BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Cathy J. Orler, et al. Complainants, v. Folsom Ridge, LLC, and Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association, Inc. Respondents.	)	Case No. WC-2006-0082, et al.
In the matter of the Application of Folsom Ridge LLC and Big Island Homeowners Water and Sewer Association, Inc. for an order authorizing the transfer and Assignment of Certain Water and Sewer Assets to Big Island Water Company and Big Island Sewer Company, and in connection therewith certain other related transactions.	)	Case No. WO-2007-0277

RESPONDENTS'/APPLICANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COME NOW Folsom Ridge LLC and Big Island Homeowners Water and Sewer Association, Inc. and submit the following proposed findings of fact and conclusions of law.

Procedural History and Preliminary Matters

Between mid August and late September, 2005, Cathy J. Orler, Benjamin D. Pugh, Ben F. Weir, Stan Temares, Joseph Schrader, Judy Kenter, Dean Leon Fortney, Cindy Fortney and Duane Stoyer, who were either residents or previous residents of Big Island Lake of the Ozarks,

filed complaints in this Commission against Folsom Ridge LLC (Folsom). Eventually, Big Island Homeowners Water and Sewer Association, Inc. f/k/a Big Island Homeowners Association, Inc. (the Association) was added as a party respondent. The complaints were consolidated under Case No. WC-2006-0082. On April 24 2006, Mr. Ben Pugh, one of the complainants in the consolidated complaints, advised the parties and the Commission by letter that his friend, Mr. Duane Stoyer, another complainant, had died. Lacking any substitution of parties, the Commission dismissed Mr. Stoyer's complaint pursuant to Respondents' motion.[1]

On January 23, 2007, Respondents filed an application to approve the transfer of the water system and sewer system on Big Island to Big Island Water Company and Big Island Sewer Company. The Commission assigned Case No. WO-2007-0277 to this case (the Application Case). On January 30, 2007, Big Island Water Company and Big Island Sewer Company (the 393 Companies) filed a timely application to intervene in the Application Case. On February 2, the following individuals filed timely applications to intervene in the Application Case: Fran Weast; Donald J. Weast; Geary and Mary Mahr; Tom and Sally Thorpe; Bernadette Sears; Sherrie Fields; Arthur W. Nelson; Cathy J. Orler; Cindy Fortney; Benjamin D. Pugh; and William T. Foley, II. All applications to intervene were granted.

Recognizing that both cases involved common issues of fact and law, the Commission, by order dated January 26, 2007, established a joint procedural schedule to resolve both cases. The cases were not formally consolidated. Hearing on both was conducted on February 28, 2007 though March 2, 2007 with an ancillary hearing held on March 30, 2007.

At the hearing of these causes, Ms. Fortney, Ms. Orler, Mr. Pugh, and Mr. Temares appeared without counsel. The following parties, either complainants or interveners, failed to

[1] *Order Dismissing Complaint*, Case No. WC-2006-0129, August 13, 2006.

appear at hearing: Ben F. Weir, Joseph Schrader, Judy Kenter, Dean Leon Fortney, Fran Weast; Donald J. Weast; Geary and Mary Mahr; Tom and Sally Thorpe; Bernadette Sears; Sherrie Fields; Arthur W. Nelson; and William T. Foley, II. The Commission is also advised that interveners Fran Weast; Donald J. Weast; Geary and Mary Mahr; Tom and Sally Thorpe; Bernadette Sears; Sherrie Fields; and Arthur W. Nelson failed to comply with the Commission's *Order Granting Motion To Waive The Requirements Of 4 CSR 240-2.090(8) And Granting Motion To Compel*, dated February 27, 2007.

Regarding Ben F. Weir, Joseph Schrader, Judy Kenter, Dean Leon Fortney, none appeared to prosecute their complaints, and there being no evidence on any of their complaints, the same are hereby dismissed. Although Mr. Temares appeared at the hearing, he offered no evidence in support of his separate complaint. Absent proof to support his complaint, the same is hereby dismissed.

Regarding the interveners Fran Weast; Donald J. Weast; Geary and Mary Mahr; Tom and Sally Thorpe; Bernadette Sears; Sherrie Fields; and Arthur W. Nelson, their failure to comply with orders of this Commission pertaining to discovery authorizes their dismissal; moreover, their failure to appear at the hearing, and Mr. Foley's failure to appear at hearing, and submit evidence of any kind in connection with their interest in this proceeding, also warrants dismissal. Accordingly, Fran Weast; Donald J. Weast; Geary and Mary Mahr; Tom and Sally Thorpe; Bernadette Sears; Sherrie Fields; Arthur W. Nelson; and William T. Foley, II are hereby dismissed as parties in these matters.

