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June 25, 2003

Hon. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Attn: Filing Desk

HAND DELIVERY

Re: In the Matter of a Water Tariff Filing Made by Osage Water Company
Case No. WT-2003-563

Dear Judge Roberts:

Please find enclosed for filing in the above referenced matter the original and 8 copies of the following pleading(s):

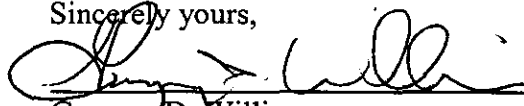
1. Osage Water Company's Response to Staff Motion to Reject Tariff Filing.

An additional copy of the same is enclosed to be stamped "filed" and returned to my office.

A copy has been mailed to all counsel of record.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely yours,



Gregory D. Williams

cc: Keith R. Krueger
Office of Public Counsel

FILED²

JUN 27 2003

Missouri Public
Service Commission

FILED²

JUN 27 2003

**Missouri Public
Service Commission**

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

**In the Matter of a Water Tariff Filing Made
by Osage Water Company**

**Case No. WT-2003-563
(Tariff No. JW-2003-2114)**

**OSAGE WATER COMPANY'S
RESPONSE TO STAFF
MOTION TO REJECT TARIFF FILING**

COMES NOW Osage Water Company and for its Response to the Motion to Reject
Tariff Filing submitted by the Staff of the Commission on June 19, 2003 states:

ERRONEOUS STATEMENTS OF FACT IN STAFF MOTION

In Paragraph 7 of its Motion, Staff makes the vague and unsubstantiated statement that "[w]hile OWC's current president took certain actions on June 4, 2003 to have the administrative dissolution rescinded, the Secretary of State's Office has not yet done that as of the date of this Motion." OWC is uncertain what relevance, if any, this unsubstantiated factual allegation has to the filing of tariff pages with the Commission, as Staff has offered no explanation in its motion as to how the facts alleged in paragraph 7 relate to the filing of a tariff page. OWC therefore presumes that the statement was included in an effort by Staff to bias the Commission against OWC.

However, the factual information and inferences contained in said Paragraph 7 are false. Osage Water Company is in fact in good standing in the State of Missouri, and is authorized to transact such business as is permitted by its charter and the Laws of the State of Missouri. Attached hereto as Exhibit 1 is a copy of a certificate of good standing issued by the Missouri Secretary of State on June 4, 2003. While it is probably irrelevant to any issue concerning the tariff pages at issue herein, attached as Exhibit 2 is a Certificate of Tax Clearance issued by the Missouri Department of Revenue on June 4, 2003 stating that OWC has no delinquencies with respect to Missouri State taxes.

What actions, if any, the Staff undertook to verify the accuracy of the statements contained in Paragraph 7 of its Motion is unknown to OWC, however, Staff did not contact OWC to obtain the information alleged therein. OWC would point out to the Commission that Missouri Supreme Court Rule 55.03(b)(3) requires that an attorney signing a motion filed with the Court is specifically representing that "the allegations and other factual contentions have evidentiary support ...". This Commission has adopted the Missouri Supreme Court Rules for Commission proceedings.

APPLICABLE STATUTES, REGULATIONS AND CASE LAW

Staff in its Motion to Reject Tariff Filing has also erroneously stated the applicable statutes and regulations which pertain to the tariff page at issue, and has omitted relevant statutes and regulations.

APPLICABLE STATUTES

Section 393.140(11) establishes the requirement that changes in rates and charges by a water or sewer corporation must be filed with the Commission with thirty days notice in order to become effective. The relevant portion of the statute states that "no change shall be made in any rate or charge ... which shall have been filed or published by a ... water corporation or sewer corporation ... except after thirty days' notice to the commission ..." OWC has complied with this requirement by filing with the Commission its new schedule of rates on June 4, 2003 and bearing an effective date of July 6, 2003, which is more than 30 days later.

Section 393.150.1 prescribes what actions the Commission may take when "there shall be filed with the commission by ... any water corporation or sewer corporation any schedule stating a new rate". Among the various actions which Section 393.150.1 allows the Commission to take with respect to such a filing, "rejecting" the filing is not mentioned. In fact, Staff states no

statutory authority for its requested action by the Commission that the “subject revised tariff sheet be rejected and treated as if it had not been issued.” After diligent research, OWC has been unable to located any statutory authority for the Commission to take such action.

