

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT APPLICATION OF ORCHARD )  
GRASS UTILITIES, INC. AND OLDHAM )  
COUNTY SEWER DISTRICT FOR APPROVAL )  
OF THE TRANSFER OF WASTEWATER ) CASE NO. 2004-00029  
TREATMENT FACILITIES PURSUANT TO )  
AN ASSET PURCHASE AGREEMENT )  
BETWEEN THE PARTIES )

O R D E R

On January 29, 2004, Orchard Grass Utilities, Inc. ("Orchard Utilities") and the Oldham County Sewer District ("OCSD") (collectively, "Joint Applicants") petitioned the Commission for approval of the transfer of the wastewater treatment assets and business of Orchard Utilities to OCSD pursuant to a Stock Purchase Agreement ("Agreement").

PROCEDURE

The Commission granted the Attorney General of the Commonwealth of Kentucky ("Attorney General") and residential customer Robert L. Madison full intervention in the proceeding.<sup>1</sup> A procedural schedule was established that permitted discovery requests upon the Joint Applicants. Upon Mr. Madison's motion for a hearing, the Commission ordered a public hearing, which was duly held on April 15, 2004. The

---

<sup>1</sup> The Commission also received letters in support of the proposed transfer from Rick Rash, Magistrate of Oldham County, Kentucky, and from the Kentucky Environmental and Public Protection Cabinet, Department for Environmental Protection, Division of Water ("DOW").

parties have submitted post-hearing briefs. This matter now stands submitted for a decision.

### PROPOSED TRANSACTION

Orchard Utilities is a Kentucky corporation that owns and operates sewage treatment and collection facilities in Oldham and Jefferson counties and is a utility subject to the jurisdiction of this Commission. KRS 278.010(3)(f).

OCSD is a special district created pursuant to KRS 67.715(2) “to provide for the collection and disposal of sewage and other liquid waste in Oldham County, Kentucky.” It is not a utility subject to the jurisdiction of the Commission.<sup>2</sup>

Under the terms of the proposed Agreement, Orchard Utilities will sell, and OCSD will purchase, all outstanding stock and interest in Orchard Utilities for \$675,000. Upon completion of transfer of stock, Orchard Utilities will be dissolved and OCSD will have legal title to all of its corporate assets. The assets of Orchard Utilities that will transfer include the Orchard Grass wastewater treatment plant, the wastewater collection system served by Orchard Grass wastewater treatment plant and the pump stations related thereto (“Orchard Grass”) as well as the Willow Creek wastewater treatment plant, the wastewater collection system served by the Willow Creek wastewater treatment plant, and the pumping stations related thereto (“Willow Creek”). Orchard Grass currently serves approximately 710 customers in Oldham County. Willow Creek currently serves approximately 230 customers in Oldham County and 125 customers in Jefferson County.

---

<sup>2</sup> See Oldham County Sanitation District v. Public Service Comm’n., No. 2001-CA-001482-MR (Ky.Ct.App. July 12, 2002).

## STATUTORY PROVISIONS

KRS 278.020(4) and (5) establish the standard for review of the proposed transfer. KRS 278.020(4) states that no person shall acquire ownership or control of any utility under Commission jurisdiction without prior Commission approval. The Commission is mandated to grant such approval if the acquirer has the financial, technical, and managerial abilities to provide reasonable service. KRS 278.020(5) requires prior Commission approval of the acquisition or control of any utility furnishing utility service in Kentucky and provides that the Commission shall approve such acquisition when the same is to be made in accordance with law, for a proper purpose, and in accordance with the public interest.

OCSD and the Attorney General acknowledge that KRS 278.020(4) is applicable to the transaction, but deny the applicability of KRS 278.020(5). The Attorney General merely states that a sanitation district does not fall within the category of entities subject to subsection 5.<sup>3</sup> OCSD states that the Commission lacks jurisdiction to impose limitations upon its acquisition pursuant to subsection 5. It further states that since “OCSD is not a utility within the jurisdiction of the Public Service Commission and is a municipal corporation and political subdivision of the state, the PSC lacks the statutory authority to review and approve the contractual decisions made by OCSD Board of Directors with regard to the acquisition of the assets of Orchard Grass.”<sup>4</sup> OCSD’s

---

<sup>3</sup> Attorney General’s Post-Hearing Comments. The Attorney General asserts that “[i]t is unnecessary and unwarranted in this proceeding to discuss all aspects of the scope or applicability of KRS 278.020(5). Suffice to say, it does not apply to sanitation districts.”

