

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

In the matter of the Application of Ozark Shores Water)	
Company, North Suburban Public Utility Company and)	
Camden County Public Water Supply District Number Four)	
for an order authorizing the Sale, Transfer and Assignment)	<u>Case No. WM-2015-0231</u>
Water Assets to Camden County Public Water Supply)	
District Number Four and in connection therewith certain)	
other related transactions.)	

MOTION FOR EVIDENTIARY HEARING

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Motion for Evidentiary Hearing*, states as follows:

Introduction

1. Staff points out that, because this is a contested case, a hearing is required unless none of the proper parties requests the opportunity to present evidence. Staff is a proper party and now formally requests the opportunity to present evidence.

Statement of the Case

2. On March 25, 2015, Ozark Shores Water Company ("Ozark Shores"), North Suburban Public Utility Company ("Suburban") and Camden County Public Water Supply District No. 4 ("PWSD"), collectively the "Joint Applicants," filed their *Joint Application* seeking authority to transfer Ozark Shore's water system assets used in the provision of regulated utility services to the public to PWSD for \$5,252,781. The transaction also includes the sale by Suburban to PWSD of certain tracts of land and buildings used by Ozark Shores for \$165,000, a transaction that does not require the authority of the Commission.¹

¹ Suburban, which is not a Missouri regulated utility, owns all of the outstanding shares of Ozark Shores.

3. On May 5, 2015, Staff filed its *Recommendation to Deny Transfer of Assets and Request for Local Public Hearing*, in which Staff stated:

- The agreed purchase price for Ozark Shore's system is more than twice the value of its rate base;
- Relationships exist between Ozark Shores, Suburban and PWSD such that Staff doubts that this is an arm's length transaction;
- The very large acquisition premium is likely to cause customers' rates to increase significantly.

Staff also set out the standard governing transactions of this sort, which is that "[a] property owner should be allowed to sell his property unless it would be detrimental to the public."² Of course, it is the Joint Applicants' burden to show that the standard is satisfied. And not Staff's, contrary to the statement in the Joint Applicants' *Response*.

4. On May 7, 2015, the Joint Applicants responded to Staff's *Recommendation*. Therein, the Joint Applicants stated:

The price the parties have agreed on for purchase of Ozark Shores' assets and the manner in which that price was negotiated are not factors which justify delay in approving the Application in this matter. Staff's recommendation should be rejected by the Commission and the application should be approved with dispatch.³

The Agenda of May 20, 2015

5. On May 20, 2015, the Commission took up Staff's *Recommendation* for discussion. In the course of that discussion – in which only the RLJ and the five members of the Commission participated – the Commission was unpersuaded by Staff's stated concerns and decided to move forward with the *Joint Application* as requested by the

² ***State ex rel. City of St. Louis v. Public Service Com'n of Missouri***, 335 Mo. 448, 459, 73 S.W.2d 393, 400 (Mo. banc 1934).

³ *Response to Staff Recommendation and Motion for Expedited Treatment*, p. 2 (footnote omitted).

Joint Applicants. Although labelled a “Case Discussion” on the Agenda and not marked by any order, this discussion appeared to constitute an adjudication. Only Commission Rule 4 CSR 2490-2.117(2), *Determination on the Pleadings*, permits an adjudication in such circumstances.⁴

The Law Requires a Hearing in this Case

6. Staff notes that determination on the pleadings is unauthorized in this case because it is a contested case and a hearing is thus required by law.⁵ This case may appear at first glance to be a non-contested case; but first glances can be deceiving. In the language of the *Missouri Administrative Procedures Act* (“MAPA”), a non-contested case is one in which a hearing is not required by law.⁶ Section 393.190.1, RSMo., the controlling statute here, does not expressly require a hearing. However, the requirement of a hearing need not be statutory, but can derive from the interplay of the Constitution and the nature of the private rights at stake.

The “law” referred to in the contested case definition encompasses any statute or ordinance, or any provision of the state or federal constitutions that mandates a hearing. The right to a hearing, in other words, is determined by substantive law outside the MAPA. In this case, neither Yarber nor the school district has directed us to any statute, rule, or ordinance granting Yarber a hearing, nor have we found one independently. The only other possible source for a hearing, therefore, is the constitutional right to due process.⁷

In ***Yarber***, due process required a hearing on his expulsion because attending public

⁴ Commission Rule 4 CSR 240-2.117(2) provides, “[e]xcept in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.”

⁵ “‘Contested case’ means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing”; Section 536.010*(4), RSMo.

⁶ The *Missouri Administrative Procedures Act* (“MAPA”) is Chapter 536, RSMo. a non-contested case, therefore, is any case that is not a contested case.

⁷ ***State ex rel. Yarber v. McHenry***, 915 S.W.2d 325, 328 (Mo. banc 1995).

school is a state-created protected property interest.⁸ The Missouri Supreme Court has declared that the right to sell private property is “an incident important to ownership of property;”⁹ for that reason, just as in *Yarber*, a hearing is required here, because the right of Ozark Shores to sell its private assets is a protected property interest. The principle is well-settled that “if the State feasibly can provide a hearing before deprivation of a protected interest, it generally must do so in order to minimize ‘substantively unfair or mistaken deprivations.’”¹⁰

7. For purposes of the Constitution, Ozark Shores has a *right* to a pre-deprivation hearing and may choose to waive that right. However, for purposes of Chapter 536, a case is either contested or non-contested and a hearing is either required or it is not. Because of the nature of the private right at stake, a hearing is required in this case and Ozark Shoes cannot simply waive it. Instead, as described in the previously-cited *Deffenderfer* case, the Commission must offer an opportunity for a hearing and it must be held unless *all* of the proper parties decline to offer evidence. Staff states that it wants to offer evidence.