Findings of Fact

The Parties.

1. Cindy Fortney, Cathy J. Orler and Benjamin Pugh are individuals residing on Big Island, Lake of the Ozarks.

2. Folsom is a limited liability company organized under the laws of the state of Colorado and is authorized to engage in business in the State of Missouri.

3. The Association is a Missouri not for profit corporation.

4. Big Island Water Company and Big Island Sewer Company are corporations organized under the laws of the State of Missouri. They have been organized as not for profit water and sewer companies, respectively, under select provisions of Chapter 393, RSMo. (hence the abbreviations of the "393 Companies").

5. Folsom was formed in 1997 to engage in the business of owning and developing real property in the State of Missouri. In pursuit of that purpose, Folsom Ridge purchased all, or nearly all, of undeveloped Big Island at the Lake of the Ozarks, which is located near Roach, Missouri.

6. Folsom's plans for development of Big Island have been approved by Camden County local zoning authorities. The Big Island Planned Unit Development is currently permitted for 120 units and expectations are four phases of development over the next 5 to 7 years. The phases will be completed sequentially from north to south along the western shoreline of the Island. There are also existing, platted lots in the center of the island. Additional phases of the development will include portions of the center of the island.

The Big Island Water and Sewer Systems and the Association.

7. The water and sewer systems to support all of the Big Island PUD "filing 1" development have been installed.

8. For purposes of sizing the water distribution system and the wastewater treatment facility and its expansion, a projected build out of 320 homes was used.

9. The water system is comprised of a water supply well, three (3) ground storage tanks, a booster pumping system and distribution system. The well has an estimated capacity of 140 gallons per minute (gpm). This is adequate to serve 320 residential customers.

10. The pumping equipment presently delivers a flow of approximately 100 gpm, and will have to be upgraded to supply 140 gpm. The ground storage tanks were designed to serve 80 residential customers. They are in the process of being replaced with a standpipe designed to serve 320 residential customers. The distribution system is adequately sized to serve 320 residential customers.

11. The sewer system is comprised of a septic tank effluent pumping (STEP) collection system and a recirculating sand filter treatment facility. Wastewater from each home is treated at each individual home with a septic tank. The gray water is pumped from the septic tanks through small diameter pipes to the recirculating sand filter where the water is treated to meet Missouri Department of Natural Resources (DNR) discharge limits. The original treatment facility was designed to treat 22,525 gallons per day. The addition currently under construction will provide for treatment of an additional flow of 41,625 gallons per day.

12. Title to these facilities has remained in the name of Folsom. Operation and maintenance of those assets has been the obligation of the Association.

13. The Association has been in existence since July, 1998 and has been operating the system since the first customers were connected in early 2000.

14. Association billing for services commenced in January, 2001 and continues today.

15. Rules and regulations pertaining to the water and sewer services and the power of the Association to govern the systems are established in the Amended and Restated Declarations of Covenants and Restrictions recorded January 21, 2001 in the Camden County Recorder's office at Book 507, Page 587.

16. At the time of hearing, there were sixty (60) customers receiving sewer service and forty-eight (48) customers receiving water service from these systems.

17. The Association charges $15.00 per month for sewer service and $10.00 per month for water service. Members of the Association who are not connected to the systems are billed a charge of $5.00 per month for water and $5.00 per month for sewer. These latter charges are not for utility services but rather to cover costs of making facilities available for connection and maintaining those facilities.

18. The Association is not organized to make a profit, and declares no dividend and derives no return on investment. The Association does accrue a fund balance (or sinking fund), unrelated to profit, in order provide for future possible expenses including extraordinary repairs or other activities. The Association is not engaging in its business for profit and has no profit. (Ex. 13, Hughes Direct, page 3-4)

19. No dividends have been paid to Folsom in connection with the Association's operation of the systems. Folsom has received payments from the Association for reimbursement of advances on certain construction costs, but Folsom has never received payments derived from provision of water and sewer services to the system customers.

