

IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
 WESTERN DISTRICT OF MISSOURI  
 CENTRAL DIVISION

IN THE MATTER OF: )  
 ) Case No. 17-42759-drd11  
 OSAGE WATER COMPANY, )  
 )  
 Debtor. )

PUBLIC WATER SUPPLY DISTRICT NO. 5 )  
 OF CAMDEN COUNTY, LAKE AREA )  
 WASTER WATER ASSOCIATION, INC., )  
 MISSOURI WATER ASSOCIATION, INC., )  
 AND CEDAR GLEN CONDOMINIUM )  
 OWNERS ASSOCIATION, INC., )  
 )  
 Plaintiffs, ) Adversary No. 20-02004-drd  
 )  
 v. )  
 )  
 OSAGE WATER COMPANY., et al. )  
 )  
 Defendants. )

**TRUSTEE’S SUGGESTIONS IN OPPOSITION TO PLAINTIFF’S REQUEST FOR  
 TEMPORARY RESTRAINING ORDER**

COMES NOW Jill D. Olsen, Chapter 11 Trustee for Osage Water Company (“Trustee”),  
 by and through undersigned counsel for her Suggestions in Opposition to Request for Temporary  
 Restraining Order, and states as follows:

**INTRODUCTION**

The assets of Osage Water Company (“Debtor”) have been under some form of court  
 supervision for the past fifteen years. After conducting a successful auction and negotiating a  
 settlement resolving the various claims to the sale proceeds, the Trustee was on track to end such  
 supervision and the attendant costs, expenses, and uncertainty associated with the same.  
 Notwithstanding the fact that the Court approved the sale more than eighteen months ago, the

Trustee has been unable to close the sale on account of the delays attributable to the litigation before the Missouri Public Service Commission (“PSC”) initiated by the movants Public Water Supply District No. 5 of Camden County, Missouri, Missouri Water Association, Inc., and Lake Area Waste Water Association, Inc. (collectively, the “Back-Up Bidders”).

Instead of submitting a higher bid to win the auction conducted by the Trustee or objecting to the sale in the first instance, the Back-Up Bidders chose instead to challenge the successful bidder’s application with the PSC. Now that the PSC has approved the transfer, the Back-Up Bidders have sought relief in three separate forums to stay the PSC’s order. This adversary proceeding is the latest attempt by the Back-Up Bidders to thwart the sale of Debtor’s assets to the successful bidder.

Missouri law has an established set of procedures for staying PSC orders. The Court should follow suit with the Missouri Court of Appeals and abstain from granting relief that would allow the Back-up Bidders to forum shop and end-run around this procedure. Even if it were appropriate for the Court to rule on this matter, the movants have not met their burden for the imposition of a temporary restraining order. For the reasons set forth herein, the Court should deny the extraordinary relief being sought by the movants.

### **BACKGROUND**

1. Debtor operates certain water and waste-water systems in Camden County, Missouri.
2. On October 11, 2017, after nearly twelve years in a state court receivership, Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Trustee was appointed as the Chapter 11 Trustee of Debtor on October 26, 2017.
3. On October 24, 2018, the Trustee, after successfully challenging several purported judgment liens with respect to the real property, held an auction for the sale of

substantially all of the Debtor's assets. Central States Water Resources (the "Stalking Horse Purchaser"), the stalking horse purchaser, was the successful bidder at the auction with a bid of \$800,000.<sup>1</sup> [Doc. 130]. The first-back up bidder was a joint bid by the Back-Up Bidders, also with a bid of \$800,000. *Id.* The second back-up bidder was Missouri-American Water Company (the "Second Back-up Bidder") with a bid of \$600,000. *Id.*

4. The Back-Up Bidders did not file an objection with this Court in opposition to the Stalking Horse Purchaser being declared the successful bidder or with respect to how the auction was conducted.

5. On November 14, 2018, the Court entered an order (the "Sale Order") approving the Trustee's agreement (the "Sale Agreement") to sell the Debtor's assets to the Stalking Horse Purchaser or its affiliate. In the Sale Order, the Court also approved the sales to the Back-Up Bidders and the Second Back-up Bidder in the event the Stalking Horse Purchaser was unable to close the transaction. [Doc. 135]. The Sale Order provided that no further approval other than "any necessary approval" by state regulatory authorities was necessary for the Trustee to consummate the sale transaction. [Doc. 135 at 4]. The Sale Order further provided that the Trustee was authorized to sell the assets "subject to any necessary approval by [ ] any state regulatory authorities." [Doc. 135 at 5].

6. The Sale Agreement contained the following condition precedent for closing, which could be waived under the Sale Agreement:

The PSC and DNR shall have, if necessary, authorized or approved the sale, transfer or disposition of the Assets to Buyer from Seller, the proposed financing, and schedule of compliance for proposed utility improvement projects for regulatory compliance deemed necessary by Buyer, in each form and substance (including without limitation with respect to the terms and conditions contained in such approval) acceptable to Buyer in Buyer's sole and absolute discretion.

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<sup>1</sup> It should be noted that the original stalking horse bid was \$465,000.

[Doc. 135 at 8].

7. On December 19, 2018, the Stalking Horse Purchaser's affiliate, Osage Utility Operating Company ("Osage Utility"), filed its application with the PSC for the approval of the transfer of Debtor's assets to Osage Utility, which case is pending as Case No. WA-2019-0185 with the PSC (the "PSC Proceeding").

8. On January 18, 2019, the Back-Up Bidders and Cedar Glen Condominium Owners Association, Inc. (collectively, "Movants") filed motions to intervene in the PSC Proceeding.

9. On May 24, 2019, the Staff of the PSC filed a recommendation that the PSC approve the transfer to Osage Utility. Movants filed responses in opposition to the staff's recommendation, requesting that the PSC deny approval of the transfer to Osage Utility because, among other things, Back-Up Bidders wanted to purchase the assets. [Docs. 27 and 28 in PSC Proceeding].

10. The parties engaged in additional briefing and submitted evidence in support of their respective positions in the PSC Proceeding. A hearing was held on September 17 and 18, 2019, and the parties filed post-hearing briefing.

11. On April 8, 2020, more than a year after the application was originally submitted, the PSC entered its Report and Order (the "PSC Order"). A copy of the PSC Order is attached hereto as **Exhibit A**.

12. In the PSC Order, the PSC found that Osage Utility "possesses adequate technical, managerial, and financial capacity to own, operate, manage, and maintain the Osage Water Company water and sewer systems," and authorized the Trustee and Osage Utility to close the transaction agreed to in the Sale Agreement. Exhibit A at 38-39. The PSC Order further ordered Osage Utility to complete certain repairs within ninety days of the effective date of the

PSC Order. Exhibit A at 41. The effective date of the PSC Order was May 8, 2020. Exhibit A at 43.

13. To appeal an order from the PSC, a party must first seek a rehearing with the PSC. Mo. Rev. Stat. § 386.515. The deadline to request a rehearing is the effective date of the PSC's order, which is generally thirty days after service of the order. Mo. Rev. Stat. § 386.490. An application for rehearing does not automatically stay the effectiveness of the PSC's order, but the PSC may order otherwise. Mo. Rev. Stat. § 386.500.3. If an applicant timely files a notice of appeal after the PSC either denies the application for rehearing or makes a decision on rehearing, the applicant can appeal the PSC's decision. Mo. Rev. Stat. § 386.510. An appeal does not stay the effectiveness of the PSC's order, but the appellate court has discretion to issue a stay after "the posting of an appropriate appeal bond." Mo. Rev. Stat. § 386.520.

14. The deadline to request a rehearing of the PSC Order was May 8, 2020. On May 5, 2020, Movants filed a motion (the "PSC Stay Motion") with the PSC requesting a stay of the PSC Order until (1) the time for filing a notice of appeal has expired in the event no notice of appeal is filed; (2) any motion for stay or suspension has been denied by the Missouri Court of Appeals; or (3) thirty days after the filing of a notice of appeal if no motion for stay or suspension is filed. [Doc. 125 in PSC Proceeding]. On May 7, 2020, the Movants filed an application for rehearing (the "Application for Rehearing"). [Doc. 129 in PSC Proceeding]. Movants requested expedited treatment of the PSC Stay Motion, which the PSC declined to grant. As a result, the PSC Order took effect by its own terms at 12:01 a.m. on May 8.

15. After the PSC Order became effective according to its own terms, Movants sought a writ from the Missouri Court of Appeals for the Western District in Case No. WD83773

(the “Appellate Case”). Movants requested that the Missouri Court of Appeals stay or suspend the operation of the PSC Order until after a ruling on appeal.

16. On May 12, 2020, the Missouri Court of Appeals entered an order directing the PSC to file suggestions in opposition as to why the relief requested by the Movants should not be granted and ordered that “implementation of the [PSC Order] is stayed until further notice of this court.”

17. On May 21, 2020, both the PSC and Osage Utility filed opposition to the relief requested by the Movants.

18. On May 28, 2020, before the Missouri Court of Appeals could rule on the Movants’ petition, the Movants initiated this adversary proceeding.

19. On June 3, 2020, the Missouri Court of Appeals issued an order denying the Movants’ Petition for Alternative Writ of Certiorari and Writ of Mandamus.

20. On June 4, 2020, the Movants filed a request for an emergency hearing.

21. On June 4, 2020, Movants also filed a renewed motion to stay with the PSC. [Doc. 132 in PSC Proceeding]. The PSC has demanded that any responses to the renewed motion be filed by June 8, 2020. [Doc. 133 in PSC Proceeding]. It is the Trustee’s understanding that Osage Utility is opposing such a request.

22. On May 18, 2020 and May 28, 2020, the Trustee received Inspection Reports and Letters of warning from the Missouri Department of Natural Resources (“DNR”). The reports require the Trustee to take several remedial steps, including substantial costly repairs, and formally respond to the DNR by June 29, 2020 documenting the actions taken by the Trustee with respect to such remedial actions. Initial estimates show that these repairs could cost over \$800,000.

23. The Trustee and Osage Utility are diligently completing the various requirements under the Purchase Agreement in preparation of closing. It the Trustee's hope that such sale can be closed before the bankruptcy estate is forced to incur the expense in complying with the DNR's notices.

## ARGUMENT

### **I. IT IS NOT APPROPRIATE FOR THE BANKRUPTCY COURT TO GRANT THE RELIEF SOUGHT**

As an initial matter, it is inappropriate for this Court to grant the relief requested by the Movants. Rather than following the procedures prescribed by Missouri law, Movants are attempting to entangle this Court in a state regulatory matter. This approach is contrary to numerous policies respecting a state's powers within the bankruptcy forum. For example, the automatic stay does not stay the government's "police and regulatory power." *See* 11 U.S.C. § 362(b)(4).

Rather than overruling and intervening in state administrative matters, the Court should follow the principles of comity and abstain from ruling on the Movants' request for injunctive relief.<sup>2</sup> A bankruptcy court may abstain "from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11" "in the interest of justice, or in the interest of comity with State courts or respect for State Law." 28 U.S.C. § 1334(c)(1). While permissive abstention should be used sparingly, it is within the Court's discretion to do so. *See In re Kesar Enterprises, Inc.*, 330 B.R. 756, 761 (Bankr. W.D. Mo. 2005).

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<sup>2</sup> To the extent the Movants are attempting to indirectly attack the Missouri Court of Appeals' denial of their request for a writ staying enforcement of the PSC Order, such attempts are barred by *Rooker-Feldman*. The *Rooker-Feldman* doctrine "prohibits lower federal courts from exercising appellate review of state court judgments." *Skit Intern, Ltd. v. DAC Technologies of Arkansas, Inc.*, 487 F.3d 1154, 1156 (8<sup>th</sup> Cir. 2007). "The *Rooker-Feldman* doctrine bars both straightforward and indirect attempts by plaintiff to 'undermine state court decisions.'" *Prince v. Arkansas Bd. Of Examiners in Psychology*, 380 F.3d 337, 338 (8<sup>th</sup> Cir. 2004).