APPLICABLE REGULATIONS

Staff in its motion makes abbreviated reference to regulations issued by the Commission pertaining to the filing of tariff pages which provide for increases in rates. Staff cites 4 CSR 240-2.065(1), in part, and 4 CSR 240-2.065(4), and also cites 4 CSR 240-3.330(1) regarding the small water and sewer utility informal rate case procedure. However, Staff omits 4 CSR 240-3.030, 4 CSR 240-3.645, and 240-3.340, without explanation, although all of these regulations are not only applicable, but controlling.

The Commission rule on “Tariff Filings which Create Cases” is set out in 4 CSR 240-2.065 which is cited in part the Staff in its Motion. While the Commission no doubt has available a copy of the entire regulation which it has adopted, OWC will for convenience only cite the portions thereof which appear to relate to this matter. The rule states, in material relevant part, as follows:

- (1) A general rate increase request is one where the company or utility files for an overall increase in revenues through a company-wide increase in rates for the utility service it provides ... When a public utility submits a tariff which constitutes a general rate increase request, the commission shall establish a case file for the tariff. ... The tariff submitted shall be in compliance with the provisions of the rules relating to the separate utilities. A tariff filed which proposes a general rate increase request shall also comply with the minimum filing requirements of these rules for general rate

increase requests. Any public utility which submits a general rate increase request shall simultaneously submit its direct testimony with the tariff.”

Staff argues in its Motion that the tariff pages submitted by OWC are a “general rate increase request” under the provisions of this rule, because they provide for a company-wide increase in rates for the utility service OWC provides. However, the Commission has adopted a specific rule concerning general rate increase requests, which for no explicable reason the Staff has failed to cite in its Motion. The Commission’s Rule on “Minimum Filing Requirements for Utility Company General Rate Increase Requests” is found at 4 CSR 240-3.030. It has limited application, and does not apply to the tariff pages at issue. In material relevant part, that rule provides as follows:

- (1) This rule applies to ... all water utilities with more than five thousand (5,000) customers; to all sewer utilities with more than five thousand (5,000) customers ...
- (2) A general rate increase request is one where the company or utility files for an overall increase in revenues through a company wide increase in rates for the utility service it provides ...

There is no allegation in Staff’s Motion that OWC has more than five thousand water or sewer customers, and in fact OWC has less than five hundred water customers and less than five hundred sewer customers. Clearly the Commission’s Rule on Minimum Filing Requirements for Utility Company General Rate Increase Requests does not apply to the tariff pages filed by OWC at issue herein. The Commission may note that 4 CSR 240-3.030(2) is word for word identical with the first portion of 4 CSR 240-2.065(1) such that it is apparent that the regulations are intended to be interpreted together, and that the “general rate increase request” described in the Rule pertaining to “Tariff Filings Which Create Cases” is the same “general rate increase

request” described the Rule pertaining to “Minimum Filing Requirements for Utility Company General Rate Increase Requests.” Since OWC has less the minimum number of customers for the latter rule, its tariff filing is not a “General Rate Increase Request” as that phrase is utilized in the former rule.

This interpretation of 4 CSR 240-2.065 is further supported by the language in paragraph (1) thereof which states “[t]he tariff submitted shall be in compliance with the provisions of the rules relating to the separate utilities.” Staff cites no “rules relating to the separate utilities” in its Motion, although the Commission has adopted and published such rules. The Commission’s Rule on “Filing Requirements for Water Utility Rate Schedules” can be found at 4 CSR 240-3.645, and provides in material relevant part as follows:

“(5) All proposed changes in rates, charges or rentals or in rules that affect rates, charges or rentals, filed with the commission shall be accompanied by a brief summary, approximately one hundred (100) words or less, of the effect of the change on the company’s customers. ...

(6) Thirty (30) days’ notice to the commission is required as to every publication relating to water rates or service ...”

The Commission’s Rule on “Filing Requirements for Sewer Utility Tariff Schedules” is found at 4 CSR 240-3.340, and provides in material relevant part as follows:

“(14) All proposed changes in rates, charges, or rentals, or in rules that affect rates, charges, or rentals filed with the commission shall be accompanied by a brief summary, approximately one hundred (100) words or less, of the effect of the change on the company’s customers. ...

(15) Thirty (30) days notice to the commission is required as to every publication relating to sewer rates or service ...”