8. Even if the Due Process Clause did not require a hearing in this case, that is, if it were a non-contested case, a hearing would still be required because the Commission has not established a separate procedure for non-contested cases and its rules apply contested case procedures to all adjudications. While the Commission has

⁸ *Id.* Both the federal and Missouri constitutions forbid governmental deprivations of life, liberty or property except via due process of law; U.S. Const., amend. XIV, § 1; Mo. Const., art. I, § 10. “Under both the federal and state constitutions, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 82 (Mo. banc 2008) (internal citations and punctuation omitted); see *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

⁹ *City of St. Louis*, *supra*.

¹⁰ *Jamison v. State, Dept. of Social Services, Div. of Family Services*, 218 S.W.3d 399, 408 (Mo. banc 2007); and see *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2s 556 (1972).

broad authority to adopt rules for its proceedings, it does not have “unlimited discretion to conduct its hearings in any possible manner.”¹¹ “The rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding upon the agency adopting them.”¹² The Commission’s procedural rules at 4 CSR 240-2 provide for contested case hearings and, at 4 CSR 240-4.117, for summary disposition by motion for summary determination or by determination on the pleadings. The conditions for summary determination have not been met and, as discussed, determination on the pleadings is not permitted here.

Inaccurate Information Provided to the Commission

9. During the Agenda discussion on May 20, 2015, the RLJ responded to several questions from members of the Commission. Inadvertently, his answers were not accurate:

- Upon being asked why OPC was not participating in the case, the RLJ stated that he did not know, but then went on to state that he inferred that it was because OPC believed that Staff’s position was without merit. Staff’s conversations with OPC do not support that surmise;
- The RLJ also stated that he did not believe that any current and ongoing relationship existed between the board of the PWSD and Ozark Shores. The basis of the RLJ’s belief is not known to Staff. This point is a matter of ongoing investigation. In fact, on information and belief, Staff states that a current member of the PWSD board was a founder of Ozark Shores. Also

¹¹ *State ex rel. Fischer v. Public Service Commission of Missouri*, 645 S.W.2d 39, 42 (Mo. App., W.D. 1982).

¹² *State ex rel. Martin–Erb v. Missouri Com’n on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002).

on information and belief, Staff states that the financial advisor for Ozark Shores serves in the same capacity for the PWSD and for Lake Region. At the time of the 2010 rate case of the related utility, Lake Region Water and Sewer, the Commission found that Mr. John Summers served simultaneously as the chief executive of both Lake Region and Ozark Shores, as well as the principal employee of the PWSD.¹³ This fact alone demonstrates an entanglement between Ozark Shores and the PWSD. In Lake Region's latest rate case, the Commission found that a clerical employee of the PWSD did the monthly billing for Lake Region's availability fees, which funds were dispersed to private parties resident in Texas and Kansas.¹⁴ This use of a public employee for private purposes was uncompensated and is, in fact, illegal.

- The RLJ also stated, erroneously, that Staff was not pursuing any discovery. Again, how the RLJ would know what discovery is going on in the case is unknown to Staff. Discovery is not filed in the EFIS docket and the RLJ has no access to the EFIS Data Request module. Staff states that it is, indeed, conducting discovery and was doing so on May 20. Staff had just over a month to do its investigation and file its recommendation. Obtaining information through discovery takes time. Staff requested more time, but the

¹³ ***In the Matter of Lake Region Water and Sewer***, Case No. WR-2010-0111 (***Report & Order***, iss'd August 18, 2010), p. 13: "John R. Summers is the General Manager of Public Water Supply District Number Four of Camden County. In this capacity he serves as the de facto General Manager for Ozark Shores Water Company, The Meadows Water Company and Lake Region Water & Sewer Company in Missouri as well as Northern Illinois Investment Group which operates a small water system in Illinois. He has earned a Bachelor of Science Degree in Accounting from Missouri Valley College and a Masters of Business Administration from Rockhurst University. He currently holds a Class D Wastewater Treatment license and a DS I Water Distribution license issued by the Missouri Department of Natural Resources."

¹⁴ ***In the Matter of Lake Region Water and Sewer***, Case No. WR-2013-0461 (***Report & Order***, iss'd April 30, 2014), p. 31.

Applicants opposed that request. Therefore, Staff filed its recommendation opposing the transfer based on the knowledge it had on hand. Staff continues to request and receive information from the Applicants and believes further time and investigation is needed.

WHEREFORE, Staff respectfully requests that the Commission issue an order setting an evidentiary hearing in this case and, preparatory thereto, convene a prehearing conference and direct the parties to file a proposed procedural schedule.

Respectfully submitted,

/s/ Kevin A. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by First Class United States Mail, postage prepaid, to all counsel of record this 26th day of May, 2015.

/s/ Kevin A. Thompson