Courts consider the following factors with respect to permissive abstention:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficult or unsettled nature of the applicable law,
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than the form of an asserted “core” proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- (9) the burden on the bankruptcy court's docket,
- (10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties,
- (11) the existence of a right to a jury trial, and
- (12) the presence in the proceeding of nondebtor parties.

*In re Pursell Holdings, LLC*, 605 B.R. 914, 921 (Bankr. W.D. Mo. 2019). As this Court has recognized, the above factors should be applied “flexibly as their relevance and importance will vary depending on the specific facts of each case and no one factor is determinative.” *In re Kesar Enterprises, Inc.*, 330 B.R. at 761.

Application of these factors to the case at hand weighs in favor of abstention:

- For the first factor, granting the Movants’ requested relief would negatively impact the efficient administration of the estate, as it could add years of delay if the Trustee is unable to close the Purchase Agreement.

- For the second factor and third factors, to the extent the Movants are attempting to argue about the merits of their appeal of the PSC's order, those are technical, state law issues.
- For the fourth factor, there is already a state-law proceeding in which the Movants are seeking to stay the enforcement of the PSC Order. The PSC has the authority to grant a stay of its order. Mo. Rev. Stat. § 386.500.3. Once an appeal has been filed, the Missouri Court of Appeals may issue a stay upon the posting of an appropriate bond. Mo. Rev. Stat. § 386.520. The Movants also sought a writ from the Missouri Court of Appeals, which has been denied.
- For the fifth factor, there is no other jurisdictional basis other than 28 U.S.C. § 1334. There is not diversity of jurisdiction and no federal question is involved.
- For the sixth factor, there is little relatedness to the main bankruptcy case. The Movants have couched their Complaint as seeking a determination as to whether a condition precedent has been satisfied for a contract that the Movants are not a party to. In reality, the Movants' Complaint is focused on their grievances with the PSC Proceeding.
- For the seventh factor, whether the Purchase Agreement can close is a matter affecting the administration of the estate. However, the substance of the Movants' Complaint is focused on the PSC Proceeding.
- For the eighth factor, the PSC and the Missouri Court of Appeals can decide the appropriateness of the sale to Osage Utility under the PSC's standards for transfer of assets. This Court has already authorized the sale to Osage Utility and no further approval is needed from this Court.
- For the ninth factor, this case creates an additional burden on the Court's docket.
- For the tenth factor, the Movants have clearly engaged in forum shopping. The Movants first filed a motion for stay with the PSC. Days later, they sought a writ from the Missouri Court of Appeals. Now, they are trying a third forum in case they do not receive a stay from the PSC. It is hard to imagine a clearer example of forum shopping.
- For the eleventh factor, the Movants have not requested a jury trial.
- For the twelfth factor, the PSC Proceeding involves entirely non-Debtor parties, favoring abstention.

Other bankruptcy courts have declined to grant injunctive relief under similar scenarios.

The Bankruptcy Court for the Southern District of New York examined these issues in an analogous case. In *In re Go West Entertainment, Inc.*, debtor's liquor license was revoked by the

New York State Liquor Authority. 387 B.R. 435, 437 (Bankr. S.D.N.Y. 2008). The debtor initiated an adversary proceeding seeking an injunction staying revocation pending appeal. *Id.*

The bankruptcy court acknowledged that the debtor would be harmed by the decision, but ultimately declined to grant the requested injunctive relief. First, the court noted that the bankruptcy court “has no power to review or overturn a final State determination of the issues” related to the license revocation. *Id.* at 442. Second, granting an injunction “would directly violate the principle of comity and avoidance of needless friction between Federal and State courts that has been incorporated in several abstention doctrines.” *Id.* “The same comity principles apply with respect to State administrative proceedings . . . .” *Id.* at 443. Third, the court found that it lacked jurisdiction under *Rooker-Feldman*. *Id.* at 445-46.

Movants rely on 11 U.S.C. § 105 for their requested relief. Section 105(a), however, “does not permit courts to ‘act as roving commissions to do equity.’” *In re Amco Ins.*, 444 F.3d 690, 696 (5th Cir. 2006) (alterations omitted) (quoting *In re Mirant Corp.*, 378 F.3d 511, 523 (5th Cir. 2004)). The Court should decline the invitation to use its equitable powers to grant relief to the Movants on their Complaint.

## **II. MOVANTS HAVE NOT MET THEIR BURDEN FOR A TEMPORARY RESTRAINING ORDER**

In ruling on a request for a temporary restraining order, the Court must weigh the following factors: (1) the threat of irreparable harm to the movant; (2) the balance of this harm and the injury that granting the relief will have on the non-movant; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Management Registry, Inc. v. A.W. Companies, Inc.*, 920 F.3d 1181, 1183 (8<sup>th</sup> Cir. 2019). A temporary restraining order is “an extraordinary remedy” and the burden of proof is on the movant. *Id.*

**A. Threat of Irreparable Harm to Movant**

The Movants have failed to meet their burden of irreparable harm. “To succeed in demonstrating a threat of irreparable harm, ‘a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.’” *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 School Dist.*, 696 F.3d 771, 778 (8<sup>th</sup> Cir. 2012). “Speculative harm does not support a preliminary injunction.” *Id.* at 779. If there is an adequate remedy at law, then injunctive relief is not appropriate. *See Watkins Inc. v. Lewis*, 346 F.3d 841, 845 (8<sup>th</sup> Cir. 2003)

The harm to the Back-Up Bidders is that they might not get a chance to buy something that they previously decided not to buy. If they wanted to buy the Debtor’s assets, they could have continued to bid until they were the highest bidder at the auction. The Back-Up Bidders chose not to do so. Instead, the Back-Up Bidders have been interfering with the Stalking Horse Purchaser’s attempts to meet the conditions precedent under the Sale Agreement in the apparent hope that the Stalking Horse Purchaser will be unable to close. Attempts by unsuccessful bidders to stop the winning bidders from performing contracts are not the type of great harm for which courts grant injunctive relief. *See M. C. Thomas Constr. Co. v. City of St. Louis*, 679 F. Supp. 908, 909 (E.D. Mo. 1988) (denying unsuccessful bidder’s requested for injunction to stop city from awarding contract to another bidder); *C.S. McCrossan Constr., Inc. v. Minn. Dep’t of Transp.*, 946 F. Supp. 2d 851, 858-60 (D. Minn. 2013) (finding that there was no irreparable harm and denying unsuccessful bidder’s request for injunctive relief).

Moreover, the risk of harm to Movants is speculative, and there is already an adequate process under Missouri law. Missouri law gives the PSC the discretion to stay the enforcement of its orders. Mo. Rev. Stat. § 386.500. Movants have filed a motion for the PSC to grant a stay

under Mo. Rev. Stat. § 386.500,3 but the PSC has not yet ruled on this motion. It is not appropriate for a federal court to assume that Missouri's laws and procedures are deficient. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14-17 (1987) (holding that federal court's grant of injunction to bar enforcement of state court order was inappropriate when state court had its own procedures for resolving issues raised). Given the lack of irreparable harm, the Court should deny the request for temporary restraining order.

***B. Balance Between Harm to Movants and Harm to Estate***

The harm to the bankruptcy estate outweighs the potential harm to the Movants. First, there is a risk that the Stalking Horse Purchaser will decide not to close the sale because of the delay. This will result in the loss of \$800,000 in gross proceeds to the bankruptcy estate and any expenses the Trustee may incur seeking to enforce the Sale Agreement. While there is a back-up purchase agreement with the Back-Up Bidders, that agreement requires the Back-Up Bidders to obtain necessary approval with the PSC and to complete certain annexation. There is no guaranty that the Back-Up Bidders will be able to satisfy these conditions precedent or that they will ultimately agree to close the transaction. The Second Back-up Bidder has already withdrawn its offer due to the delay, and if none of the approved bidders closes, the Trustee will need to engage in a new sale process to the detriment of the bankruptcy estate and its creditors.

Second, the longer the bankruptcy estate remains open, the more expenses the bankruptcy estate incurs. There are administrative expenses associated with operating the bankruptcy estate, including the trustee's fees and attorneys' fees. More importantly, there are also improvements and repairs that the bankruptcy estate will need to complete if the Trustee is required to continue to operate the systems. For example, the Trustee recently received reports from DNR that

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<sup>3</sup> It should also be noted that the Movants had 30 days from the issuance of the PSC Order to originally seek a stay with the PSC and they waited until the eleventh hour to do so.

mandates that certain actions be completed by June 29, 2020. Based on initial estimates, the cost to repair the items identified by DNR could cost over \$800,000.

Third, there is harm to the creditors who could have their distributions delayed by years. One of the creditors, the bankruptcy estate of Hancock Construction Company, is keeping its own estate open until it receives a distribution on its claim. [Doc. 186]. Granting the Movants' requested relief will harm both the creditors of this bankruptcy estate and Hancock Construction Company's bankruptcy estate. Further, Gary Cover is unable to close his receivership estate until the Trustee is able to wind up Debtor's operations. Due to the harm to the bankruptcy estate and the ramifications of that harm, the Court should deny the request for injunctive relief.

***C. Probability that Movants will Succeed on the Merits***

The Movants have failed to show a probability that they will succeed on the merits. In their Complaint, the Movants focus on the merits of their prospective appeal with the Missouri Court of Appeals. The Missouri Court of Appeals has already analyzed the merits of Movants' arguments related to the PSC Proceeding and declined to issue a writ to stay enforcement of the PSC Order.

Moreover, the relevant question is whether the Movants "are likely to succeed in this lawsuit, not that the [Movants] are likely to overturn the [PSC's] determination in the Appellate Division." *In re Go West Entertainment*, 387 B.R. 435, 441 (Bankr. S.D.N.Y. 2008). Movants are not likely to succeed in this adversary proceeding. Movants have requested that this Court determine whether conditions precedent have been satisfied for performance of a contract to which they are not a party.

As a rule, "[o]nly parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract." *Verni v. Cleveland Chiropractic College*, 212 S.W.3d 150, 153 (Mo. banc. 2007). "To be bound as a third-party beneficiary, the terms of the contract must

clearly express intent to benefit that party or an identifiable class of which the party is a member.” *Id.* (quoting *Nitro Distributing, Inc., v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc. 2006)). Likewise, only a party with standing to enforce a contract has standing to seek a declaratory judgment action on a contract. *See Pegasus Satellite Television, Inc., v. DirectTV, Inc.*, 318 F. Supp.2d 968, 977 (C.D. Cal. 2004) (dismissing claims for declaratory relief when plaintiff was not a party to or third-party beneficiary of challenged contract).

The Movants are not a party to the Purchase Agreement, and the Purchase Agreement specifically states that there are no third-party beneficiaries to the Purchase Agreement. [Doc. 135-1 at 13-14]. Movants do not have standing to seek declaratory relief as to whether the conditions precedent for the Trustee to close the Purchase Agreement have been satisfied.

The agreement with the Back-Up Bidders contains the same language and is subject to the same conditions as the Purchase Agreement. However, the issue of what conditions precedent need to be satisfied for the Back-Up Bidders’ agreement is not ripe, and a decision on the same would be nothing more than an advisory opinion. *In re Boaz*, 386 B.R. 756, 757-58 (Bankr. D.N.D. 2008) (finding that case based on a hypothetical set of facts was not ripe for adjudication). The Court may not issue such advisory opinions. *Public Water Supply Dist. No. 8 of Clay County, Mo. v. City of Kearny, Mo.*, 401 F.3d 930, 932-33 (8<sup>th</sup> Cir. 2005).