20. The Association bills and collects, and deposits revenue from the operations of the water and sewer system.

21. The Association has not paid fees or dividends to its members.

22. The Association's rates for water and sewer service are not designed to return a profit but rather the board of directors goes through a budgetary process each year and determines the level of assessment necessary to maintain and operate the system.

23. The Association offers water and sewer services to property outside of that described in the Amended and Restated Declaration of Covenants and Restrictions but the offer of water and sewer service is limited to the facilities that have been installed.

24. The Association does not offer water and sewer service to the public generally; just those persons whose property is proximate to the water mains and wastewater collection lines installed for the systems and who have agreed to pay the required tap on fees.

25. The Amended and Restated Declaration of Covenants and Restrictions set out the rights and duties of each owner connected to the system. They also provide that the Association is limited to offering and providing water and sewer service to its "members." This was devised so that members might have a special interest in the operation, ownership and control of the water and sewer systems on Big Island that would be a benefit or gain to each, very much like a cooperative.

26. Every household connected to either system has been offered "membership" in the Association. No household connected to either system has been denied an opportunity to become a member in the Association. To become a member of the Association, some property owners are expected to agree to or "ratify" the Amended and Restated Covenants and Conditions. Generally, these are property owners who have homes that were not covered originally by the recorded Covenants and Conditions.

27. Ms. Fortney is not connected to either system.

28. Ms. Orler is not connected to either the water or sewer system on the Island. She does have the right to connect to either system however. Her predecessor in title to the home in which she now resides paid the required tap on fee of $2,000 for water and $4,800 for sewer to Folsom.

29. Mr. Pugh is connected to the sewer system only. Mr. Pugh has not ratified the Amended and Restated Covenants and Restrictions. He does not consider himself a member in the Association. He has been asked to become a member of the Association and has refused. He receives notice of the annual meetings of the Association and has participated in discussions at many of those annual meetings.

Construction of the Facilities and Missouri Department of Natural Resources Regulation

30. Construction of the water and sewer facilities under review in these matters commenced in approximately 1998. The systems were activated in 2000.

31. Construction of the systems was under the supervision of Mr. David Lees, who was a member of Folsom, along with Mr. Reginald V. Golden and Mr. Rick Rusaw. Mr. Lees was the "man in the field" for the partnership. Mr. Golden and Mr. Rusaw were passive investors at that time.

32. During construction of the facilities, the Missouri Department of Natural Resources (DNR) issued several notices of violation to Folsom.

33. DNR issued a notice of violation on August 8, 2003 in which Folsom was cited for a violation of the terms of Permit MO-0123013. The notice cited Folsom for construction of water distribution and sewer collection lines in the same trench without proper separation between the lines or proper fill material around the lines, failure to place the water distribution lines on a packed earth shelf and failure to construct water and sewer lines in accordance with

the approved plans. This notice of violation was further investigated by Folsom Ridge and DNR in January of 2004.

34. In January of 2004, Folsom, with DNR on site, drilled test holes along the route of the water and sewer line right of way. The test holes showed that the water and sewer mains that shared the same trench had not been installed to maintain DNR's approved separation. Up until the time the test holes had been drilled, Mr. Golden and Mr. Rusaw had been assured by Mr. Lees and Folsom's then engineers that the lines had been installed in full compliance with DNR requirements.

35. After discovery of the non-complying condition, Folsom entered a Settlement Agreement on April 26, 2004 with DNR for the remediation of the non-complying condition, in which a civil penalty was imposed along with a schedule under which the condition would be corrected.

36. Folsom's engineers submitted plans for the remedial water main replacement project to DNR on May 13, 2004. The civil penalty of $8,000 due under the Settlement Agreement was paid on June 10, 2004 and the Attorney General closed its file in September of 2004. On October 21, 2004, five months after submission of the plans, DNR approved the plans and specifications for the water line replacement project.

37. Folsom completed construction of the water main relocation project in summer of 2005. On September 21, 2005, the project was inspected by DNR which determined that the water main had been replaced in conformity with DNR requirements and design regulations.

38. At this time, DNR has cited no unsatisfactory features about either system and has no enforcement action under consideration.

39. DNR considers the systems and their operations very good systems in terms of

meeting regulatory requirements.

40. All notices of violation issued by the DNR have been rectified.

The Asset Transfer

41. Folsom and the Association are "Sellers" and the 393 Companies are the "Buyers" under an agreement to transfer the water and sewer systems on Big Island.

