

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

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| In the Matter of the Application of Elm Hills |) | |
| Utility Operating Company, Inc. and |) | |
| Missouri Utilities Company for Elm Hills to |) | |
| Acquire Certain Water and Sewer Assets of |) | Case No. SM-2017-0150 |
| Missouri Utilities Company, for a Certificate |) | |
| Of Convenience and Necessity, and, in |) | |
| Connection therewith, to Issue Indebtedness |) | |
| And Encumber Assets. |) | |

**RESPONSE TO STAFF RECOMMENDATION
AND REQUEST FOR PROCEDURAL SCHEDULE AND EVIDENTIARY HEARING**

COMES NOW, Missouri’s Office of the Public Counsel (“OPC”), by and through under-
signed counsel, and does respond to the recommendation of the Missouri Public Service Com-
mission’s Staff (“Staff”). In support thereof, OPC states as follows:

I. SUMMARY

1. OPC agrees with Staff that the Commission should approve the transfer of assets to Elm Hills, and grant Elm Hills a Certificate of Convenience and necessity, with conditions, to provide water and sewer service to the requested service areas. OPC, however, has certain different conditions than Staff.
2. OPC will raise several issues in this filing which include objections to Staff’s interim rate proposal process, to one of Staff’s proposed rates, and to certain legal standards relied upon by Staff¹. Additionally, OPC seeks to add clarification of conditions that it considers

¹ Note that Staff incorrectly cites to a sixth Tartan criteria in Staff’s Official Case File Memorandum. However, the cover pleading correctly cites to five Tartan criteria. OPC objects to consideration of a sixth Tartan criteria.

a priority including treatment of the allocation that Staff recommends and clarifications of conditions relative to financing.

3. To begin, OPC notes substantial agreement with Staff, and OPC summarizes its posture relative to Staff's enumerated recommendations:
 - a. OPC supports Staff Recommendations 2-4, 6-11, and 13-30.
 - b. OPC objects to Staff Recommendation 1 as it relates to incorporating "the conditions as described within this memorandum," insofar as it would incorporate the Staff's "interim rate process," but otherwise recommendation 1 is not unreasonable. OPC objects to Staff Recommendation 5 as it relates to the MUC sewer tariff rate per month, but OPC believes 5 is not unreasonable as it relates to State Park Village sewer area.
 - c. OPC believes Staff Recommendation 12 relating to depreciation rates is not unreasonable.

II. *BACKGROUND*

4. On November 22, 2016, Elm Hills Utility Operating Company, Inc. ("Elm Hills") and Missouri Utilities Company ("MUC") initiated the above-captioned matter. In the application, Elm Hills seeks to acquire the water and sewer assets of MUC and seeks a certificate of convenience and necessity ("CCN"). Elm Hills also seeks a CCN to provide wastewater treatment services to customers in an area known as State Park Village.
5. In connection therewith, Elm Hills asks for approval to issue indebtedness, for approval to encumber the acquired assets, and for the Commission to grant interim rates.

6. In its application, Elm Hills seeks interim rates of \$45 for the sewer services that would be provided to customers currently served by State Park Village and by MUC. Elm Hills seeks interim rates of \$30.51 for water services that would be provided to customers currently served by MUC.
7. Throughout their application, Elm Hills identified many problems with the assets they are seeking approval to purchase.
8. The Commission granted OPC's request for local public hearings, and the Commission held two local public hearings on May 9, 2017. The first local public hearing was not well attended. However, the second local public hearing received a good turnout.
9. At the public hearings, customers testified to reliability and safety issues at MUC including "running water that looked like root beer."² Another customer explained that she had sewage that flooded her home that was "under the stairway, one of the bedrooms, the bathroom, the laundry room and the family room" of a customer's home," and she said that her repair service, Roto Rooter, indicated the problem was with "your line."³ Customers did not always provide clear timelines to identify when these problems occurred, but the latter quotation came from a customer who indicated she made two telephone calls to a Gary who lives in Clinton, and those calls went unanswered.
10. Customers also indicated affordability concerns. For example, one customer said "a lot of people can't, I would say, afford to have this big increase [in rates]."⁴ Another customer

² Local Public Hearing - Vol. 2, 5/9/2017, Page 41, Line 12-13

³ Local Public Hearing - Vol. 2, 5/9/2017, Page 14, Lines 20-25 respectively

⁴ Id. at Page 32, Line 15-17.