Staff does not address the affect of either of these Commission Rules on the tariff page(s) at issue herein, although they are clearly applicable and controlling. OWC did in fact tender its proposed change in rates together with a brief summary of less than 100 words as to the effect of the change on the company’s customers, and therefore has satisfied the requirement of 4 CSR 240-2.065(1) that the “tariff submitted shall be in compliance with the provisions of the rules relating to the separate utilities.”

OWC’s review and interpretation of the Commission’s Rules on tariff filings is both comprehensive and internally consistent, and in accordance with the applicable statutes. That interpretation may be summarized as follows:

1. All utility companies may file tariff pages changing their rates as allowed by Section 393.140(11), RSMo.
2. Tariff page filings by water and/or sewer companies with less than five thousand customers are not considered “general rate increase requests” to which the increased filing requirements of 4 CSR 240-2.065 apply.
3. Tariff page filings by small water and/or sewer companies must be accompanied by a brief summary describing the effect of the change on the company’s customers, consisting of one hundred words or less.
4. One a tariff page stating a new rate is filed with the Commission, Section 393.150 applies, and the Commission may allow the new rate to take effect without further action, or may undertake to investigate and review the same, and to conduct a hearing concerning the propriety of the new rate.

5. There is no provision of any Missouri Statute or Regulation which would allow or authorize the Commission to “reject” a tariff page stating a new rate that has been filed with the Commission by a water or sewer corporation.

Staff seems to suggest in its Motion that 4 CSR 240-2.065(4) provides some authority for this Commission to reject the tariff page at issue. In fact, that paragraph of the rule simply describes the circumstances under which a tariff filing will not create a “case”, as opposed to tariff filings described in the previous paragraphs which will automatically create a “case.” Since 4 CSR 240-2.065 (3) provides for the creation of a case upon filing of a pleading which objects to a tariff, staff has filed a pleading which objects to a tariff, and a case has been “created” by the Commission and a case number assigned, 4 CSR 240-2.065(4) clearly does not apply in this matter.

Finally, the Commission may not agree with OWC’s interpretation of its Rules and conclude that the tariff filing at issue is a “general rate increase request” within the meaning of its rules, notwithstanding the limited application of 4 CSR 240-3.030(1), and that therefore direct testimony should be or have been filed in support of the proposed rate. In response to such an interpretation, OWC would adopt as its direct testimony the testimony of William P. Mitchell, OWC’s president, found in the transcript of Case WC-2003-0134 at Pages 1065 Line 3 through 1090 Line 23, and Pages 1103 Line 1 through 1106 Line 2, and the following allegations by the Commission to the Circuit Court of Camden County, Missouri in Case CV102-965CC:

Paragraph 7: The Company is unable or unwilling to provide safe and adequate service to its customers in the following respects:

- c. It cannot pay past due state withholding taxes ...

- d. "The Company is currently insolvent. It lacks sufficient income with which to pay its debts as they come due. The Company's monthly operating expenses, not including the cost of repairs, meters, other recurring expenses or extraordinary items, currently consume virtually all of OWC's monthly revenues, leaving nothing available for making payment on the significant debt that the Company has incurred in the past."
- h. "... the service that the Company now provides is barely safe and barely adequate. There is at least one major leak in a water main that the Company has not been able to repair. The Company has no money set aside to pay for major repairs to its systems, and no one is willing to put more money into the Company in the event that such repairs are needed. The Company has been performing only minimal maintenance on its systems."
- l. "If there is an uninsured major outage, the Company will not have the financial resources that are needed to repair the damage ..."
- q. The owners of the Company have stated that they will not provide services to the Company unless they are fully compensated for their services. The Company does not have any funds available for that purpose.

Exhibit A – Page 10: "The current owners of Osage Water are unwilling or unable to pump more cash into the company. Greg Williams testified that he was unwilling to make any additional capital contributions to Osage Water unless he could be assured of earning a return on that capital. He also testified that he was 'quite certain the company does not have rates sufficient to pay return on such capital, since it can't pay a return on its existing capital.'

APPLICABLE CASE LAW

Missouri cases have followed the applicable decisions of the United States Supreme Court in holding that public utility companies have a constitutional right to charge sufficient rates to recover operating costs, depreciation, and provide a return on investment made in the provision of utility service to the public. In State ex rel. Laclede Gas Co. v. Public Service Commission, 535 S.W.2d 561, 569 (Mo. App. 1976), the Court held

“Turning now to Laclede’s constitutional argument, it contends that the due process clauses of the United States and Missouri constitutions and the prohibition in the Missouri constitution against taking property without just compensation join in requiring that the test to be applied in any rate hearing (whether for permanent or interim increases) be that the rates be sufficient to produce a fair return on the property invested. **Every utility does have an undoubted constitutional right to such a fair and reasonable return, and this is a continuing right which does not cease after beginning rates are initially determined.**”

This Commission may not arbitrarily reject the tariff submitted by OWC. OWC does have a constitutional right to a fair and reasonable return on its capital invested in the provision of water and sewer utility service. This Commission has found, and has alleged in Circuit Court proceedings, that OWC is not receiving such a return.