42. Folsom is not affiliated with the 393 Companies. They are independent of Folsom or any developer.

43. Under the transfer agreement, Folsom and the Association will join in transferring their interests, as they appear, to all of the assets used or useful in the provision of water distribution services and wastewater collection and treatment including the real estate and easements in or on which the facilities are located. The assets will include facilities now under construction for expansion of the system. All accounts, accounts receivable and reserve accounts, if any, related to the provision of water and sewer service will be transferred as well.

44. The Association has a reserve account for purposes of defraying or covering costs of unexpected equipment or material needs or other unanticipated expenses in the operation and maintenance of the system. At the time of hearing, the balance in that account was approximately $7,000.00. It will be transferred to the 393 Companies.

45. Folsom and the Association proposed to transfer the assets without charge to the 393 Companies. However, a portion of tap permit fees collected by the 393 Companies from certain homeowners or their successors in title over the next 10 years will be paid to Folsom.

46. Residents who have paid the tap fees for connection to the water and sewer systems but who have not yet connected are still guaranteed the right to connect. The 393 Companies have agreed to assume that obligation and responsibility. That obligation is

expressed in the bylaws of each company.

47. Development on the Island is expected to continue and main extensions for both systems are contemplated as the development progresses. Any extensions of the systems will be done at the developer's cost pursuant to extension agreements with the 393 Companies.

48. The asset transfer will not close unless the 393 Companies have acquired the necessary permits or other approvals from the Missouri Department of Natural Resources.

49. Operation and maintenance of the system will be the responsibility of Mr. Michael T. McDuffey's firm, Lake Ozark Water and Sewer LLC (LOWS). This company operates and maintains the systems already. There will be no change in the operator after transfer of the assets. Mr. McDuffey's organization will also do the billing for the 393 Companies.

50. The proposed rates after transfer would be $14 per month for water and $21 per month for sewer.

51. The membership of the Association has approved the transfer of assets. Pursuant to written notice, the membership adopted a resolution to transfer the assets as proposed in the Application. The vote taken by the Association can be broken down in several ways. There are at this time a total of sixty (60) customers connected to the wastewater system and 49 customers connected to the water distribution system. Of the customers connected to the systems 50 voted in favor of the resolution and 5 voted against. There are 92 customers that are billed by the Association. Of the customers billed by the Association 70 voted in favor of the resolution. Thirteen (13) voted against. According to the Association's records, there are 105 owners of property on the Island. Of those 105 owners 73 owners voted in favor and 16 owners voted against.

DISCUSSION

The Commission identified the issues in this case as follows:

Primary Issues In WC-2006-0082:

1.) Are Folsom Ridge or BIHOA, or both of them, a public utility pursuant to §386.020(42), RSMo Supp. 2006, and thus subject to the jurisdiction, control and regulation of the Missouri Public Service Commission pursuant to §386.250, RSMo Supp. 2006?

2.) Have Folsom Ridge or BIHOA, or both of them, violated § 393.170, RSMo 2000, by constructing and operating a water system or a sewer system, or both, without having first obtained authority from the Commission in the form of a Certificate of Public Convenience and Necessity?

Secondary Issues to be Resolved in Relation to the Primary Issue 1:

1A.) Is Folsom Ridge a water corporation pursuant to § 386.020(58), RSMoSupp. 2006, in that it owns, controls, operates, or manages a water system, plant or property and distributes, sells or supplies water for gain?

1B.) Is BIHOA a water corporation pursuant to § 386.020(58), RSMo Supp. 2006, in that it owns, controls, operates, or manages a water system, plant or property and distributes, sells or supplies water for gain?

1C.) Is Folsom Ridge a sewer corporation pursuant to § 386.020(48), RSMo Supp. 2006, in that it owns, controls, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain?

1D.) Is BIHOA a sewer corporation pursuant to § 386.020(48), RSMo Supp. 2006, in that it owns, controls, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain?

Primary Issue in WC-2007-0277:

Would Applicants' proposed transfer of the water and sewer assets to Big Island Water Company and Big Island Sewer Company be detrimental to the public interest?

Secondary Issue to be Resolved in Relation to the Primary Issue:

What conditions, if any, should be imposed on the proposed transfer?