Finally, even if the Court were to rule on this issue, the Movants would still lose. The condition precedent for the buyer to close, which can be waived under the agreement, is that the “PSC and DNR shall have, if necessary, authorized or approved the sale, transfer or disposition of the Assets . . . in a form and substance . . . acceptable to [the buyer] in [the buyer’s] sole and absolute discretion.” [Doc. 135-1 at 8; Doc. 135-2 at 8-9]. The contract does not require a final, non-appealable approval. Likewise, the Sale Order only refers to “necessary approval,” not final,

non-appealable approval. [Doc. 135 at 4, 5, 8, 10]. If the Court or the parties wanted to condition the sale on a non-appealable order, they could have done so. They did not, and the Movants have not shown a likelihood of success on the merits.

***D. Public Interest***

Movants have not met their burden of showing that the public interest favors their requested relief. In deciding whether to approve the transfer of the Debtor's assets to Osage Utility, the PSC analyzed whether the sale would be detrimental to the public interest. Exhibit A at 29-35. The PSC determined that it would not, and approved the sale to Osage Utility. If there is a risk of harm to the public, the PSC still has the opportunity to stay the effectiveness of the PSC Order, as the Movants' motion for a stay is still pending in the PSC Proceeding.

The public interest favors some finality after almost fifteen years of Debtor's assets operating under the control of a court-appointed receiver or bankruptcy trustee. Osage Utility has proposed a number of improvements, which the PSC has recognized as necessary. Staying the sale will delay those improvements. As discussed above, suspending the sale will delay the Trustee's ability to close this estate, contrary to the goal of the efficient administration of bankruptcy cases. *See In re Hancock-Nelson Mercantile Co., Inc.*, 95 B.R. 982, (Bankr. D. Minn. 1989) (explaining that one of the goals of bankruptcy cases is the "prompt and efficient administration of the estate.").

The Movants have not met their burden of showing that they are entitled to a temporary restraining order or preliminary injunction, and their request should be denied.

**III. IF THE COURT GRANTS THE REQUEST RELIEF, THE MOVANTS MUST POST ADEQUATE SECURITY**

If the Court is inclined to grant injunctive relief, the Movants must give "security in an amount that the court considers proper to pay the costs and damages by any party found to have

been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c), incorporated by Fed. R. Bankr. P. 7065. As discussed above, a temporary restraining order or preliminary injunction puts the bankruptcy estate at risk of losing an \$800,000 sale. The bankruptcy estate will continue to incur administrative costs, including trustee’s fees and attorneys’ fees. Additionally, if the sale does not close immediately, the Trustee will be required to expend bankruptcy estate funds to make repairs for the systems to the detriment of the creditors. Given these potential harms, the Trustee requests that any temporary restraining order or preliminary injunction be conditioned on the Movants depositing \$1,600,000 in the Court’s registry as security.

Rather than posting a bond, the Trustee is requesting the security to be in the form of a cash deposit into the Court’s registry. First, a bond would necessarily obligate the Trustee to incur additional funds in making a bond claim with a third party and initiate an adversary proceeding to recover the same. *See* Bankruptcy Rule 9025. If the cash security is deposited with the Court, then any disputes and entitlement may be brought before this Court for prompt resolution and without having to entangle any more parties to this action. Other courts have required the moving party to place funds in the court registry as security instead of posting a bond. *See, e.g., Gonzales v. CitiMortgage*, 2014 WL 7927627 at \*2 (N.D. Cal. Oct. 10, 2014) (requiring plaintiff to deposit \$2,000 a month in the Court’s registry as security); *Henderson v. Shapiro & Kirsch, LLP*, 2011 WL 4478806 at \*1 (M.D. Tenn. Sept. 26, 2011)(case where Court required as security a payment of \$700 per month into the court registry); *Ziemba v. American Home Mortg. Servicing, Inc.*, 2010 WL 472344 at \*3 (N.D. Ga Nov. 15, 2010)(requiring moving party to tender \$23,647.92 into the court registry as security for requested injunction).

WHEREFORE, Trustee respectfully requests that (i) Court deny the Movants’ request for a temporary restraining order or preliminary injunction; (ii) if the Court does grant injunctive

relief to Movants, it be conditioned on Movants depositing \$1,600,000 in the Court's registry;  
and (c) that the Court grant such other and further order as it deems just and proper.

Date: June 8, 2020

Respectfully submitted,

**SPENCER FANE LLP**

By: /s/ Eric L. Johnson

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COUNSEL FOR TRUSTEE

**CERTIFICATE OF SERVICE**

I hereby certify that on June 8, 2020, a true and correct copy of the above and foregoing was served electronically upon those parties receiving electronic notification through the Court's cm/ecf system.

/s/ Eric L. Johnson  
An attorney for the Trustee

# 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 and for a         )  
Certificate of Convenience and Necessity         )  
**File No. WA-2019-0185**

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## REPORT AND ORDER

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**Issue Date: April 8, 2020**

**Effective Date: May 8, 2020**

**EXHIBIT A**

# 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 and for a        )  
Certificate of Convenience and Necessity        )     **File No. WA-2019-0185**

## APPEARANCES

### **OSAGE UTILITY OPERATING COMPANY:**

**Dean L. Cooper**, and **Jennifer L. Hernandez**, Brydon, Swearengen & England, PC, P.O. Box 456, Jefferson City, Missouri, 65102-0456.

### **CEDAR GLEN CONDOMINIUM OWNERS ASSOCIATION, INC:**

**Mark W. Comley**, Newman, Comley & Ruth, PC, 601 Monroe Street, Suite 301, Jefferson City, Missouri, 65102.

### **PUBLIC WATER SUPPLY DISTRICT #5, LAKE AREA WASTEWATER ASSN., INC., MISSOURI WATER ASSN., INC.:**

**Aaron Ellsworth**, Ellsworth & Hardwick, P.O. Box 250, 2404 Bagnell Dam Boulevard, Lake Ozark, Missouri, 65043.

### **GREAT SOUTHERN BANK:**

**Sue A. Schultz** and **Anthony J. Soukenik**, 600 Washington Ave, 15<sup>th</sup> Floor, St. Louis, MO 63101.

### **REFLECTIONS CONDOMINIUM:**

**Christopher Kurtz** and **Stanley Woodworth**, 5250 W 11<sup>th</sup> Place, Suite 400, Leawood, KS 66211.

### **OFFICE OF THE PUBLIC COUNSEL:**

**Caleb Hall**, Senior Counsel, Department of Commerce & Insurance, 200 Madison Street, Suite 650, P.O. Box 2230, Jefferson City, Missouri 65102.

**STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION:**

**Whitney Payne**, Senior Counsel, and **Mark Johnson**, Deputy Counsel, Missouri Public Service Commission, 200 Madison Street, Suite 800, P.O. Box 360, Jefferson City, Missouri 65102.

**SENIOR REGULATORY LAW JUDGE:** Nancy Dippell

## REPORT AND ORDER

### I. Procedural History

On December 19, 2018, Osage Utility Operating Company, Inc. (Osage Utility) filed an Application and Motion for Waiver<sup>1</sup> for authorization to acquire the water and sewer assets and the certificates of convenience and necessity (CCN) in the four service areas of Osage Water Company and the single service area of Reflections Subdivision Master Association, Inc., and Reflections Condominium Owners Association, Inc. Osage Utility's Application also included a request for an acquisition incentive pursuant to Commission rule 20 CSR 4240-10.085.<sup>2</sup> On February 19, 2019, Osage Utility filed an Amended Application and Motion for Waiver.

Lake Area Waste Water Association, Inc. (LAWWA), Missouri Water Association, Inc. (MWA), Public Water Supply District No. 5 of Camden County Missouri (PWSD#5), Cedar Glen Condominium Owners Association, Inc. (Cedar Glen), Reflections Condominium Owners Association, Inc. (Reflections COA),<sup>3</sup> Great Southern Bank,<sup>4</sup> and the Reflections Subdivision Master Association, Inc. (Reflections MA),<sup>5</sup> were granted intervention. The Staff of the Commission (Staff) filed its initial recommendation on May 14, 2019. Several parties filed

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<sup>1</sup> The identical application was originally submitted in two files, one for water service (File No. WA-2019-0185) and one for sewer service (File No. SA-2019-0186). Those files were consolidated on January 29, 2019.

<sup>2</sup> Effective August 28, 2019, all of the Commission's regulations were transferred from the Department of Economic Development's (DED) Title 4 to the Department of Commerce and Insurance's (DCI) (formerly Department of Insurance, Financial Institutions and Professional Registration) Title 20. Thus, when filed, this rule was 4 CSR 240-10.085.

<sup>3</sup> Reflections COA is a not-for-profit corporation created by a condominium declaration for the three existing condominium buildings that are part of the Reflections subdivision.

<sup>4</sup> Great Southern Bank provided the financing for Abba Development Company, L.L.C. (Abba), the developer of the Reflections subdivision. Abba defaulted on its loan and conveyed title to all but three of the condominium buildings at the Reflections subdivision to Great Southern Bank. This included the real estate and the physical assets that are part of the water and sewer systems serving the development.

<sup>5</sup> Reflections MA was created by a "Declaration of Restrictions for Reflections Subdivision" when Abba created the subdivision. Reflections MA is the entity charged with the operation of the water and sewer facilities serving the Reflections subdivision.

responses to the recommendations and the parties agreed to a procedural schedule. A hearing was set and written direct, rebuttal, and surrebuttal testimony was filed.

On September 9, 2019, Great Southern Bank, Reflections COA, and Reflections MA (collectively referred to as “Reflections”) filed a motion to dismiss the portion of the application related to the sale of the Reflections water and sewer systems. In its motion to dismiss, Reflections claimed that it had terminated its purchase agreement with the managing parent company of Osage Utility, Central States Water Resources, Inc., and had sold the Reflections water and sewer systems to third parties.<sup>6</sup> As an alternative to dismissing the entire application, Reflections requested the Commission dismiss the portion of the amended application relating to Reflections. The Office of the Public Counsel (Public Counsel) filed a response in support of the motion to dismiss.

On September 9, 2019, LAWWA, MWA, and PWSD#5 (referred to as the “Joint Bidders”) filed a Motion to Strike Portions of the Written Surrebuttal Testimony of Todd Thomas and Josiah Cox, or Alternatively, Motion for Leave to File Testimony in Response. Cedar Glen filed a similar motion. On the same date, Osage Utility filed both a Motion to Strike and/or Limit Scope of the Proceeding and an Amended Motion to Strike and/or Limit Scope of the Proceeding. The motions to strike and motion to limit the proceeding were denied at the hearing.<sup>7</sup>

The Commission issued an order on September 11, 2019, bifurcating for hearing purposes the Reflections and Osage Water Company portions of the case. The Commission also directed Staff to file a revised recommendation regarding only the Osage Water Company systems. The Commission ordered that the other parties would be allowed to offer testimony responsive to Staff’s revised recommendation at the hearing. Staff filed its revised

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<sup>6</sup> The “third parties” were LAWWA and MWA.

<sup>7</sup> Transcript, pages 15-16.

recommendation on September 13, 2019, in the form of Supplemental Testimony of Natelle Dietrich with Revised Staff Memorandum.<sup>8</sup> On September 17-18, 2019, a hearing was held regarding only the transfer of assets and CCN for the Osage Water Company water and sewer systems. On September 30, 2019, Osage Utility filed a statement indicating that it was not opposed to the motion to dismiss the Reflections portion of the application.<sup>9</sup> The Commission will grant the motion and dismiss the request for a CCN and to transfer the assets of the Reflections water and sewer systems.

As part of the procedural schedule, the parties were directed to file a list of issues to be decided by the Commission. The parties could not agree to a single issues list and so Staff and Osage Utility filed a list of issues and the other parties filed a separate list of issues. The difference between the lists was the question of whether the motion to dismiss should be granted and the addition of a sub-item asking the question: "Are the certificates necessary or convenient for the public service?" At the hearing, the parties presented evidence relating to the following over-arching issues identified by the parties:

1. Would the sale of Osage Water Company's certificates of convenience and necessity and its water and sewer assets to Osage Utility be detrimental to the public interest?
2. Should the Commission approve an acquisition premium for the acquisition of the Osage Water Company and Reflections systems under 20 CSR 4240-10.085?