<sup>4</sup> Post-Hearing Brief of the Oldham County Sewer District at 7.

arguments appear inconsistent. OCSD asserts that the Commission lacks statutory authority to review and approve the contractual decisions of OCSD with regard to the acquisition, but states that prior Commission approval is required under KRS 278.020(4).

The Commission is not persuaded by the arguments of the Attorney General and OCSD. KRS 278.020(5) contains no exception for entities outside of Commission jurisdiction. In fact, many entities acquiring control of a jurisdictional utility are not directly under the Commission's jurisdiction. While a KRS Chapter 67 sanitation district may be exempt from Commission jurisdiction as a utility, it is still subject to the sections of KRS Chapter 278 that apply to all persons and entities regardless of their jurisdictional status. Therefore, we find that both sections apply to the transfer of a "utility" without reference to the nature of the entity acquiring it. Consequently, the Commission concludes that both sections of the statute apply to the proposed transaction.

#### FINANCIAL, TECHNICAL, AND MANAGERIAL ABILITIES

The Joint Applicants and the Attorney General assert that the record demonstrates that OCSD has the requisite abilities to acquire Orchard Utilities. Mr. Madison argues that OCSD has not made the requisite showing and that the acquisition should be denied or, in the alternative, approved on the condition that OCSD be permitted to recover only the actual value of the plants through rates.

OCSD acknowledged that it has experienced net losses as a result of various acquisitions that required considerable repair and maintenance to bring them into

compliance with federal and state environmental laws.<sup>5</sup> However, for the period ending March 31, 2004, OCSD reported a cash balance of \$892,220.84. As of June 30, 2003, it reported total net capital assets of \$5,049,834. In addition, OCSD states that its Board approved new rates effective February 2004 and estimates that after this transfer, if approved, OCSD will have total revenues of \$1,785,000 and total expenses of \$1,644,000 for a net revenue of \$141,000.<sup>6</sup>

OCSD currently retains a registered professional engineer with extensive experience in wastewater treatment plant operation and design who will supervise the operation of Orchard Utilities. OCSD states that it also receives planning and management consultation from the Louisville and Jefferson County Metropolitan Sewer District ("MSD"). In addition, the OCSD Board of Directors consists of a professional engineer with a Kentucky Wastewater Class III operator certification, a Kentucky licensed architect and an accounting major with extensive financial management experience.

After careful consideration, the Commission finds that OCSD has demonstrated that it has the financial, technical, and managerial abilities to provide reasonable service to the customers of Orchard Utilities following the proposed transfer.

IN ACCORDANCE WITH LAW, FOR A PROPER PURPOSE,  
AND IN THE PUBLIC INTEREST

As stated previously, OCSD and the Attorney General do not believe the Commission is authorized to review the proposed transfer to determine whether same is

---

<sup>5</sup> Application at 4.

<sup>6</sup> OCSD Supplemental Response to Commission Staff's Data Request.

in accordance with law, for a proper purpose, and in the public interest. Orchard Utilities makes the same assertion at the hearing; nevertheless, Orchard Utilities in its brief contends that the record reflects that the transfer meets these criteria. Mr. Madison argues that the proposed transfer does not meet these criteria and has requested that the Commission deny the transfer or, in the alternative, approve the transfer with certain conditions.<sup>7</sup>

The issue of whether OCSD is authorized to provide sewer service to residents of Jefferson County arose during this proceeding. The Willow Creek treatment plant is located in Oldham County, but sewage treated at this plant is also collected from homes located in Jefferson County. KRS 220.285 provides:

The board of directors of a sanitation district may make contracts or other arrangements to provide for the collection, disposal and treatment of sewage and other liquid wastes produced outside of the district, as the board of directors may determine; provided, however, that this does not authorize a sanitation district to provide sewer service within a city of the first class except with permission of the board of aldermen of such city.