Common Issues to WC-2006-0082 and WO-2007-0277, Should the Commission

Determine it has Jurisdiction over a Public Utility Operated by Folsom Ridge, LLC, BIHOA, or Both of Them:

1. Has Folsom Ridge, LLC, or BIHOA, or both of them, failed to provide safe and adequate water and sewer service in violation of § 393.130.1, RSMo 2000.

2. Has Folsom Ridge, LLC, or BIHOA, or both of them, discriminated against some customers and provided preferences to others in its rates and charges for water and sewer service and tap-on and connection fees?

Section 386.020(42)[2] defines "**public utility" to** include

> every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter;

To be classified as a public utility under this definition, one or both of the Respondents must be either a sewer corporation or water corporation. We therefore commence discussion of our jurisdiction with whether either or both of the Respondents is a "water corporation" or "sewer corporation" as defined in Section 386.020.

Section 386.020 (48) provides:

> **"Sewer corporation"** includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets;

Section 386.020(58) provides:

[2] All statutory citations are to the current revision or cumulative supplement of the Revised Statutes of Missouri unless otherwise noted.

> **"Water corporation"** includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water;

In its determination of whether entities offering water or sewer services were subject to its regulation, the Commission has in the past followed policies that were expressed in *In the matter of Rocky Ridge Ranch Property Owners Association for an order of the Public Service Commission Authorizing Cessation of the PSC jurisdiction and regulation over its operations*, Case No. WD-93-307. In that order the Commission declined to exercise jurisdiction acknowledging first that the POA was a not-for-profit corporation and did not distribute or sell water "for gain." The Commission also acknowledged that the POA had changed its bylaws so that its services were strictly to be supplied to its members. Previously, no such assurance was found in the corporate bylaws. In our order in that case, we concluded:

> The Commission, having considered all of the competent and substantial evidence upon the whole record, finds that the POA has met its burden by qualifying as an association which does not require regulation under the rules and statues of the state of Missouri. In Case No. WM-93-136, the Commission found it necessary to continue to retain jurisdiction over the Property Owners Association based upon the finding that the Association would continue to serve customers who were not members of the Association. The Commission now finds changed circumstances due to the changes in the bylaws of the Property Owners Association. **Pursuant to those changes, the Commission finds that the Property Owners Association does and will only provide water service to members of the Association. As such POA does not qualify as a "water corporation" as defined by 386.020(51).**[3] [Emphasis added]

We note that in this case it is the Association which has control over the facilities used to provide water and sewer services for customers on Big Island. Folsom's interests in the facilities are in name only. Folsom acquires no money from customers or the Association in connection with the

[3] In the current revision of the Missouri Revised Statutes, the definition is found in Section 386.020 (58).

operations of each system. Accordingly, we will focus only on the Association, which bills and collects for the services rendered and contracts with maintenance personnel. It is the activities and operations of the Association that are therefore to be evaluated against the statute and any applicable Commission standards to determine its jurisdiction.

If the Commission were to apply the ruling in *Rocky Ridge Ranch* alone, the Commission conclusively has no jurisdiction over the Association. The Association is without question organized as a not for profit corporation, and operates on a not for profit basis in all aspects. Like the POA in *Rocky Ridge Ranch* the Association, as a not for profit entity, is not engaging in the water or sewer business "for gain." Examination of the Association's Amended and Restated Declaration of Covenants and Restrictions confirms that the purpose of the Association is to provide water and sewer services to the lots covered by the declaration, the owners of which are members in the Association. By the terms of its governing documentation, the Association has limited its service to members of the Association.

The Association does provide service to nonmembers however. Membership has been offered to each lot owner connected to the system. Like Mr. Pugh, these homeowners have not ratified the Covenants despite the Association's invitation to them to join as members. Though not members, they are currently enjoying the benefits of membership through connection to centralized water or sewer systems operated by the Association and are treated as if they were members. We believe that a resident's decision not to become a member of a not for profit Association whose governing documents limit service to "members" does not create jurisdiction in this Commission. We look to the Association and its intentions, operations and practices in connection with determining whether it qualifies as a "public utility" under the statute. Here, we

find that under the reasoning of *Rocky Ridge Ranch* neither Folsom nor the Association qualifies as a "water corporation" or "sewer corporation."