indicated that if people can't afford it, "... they're not going to afford it. They're going to leave [the town]."⁵

III. STAFF RECOMMENDATION AND OPC RESPONSE

11. On June 8, 2017, Staff filed its Staff Recommendation, and Staff offered their opinion that the Commission "approve the transfer of assets to Elm Hills, and grant Elm Hills a Certificate of Convenience and necessity, with conditions, to provide water and sewer service to the requested service areas."⁶

A. *OPC opposes Staff's reliance on non-emergency interim rate relief.*

12. Although OPC does not endorse usage of emergency interim rate relief through this filing, OPC recognizes that the case law contemplates emergency interim rate relief. Pursuing such relief would require the Company to show: a "deteriorating financial situation which 'constituted a threat to the company's ability to render adequate service.'"⁷ The utility would carry a "very heavy burden of proof" to show an emergency financial situation.⁸

13. Staff's recommendation includes its putative legal authority for non-emergency interim rate relief.⁹ OPC disputes the Staff's reasoning. OPC acknowledges that some of the Commission's prior decisions, for example, SO-2008-0289, Item No. 68, Pages 117-118, cite to an alleged and an implied power to grant interim rates on a non-emergency basis

⁵ *Id.* at Page 58, Line 14-17

⁶ EFIS, SM-2017-0150, Item No. 27, Staff Recommendation, Pg. 6

⁷ *State ex rel. Laclede Gas Co. v. Public Service Com.*, 535 S.W.2d 561, 565-568 (W.D. Ct. App. 1976).

⁸ *Id.*

⁹ EFIS, SM-2017-0150, Item No. 27, Staff Recommendation, Page 5, Paragraph 15, Footnote 5

“for good cause shown.”¹⁰ Staff has recounted these prior orders by noting a prior order cited to *State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W. 2d 457 (Mo. App. 1987). *Arkansas Power* case does not discuss interim rates nor does it specifically authorize non-emergency interim rates. In fact, another Commission order concluded that the “good cause shown standard” means that a utility has a deteriorating financial condition which impairs their ability to render adequate services.¹¹ In other words, prior decisions only contemplate one category of interim rate relief: when there is an emergency as explained above.

14. In its pleading, Staff does not expressly identify the legal standard required to be met in an emergency situation, and OPC is unclear if Staff is proposing their recommended rates under an emergency standard, another standard, or multiple standards. To the extent Staff relies on those cases as authority, OPC objects.

B. *OPC opposes Staff’s recommended rates for MUC sewer service, and OPC find Staff’s rate recommendation to be otherwise not unreasonable.*

15. Assuming that Elm Hills has not waived its ability to request interim rate relief, OPC responds as follows to the interim rate request:

¹⁰ Citing to *State ex. Rel GTE North, Inc. v. Missouri Public Service Comm’n*, 835 S.W.2d 356, 368 (Mo. App. 1992) (addressing the litigants request for interim rate imposition during the pendency of the appeal process, the Court commented: “Although there is nothing to prohibit the Commission from authorizing interim rates, there is no authority for finding that execution of a circuit court judgment is in fact a remand for implementation of interim rates.”) OPC notes that this proceeding does not concern the implementation of Commission approved rates through the pendency of the appeals process, and more notably the case does not establish a broad authority to grant non-emergency rate relief in any circumstance, nor does the case articulate a legal standard for which the Commission could approve such rates.

¹¹ *In Re Empire Dist. Elec. Co.*, ER-97-82, 1997 WL 280093 at Paragraph 21 (Mo. P.S.C. Feb. 13, 1997).

- a. OPC finds that Staff's rate recommendations for State Park Village sewer service and MUC water service are not unreasonable.
- b. OPC objects to Staff's recommended rates for MUC sewer service because Elm Hills has not provided adequate evidentiary support to meet the very heavy burden.