---

<sup>7</sup>Post-Hearing Brief of Robert L. Madison. Mr. Madison recommends that the Commission approve the transfer only if the following conditions are imposed: that OCSD not impose drainage fees for a period of 3 years and use revenues from drainage fees only for drainage projects; that OCSD obtain written approval from Louisville Metro Council to serve the customers in Jefferson County; that OCSD be required to implement its approved residential sewer adjustment for irrigation/pool fill and provide the form to all customers; that OCSD agree to reduce its calculation of sewer costs by using 85 percent of a customer's water usage; that OCSD not charge the current customers of Willow Creek and Orchard Grass a tap fee; that OCSD receive Oldham County Fiscal Court signature on the conditions; and that OCSD agree that all disputes regarding OCSD's compliance with the conditions be resolved in Oldham County Fiscal Court.

The witness for OCSD testified that the Jefferson County customers of Willow Creek are not located within the boundaries of the former city of Louisville, a first-class city. The Commission finds that since the customers of Willow Creek are neither presently within the boundaries of a first-class city nor within the boundaries of the former city of Louisville, no approval by a first-class city board is required. OCSD plans to remove the Orchard Grass and Willow Creek plants from operation and to divert the effluent from these plants to MSD's Hitt Creek Treatment Plant in cooperation with MSD through an Interlocal Cooperation Agreement.

On April 9, 2004, William Chlebowy, P.E., Supervisor of the Municipal Planning Sections Facilities Construction Branch of the DOW, filed a letter with the Commission stating that the proposed transfer is consistent with the Oldham County Wastewater Facility Plan approved by the DOW. He further stated that the DOW encourages the regionalization of treatment facilities and that the proposed transfer will further that objective.

Carroll Cogan, owner of Orchard Utilities, testified that the last rate adjustment for Orchard Grass and Willow Creek was in 1998 and that a rate filing had not been made since that time because Orchard Utilities has been actively negotiating the transfer of these utilities to OCSD for several years. The OCSD Board approved uniform rates for the District effective February 2004.<sup>8</sup> These new rates are \$7.67 per customer and a charge of \$3.20 per 1,000 gallons of water usage. The customers of

---

<sup>8</sup> Counsel for OCSD acknowledged at the informal conference held in this case that, prior to the implementation of these uniform rates, OCSD was charging various rates to its customers. He stated that OCSD had not moved to change the rates for these customers because, until recently, the courts had not resolved the issue of whether OCSD was a utility under the jurisdiction of the Commission.

Willow Creek and Orchard Grass will experience an increase in rates. The amount of the increase depends upon the amount of water used. Mr. Madison argues that the rate increase to Willow Creek and Orchard Grass is not reasonable.<sup>9</sup> He contends that a high rate of development and higher taxes will result if the transfer is approved and that, as a result, the transfer is not in the public interest or for a proper purpose. Mr. Madison recommends that, if the Commission approves this transfer, such transfer be conditioned upon OCSD agreeing to charge the customers of Willow Creek and Orchard Grass less than the rate approved by the OCSD Board of Directors. He further recommends that the Commission require OCSD to refrain from implementing a drainage fee for 3 years or assessing a tap-on fee to current Willow Creek and Orchard Grass customers.

KRS 220.135(7) provides that a sanitation district “shall establish uniform rates for its services throughout its jurisdiction, and district rates shall vary only on the basis of consumption.” The Commission finds that any required rate moratorium would require OCSD to act in violation of the statute. John Bennett testified at the hearing on behalf of OCSD that OCSD had no plans to implement a drainage fee and that it would not charge the current customers of Orchard Grass and Willow Creek a tap-on fee. Therefore, the Commission does not find it necessary to impose the conditions Mr. Madison requests.

After consideration of the record and Mr. Madison’s objections and recommendations, the Commission finds that the transfer, when reviewed in its entirety,

---

<sup>9</sup> Post-Hearing Brief of Robert Madison.



is in accordance with law, for a proper purpose and in the public interest and that it is not necessary for the Commission to impose conditions upon OCSD.

CONCLUSION

The proposed transfer is in accordance with KRS 278.020(4) and (5) and should be approved.

IT IS THEREFORE ORDERED that:

1. The application for the approval of OCSD's acquisition of Orchard Utilities is approved.

2. Within 30 days of the date of the transfer, the Joint Applicants shall notify the Commission in writing of the completion of the transfer.

3. Orchard Utilities shall be responsible for submitting to the Commission a financial and statistical report, as described in 807 KAR 5:006, Section 3, for the period in calendar year 2004 that it owned and operated the transferred assets.

Done at Frankfort, Kentucky, this 27<sup>th</sup> day of May, 2004.

By the Commission

ATTEST:



Executive Director