

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

In the Matter of Elm Hills Utility) Operating Company, Inc.'s Request for) a Water and Sewer Rate Increase)	Case No. WR-2020-0275
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**MOTION TO DISMISS CASE OR PROVIDE OTHER RELIEF IN THE
ALTERNATIVE**

COMES NOW the Office of the Public Counsel ("OPC") and for its *Motion to Dismiss Case or Provide Other Relief in the Alternative*, states as follows:

1. On September 18, 2020, the OPC filed its *Motion for Order Regarding the Production of Documents* in this case.

2. After several additional filings, the Missouri Public Service Commission ("the Commission") issued its *Order Granting Motion for Production* on October 28, 2020, granting the OPC's requested motion and ordering, in part, that:

Sciens Water Opportunities Fund LP, US Water Systems LLC, an unnamed investment firm (see footnote 2 supra), Tom Rooney, John Rigas, and Daniel Standen shall produce the books, accounts, papers, and records listed in Attachment K of OPC's Motion (attached hereto in redacted form) at the OPC's offices at 200 Madison Street, Suite 650, Jefferson City, Missouri 65101, no later than on November 18, 2020, at 10:00 a.m.

3. Pursuant to the Commission's *Order*, the Commission's Data Center attempted service of the *Order* by certified mail. Three certified mail receipts were subsequently filed into EFIS: one from Tom Rooney, one from the unnamed investment firm, and one from US Water Systems LLC.

4. Despite the *Order* directing production of the documents to be made on November 18, 2020, at 10:00 a.m., the only response the OPC received on that day was a letter transmitted via email (received by the OPC at 3:23 p.m.) sent by counsel retained by US Water Systems LLC. This letter claimed that US Water Systems LLC needed additional time to respond. A copy of this email and the attached letter are included as Attachment A to this motion.

5. Five days after the date for response provided in the Commission's *Order*, counsel for US Water Systems LLC again contacted the OPC with a second email and letter stating simply that, upon further review, the Company had decided to "decline" to obey the order. A copy of this second email and the attached letter are included as Attachment B to this motion.

6. No other party subject to the *Order* has contacted the OPC to date.

7. Given the complete lack of response from all but one party subject to the Commission's *Order* as well as the effective non-answer of the one response that was received, the OPC now brings this motion seeking redress.

Review of Circumstances Germaine to this Motion

8. The nature of the issue underlying the OPC's request for the production of documents has been detailed at length in previous filings. Therefore, the OPC will provide only a brief recitation of the pertinent facts.

9. Elm Hills Utility Operating Company, Inc. ("Elm Hills") is the water and wastewater service provider seeking to change its rates in the present case.

10. Elm Hills, through a series of connecting entities, is wholly owned by CSWR LLC, which also owns several other water and wastewater service providers in Missouri and other states. CSWR LLC is itself indirectly wholly owned (or at least majorly controlled by) Sciens Capital Management LLC.

11. The OPC believes that Sciens Capital Management LLC is raising debt financing to fund, in part, the improvements being made to the systems managed by CSWR LLC (including Elm Hills) and that this debt financing is being raised by one or more of several wholly owned or majorly controlled subsidiaries of Sciens Capital Management LLC including Sciens Water Opportunities Fund LP, US Water Systems LLC, and an unnamed investment firm or their affiliates.

12. The OPC does not take issue with this method of debt financing on its face. In fact, the OPC believes such debt financing may be ultimately beneficial to Elm Hills' customers. The problem instead lies with the fact that Elm Hills is actively hiding the existence of any debt financing raised at a higher level in its corporate structure by simply claiming ignorance of anything that occurs above the CSWR LLC level.

13. Because Elm Hills claims that CSWR LLC funds all of its subsidiaries with 100% equity capital it receives from US Water Systems LLC, it and other parties have no objective cost of debt transactions to utilize for setting a reasonable return for the debt in its recommended hypothetical capital structure. Evidence the OPC has discovered suggests that Elm Hills is not only likely capitalized with much more

reasonable debt costs than requested by Elm Hills, but also at a higher proportion than what is included in Elm Hills' requested hypothetical capital structure.

