement for Sale*, a contract. The former is within the purview of the Commission, while the latter is within the exclusive jurisdiction of Article III courts. *See Katz Drug Co. v. Kan. City Power & Light Co.*, 303 S.W.2d 672 (Mo. App. 1957) ("Since the commission is not a court, it 'has neither the power to construe contracts, nor to enforce them'" and "it 'has no authority to adjudicate and determine individual or personal rights because, under the Constitution, the Legislature has no power or authority to invest such Commission with judicial powers'").(internal citations omitted.)

Lastly, the *Motion to Dismiss* ignores specific language in Section 393.170, RSMo, that authorizes the Commission to impose any conditions on a CCN that it deems reasonable and necessary. The Commission may condition the Reflections CCNs upon OUOC's closing on the *Agreement for Sale*. In fact, the surrebuttal testimony of Staff Witness Natelle Dietrich

suggests this option. In short, the Commission may approve the CCN while the parties litigate the contract dispute in Camden County Circuit Court, conditioning the effectiveness of the Reflections CCNs on OUOC's closing on the *Agreement for Sale*. Therefore, the *Motion to Dismiss* does not provide a basis for dismissal of the *Amended Application*.

Further Response

While the Commission inquiry into the *Motion to Dismiss* should stop with the above analysis, OUOC feels compelled to respond to certain allegations in the Motion to Dismiss:

- The *Motion to Dismiss*, among other things, alleges that “[t]he Systems have been sold to third parties.” (para. 14 (emphasis added)). However, there is no evidence provided with the *Motion to Dismiss* indicating that a third-party closing has taken place. The Company’s review of Camden County records does not reveal any deed having been recorded that purports to transfer ownership of the Systems;
- On August 15, 2019, Central States Water Resources, Inc. (“CSWR”) filed a Petition for Injunction & Declaratory Relief (“Petition”) against the Associations and GSB in the Circuit Court of Camden County (Case No. 19CM-CC00158). CSWR’s Petition in the civil

litigation has been amended to include a count requesting specific performance. That case continues and OUOC and CSWR continue to seek a declaratory judgment that the *Agreement for Sale* remains in effect and injunctive relief to prevent the Associations and GSB from attempting to sell to any third-party those assets subject to the *Agreement for Sale*;

- As stated in the referenced Petition, there is an issue as to the validity of the Associations' and GSB's purported termination. Whether CSWR/OUOC has a "contractual right or interest to purchase or operate the Systems" is an issue the courts must decide. Unless and until a court of competent jurisdiction declares the *Agreement for Sale* to be terminated, the request for CCNs should be addressed by the Commission;
- The Associations' and GSB's counsel entered their appearance at the Temporary Restraining Order hearing referenced by the *Motion to Dismiss* and signed the Court Memorandum attached to the *Motion to Dismiss*. There is no failure to provide service or notice in that case;
- Discovery has been initiated by CSWR in the civil proceeding and a Notice filed to obtain a setting for an injunction hearing. CSWR

continues to diligently prosecute the lawsuit;

- The *Agreement for Sale* entered into by the Associations, GSB and OUOC *** [REDACTED]

[REDACTED]

[REDACTED] *** One of the additional issues for the civil courts to address will likely include whether the Declaration of Restrictions for Reflections Subdivision, recorded on March 5, 2002, in Camden County at Book 530, page 243 et seq., controls the sale of the systems to certain entities. Section 16.1.5 of the Master Declaration provides:

The Association is empowered, subsequent to such time as Developer may transfer and convey the Sewer System or any portion thereof to the Association, to transfer and convey to any public authority, municipal corporation, or private corporation certified by the Public Service Commission of Missouri, said Sewer System, either with or without money consideration therefor, and such conveyance shall become mandatory and shall be made by the Association as soon as practicable, subject to the approval of the Commission, when any such public authority, municipal corporation, or private corporation certified by the Public Service Commission becomes capable of accepting such conveyance and thereafter performing all functions relating to the construction, maintenance, operation repair, improvement and regulation of the Sewer System.

(emphasis added). The entities with which the Associations and

GSB purport to have contracted with appear to not be a “public authority, municipal corporation, or private corporation certified by the Public Service Commission”; and

- The Associations and GSB have known since prior to the filing of the *Application* in December of 2018, that OUOC intended to combine the filing with that for the Osage Water Company assets and that OUOC would request a non-viable utility incentive.

As stated above, it is not necessary for the Commission to pass judgment on any of these factual matters in conjunction with ruling on the *Motion to Dismiss*. However, it is important that the Commission also not jump to conclusions based on the perhaps misleading allegations found in the *Motion to Dismiss*.

Conclusion

The *Motion to Dismiss* provides no legal basis for this Commission to dismiss OUOC’s *Amended Application* in whole, or in part. Instead, it asks this Commission to ignore the standards governing motions to dismiss; it asks this Commission to undertake unlawful acts by adjudicating the parties’ rights under the *Agreement for Sale*; and it asks the Commission to limit its own processes and authority to act on the *Amended Application* by ignoring

the Commission's authority to condition the Reflections CCNs. As such, the Commission should deny the *Motion to Dismiss* and decide the merits of the *Amended Application* after the evidentiary hearing in this matter scheduled for September 17-18, 2019.

WHEREFORE, OUOC respectfully requests that the Commission deny the *Motion to Dismiss, Or In The Alternative, Motion to Modify Osage Utility Operating Company, Inc's Amended Application*.

Respectfully submitted,

/s/ Jennifer L. Hernandez

Jennifer L. Hernandez, MBE #59814

Dean L. Cooper, MBE #36592

BRYDON, SWEARENGEN &

ENGLAND P.C.

312 E. Capitol Avenue

P.O. Box 456

Jefferson City, MO 65012

(573) 635-7166 telephone

(573) 636-7431 facsimile

jhernandez@brydonlaw.com

dcooper@brydonlaw.com

**ATTORNEYS FOR OSAGE
UTILITY OPERATING COMPANY,
INC.**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served electronically on all parties of record herein on this 11th day of September 2019.

/s/ Jennifer L. Hernandez