SMALL COMPANY RATE CASE PROCEDURE

Staff suggests that 4 CSR 240-3.340(1) and 4 CSR 240-3.635(1) prescribes “the” procedure for small water and sewer utilities to obtain a rate increase. OWC simply does not

agree, nor does the applicable regulation mandate utilization of the procedure set forth therein, it states:

“(1) Notwithstanding any other rule to the contrary, small companies, as defined in this rule, may seek a general increase in revenues through a small company rate case by filing a letter requesting the change. ...”

The Commission should note the use of the permissive word “may” rather than the mandatory word “shall”. OWC is not required to utilize the procedures of 4 CSR 240-3.340 or 4 CSR 240-3.635 to increase its rates. OWC has done so in the past, and found that the procedure described therein simply does not work, was not completed in a timely manner, and that OWC incurred great expense, delay and financial loss as a result. OWC’s failure to utilize the Small Company Rate Increase procedure is by intent, not inadvertence. The applicable regulations make it clear that they are not the exclusive manner for OWC to proceed.

CONCLUSION

Staff has made material misstatements of fact in its Motion to Reject Tariff Filing. Staff has failed to cite to the Commission all of the applicable statutes, regulations, and case law which pertain to and are controlling with respect to the issues presented to the Commission by the tariff page(s) at issue in this matter. Staff has particularly failed to cite to the Commission any statute, regulation, or case law which authorized the Commission to “reject” the tariff filing at issue. OWC has complied with the Commission’s specific rules pertaining to water utility and sewer utility tariff filings. Its tariff pages are now on file with the Commission. The Commission may not reject those pages. Therefore, the Staff’s Motion to Reject Tariff Filing herein must be denied.


Gregory D. Williams #32272

Highway 5 at Lake Road 5-33
P.O. Box 431
Sunrise Beach, MO 65079
(573) 374-8761

CERTIFICATE OF SERVICE

I, Gregory D. Williams, do hereby certify that a true copy of the foregoing was on this 27th day of June, 2003, mailed, postage prepaid, to the following:

Keith R. Krueger, Deputy General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, MO 65102; Office of the Public Counsel, P.O. Box 7800, Jefferson City, MO 65102.



Gregory D. Williams

STATE OF MISSOURI



Matt Blunt
Secretary of State

CERTIFICATE OF GOOD STANDING

I, MATT BLUNT, Secretary of the State of Missouri, do hereby certify that the records in my office and in my care and custody as Secretary of State reveal that

OSAGE WATER COMPANY
00306945
(A MISSOURI CORPORATION)

was created under the laws of this State on the 23rd day of September, 1987, and is an good standing, having fully complied with all requirements of this office.

In testimony whereof, I have set my hand and imprinted the Great Seal of the State of Missouri, on this, the 4th day of June, 2003.


Secretary of State





STATE OF MISSOURI
Department of Revenue
Division of Taxation and Collection

EXHIBIT

2

CERTIFICATE OF TAX CLEARANCE

OSAGE WATER COMPANY
PO BOX 650
SUNRISE BEACH MO 65079

DATE: JUNE 4, 2003

MISSOURI CORPORATION CHARTER NUMBER: 00306945

In response to the corporation's request, a review of the tax records has been completed. There are no delinquencies with respect to Missouri state taxes.

This certificate does not limit the Department of Revenue's authority to conduct audits or reviews of the taxpayer's records. Further this certificate does not restrict the Department from pursuing collection of liabilities arising from such audits or reviews.

This certificate does not constitute reinstatement of corporation status or rights. To be reinstated, this certificate must be presented to the Missouri Secretary of State, along with the required application and any other information requested by the Office of the Secretary of State. THIS CERTIFICATE REMAINS VALID FOR 45 DAYS FROM THE ISSUANCE DATE.

Sincerely,

Kenneth M. Pearson
Administrator
Business Tax

JF:DU0983

ENC.

CBN001
200315500300945