Additionally, the record was held open until September 30, 2019, for the receipt of post-hearing Exhibit 406, a letter regarding compliance of the Joint Bidders from the Missouri Department of Natural Resources (MDNR). The Commission also gave Osage Utility the opportunity to file additional correspondence from MDNR by September 30, 2019. Neither

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<sup>8</sup> Exhibit 105.

<sup>9</sup> File No. WA-2019-0185, Statement of Non-Opposition to the Motion to Dismiss Request Related to Reflections Subdivision, (filed September 30, 2019).

Exhibit 406 nor any other post-hearing MDNR correspondence was filed and the record was closed on September 30, 2019. Initial post-hearing briefs were filed on October 3, 2019, and reply briefs were filed on October 17, 2019.

Along with its original and amended applications, Osage Utility requested the Commission waive the requirement to give 60-days' notice prior to filing the application as required in Commission rule 20 CSR 4240-4.017(1). Osage Utility stated that it did not engage in conduct that would constitute a violation of the Commission's ex parte rule. The Commission finds that good cause exists to waive the notice requirement, and a waiver of 20 CSR 4240-4.017(1) is granted.

## **II. Findings of Fact**

Any finding of fact for which it appears that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

1. Osage Utility is a Missouri corporation with its principal place of business in St. Ann, Missouri.<sup>10</sup> Osage Utility was formed for the purpose of providing water and sewer service to the public in the service areas of Osage Water Company and Reflections water and sewer systems.<sup>11</sup>

2. Osage Utility intends to operate as a "water corporation," a "sewer corporation," and a "public utility" as those terms are defined by statute.<sup>12</sup> As such, Osage Utility is subject to the jurisdiction and supervision of the Commission as established by statute.<sup>13</sup>

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<sup>10</sup> Exhibit 1, Direct Testimony of Josiah Cox, p. 1.

<sup>11</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 1 and 4.

<sup>12</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 4.

<sup>13</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 4.

3. CSWR, LLC (formerly known as First Round CSWR, LLC), is Osage Utility's ultimate parent company.<sup>14</sup> Central States Water Resources, Inc. (Central States) is the managing affiliate for CSWR, LLC.<sup>15</sup>

4. Josiah Cox is the President of Osage Utility. Mr. Cox is also the President of Central States.<sup>16</sup>

5. Staff is a party in all Commission investigations, contested cases, and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.<sup>17</sup> Staff participated in this proceeding.

6. Public Counsel is a party to this case pursuant to Section 386.710(2), RSMo,<sup>18</sup> and by Commission rule 20 CSR 4240-2.010(10).

7. The Commission granted a transfer of assets and a CCN to operate as a water and sewer utility to Osage Water Company in 1989 in Commission File No. WM-89-73.<sup>19</sup> Subsequently, Osage Water Company was granted CCNs to provide service to additional water and sewer service areas.<sup>20</sup>

8. Currently, Osage Water Company provides water and sewer services to four active water and sewer service areas: Cedar Glen, Chelsea Rose, Cimarron Bay, and HWY KK. The

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<sup>14</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 5 and Schedule JC-1.

<sup>15</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 5 and Schedule JC-1.

<sup>16</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 1 and 4.

<sup>17</sup> 20 CSR 4240-2.010(10) and (21) and 2.040(1).

<sup>18</sup> Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016.

<sup>19</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 11; Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 18; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4.

<sup>20</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 18; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4.

HWY KK water service area consists only of the Eagle Woods subdivision; the sewer service area includes both Eagle Woods and Golden Glade subdivisions.<sup>21</sup>

9. Osage Water Company also has six inactive water service areas to which Osage Water Company either never provided service or the City of Osage Beach is currently providing the service. Staff proposes those inactive service areas not be included in Osage Utility's water tariff at the time of any transfer. These inactive service territories are: Osage Beach South, Osage Beach North, Sunrise Beach South, Sunrise Beach North, Shawnee Bend, and Parkview Bay.<sup>22</sup> No party objected to these service territories being removed from any future grant of authority.

10. PWSD#5 is a public water supply district organized under Chapter 427, RSMo. PWSD#5 wants to provide water and sewer service to the Cedar Glen service area and has a system adjacent to Cedar Glen with excess water and wastewater capacity.<sup>23</sup>

11. LAWVA is a nonprofit member managed corporation established under Chapter 393, RSMo, for the specific purpose of providing wastewater treatment systems.<sup>24</sup> LAWVA wants to provide sewer service to the Chelsea Rose, Cimarron Bay, and Eagle Woods service areas. LAWVA currently provides sewer service to over 2,700 members with more than 50 treatment facilities throughout the state. The bulk of its members are in Camden, Morgan, and Miller Counties.<sup>25</sup> MWA is governed by a Board of Directors elected by its members.<sup>26</sup> MWA's members gain membership status by applying for and receiving water services from MWA.<sup>27</sup>

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<sup>21</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 18; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4.

<sup>22</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 18; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4

<sup>23</sup> Ex. 300, Direct Testimony of David G. Krehbiel, pp. 3-6.

<sup>24</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 1.

<sup>25</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 1.

<sup>26</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 2.

<sup>27</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 2.

12. MWA is a nonprofit member managed corporation established under Chapter 393, RSMo.<sup>28</sup> MWA wants to provide water service to the Chelsea Rose, Cimarron Bay, and Eagle Woods service areas. MWA currently provides water services to over 1,000 members with 20 water production wells.<sup>29</sup> Its members are located in Camden, Miller, and Morgan Counties.

13. In September 2019, LAWWA and MWA jointly purchased the Reflections water and sewer system. After this purchase, Osage Utility dropped its opposition to dismissing the Reflections system from its application.<sup>30</sup>

14. Cedar Glen is a not-for-profit condominium owners corporation. Cedar Glen consists of 216 of Osage Water Company's water and sewer customers.<sup>31</sup> Cedar Glen is opposed to Osage Utility's application preferring to have PWSD#5 annex the Cedar Glen Condominiums into its territory.<sup>32</sup>

15. Osage Water Company currently provides water service to approximately 402 customers, and sewer service to approximately 420 customers in Camden County, Missouri.<sup>33</sup>

16. On December 10, 2002, the Commission issued a Report and Order in File No. WC-2003-0134 finding that Osage Water Company had been effectively abandoned by its owners, and that it was unable or unwilling to provide safe and adequate service to its customers.<sup>34</sup>

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<sup>28</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 2.

<sup>29</sup> Ex. 401, Direct Testimony of Neddie Goss, p. 2; and Tr. p. 458.

<sup>30</sup> See, Case No. WA-2019-0185, Reply in Support of Motion to Dismiss or, in the Alternative, Motion to Modify Osage Utility Operating Company, Inc.'s Amended Application, Exhibits A and B.

<sup>31</sup> Ex. 301, Rebuttal Testimony of David G. Krehbiel, p. 2; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4.

<sup>32</sup> Ex. 300, Direct Testimony of David G. Krehbiel, p. 2.

<sup>33</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 12; Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 19; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4.

<sup>34</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 11-12; Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 18; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 4. See also, *In the matter of the Staff of the Missouri Public Service Commission, Complainant, v. Osage Water Company, Respondent*, Report and Order, 12 Mo.P.S.C.3d 25, File No. WC-2003-0134 (December 10, 2002).

17. On October 21, 2005, Osage Water Company was placed into permanent receivership by order of the Circuit Court of Camden County, Missouri, pursuant to Section 393.145, RSMo.<sup>35</sup> The Circuit Court also ordered the receiver to liquidate the assets of Osage Water Company.<sup>36</sup>

18. The receiver marketed the Osage Water Company assets and received multiple bids from 2014 to 2017.<sup>37</sup>

19. The receiver reported the following bids to the Circuit Court on January 14, 2015: (1) Central States, \$479,702.00; (2) Missouri American Water Company, \$250,000.00; (3) jointly Cedar Glen, MWA, and LAWVA, \$160,000.00; and (4) Gregory Williams, satisfaction of judgment against Osage Water Company.<sup>38</sup>

20. The receiver reported the following bids to the Circuit Court on May 12, 2017: (1) Central States, \$440,000.00; (2) PWSD#5, \$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 against Osage Water Company.<sup>39</sup>

21. None of the pre-bankruptcy bids resulted in a sale.<sup>40</sup>

22. On August 28, 2017, after being unable to liquidate the assets of Osage Water Company, the Circuit Court authorized the Osage Water Company receiver to file for Chapter 11 bankruptcy.<sup>41</sup>

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<sup>35</sup> Circuit Court of Camden County, Case No. 26V010200965 (formerly Case No. CV102-965CC); Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-4; Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 19; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 5

<sup>36</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-4, p. 4.

<sup>37</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 10.

<sup>38</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, pp. 10-11.

<sup>39</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 11.

<sup>40</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 11.

<sup>41</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-5.

23. On October 11, 2017, Osage Water Company filed for Chapter 11 bankruptcy.<sup>42</sup> On October 26, 2017, a bankruptcy trustee was appointed.<sup>43</sup>

24. The bankruptcy trustee held an auction on October 24, 2018, to liquidate Osage Water Company's assets.<sup>44</sup> The bankruptcy auction was conducted with the purpose of achieving the "highest and best offers for the [a]ssets."<sup>45</sup>

25. The trustee utilized a "stalking horse" bidding process with Central States being the stalking horse bidder.<sup>46</sup>

26. A stalking horse bidding process is one where the debtor (the bankruptcy trustee in this case) enters into an agreement with a bidder for an initial bid in advance of the auction. The initial bid serves as the baseline for the auction. If a higher bid is not made at the auction then the stalking horse agreement becomes the asset purchase agreement. The stalking horse bidding process is common under Section 363 of the U.S. Bankruptcy Code.<sup>47</sup>

27. The agreement between Central States and the bankruptcy trustee permitted the trustee to solicit other bids, but Central States maintained the right to match those bids.<sup>48</sup> The initial stalking horse bid by Central States was \$465,000.<sup>49</sup>

28. At the auction, the bankruptcy trustee received bids from the Joint Bidders and Missouri American Water Company, with the Joint Bidders having the highest bid. Then, per the

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<sup>42</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-6.

<sup>43</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-7.

<sup>44</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9, p. 2.

<sup>45</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-10, p. 3.

<sup>46</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-7; and Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 3.

<sup>47</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 2.

<sup>48</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 3.

<sup>49</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 39.

terms of the stalking horse agreement, Central States was allowed to match that bid, which it did.<sup>50</sup>

29. The bankruptcy trustee determined that Central States was the successful bidder with a bid of \$800,000.<sup>51</sup> The Joint Bidders were the First Back-Up Bidders with a bid of \$800,000.<sup>52</sup> Missouri-American Water Company was the Second Back-Up Bidder with a bid of \$600,000.<sup>53</sup>

30. Central States, Joint Bidders, and Missouri-American Water Company each signed a purchase agreement with Osage Water Company.<sup>54</sup>

31. The purchase agreements “were negotiated, proposed, and entered into by the [bankruptcy trustee and Central States, Joint Bidders, and Missouri-American Water Company] in good faith, without collusion, and was the result of arm’s-length bargaining with the parties represented by independent counsel.”<sup>55</sup>

32. On November 14, 2018, the bankruptcy court issued an order approving the sale of Osage Water Company’s assets to Central States under the terms set forth in the asset purchase agreement between Central States and the bankruptcy trustee.<sup>56</sup> The bankruptcy court order also approved the Joint Bidders as the First Back-Up Bidders and Missouri-American

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<sup>50</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, pp. 12-13.

<sup>51</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9, p. 2; and Schedule JC-10; and Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 13.

<sup>52</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9, p. 2; and Schedule JC-10.

<sup>53</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9, p. 3; and Schedule JC-10.