Staff has cited *Osage Water Company v. Miller County Water Authority, Inc*, 950 S.W.2d 569 (S.D. 1997), in support of its arguments that jurisdiction attaches to the operations of Folsom and the Association in these matters. In *Osage Water*, a Commission-regulated water company sought to condemn property of Miller County Water Authority, Inc. (MCW). MCW was a not for profit corporation which maintained an unexplained beneficial interest with Miller County Water Supply District. No. 2 and provided water service to residents in Camden and Miller Counties specifically to residents in two residential subdivisions. The evidence indicated that MCW never refused to provide service to any of the residents in the two subdivisions and the testimony suggested that it would provide water service to everyone within its capability. In defense of the condemnation petition filed by the plaintiff, MCW contended it was itself a public utility and by statute another public utility could not condemn its property. The trial court agreed and the decision was affirmed by the Southern District.

In affirming the trial court, the Southern District examined the nature and conduct of MCW's operations. It concluded the MCW was a "water corporation" under the definition set out in Section 386.020 even though MCW had not acquired certification from this Commission. The Southern District did not discuss the meaning of "gain" in the applicable statute. The Southern District concluded:

> We believe [MCW] is a "water corporation," as defined by the Missouri legislature, because it is incorporated and is in the business of operating, managing and providing water service to the public for **compensation**. [emphasis added]

Osage Water at 574. By so holding, the Southern District erased the word "gain" from the statute. In the absence of Commission participation on appeal, the Southern District 1) essentially expanded our jurisdiction over nonprofit entities engaged in provision of water service to those not in the business for "gain" but merely to recover costs. We agree with Respondents argument that "gain" and "compensation" are not synonymous.[4]

The Commission has concluded that *Osage Water* is not sound authority on its jurisdiction over nonprofit entities engaging in the provision of water and sewer services. The case is fundamentally about the rights of one public utility to condemn the property of another "provider of public utility services" and not about the limits or extent of regulatory jurisdiction of the Commission. We also observe that we apparently did not follow the Opinion. Although the Southern District concluded that MCW was a "water corporation," the Commission has never authorized or heard a complaint against it, nor has the Commission issued MCW a certificate. There is a record that the Commission staff filed a complaint against MCW on February 23, 1995 alleging that it was operating as a public utility and therefore was subject to regulation by the Commission. On July 11, 1997 the Staff filed a notice of dismissal and the case was dismissed pursuant to that notice effective August 8, 1997. See, *Staff v. Miller County Water Authority*, Case No. WC-95-252. MCW is not registered or certificated as a Missouri regulated utility.

The evidence establishes conclusively that the Association earns no "gain" of any kind from operations of the water and sewer systems it controls. As mentioned previously, Folsom

[4] According to Black's Law Dictionary (8th ed. 2004), "**gain"** means "1. an increase in amount, degree, or value. 2. Excess of receipts over expenditures or of sale price over cost. See PROFIT (1). 3. Tax. The excess of the amount realized from a sale or other disposition of property over the property's adjusted value. IRC (26 USCA) § 1001. -- also termed realized gain; net gain." From the same source, "**compensation"** means "1. Remuneration and other benefits received in return for services rendered; esp., salary or wages. Compensation consists of wages and benefits in return for services. It is payment for work. If the work contracted for is not done, there is no obligation to pay. "

receives no revenue from the Association or the customers of the systems in connection with their operations. As a not for profit corporation, the Association is not engaging in the water and sewer business for gain, and as it limits its service to members as set out in the Covenants and Restrictions, it does not qualify as a "water corporation" or "sewer corporation" under Section 386.020. The Commission lacks jurisdiction over the Respondents.

[WHAT FOLLOWS IS DISCUSSION WHICH IS PERTINENT ONLY IF THE COMMISSION DETERMINES IT HAS JURISDICTION]

1. Have Folsom Ridge or BIHOA, or both of them, violated § 393.170, RSMo 2000, by constructing and operating a water system or a sewer system, or both, without having first obtained authority from the Commission in the form of a Certificate of Public Convenience and Necessity?

2. Has Folsom Ridge, LLC, or BIHOA, or both of them, failed to provide safe and adequate water and sewer service in violation of § 393.130.1, RSMo 2000.

3. Has Folsom Ridge, LLC, or BIHOA, or both of them, discriminated against some customers and provided preferences to others in its rates and charges for water and sewer service and tap-on and connection fees?

Section 393.170

Having determined that the Commission has jurisdiction over the operations of the Respondents, the Commission addresses the issues above. Respondents have objected to the inclusion of these issues. Respondents contend that these issues are beyond the scope of the pleadings and are barred by the statute of limitations. The Commission agrees with the Respondents, but will provide discussion on these issues nonetheless as part of its decision in this case.