C. *OPC objects to Staff's interim rate process as unlawful.*

16. OPC objects to the Staff's proposed "interim rate process" as unlawful. OPC reviewed the enumerated request, and OPC could not find this process specifically included in the enumerated request. However, OPC objects to its inclusion through Staff Recommendation 1 and objects to the extent it is included in any other Staff Recommendation. OPC objects to the lawfulness of Staff's proposal for multiple reasons:

- a. First, OPC notes that it is well accepted that a commission order cannot bind future Commission's Report and Orders.¹²
- b. Second, OPC has concerns that the way the process is proposed may unlawfully change the burden of proof.¹³
- c. Third, OPC objects because the Commission cannot only review a single issue when ordering just and reasonable rates.¹⁴

¹² ER-2014-0258, p. 133, *Iss'd* Apr. 29, 2015; and see ER-2011-0028, p. 111, *Iss'd* July 13, 2011 ("Any such order the Commission could issue in this case would be ineffective, as this commission cannot bind a future Commission.")

¹³ *State ex rel. Laclede Gas Co. v. Public Service Comm'n*, 535 S.W.2d 561, 574 (the moving party bears a "very heavy burden of proof").

¹⁴ *State ex rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. 1979) ("Even under the file and suspend method, by which a utility's rates may be increased without *requirement* of a public hearing, the commission must of course consider all relevant factors including all operating expenses and the utility's rate of return, in determining that no hearing is required and that the filed rate should not be suspended.")

- d. Fourth, OPC objects that Staff's interim rate process is prohibited retro-active ratemaking.¹⁵
- e. Finally, Staff has not identified statutes or rules that authorize special treatment, and OPC notes that the movant bear the burden of proof to substantiate its claims.

17. As a counter-proposal, OPC recommends a method of providing regular updates to customers to educate customers about the status of the capital expenditures being made by Elm Hills and to regularly remind customers that these capital expenditures will need to be reflected in a future rate case as a means to address concerns regarding rate shock.

18. For these reasons, OPC objects to Staff's interim rate process.

D. *OPC supports certain of Staff's enumerated and unenumerated recommendations that apply to financing.*

19. In its application, Elm Hills seeks to encumber the newly acquired assets, and Elm Hills provides a term sheet, the contents of which were filed as highly confidential.

20. OPC agrees with Staff's unenumerated recommendation that "[e]ven if the Commission continues to find the Fresh Start 14% [interest] rate reasonable for ratemaking purposes, Staff suggests the Commission order the Applicant to submit a financing agreement with a reasonable prepayment penalty, if any, that allows for refinancing at a rate lower than 14%."

21. OPC specifically recommends this condition be ordered.

¹⁵ Id. at 59 ("the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate actually established.")

22. OPC also has continuing concerns about charging 14% interest rates with affiliate lenders, and OPC would similarly recommend that the Commission approve this transfer on the condition that Elm Hills submit a financing agreement with a reasonable prepayment penalty, if any, that allows for refinancing at a rate lower than 14%.
23. OPC shares Staff's concerns with the organizational structure and relationship between the lender and the borrower, with Elm Hills' lack of adequate efforts to obtain lower cost of debt, and with the lack of strategy for lowering requested capital costs.
24. Because Elm Hills will not provide the actual loan agreement until it is executed, OPC emphasizes Staff's recommendations as priorities to protect consumers as much as possible from costly and unreasonable terms and conditions that may surface in the loan agreement once it is executed and disclosed to the parties.
25. For the reasons stated earlier, OPC specifically recommends that the Commission not approve this transfer without a condition that Elm Hills submit a financing agreement with a reasonable prepayment penalty, if any, that allows for refinancing at a rate lower than 14%.

E. *OPC supports Staff's recommendation to amortize receiver's assets over five years, but OPC objects to applying those costs to State Park Village customers.*

26. Staff's recommendation contemplates recovery of the receivership fee as a regulatory asset and amortized over a five-year period. Staff would "split [the costs] equally between water and sewer."¹⁶ OPC generally finds this to be reasonable; however, given that the

¹⁶ EFIS, SM-2017-0150, Item No. 27, Staff Recommendation, Official Case File Memorandum, Pg. 6 of 19

receiver only operated at MUC, OPC specifically recommends that the amortization of these not be shared with the State Park Village system.

CONCLUSION

WHEREFORE, OPC respectfully requests that the Commission accept its response to Staff's Recommendation, accept OPC's conditions and objections, set a hearing to determine any contested issues, and grant other relief as this Commission deems as just and reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 28th day of June, 2017, I hereby certify that a true and correct copy of the foregoing motion was submitted to all relevant parties by depositing this motion into the Commission's Electronic Filing Information System ("EFIS").

/s/ Ryan D. Smith