<sup>54</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9.

<sup>55</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-10, p. 4 (In the Matter of Osage Water Company, Debtor, U.S. Bankruptcy Court for the Western District of Missouri, Case No. 17-42759-drd11, *Order Approving (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*, (issued Nov. 14, 2018).); and Ex. 100, Direct Testimony of Natelle Dietrich, Confidential Schedule ND-d2.

<sup>56</sup> Ex. 1 Direct Testimony of Josiah Cox, Schedule JC-10.

Water Company as the Second Back-Up Bidder per the terms of their agreements with the trustee.<sup>57</sup>

33. Under the terms of their agreement with the bankruptcy trustee, if Central States fails to purchase the Osage Water Company systems, the Joint Bidders as First Back-Up Bidders are obligated to purchase the Osage Water Company systems.<sup>58</sup>

34. The Osage Water Company facilities are currently in need of maintenance and repair.<sup>59</sup> In its revised memorandum, Staff identified maintenance, repair, and/or permitting concerns at each of Osage Water Company's water and sewer facilities. These needs, as identified by Staff, include: facilities operating without permits from the MDNR; one wastewater treatment system with partially treated or untreated wastewater bypassing the treatment processes; and other immediate repairs and longer-term capital improvements.<sup>60</sup>

35. Central States, Osage Utility's affiliate, has purchased 22 wastewater treatment facilities and associated plant. Central States affiliates provide sewer service to approximately 2,800 customers.<sup>61</sup>

36. Central States affiliates own and manage 13 drinking water systems providing water service to approximately 2,900 customers in Missouri and Arkansas.<sup>62</sup>

37. The following Central States affiliates are public utilities authorized to provide water and sewer service in Missouri subject to the regulation of the Commission: Hillcrest Utility Operating Company, Inc.; Elm Hills Utility Operating Company, Inc.; Raccoon Creek Utility

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<sup>57</sup> Ex. 1 Direct Testimony of Josiah Cox, Schedule JC-10.

<sup>58</sup> Ex. 1, Direct Testimony of Josiah Cox, Schedule JC-9.

<sup>59</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 16-20; Ex. 300, Direct Testimony of David G. Krehbiel, p. 5; and Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Revised Memorandum.

<sup>60</sup> Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Revised Memorandum, p. 4 of 21.

<sup>61</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 5.

<sup>62</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 6.

Operating Company, Inc.; Indian Hills Utility Operating Company, Inc.; and Confluence Rivers Utility Operating Company, Inc.<sup>63</sup> These Central States-affiliated companies have acquired small Missouri water and sewer companies, improved those systems, brought those systems back into regulatory compliance where needed, and delivered safe and adequate service.<sup>64</sup> Some of those acquired systems were in receivership and had multiple MDNR deficiencies when purchased.<sup>65</sup>

38. Purchasing distressed systems to rehabilitate and operate them as a viable entity is the basic business plan of Central States.<sup>66</sup>

39. Central States has customer service systems at each Missouri utility it currently operates that provide benefits to the customers and comply with the Commission's Chapter 13 rules.<sup>67</sup>

40. Central States has experience in the operation of water and sewer systems.<sup>68</sup> As the other Central States-affiliated companies have done, Osage Utility intends to contract with a qualified and licensed utility system operator for water and sewer plant operations. The contract operator will undertake routine day-to-day inspections, checks, sampling, reporting, meter reading, most system repairs, and extraordinary operations tasks.<sup>69</sup> Central States' computerized maintenance management system will track all these plant operations.<sup>70</sup>

41. Central States has experience in the design and construction of water and sewer systems.<sup>71</sup> In Missouri, Central States-affiliated companies have designed, permitted, and

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<sup>63</sup> Ex. 5, Surrebuttal Testimony of Josiah Cox, pp. 8-9.

<sup>64</sup> Ex. 5, Surrebuttal Testimony of Josiah Cox, pp. 8-9.

<sup>65</sup> Ex. 5, Surrebuttal Testimony of Josiah Cox, pp. 8-9.

<sup>66</sup> Ex. 202, Direct Testimony of Kerri Roth, p. 9.

<sup>67</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 7.

<sup>68</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 8.

<sup>69</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 8.

<sup>70</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 8.

<sup>71</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 5.

completed construction, with MDNR approval of approximately \$5.1 million of sewer investments<sup>72</sup> and approximately \$4.1 million of investments in water systems since March 2015.<sup>73</sup>

42. Central States affiliates have been able to attract investment capital to construct and maintain facilities necessary to provide safe and adequate water and sewer service in its other purchased systems to date. Osage Utility plans to fund this purchase using equity from its parent company CSWR, LLC.<sup>74</sup> Osage Utility has access to the funds necessary to make any necessary repairs and replacements to bring the Osage Water Company systems into regulatory compliance and ensure the provision of safe and adequate service.

43. Similar to the other Central States affiliates, Osage Utility has the technical, managerial, and financial capability to own and operate the Osage Water Company water and sewer systems.<sup>75</sup>

44. Osage Utility has experience in the rehabilitation, operation, management, and investment in small water and sewer facilities to systems that have been essentially “treating water” for over 14 years.<sup>76</sup>

45. MWA and LAWVA have not gotten reports from MDNR to determine what repairs or improvements are required by MDNR for the Chelsea Rose, Eagle Woods, or Cimarron Bay water or sewer systems.<sup>77</sup> Further, the MWA and LAWVA testimony referred to the Eagle Woods subdivision, but made no mention of the Golden Glade subdivision, which is also a part of the Highway KK sewer service area of Osage Water Company.<sup>78</sup>

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<sup>72</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 5.

<sup>73</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 6.

<sup>74</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 8 and 10.

<sup>75</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 5-10.

<sup>76</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 5-10.

<sup>77</sup> Ex. 401, Direct Testimony of Neddie Goss, pp. 3-6.

<sup>78</sup> Ex. 401, Direct Testimony of Neddie Goss.

46. The Cedar Glen water and sewer systems are not currently in the PWSD#5 service territory, but a portion of the PWSD#5 service territory is adjacent to Cedar Glen with U.S. Highway 54 separating the two areas.<sup>79</sup> In order to connect the PWSD#5 water systems, including its well and water tower, PWSD#5 would need to receive permissions to cross under U.S. Highway 54.<sup>80</sup>

47. If PWSD#5 connected its system to the Cedar Glen system, the drinking water system would have a redundant well capability for both Cedar Glen Condominiums and for PWSD#5's customers.<sup>81</sup>

48. PWSD#5 has prepared no estimate for the interconnection of its system with the Cedar Glen systems, which could take more than two years to complete.<sup>82</sup>

49. Osage Utility has inspected and analyzed all of the Osage Water Company systems and has a comprehensive plan for addressing the repair and replacement needs of all of the Osage Water Company water and sewer systems.<sup>83</sup> Osage Utility estimated the costs of repair and improvements at Cedar Glen Condominiums is \$659,700.<sup>84</sup>

50. Osage Utility's process for determining which repairs are needed includes having a licensed professional engineer work with MDNR, operating the facility on an interim basis to determine which repairs are truly needed, and then going through a competitive bidding process to hire contractors to complete the repairs.<sup>85</sup>

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<sup>79</sup> Ex. 300, Direct Testimony of David G. Krehbiel, pp. 3-4.

<sup>80</sup> Tr. p. 338.

<sup>81</sup> Ex. 300, Direct Testimony of David G. Krehbiel, p. 4.

<sup>82</sup> Tr. pp. 340, 364, 365.

<sup>83</sup> Ex. 1, Direct Testimony of Josiah Cox; Ex. 6, Direct Testimony of Todd Thomas; Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation.

<sup>84</sup> Ex. 6, Direct Testimony of Todd Thomas, p. 3; and Ex. 302, Rebuttal Testimony of Kenneth Hulett, p. 6.

<sup>85</sup> Tr. pp. 161-162 and 200.

51. Staff found Osage Utility's planned improvements to be reasonable and consistent with the improvements of other water and sewer utilities and they showed a complete plan for bringing the system into compliance and providing safe and adequate service.<sup>86</sup>

52. Staff did not do in-depth cost studies or review in-depth the Joint Bidders' proposal. Staff's witness did not feel comfortable endorsing the Joint Bidders' plan because it was too incomplete.<sup>87</sup>

53. Lake Ozark Water and Sewer has been operating and maintaining the Osage Water Company system on behalf of the receiver and bankruptcy trustee.<sup>88</sup>

54. PWSD#5 received estimates from the Osage Water Company operator, Lake Ozark Water and Sewer, with recommended repairs for the Cedar Glen Condominiums system.<sup>89</sup> Lake Ozark Water and Sewer identified the needed repairs from MDNR inspection reports.<sup>90</sup> PWSD#5 estimated the cost of improvements needed at the Cedar Glen Condominium system to be \$39,000.<sup>91</sup>

55. PWSD#5 does not have all the permissions and only very general estimates on the interconnection of the Cedar Glen Condominiums to its water system including the cost to lay pipe under U.S. Highway 54.<sup>92</sup>

56. Osage Utility and PWSD#5 disagree about whether a second well is necessary at Cedar Glen Condominiums.<sup>93</sup> There is more than one method of determining the number of

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<sup>86</sup> Tr. pp. 258-259.

<sup>87</sup> Tr. pp. 252-253.

<sup>88</sup> Ex. 400, Direct Testimony of David Stone, p. 3.

<sup>89</sup> Ex. 400, Direct Testimony of David Stone, p. 3.

<sup>90</sup> Ex. 400, Direct Testimony of David Stone, p. 3.

<sup>91</sup> Ex. 400, Direct Testimony of David Stone, pp. 3-5; and Ex. 302, Rebuttal Testimony of Kenneth Hulett, pp. 6-7.

<sup>92</sup> Tr. pp. 338 and 404.

<sup>93</sup> Tr. pp. 112, 124, 164, 167, and 172.

people served by a well and Osage Utility has a plan for making the determination and ensuring that the system is in compliance with MDNR regulations as to the number of wells needed.<sup>94</sup>

57. LAWVA and MVA have not evaluated the necessary improvements to Eagle Woods, Cimarron Bay, or Chelsea Rose service areas, so LAWVA and MVA did not present any estimates for improvements.<sup>95</sup>

58. PWSD#5 intends to use funding from bonds to finance any additions or improvements.<sup>96</sup> LAWVA and MVA have not indicated what the source of their financing would be.

59. Any improvements made by Osage Utility will be evaluated by Staff for prudence and presented to and approved by the Commission in a general rate case before being included in rates.<sup>97</sup>

60. At purchase, Osage Utility plans to adopt the current rates for customers until it files its first general rate case.<sup>98</sup>

61. The current water rates for Osage Water Company are as follows:<sup>99</sup>

Monthly Minimum: (Includes 2,000 gallons of water)  
 For Service through a 5/8" water meter \$24.76 per month  
 For Service through a 1" water meter \$34.27 per month  
 For Service through a 1 1/2" water meter \$58.80 per month  
 For Service through a 2" meter \$66.98 per month  
 For Service through a 3" meter \$96.19 per month  
 For Service through a 4" meter \$243.89 per month

Commodity Charge: For metered usage greater than 2,000 gallons per month  
 \$5.86 per 1,000 gallons

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<sup>94</sup> Tr. pp. 124 and 164.

<sup>95</sup> Ex. 401, Direct Testimony of Neddie Goss, pp. 4-5.

<sup>96</sup> Tr. p. 385.

<sup>97</sup> Tr. pp. 53, 213, 239, and 279.

<sup>98</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 22.

<sup>99</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 22. These rates do not include applicable taxes.