14. To summarize, by hiding any debt financing raised to fund its investment in Elm Hills behind a string of empty shell companies, Sciens Capital Management LLC has enabled Elm Hills to claim to be fully funded with equity and thereby argue for a higher than necessary rate of return through a series of hypothetical requests including both a hypothetical capital structure and debt costs. This allows Sciens Capital Management LLC to earn a much higher return on its small equity base than is transparent from the CSWR LLC subsidiaries' financial statements.

Effects and Implications of the Response to the Commission's Order

15. By far, the easiest and simplest way that Elm Hills could refute the argument presented by the OPC would be to explain the origin of the financing that Sciens Capital Management LLC has invested in CSWR LLC.¹

16. The source of this financing is information that is wholly within the control of Elm Hills and its affiliates, yet neither Elm Hills nor any of its affiliate entities have chosen to provide it.

17. In fact, Elm Hills and its affiliate entities have not only refused to present this information to rebut the OPC's argument, they have now gone so far as to actively defy the Commission's *Order* to produce it.

¹ If the utility were to demonstrate that the equity contributions Sciens Capital Management LLC has made into CSWR LLC were not partially funded by debt financing raised for the express purpose of funding CSWR LLC, then it is likely that the OPC would withdraw its argument altogether.

18. There are at least three important implications that arise from this behavior.

19. First, the complete unwillingness of Elm Hills or its affiliates to present the information necessary to rebut the OPC's argument should be viewed as a tacit admission of the accuracy of that argument. No rational actor would go to such extreme lengths to hide information that could easily exonerate them from the type of allegations the OPC has levied against Elm Hills and its affiliates. The only logical conclusion regarding the utility's current behavior, therefore, is that the OPC has correctly identified how Sciens Capital Management LLC is attempting to lever its allowed hypothetical returns to generate a much higher return on equity than the Commission might allow, which is why Elm Hills and its affiliates steadfastly refuse to disclose the requested evidence.

20. Second, this dispute has the potential to devastate the Commission's ability to develop a clear and complete record in other rate cases. The theory advanced by Elm Hills and its affiliates is that any action undertaken on behalf of a utility (including the raising of capital) that is done by an entity that is subject to the control of the utility's ultimate equity owner but which is itself located in a different state is beyond the jurisdiction of the Commission and thus shielded from discovery. If the Commission accepts this position, then there is nothing preventing companies that own utility assets in Missouri from restructuring in order to avoid Commission scrutiny by forming affiliate entities registered in a different state to handle all capital procurement thereby protecting their debt instruments and related cost

information from discovery. This outcome is as dangerous as it is ridiculous. The Commission's ability to discover relevant information does not end at the state line, no matter what Elm Hills argues.

21. Third, this behavior directly impinges the authority and power of the Commission. Of the six entities identified in the Commission's *Order*, only one even bothered to respond as required. Further, the one entity that did respond failed to do so in a timely manner, despite having been given three weeks to do so, and even then its ultimate response amounted to nothing more than a short letter stating that it did not intend to obey the *Order*. Should the Commission wish to preserve its regulatory authority, then it must take seriously this open, obvious, and unrepentant rebuking of that authority.

22. Given the prodigious significance of the situation thus described, the OPC requests the Commission take serious action in this case.

Relief Requested

23. Elm Hills is, indirectly, a wholly owned subsidiary of US Water Systems LLC.² Every action undertaken by Elm Hills is consequently performed at the will and discretion of US Water Systems LLC who exerts total control over the subordinate utility.

