

1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

Case No. WA-97-332

ORDER DISMISSING APPLICATION

On February 19, 1997, Osage Water Company (Osage) filed an application with the Commission requesting a certificate of convenience and necessity for the construction and operation of a water supply system for the public in an area located within the city limits of the City of Osage Beach, Missouri. The Osage Beach Fire Protection District (the Fire Protection District) and the City of Osage Beach (the City) were admitted as intervenors in this matter. After the adoption of a procedural schedule and substantial discovery, and within a week of the evidentiary hearing, the Fire Protection District filed a motion to dismiss the application for reason that Osage has not obtained the required franchise from the City of Osage Beach. After notice, a separate response to the motion to dismiss was filed by the Staff of the Commission (the Staff).

The position of Osage and the City is reflected in the hearing memorandum filed September 26, 1997. Osage first states that the City gave permission to Osage to operate in the proposed service area subject to approval of the design of the proposed system by the City planner. Osage further contends that a franchise is not required by statute, regulation, or ordinance, and that a franchise is not necessary to operate within the

city limits of Osage Beach. Osage adds that the planned project does not contemplate the use of City rights-of-way and that a separate private right-of-way will be acquired for laying the service pipes.

The Fire Protection District states that no voter approval of a franchise has been obtained by Osage and that the permission of the Board of Alderman of the City has been rescinded. Both the Fire Protection District and the City state that the City ordinances require a franchise to be obtained regardless of whether the City's rights-of-way will be used or not.

The Staff takes the position that it is impossible to provide service in the proposed certificated area without using the City's rights-of-way. The Staff concludes, therefore, that the company needs the City's consent.

The applicable state statute in this case is Section 393.170(2), which states in pertinent part that, before the Commission may issue a certificate of convenience and necessity, the applicant must file "a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities." In addition, the pertinent Commission rule, 4 CSR 240-2.060(2)(h), requires that an applicant show it has acquired "approval of the affected government bodies . . . when consent by franchise by a city or county is required . . . by a certified copy of the document granting consent or franchise."

Several questions of fact and law are presented by the motion to dismiss, including whether the applicant may serve the proposed area without use of the City's right-of-way, whether the City granted, and then revoked, permission for Osage to proceed with its proposed project, and

whether Osage has, therefore, met all of the initial filing requirements of the Commission.

However, a threshold issue exists as to whether a franchise or other proper consent is required as a matter of law. This issue must be determined before Osage may proceed with its application. The Commission's rules provide that such a franchise or consent is necessary as an initial filing requirement, not as a question to be decided at the Commission's evidentiary hearing. In addition, the statutes controlling the necessity for, and issuance of, municipal franchises are contained in those sections of the Revised Statutes of Missouri which govern the operation of cities, towns, and villages (i.e., Chapters 71, ex. seq. RSMo 1994). The Commission finds the interpretation and application of those statutes to be outside the scope of the Commission's authority contained in Sections 386 and 393, RSMo 1996.

Therefore, the Commission finds that the application must be dismissed, as the applicant has failed to meet the filing requirements set out in Section 393.170, RSMo 1994, and 4 CSR 240-2.160(2) for reason that the applicant has not shown that it has obtained the proper consent and/or franchise from the City of Osage Beach or that, as a matter of law, such consent or franchise is not required.

IT IS THEREFORE ORDERED:

1. That the motion to dismiss this application, filed September 22, 1997, by the Osage Beach Fire Protection District, is hereby granted for reasons as set out above, and the application of Osage Water Company for a certificate of convenience and necessity is dismissed.

2. That this order shall become effective on October 15, 1997.

BY THE COMMISSION

A handwritten signature in dark ink, appearing to read "Cecil I. Wright", with a long horizontal flourish extending to the right.

Cecil I. Wright
Executive Secretary

(S E A L)

Crompton, Drainer and Murray,
CC., concur.
Lumpe, Ch., absent.

Derque, Regulatory Law Judge