62. The current sewer rates for Osage Water Company are as follows:<sup>100</sup>

Monthly Bill

Unmetered Condominium \$29.02 per month

For Service through a 5/8" water meter \$29.02 per month

For Service through a 1" water meter \$51.34 per month

For Service through a 1 1/2" water meter \$109.96 per month

For Service through a 2" meter \$129.49 per month

For Service through a 3" meter \$199.25 per month

For Service through a 4" meter \$363.14 per month

63. The purchase of Osage Water Company by Osage Utility will likely result in a rate increase to recover the costs of improvements and repairs.<sup>101</sup>

64. Osage Water Company's most recent rate cases before the Commission put new rates in effect on September 19, 2009, in File Nos. WR-2009-0149 and SR-2009-0152.<sup>102</sup>

65. Staff determined the net book value of assets proposed to be purchased by Osage Utility as of December 31, 2018, was approximately \$341,508. To calculate this net book value, Staff started with the actual rate base used in Osage Water Company's most recent rate cases and updated plant in service, depreciation reserve, contributions in aid of construction (CIAC), and CIAC amortization values using Osage Water Company's annual reports.<sup>103</sup>

66. If the Joint Bidders become the owners, they will begin charging the Osage Water Company customers the rates currently set for their other customers as soon as the transfer is completed.<sup>104</sup> PWSD#5 will charge the Cedar Glen Condominiums customers \$78 for water and

<sup>100</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 22-23. These rates do not include applicable taxes.

<sup>101</sup> Ex. 1, Direct Testimony of Josiah Cox, p. 23.

<sup>102</sup> Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 22.

<sup>103</sup> Ex. 105, Supplemental Testimony of Natelle Dietrich with Revised Staff Recommendation, Appendix A, p. 22.

<sup>104</sup> Tr. p. 442.

sewer service.<sup>105</sup> The areas being served by MWA and LAWVA will pay a combined base rate of \$94 for water and sewer service plus a usage charge.<sup>106</sup>

67. Staff made the following recommendations that Osage Utility has agreed to comply with<sup>107</sup> as part of any grant of authority to transfer the assets of and receive a CCN for Osage Water Company service territories:<sup>108</sup>

- a. Authorize Osage Water Company to sell and transfer utility assets to Osage Utility, and transfer the CCNs currently held by Osage Water Company to Osage Utility upon closing on any of the respective systems;
- b. Upon closing on each of the Osage Water Company water and sewer systems, authorize Osage Water Company to cease providing service, and authorize Osage Utility to begin providing service;
- c. Require Osage Utility to file Tariff Adoption Notice tariff sheets for the corresponding water and sewer tariffs of the regulated Osage Water Company systems within ten (10) days after closing on the Osage Water Company assets;
- d. Upon closing on each of the water and sewer systems, authorize Osage Utility to provide service by applying, on an interim basis, the existing rates, rules and regulations as outlined in Osage Water Company's water tariff and sewer tariff, until the effective date of respective adoption notice tariff sheets, as recommended above;

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<sup>105</sup> Ex. 302, Rebuttal Testimony of Kenneth Hulett, p. 5; and Ex. 300, Direct Testimony of David G. Krehbiel, p. 5.

<sup>106</sup> Tr. p. 441.

<sup>107</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 26-28.

<sup>108</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, pp. 16-18.

- e. Require Osage Utility to create and keep financial books and records for plant-in-service, revenues, and operating expenses (including invoices) in accordance with the NARUC Uniform System of Accounts;
- f. Require Osage Utility to, going forward, keep and make available for audit and review all invoices and documents pertaining to the capital costs of constructing and installing the water and sewer utility assets;
- g. Approve depreciation rates for water and sewer utility plant accounts as described and shown in Attachment 1 to Staff's Memorandum;<sup>109</sup>
- h. Require Osage Utility to distribute to all customers an informational brochure detailing the rights and responsibilities of the utility and its customers regarding its water service, consistent with the requirements of Commission Rule 20 CSR 4240-13, within thirty (30) days after the effective date of approval of a CCN by the Commission;
- i. Require Osage Utility to, within ninety (90) days of the effective date of a Commission order approving Osage Utility's application, complete repairs to resolve the bypassing of treatment at any wastewater treatment system;
- j. Resolve all issues regarding noncompliance with MDNR regulations for all water and sewer systems;
- k. Require Osage Utility to provide adequate training for the correct application of rates and rules to all customer service representatives, including those employed by contractors, prior to the customers receiving their first bill from Osage Utility;

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<sup>109</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Schedule ND-d2, p. 39.

- I. Require Osage Utility to provide to the Customer Experience Department Staff of the Commission a sample of ten (10) billing statements of bills issued to Osage Water Company customers within thirty (30) days of such billing;
- m. Require Osage Utility to file notice in this case once Staff's recommendations regarding customer communications and billing, listed above, have been completed; and
- n. Require Osage Utility to file a rate case with the Commission no later than twenty-four (24) months after the effective date of an order approving Osage Utility's Application.

68. Staff's recommended conditions are reasonable and necessary to the provision of safe and adequate water and sewer service.

69. The grant of a CCN to provide water and sewer service to the Osage Water Company service areas promotes the public interest.

70. Osage Water Company is a nonviable utility.<sup>110</sup>

71. Osage Utility has the managerial, technical, and financial capability to operate the Osage Water Company systems and will not be materially impaired by the acquisition.<sup>111</sup> Osage Utility is a viable utility.

72. Osage Utility submitted preliminary plans showing how it intends to correct plant, managerial, and operational deficiencies of the Osage Water Company water and sewer

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<sup>110</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Confidential Schedule ND-d2, p. 36; and Ex. 1, Direct Testimony of Josiah Cox, p. 24.

<sup>111</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Confidential Schedule ND-d2; and Ex. 1, Direct Testimony of Josiah Cox, p. 25.

systems, and has committed to making necessary corrections within the timeframe set out in the acquisition incentive rule and Staff's recommendations.<sup>112</sup>

73. Before the Joint Bidders could purchase the Osage Water Company assets, they would also need to seek authority for the transfer from the Commission.<sup>113</sup>

74. Central States may choose not to consummate the purchase if the Commission's order makes the purchase not economically feasible in Central States's opinion.<sup>114</sup>

75. Osage Utility did not provide the records related to the original cost of Osage Water Company as required by the acquisition incentive rule.<sup>115</sup>

### **III. Conclusions of Law**

The Commission has reached the following conclusions of law.

A. Osage Water Company is a "water corporation," "sewer corporation," and a "public utility" as those terms are defined in Section 386.020, RSMo. Osage Water Company is subject to the Commission's jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 393, RSMo. After a CCN and the transfer of assets and operations takes place, Osage

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<sup>112</sup> Ex. 100, Direct Testimony of Natelle Dietrich, Confidential Schedule ND-d2; and Ex. 1, Direct Testimony of Josiah Cox, p. 25.

<sup>113</sup> Section 393.170.3, RSMo.

<sup>114</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 24-26; and Exhibit 5, Surrebuttal Testimony of Josiah Cox, pp. 2-8.

<sup>115</sup> 20 CSR 4240-10.085(3)(A)2.A-H.

Utility will also be a “water corporation,” “sewer corporation,” and a “public utility” as those terms are defined in Section 386.020, RSMo.

B. Section 393.190.1, RSMo., requires Osage Water Company to receive approval from the Commission prior to transferring its assets. Section 393.170, RSMo., requires Osage Utility to have a CCN granted by the Commission prior to providing a water and sewer service.

C. The Commission may grant a water corporation and a sewer corporation certificates of convenience and necessity to operate after determining that the services are “necessary or convenient for the public service.”<sup>116</sup> The term “necessity” does not mean “essential” or “absolutely indispensable,” but rather that the proposed project “would be an improvement justifying its cost,” and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.<sup>117</sup> It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.<sup>118</sup>

D. The Commission articulated the specific criteria to be used when evaluating applications for utility CCNs in the case *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991). The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to

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<sup>116</sup> Section 393.170.3, RSMo (Supp. 2019).

<sup>117</sup> *State ex rel. Intercon Gas, Inc., v. Public Service Commission of Missouri*, 848 S.W.2d 593, 597 (Mo. App. 1993), citing *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973), citing *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

<sup>118</sup> *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.<sup>119</sup>

E. Pursuant to Section 393.170.3, the Commission may also impose the conditions it deems reasonable and necessary for the grant of a CCN.

F. The standard for a transfer of assets is that the transfer is not detrimental to the public interest.<sup>120</sup> The Commission has previously stated how this standard should be applied:

What is required is a cost-benefit analysis in which all of the benefits and detriments in evidence are considered. The *AG Processing* decision<sup>[121]</sup> 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.<sup>122</sup>

G. The Commission has also stated as follows as to the “public interest”:

The public interest is a matter of policy to be determined by the Commission. It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The “public interest” necessarily must include the interests of both the ratepaying public and the investing public; however, as noted, the rights of individual groups are subservient to the rights of the public in general.<sup>123</sup>

<sup>119</sup> The factors have also been referred to as the “Tartan Factors” or the “Tartan Energy Criteria.” See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, \*3 (Mo. P.S.C.).

<sup>120</sup> *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App, 1980). Citing, *State Ex Rel. City of St. Louis v. Public Service Com’n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>121</sup> *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm’n of State*, 120 S.W.3d 732 (Mo. 2003).

<sup>122</sup> File No. EO- 2004-0108, *In the Matter of the Application of Union Electric Company, Doing Business as 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, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Report and Order on Rehearing (issued February 10, 2005), pp. 48-49.

<sup>123</sup> *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc.*, Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 458-459 (MoPSC July 1, 2008).

H. As the applicant, Osage Utility bears the burden of proof.<sup>124</sup> The burden of proof is the preponderance of the evidence standard.<sup>125</sup> In order to meet this standard, Osage Utility must convince the Commission it is “more likely than not” that its acquisition of Osage Water Company will not be detrimental to the public.<sup>126</sup>

I. An acquisition incentive is defined as “[a] rate of return premium, debt acquisition adjustment, or both designed to incentivize the acquisition of a nonviable utility[.]”<sup>127</sup> A debit acquisition adjustment is an adjustment “to a portion or all of an acquiring utility’s rate base to reflect a portion or all of the excess acquisition cost over depreciated original cost of the acquired system[.]”<sup>128</sup>

J. The acquisition incentive rule, 20 CSR 4240-10.085, sets out the criteria for approval of an acquisition incentive. Section (2) of the acquisition incentive rule requires an application for the incentive to “be filed at the beginning of a case seeking authority” to purchase or sell the assets. Section (2) also requires the Commission to grant the request if the Commission finds the request for the incentive to be in the public interest. The Commission does not conclude that the request for an acquisition incentive is in the public interest.

K. Paragraph (3)(A)2 of 20 CSR 4240-10.085 sets out the “[r]ecords related to the original cost of the nonviable utility” that are required to be submitted to the Commission upon filing an application for an acquisition incentive.<sup>129</sup> Osage Utility has not met these filing requirements.

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<sup>124</sup> *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo.*, 116 S.W.3d 680, 693 (Mo. App. 2003).

<sup>125</sup> *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

<sup>126</sup> *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

<sup>127</sup> 20 CSR 4240-10.085(1)(A).

<sup>128</sup> 20 CSR 4240-10.085(1)(B).

<sup>129</sup> Those records include the following:

L. Subsection (4)(I) of the acquisition incentive rule also requires the applicant to demonstrate “[t]he acquisition would be unlikely to occur without the probability of obtaining an acquisition incentive.” The stated purpose of the acquisition incentive rule is to “encourage acquisition of nonviable water or sewer utilities. . . .”<sup>130</sup>

#### **IV. Discussion**

This is a unique case dealing with the transfer of assets of Osage Water Company, a water and sewer corporation that has been before the Commission on many occasions and has been in receivership for over 15 years. Most recently, Osage Water Company filed for federal bankruptcy and the bankruptcy trustee held an auction to liquidate Osage Water Company’s assets. Through a “stalking horse” bidding process, Osage Utility matched the highest bid at the bankruptcy auction and was found by the court to be the winning bidder. The Joint Bidders were designated as the back-up bidders and have a binding contract to purchase the Osage Water Company systems if Osage Utility does not do so.

