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	)))))	**Case No. WA-2019-0185**

STAFF RESPONSE TO PARTIES RESPONSES TO STAFF RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Response to Parties Responses to Staff Recommendation* in this matter hereby states:

1. Staff filed its *Recommendation* to the Commission regarding Osage Utility Operating Company, Inc.'s (OUOC) *Application and Motion for Waiver* seeking to acquire certain water and sewer assets in the four service areas of Osage Water Company (OWC) and the single service area of Reflections Subdivision Master Association, Inc., and Reflections Condominium Owners Association, Inc. on May 24, 2019. Five parties to the matter responded to Staff's *Recommendation*: Great Southern Bank, the Office of the Public Counsel, Reflections Condominium Owners Association, Inc., Cedar Glen Condominium Owners Association, Inc., and Lake Area Waste Water Association, Inc. in conjunction with Missouri Water Association, Inc. and Public Water Supply District No. 5 of Camden County, Missouri. Staff now responds to the legal arguments set forth by Cedar Glen Condominium Owners Association, Inc. (Cedar Glen), Lake Area Waste Water Association, Inc. in conjunction with Missouri Water Association, Inc. and Public Water Supply District No. 5 of Camden County, Missouri (Joint Companies) and the Office of the Public Counsel (OPC).

2. Cedar Glen cites to Staff's *Recommendation* that OUOC's acquisition of the OWC and Reflections assets would not be detrimental to the public interest. It identifies the standard of review applied by the appellate courts as "The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest,"[1] which is the standard of review accepted and applied by the Commission. Cedar Glen continues on to apply its own interpretation of that standard as, "will the proposed sale work a detriment to the public?" That is not the interpretation which the Commission applies, however, counsel for Staff found in the 1934 case that language which established the very standard of review as stated by the Supreme Court of Missouri. First, the Supreme Court of Missouri stated,

> "Under the guise of public policy, we have no right to read into this act words not expressly found therein, or by implication, so that the purpose of the act may be carried out."[2]

What Cedar Glen defines as its interpretation would add words into the standard which previously have not been applied by the Commission. Additionally, the statement verbatim of the Supreme Court of Missouri in its 1934 case, which was later used as the standard of review in the 1980 case cited by Cedar Glen is,

> "A property owner should be allowed to sell his property unless it would be detrimental to the public."[3] The Court went on to reference a Supreme Court of Maryland case which concluded, "To prevent injury to the public,

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[1] Environmental Utilities, LLC v. Public Service Commission of Missouri, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007); *citing* 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 Commission of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc. 1934).
[2] State ex rel. City of St. Louis v. Public Service Commission of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc. 1934).
[3] *Id*.

in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefitted, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. In the public interest, in such cases, can reasonably mean no more than 'not detrimental to the public.' "[4]

Whether Cedar Glen's interpretation is derived from this 1934 case is unclear, but what is abundantly clear is that the courts and the Commission have interpreted the standard as "not detrimental to the public."

3. The Commission recently applied the standard of "not detrimental to the public interest" in its order for a case involving an affiliate of OUOC.[5] In that order the Commission finds that the proposed sale to OUOC's affiliate is not detrimental to the public interest and goes on to say,

"Considering the present troubled nature of the systems at issue, the Company's sound track record in rehabilitating similarly situated systems, the Company's ability to acquire, maintain, and operate the systems, and the statutory obligation of the Commission to ensure safe and adequate service, allowing the Company to acquire the Selling Companies' assets

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[4] *Id*.
[5] *Order Approving Stipulation and Agreement and Granting Certificates of Convenience and Necessity*, In the Matter of the Application of Confluence Rivers Utility Operating Company, Inc. to Acquire Certain Water and Sewer Assets, For a Certificate of Convenience and Necessity, and, in Connection therewith, to Issue Indebtedness and Encumber Assets, Mo. Pub. Serv. Comm'n., Pg. 4, Case No. WM-2018-0116 (February 14, 2019).

per the terms and conditions of the Stipulation will not be detrimental to the public."[6]

The Commission referenced several similar elements between that matter and the present one in its justification for finding that its decision would not be detrimental to the public interest. Staff would argue that it considered those same elements in its analysis of the present matter and its *Recommendation* is based on the Commission's guidance. Staff continues to support its *Recommendation* and will address any other challenges to its recommendations contained in Cedar Glen's response in its testimony as necessary.

4. The Joint Companies correctly set forth the legal standard for what an acquiring utility must demonstrate to the Commission when requesting an incentive related to the acquisition of a nonviable utility, codified in 4 CSR 240-10.085(4). However, the Joint Companies incorrectly rely on that rule in an argument against Staff regarding the finances of OUOC. The reference in 4 CSR 240-10.085(4)(D) to the purchase price and financial terms of the acquisition relate solely to the negotiations between the acquiring utility and the nonviable utility being acquired. The Joint Companies in their *Response* convolute that requirement with a discussion contained in a prior proceeding involving an affiliate of OUOC, regarding the debt agreement of Central States Water Resources (CSWR), which is the parent company of OUOC and its affiliates. The "financial terms" referenced in the rule pertain specifically to the agreement set forth in OUOC's *Application* and should not be confused with now-defunct financing arrangements referenced in an affiliate's case almost 3 years prior to this matter. Furthermore, OUOC did not file a financing case in conjunction with its *Application* in this

[6] *Id*.

matter and, therefore, Staff did not include financing recommendations in its *Recommendation* beyond its evaluation of OUOC's ability to meet the technical, managerial and financial requirements of utility operation. Staff continues to support its *Recommendation* and will address any other challenges to its recommendations contained in the Joint Companies' response in its testimony as necessary.

5. The Joint Companies go on to chastise Staff for concluding that OUOC's acquisition of the OWC and Reflections assets would not be detrimental to the public interest; stating that the conclusion was reached without facts or analysis. Staff's *Recommendation* in its entirety contains several facts and points of analysis and, as stated above, Staff considered those elements in its analysis which the Commission has previously highlighted and its *Recommendation* is based on the Commission's guidance.

6. Finally, OPC claims that 4 CSR 240-10.085 lacks sufficient statutory support; however there is no support for its legal argument in its response. In rulemaking Docket No. AX-2018-0240, mentioned in OPC's response, OPC did dispute the legality of the rule in its comments prior to the rule being finalized. OPC also provided a list of its concerns with the current draft of the rule at that time. However, in its final order of rulemaking, the Commission addresses numerous OPC comments so it is safe to assume that the Commission considered OPC's concerns in its final order of rulemaking. Additionally, if OPC is arguing that it continues to have concerns, it is unclear which, if any, of its concerns filed in the rulemaking docket are applicable to the statements made in its *Response* in this matter so Staff is unable to respond. Generally, Staff would say that it continues to find statutory authority for the rule in Sections 386.040; 386.250;

393.140; and 393.146, RSMo. Staff continues to support its *Recommendation* filed in this matter and will address any other challenges to its recommendations contained in OPC's response in its testimony as necessary.

WHEREFORE, Staff prays that the Commission will accept this *Response*; and grant such other and further relief as the Commission considers just in the circumstances.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 13th day of June, 2019, to all counsel of record.

/s/ Whitney Payne