² While there are two separate legal entities that exist between Elm Hills and US Water Systems LLC, each of these entities is a wholly owned subsidiary of the one that follows it in the chain. Specifically, Elm Hills is the wholly owned subsidiary of Elm Hills Utility Holding Company, Inc., which is in turn wholly owned by CSWR LLC, which is in turn wholly owned by US Water Systems LLC. Thus, there is an unbroken line of ownership and control extending between Elm Hills and US Water Systems that renders the former the wholly owned subsidiary of the latter.

24. The OPC is accordingly requesting the Commission hold Elm Hills accountable for the actions of its dominant parent including the decision of its parent to defy the Commission's order for the production of documents.

25. To support this request, the OPC notes that Missouri Courts have long recognized that, in certain circumstances, the demands of equity may require the legal separation between corporate entities be set aside. ("[W]hen the formal corporate separateness and the arrangements between the two corporations is devised or used to accomplish a fraud, injustice, or some unlawful purpose, then the separate formal corporate structures will be ignored." *Real Estate Inv'rs Four, Inc. v. Am. Design Grp.*, 46 S.W.3d 51, 56 (Mo. App. ED 2001) (quoting *Collet v. Am. Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. ED 1986)). Such instances are most commonly referred to as "piercing the corporate veil." *Id.*³

26. The OPC will not belabor an extensive study of the case law regarding corporate veil piercing. Instead the OPC will simply note the underlying basis for the doctrine, which is the application of equity to prevent an abuse of the separation of corporate identities.

27. The present situation represents a clear example of just such an abuse in that Elm Hills seeks to use the separation of corporate identities as a shield to prevent discovery of relevant and important information.

³ While the doctrine refers specifically to corporations, Missouri Courts have held that it is applicable to limited liability companies as well. *Collet v. Am. Nat'l Stores, Inc.*, 708 S.W.2d 273, 284 (Mo. App. WD 1986).

28. Given the established corporate relationship of ownership and control that exists between Elm Hills and US Water Systems LLC, the extensive statutory leeway granted to the Commission by § 386.450 RSMo., and the clear need to prevent the abuse of the separation of corporate identities as a means of hiding relevant discovery, the OPC requests that the Commission treat the decision of US Water Systems LLC not to comply with its *Order* as if it were the action of Elm Hills itself.

29. In doing so, the OPC requests that the Commission impose sanctions upon Elm Hills in accordance with Commission rule 20 CSR 4240-2.090(1), which states in part that “[s]anctions for abuse of the discovery process or failure to comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.”

30. Specifically, the OPC requests the imposition of sanctions provided for in Mo. Civil Procedure Rule 61.01(d), *Failure to Produce Documents, and Things or to Permit Inspection*, which states:

If a party fails to respond that inspection will be permitted as requested, fails to permit inspection, or fails to produce documents and tangible things as requested under Rule 58.01, or timely serves objections thereto that are thereafter overruled and the documents and things are not timely produced or inspection thereafter is not timely permitted, the court may, upon motion and reasonable notice to other parties, take such action in regard to the failure as are just and among others the following:

(1) Enter an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting the disobedient party from introducing designated matters in evidence; (2) Enter an order striking pleadings or parts thereof or staying further proceedings until the order is obeyed or dismissing the action or proceeding or any part thereof or render a judgment by default against the disobedient party; (3) Enter an order treating as a contempt of court the failure to obey; or (4) Enter an order requiring the party failing to obey the order

or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

31. The OPC requests that Commission issue an order dismissing the current rate case pursuant to Mo. Civil Procedure Rule 61.01(d)(2) and maintaining the rates currently in effect.

32. Should the Commission not choose to employ this option, then the OPC requests in the alternative that the Commission issue an order suspending the current procedural schedule for this rate case until such a time as the Commission's *Order* is obeyed under Mo. Civil Procedure Rule 61.01(d)(2).

33. As a second alternative, the OPC requests that Commission strike all testimony filed by Elm Hills in the present case pursuant to Mo. Civil Procedure Rule 61.01(d)(1).

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant the relief requested herein and take any such other action as is prudent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this second day of December, 2020.

/s/ John Clizer