On December 19, 2018, Osage Utility filed an application<sup>131</sup> seeking to acquire the water and sewer assets and the CCN in the four service areas of Osage Water Company (Cedar Glen,

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- A. Accounting records and other relevant documentation, and agreements of donations of contributions, services, or property from states, municipalities, or other government agencies, individuals, and others for construction purposes;
  - B. Records of un-refunded balances in customer advances for construction (CAC);
  - C. Records of customer tap-in fees and hook-up fees;
  - D. Prior original cost studies;
  - E. Records of local, state, and federal grants used for construction of utility plant;
  - F. Relevant commission records;
  - G. A summary of the depreciation schedules from all filed federal tax returns; and
  - H. Other accounting records supporting plant-in-service[.]

<sup>130</sup> 20 CSR 4240-10.085, Purpose.

<sup>131</sup> An amended application was later filed on February 19, 2019.

Eagle Woods, Cimarron Bay, and Chelsea Rose).<sup>132</sup> Osage Utility's application included a request for an acquisition incentive pursuant to 20 CSR 4240-10.085.<sup>133</sup>

Osage Utility also requested authority to purchase the single service area of the Reflections water and sewer systems. As discussed above, the Reflections water and sewer systems have been purchased by LAWWA and MWA and Osage Utility no longer opposes dismissing the Reflections system from its application. Therefore, the Commission will grant the motion to dismiss the Reflections water and sewer CCN and asset transfer from the application.

The contested issues at hearing ultimately revolve around whether the grant of authority and transfer of the Osage Water Company assets to Osage Utility is not detrimental to the public interest. Joint Bidders, Cedar Glen, and Public Counsel oppose the transfer of assets arguing that such a transfer is detrimental to the public interest because if the Joint Bidders purchased the assets, they would provide water and sewer services at lower rates than Osage Utility. Additionally, Public Counsel objects to the grant of an acquisition incentive and Staff objects to the acquisition incentive as requested.

**a. 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?**

This first issue has two parts – granting the CCN and approving the transfer of the assets. The parties discussed at the hearing, and in the briefs, whether Osage Utility could actually purchase an existing CCN, or whether this was an application for a new CCN. Regardless of whether this is the transfer or the grant of a new CCN, in order to be granted such authority,

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<sup>132</sup> CSWR formed Osage Utility to be the utility corporation owning and operating the Osage Water Company assets. Osage Utility filed the application for approval with the Commission. Given the receivership and bankruptcy status of Osage Water Company, it was appropriate for the purchaser to file the application.

<sup>133</sup> Effective August 28, 2019, all of the Commission's regulations were transferred from the Department of Economic Development's (DED) Title 4 to the Department of Commerce and Insurance's (DCI) (formerly Department of Insurance, Financial Institutions and Professional Registration) Title 20. Thus, when filed this rule was 4 CSR 240-10.085.

Osage Utility must show that it is qualified to own and operate Osage Water Company's assets. The Commission traditionally determines if a company is qualified to become a public utility by analyzing the *Tartan* factors. The Tartan Factors contemplate a 1) need for service, 2) the utility's qualifications, 3) the utility's financial ability, 4) the feasibility of the proposal, and 5) promotion of the public interest.

Because a CCN has already been granted to Osage Water Company and it currently provides service to water and sewer customers under that CCN, there is an obvious need for the service.<sup>134</sup> Osage Utility has also shown that it is qualified to provide the service. Staff agreed and no other party disputed that Osage Utility has the technical, managerial, and financial capability to provide safe and adequate service to the Osage Water Company service area.<sup>135</sup> The Company has also put forth a comprehensive plan for improvements that may be needed to provide safe, adequate and reliable service.

Once the technical, managerial, and financial qualifications are established, the Commission must look to whether the transfer of the assets and the award of the CCN is "not detrimental to the public interest."<sup>136</sup> The Commission has previously stated that this means there is no net detriment after considering all of the benefits and all of the detriments, including the risk of increased rates.<sup>137</sup>

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<sup>134</sup> With the exception of the areas that Osage Water Company is not currently providing service and never has provided service, which the Commission finds are not necessary and will be removed from the Osage Water Company tariffs transferred to Osage Utility.

<sup>135</sup> Dietrich Direct, Confidential Schedule ND-d2 pg. 32-33; Cox Direct pg. 8-10.

<sup>136</sup> *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App, 1980). Citing, *State Ex Rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934).

<sup>137</sup> File No. EO- 2004-0108, *In the Matter of the Application of Union Electric Company, Doing Business as 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, Doing Business as AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Report and Order on Rehearing (issued February 10, 2005), pp. 48-49.

The Joint Bidders, Cedar Glen, and Public Counsel argue that Osage Utility should not be granted authority for the transfer because it would be detrimental to the public interest for Osage Utility to own these assets instead of the Joint Bidders. These parties' major argument is that the Joint Bidders would be able to provide water and sewer services at lower rates. However, as discussed in more detail below, the Commission has only the application of Osage Utility before it and the Joint Bidders' evidence of the improvements necessary and the costs of those improvements is incomplete. Additionally, the courts have said that increased rates on their own do not mean the transfer is detrimental to the public.<sup>138</sup> Increased rates can be one factor, but there must be a balancing of all the benefits and detriments to determine if the transfer as a whole would be detrimental to the public.<sup>139</sup> After weighing the benefits and detriments, the Commission finds the evidence shows the granting of Osage Utility's application will not be detrimental to the public.

When weighing the benefits, the Commission considered that the rates are likely to increase no matter who is providing services. The evidence showed that improvements are needed throughout the water and sewer systems and Osage Water Company customers have not had a rate increase for ten years. At purchase, Osage Utility plans to adopt the current rates for customers until it files its first general rate case, which will be within 24 months.<sup>140</sup>

In support of their argument that Osage Utility's rates will be unreasonable, and, therefore, detrimental to the public, the Joint Bidders, Cedar Glen, and Public Counsel pointed to several facts they argued would make Osage Utility's rates higher than the Joint Bidders. They point to the fact that Osage Utility is a for-profit company and its rates will include some additional amount

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<sup>138</sup> *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732, 737 (Mo. 2003).

<sup>139</sup> *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n of State*, 120 S.W.3d 732, 737 (Mo. 2003).

<sup>140</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 26-28.

of earnings for its shareholders that as non-profit entities the Joint Bidders would not charge. The Joint Bidders argue that Osage Utility plans to make unnecessary improvements that will raise rates needlessly and that Osage Utility's estimates for its planned improvements are unreasonably high. The Joint Bidders also argue that Osage Utility's parent and affiliates have a history of seeking large rate increases for the companies it purchases. Additionally, they argue that Osage Utility's affiliated companies have a history of very high finance rates, while PWSD#5 has bond money available at low interest rates to make the purchase. The Commission is not persuaded by these arguments that Osage Utility's rate, after a rate case will be unreasonable or detrimental to the public.

During the hearing, an estimate of Osage Utility's combined rates for water and sewer service was presented based on the pro forma financial statements projecting revenues after Osage Utility's initial rate case and based on the improvements it identifies as needed.<sup>141</sup> That estimated rate, if approved during a rate case, would be a significant increase for Osage Water Company's customers and would be substantially more than the rates proposed by the Joint Bidders. If all these estimates and proposed rates were to become reality, the higher rates charged by Osage Utility could be a financial detriment to Osage Water Company's customers. However, that financial detriment is tempered by the fact that Osage Water Company's customers will not have an immediate rate increase. Rather, a rate increase will come only after a rate case before the Commission. In contrast, if the Joint Bidders become the owners, they will immediately increase the rates even before any improvements are made.

The Commission found the evidence put forth by Osage Utility of improvements and cost estimates that may be needed to be a comprehensive plan for providing safe, adequate, and

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<sup>141</sup> Tr. p. 100. That rate, derived from the pro forma financial statements of Osage Utility, was considered confidential and will not be specifically set out here.

reliable service for all of Osage Water Company's customers. Osage Utility has evaluated all of Osage Water Company's systems and their needed repairs while the Joint Bidders' evidence focuses almost exclusively on the Cedar Glen Condominiums. Osage Utility also has experience in rehabilitating nonviable water and sewer systems. Although Staff did not do in-depth cost studies or review in-depth the Joint Bidders' proposal, Staff's witness testified that in his opinion, Osage Utility's preliminary estimates and planned improvements were reasonable because they were consistent with the improvements of other regulated water and sewer utilities<sup>142</sup> and they showed a complete plan for bringing the system into compliance and providing safe and adequate service. Staff's witness did not feel comfortable endorsing the Joint Bidders' plan because it was not presented as a complete application before the Commission.<sup>143</sup>

Due to the Joint Bidders' not submitting comprehensive estimates and planned improvements and not including detailed cost estimates for their proposed interconnection between PWSD#5 and Cedar Glen Condominiums, the Commission was not persuaded by the testimony of Cedar Glen's witness. Further, unlike Osage Utility's estimates, the Joint Bidders' witness's estimates were based on only the repairs identified as needed by the MDNR and did not address other system upgrades or replacements that may be needed to proactively maintain the systems to avoid future more costly repairs. The Commission finds that Osage Utility's evidence was more credible with regard to what repairs may be needed than that put forth by the parties opposed to the transfer.

Additionally, because Osage Utility's operation of the water and sewer systems will be as a regulated public utility, Osage Utility will not be able to charge a rate that the Commission has not found is just and reasonable. In a rate case, Osage Utility will not be authorized to recover

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<sup>142</sup> Tr. pp. 258-259.

<sup>143</sup> Tr. pp. 252-253.

imprudent improvements and financing charges. Osage Utility also provided testimony that its financing will be obtained from different equity sources than the other Central States-affiliated acquisitions and Osage Utility has not applied for any outside financing for this transaction.<sup>144</sup> Thus, this financing cannot be compared directly to the other troubled systems purchased by the company. Any financing would also have to be approved by the Commission to be recovered in rates.

The Joint Bidders contend that any repairs and improvements it made would be financed with bonds at a lower rate than Osage Utility's financing. However, there was no evidence as to the financing plans that would cover needed repairs for the systems that would be owned by LAWVA and MWA. The parties opposed to the transfer to Osage Utility also had no estimates or proposals for repairs or improvements to the Cimarron Bay, Eagle Woods, and Chelsea Rose systems<sup>145</sup> and make no mention of the Golden Glade system.

The Joint Bidders also argue that the water customers at Cedar Glen Condominiums will benefit from the redundancy of a second well once the area becomes interconnected with PSWD#5's facilities. The Joint Bidders claim this will save customers the costs of the second well, again lowering rates over what Osage Utility will have to charge. Whether a second well is necessary was not conclusively proven. Further, even though PWSD#5's current service territory is near the Cedar Glen Condominiums, it lies on the opposite side of U.S. Highway 54. Thus, the evidence showed that it would likely be two years before this interconnection could be made given the need to acquire rights of way and permits to cross the highway.<sup>146</sup> These costs were not taken into account in the cost estimates provided by PWSD#5.

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<sup>144</sup> Ex. 1, Cox Direct, p.10.

<sup>145</sup> Ex. 401, Direct Testimony of Neddie Goss, pp. 3-5.

<sup>146</sup> Tr. 340, 364, 365; and Ex. 7, Thomas Surrebuttal, pp. 16-17.

Osage Utility asks for a debit acquisition incentive, which the Joint Bidders argue will also increase rates to the detriment of customers. Because the Commission finds below that Osage Utility has not met the criteria for an acquisition premium, this argument is moot.

The Commission recognizes there might be other benefits of Joint Bidder ownership. One such benefit might be an opportunity for greater participation by the customers because the owners can serve on the governing boards of these public and not-for-profit entities. Another potential benefit the Joint Bidders identified is that they already have a presence in the Lake of the Ozarks area. In addition, the residents represented by Cedar Glen oppose Osage Utility's ownership and prefer the Joint Bidders to be the owners.

However, the Commission finds that Osage Utility's ownership would definitively provide many benefits over the status quo, the greatest of which would be finally having stability for the Osage Water Company customers after more than 14 years of instability. The Commission also finds benefit in the transfer of ownership taking place at the end of this proceeding and not having to have another proceeding to approve a different transfer. Additionally, neither the Commission, nor Staff, have had the opportunity to truly vet the Joint Bidders' proposal given its incompleteness, while Osage Utility has a proven track record of bringing distressed systems into compliance and operating them in a safe and adequate manner. There is further benefit to the public in the Commission continuing to have oversight of the systems whereas PWSD#5, LAWWA, and MWA are outside the jurisdiction of the Commission.

After weighing each of these benefits and detriments, the Commission finds that Osage Utility has met its burden to show that a grant of authority to purchase the Osage Water Company assets and a grant of a CCN to operate the Osage Water Company system is not detrimental to the public interest if granted with the agreed conditions proposed by Staff. The evidence that

the ratepayers will be charged unreasonably higher rates if Osage Utility owns the systems is not persuasive. There are too many unknowns to assume that the alleged lower rates to be charged by the Joint Bidders will be so significant as to make the transfer to Osage Utility detrimental to the public. Further, any future rate increases for Osage Utility will only be authorized by the Commission if found to be just and reasonable.

**b. Should the Commission approve an acquisition premium for the acquisition of the Osage Water Company under 20 CSR 4240-10.085?**

Having decided that it should grant the application for a CCN with conditions, the next issue before the Commission is whether it should grant the request for a debit acquisition incentive. Osage Utility requests a debit acquisition incentive equal to the difference between the total purchase price and the net original cost for Osage Water Company. Osage Utility originally applied for both a rate of return premium and a debit acquisition premium, but has dropped its request for the rate of return premium.<sup>147</sup>

An acquisition incentive is defined as “[a] rate of return premium, debt acquisition adjustment, or both designed to incentivize the acquisition of a nonviable utility[.]”<sup>148</sup> A debit acquisition adjustment is an adjustment “to a portion or all of an acquiring utility’s rate base to reflect a portion or all of the excess acquisition cost over depreciated original cost of the acquired system[.]”<sup>149</sup>

The Commission’s rule on acquisition premiums sets out requirements for the information to be provided upon application and the criteria for the Commission to make its decision. Osage Utility has the burden to provide records related to the original cost of Osage Water Company.<sup>150</sup>

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<sup>147</sup> Ex. 5, Surrebuttal Testimony of Josiah Cox, p. 8.

<sup>148</sup> 20 CSR 4240-10.085(1)(A).

<sup>149</sup> 20 CSR 4240-10.085(1)(B).

<sup>150</sup> 20 SCR 4240-10.085(3)(A)2.

Osage Utility did not provide this information. Additionally, Public Counsel, Cedar Glen, and the Joint Bidders argue that Osage Utility has not shown that the purchase “is in the public interest”<sup>151</sup> or that the purchase “would be unlikely to occur without the probability of obtaining an acquisition incentive.”<sup>152</sup>

Under the acquisition incentive rule, Osage Utility has the burden to show that the “acquisition would be unlikely to occur without the probability of obtaining an acquisition incentive.”<sup>153</sup> The Commission finds that the only evidence that Central States/Osage Utility would be unlikely to proceed with the purchase without the incentive is the testimony of Josiah Cox that the company would have to rethink its position if the Commission does not approve the incentive.<sup>154</sup> Mr. Cox’s testimony on this point was not persuasive.

The evidence shows that the purchase by Osage Utility will likely take place regardless of the incentive. Central States began negotiations for the purchase of Osage Water Company well before the incentive rule was effective or even before the Commission began the formal rulemaking process. Additionally, purchasing distressed systems to rehabilitate and operate them as a viable entity is the basic business plan of Central States. Further, Central States made multiple bids for Osage Water Company, consistently matching the Joint Bidders’ bids. Each of these facts leads the Commission to the conclusion that Central States/Osage Utility was determined to purchase Osage Water Company absent any additional incentive.

This case is unique in that a sale of the system is likely to take place, even if Osage Utility does not consummate the transaction. The Joint Bidders are contractually obligated under the bankruptcy order to purchase the system if Osage Utility does not. The acquisition incentive rule

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<sup>151</sup> 20 CSR 4240-10.085(4)(H).

<sup>152</sup> 20 CSR 4240-10.085(4)(I).

<sup>153</sup> 20 CSR 4240-10.085(4)(I).

<sup>154</sup> Ex. 1, Direct Testimony of Josiah Cox, pp. 24-26; and Ex. 5, Surrebuttal Testimony of Josiah Cox, pp. 2-8.

does not specifically contemplate this scenario. The focus of the rule is to provide incentives for the purchase of troubled water and sewer systems where those systems might not otherwise attract a qualified owner. In this case, it has taken 14 years, but currently other entities are ready and willing to purchase these troubled systems if Osage Utility fails to do so.

The Commission determines that Osage Utility has not met its burden to show that the sale of the system “would be unlikely to occur without the probability of obtaining an acquisition incentive.”<sup>155</sup> Osage Utility has also not met its burden of providing the necessary information about Osage Water Company’s original costs. Some of this information can be deduced from information provided by Staff, but Osage Utility has the burden to provide all the information. Without the requirements of the rule being met, the Commission cannot find that the request is in the public interest.

#### **IV. Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts to the law to reach its conclusions, the Commission determines that the substantial and competent evidence in the record supports the conclusion that Osage Utility has met, by a preponderance of the evidence, its burden of proof. The Commission finds that Osage Utility has demonstrated that it possesses adequate technical, managerial, and financial capacity to own, operate, manage, and maintain the Osage Water Company water and sewer systems. Osage Utility has also proven that the grant of a CCN to serve the Osage Water Company service areas and the transfer of Osage Water Company’s assets to Osage Utility is not detrimental to the public interest, providing that the conditions in

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<sup>155</sup> 20 CSR 4240-10.085(4)(I).

the Staff recommendation are met. The Commission further determines that Osage Utility has not met the criteria of 20 CSR 4240-10.085 for the approval of an acquisition incentive.

Therefore, the Commission will grant Osage Utility a CCN to provide water and sewer service in the service territories previously served by Osage Water Company subject to the conditions recommended by Staff. In addition, the Commission will deny Osage Utility's request for an acquisition incentive. The Commission will authorize Osage Utility to adopt Osage Water Company's tariffs and their rates as an interim measure until it files a rate case within the next 24 months. Upon completion of the transactions transferring the Osage Water Company assets to Osage Utility, the Commission will cancel the CCN of Osage Water Company. Additionally, as recommended by Staff, the Commission will delete the portions of Osage Water Company's service authority for the areas that are not served by Osage Water Company.

The Commission also grants the unopposed motion to dismiss the portions of the application related to a request for a CCN and transfer of the Reflections water and sewer system assets. Further, the Commission finds that good cause exists and waives the 60-day notice requirement of 20 CSR 4240-4.017(1) for purposes of this case.

**THE COMMISSION ORDERS THAT:**

1. The Motion to Dismiss or, in the Alternative, Motion to Modify Osage Utility Operating Company, Inc.'s Amended Application is granted, in part.
2. The portion of the application requesting authority to purchase the assets and serve the customers of the water and sewer systems owned by Reflections Condominium Owners Association, Inc., Great Southern Bank, and the Reflections Subdivision Master Association, Inc., is dismissed.
3. Commission Rule 20 CSR 4240-4.017(1) is waived for purposes of this application.

4. Osage Water Company and Osage Utility Operating Company, Inc. are authorized to enter into, execute, and perform in accordance with the terms described in the Agreement for Sale of Utility System, attached as Appendix B-C of the to the Application and Motion for Waiver, and incorporated by reference in paragraph 10 of the Amended Application and Motion for Waiver and to take any and all other actions which may be reasonably necessary and incidental to the performance of the acquisition.

5. Upon closing on each of the Osage Water Company water and sewer systems, Osage Utility Operating Company, Inc., is granted a certificate of convenience and necessity to provide water and sewer service in the service territories previously served by Osage Water Company. The grant of authority does not include the six areas (Osage Beach South, Osage Beach North, Sunrise Beach South, Sunrise Beach North, Shawnee Bend, and Parkview Bay) in which Osage Water Company has not been providing service.

6. Upon closing on each of the water and sewer systems, Osage Utility Operating Company, Inc. shall provide service by applying, on an interim basis, the existing rates, rules and regulations as outlined in Osage Water Company's water tariff and sewer tariffs, until the effective date of adoption notice tariff sheets.

7. Osage Utility Operating Company, Inc. shall file Tariff Adoption Notice tariff sheets for the corresponding water and sewer tariffs of the regulated Osage Water Company systems within ten days after closing on the assets.

8. Upon completion of the transactions transferring the Osage Water Company assets to Osage Utility Operating Company, Inc. the Commission will cancel the Osage Water Company's certificates of convenience and necessity and tariffs.

9. Osage Utility Operating Company, Inc. shall create and keep financial books and records for plant-in-service, revenues, and operating expenses (including invoices) in accordance with the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts.

10. Going forward, Osage Utility Operating Company, Inc. shall keep and make available for audit and review all invoices and documents pertaining to the capital costs of constructing and installing the water and sewer utility assets.

11. The depreciation rates for water and sewer utility plant accounts shall be as described and shown in Staff's Memorandum at Schedule ND-d2, Attachment A, page 39 of Exhibit 101, Direct Testimony of Natelle Dietrich.

12. Osage Utility Operating Company, Inc. shall distribute to all customers an informational brochure detailing the rights and responsibilities of the utility and its customers regarding its water service, consistent with the requirements of Commission Rule 20 CSR 4240-13, within thirty days after the effective date of this order.

13. Within ninety days of the effective date of this order, Osage Utility Operating Company, Inc. shall complete repairs to resolve the bypassing of treatment at any wastewater treatment system.

14. Osage Utility Operating Company, Inc. shall resolve all issues regarding noncompliance with Missouri Department of Natural Resources regulations for all water and sewer systems.

15. Osage Utility Operating Company, Inc. shall provide adequate training for the correct application of rates and rules to all customer service representatives, including those

employed by contractors, prior to the customers receiving their first bill from Osage Utility Operating Company, Inc.

16. Osage Utility Operating Company, Inc. shall provide to the Customer Experience Department Staff of the Commission a sample of ten billing statements of bills issued to Osage Water Company customers within thirty days of such billing.

17. Osage Utility Operating Company, Inc. shall file notice in this case once Staff's recommendations regarding customer communications and billing, listed above, have been completed.

18. Osage Utility Operating Company, Inc. shall file a rate case with the Commission no later than twenty-four months after the effective date of this order.

19. The request for an acquisition incentive under Commission rule 20 CSR 4240-10.085 is denied.

20. Osage Utility Operating Company shall notify the Commission of closing on the assets within five days after such closing.

21. Osage Water Company shall cease providing water and sewer service immediately after closing on the assets of each water and sewer system.

22. The Commission's Data Center shall provide a copy of this order to the County Clerk of Camden County, Missouri.

23. If the closing on the water system assets and/or resolution of the real estate issues has not occurred by June 30, 2020, Osage Utility Operating Company, Inc. shall file a status report no later than July 15, 2020, and every 30 days thereafter, until closing takes place, or until Osage Utility Operating Company, Inc. determines that the transfer of the assets will not occur.

24. The Commission makes no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters pertaining to Osage Utility Operating Company, Inc., in any later proceeding.

25. This order shall become effective on May 8, 2020.



**BY THE COMMISSION**

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff  
Secretary

Kenney, Rupp, Coleman, and  
Holsman CC., concur, as amended.  
Silvey, Chm., dissents, as amended.

Dippell, Senior Regulatory Law Judge