The evidence shows that Folsom owns no other facilities except those involved in these

matters and did not own or operate them until they were installed and became activated sometime in 2000. Folsom could not qualify as a "water" or "sewer" corporation for purposes of Section 393.170 unless it was then "owning, operating, controlling or managing" any sewer system or plant used for water service. The definitions are couched in the present tense. Corporations merely planning to put such resources into service are not covered by the definition.

Moreover, in a recent case this Commission concluded it had authority to retroactively approve construction of facilities covered by Section 393.170. Given the unquestioned need for the facilities Folsom installed on Big Island and the environmental benefits they provide to the Lake of the Ozarks and the surrounding population, we conclude there is more than sufficient justification in the record to issue the certificate for those facilities retroactively to the date construction commenced and approve construction and operation of both the water and sewer systems.

Adequacy and Safety of Service

Although the construction of these facilities was hampered by violations of DNR regulations, it appears to the Commission that at no time did DNR, the engineers or operators who attended the systems consider either to be in a condition unsafe to the customers each served. All DNR violations have been remedied to DNR's satisfaction and the Department is pleased with their regulatory compliance. No customer connected to the systems has complained that service is inadequate or unreliable. No engineer was produced by the complainants to refute the opinions and conclusions of the professionals who favorably testified on behalf of Respondents on this subject. We find that the services provided by Folsom and the Association are adequate, safe and reliable.

Rates for Service

The evidence shows that the Association's rates for service are uniform and apply to each customer connected to the system. Tap on fees for both the water and sewer system were uniformly applied and collected. With respect to the maintenance fees charged by the Association, this is a fee which has been historically untariffed by some utilities in this state, and since it is not for a utility service, does not come within the jurisdiction of the Commission under the provisions of Section 386.250(6). There is no evidence of discriminatory rates charged by Folsom or the Association.

THE ASSET TRANSFER APPLICATION WO-2007-0277

Primary Issue in WC-2007-0277:

Would Applicants' proposed transfer of the water and sewer assets to Big Island Water Company and Big Island Sewer Company be detrimental to the public interest?

Secondary Issue to be Resolved in Relation to the Primary Issue:

What conditions, if any, should be imposed on the proposed transfer?

Section 393.190 provides, in pertinent part:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do.

Section 393.190 does not set forth a standard or test for the Commission's approval of the proposed transfer of assets. However, the Missouri Supreme Court in *State ex rel. City of St.*

Louis v. Public Service Commission, 73 S.W.2d 393, 400 (Mo. banc 1934), determined that Section 393.190's predecessor, Section 5195, RSMo 1929, recognized the standard for Commission approval to be if the transaction so described is not detrimental to the public interest. This standard is further cemented by the Commission's own rules, which require an applicant for such authority to state in its application "[t]he reason the proposed sale of the assets is not detrimental to the public interest." 4 CSR 240-3.310(1)(D) (applying to sewer corporations) and 4 CSR 240-3.605(1)(D) (applying to water corporations). "The Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest." *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz,* 596 S.W.2d 466, 468 (Mo. App. 1980).

In connection with determining lack of detriment to the public interest, the Commission has previously considered such factors as the applicant's experience in the utility industry; the applicant's history of service difficulties; the applicant's general financial health and ability to absorb the proposed transaction; and the applicant's ability to operate the assets safely and efficiently.

Based upon the competent and substantial evidence in the record, the Commission finds and determines that the 393 Companies have the technical, financial and managerial resources and ability to develop, operate and maintain the water and sewer systems. They have contracted with LOWS for operation, maintenance and general management of the systems. Mr. McDuffey's firm and its abilities are well known to the Commission. His experience with the Big Island systems spans six to seven years and the systems have performed in accordance with regulatory requirements. The rate structure proposed by the 393 Companies will supply adequate financial support.

The water distribution facilities were professionally engineered, designed and constructed, and have sufficient capacity to meet the demands of the service area for many years. Additional storage is now underway so that as many as 320 households can be served, more than adequate to serve the 49 customers presently connected to the system. There is no evidence indicating that the drinking water quality fails to meet DNR standards or any related county Department of Health regulations.

The wastewater treatment and collection system, like the water distribution system, was professionally engineered, designed and constructed, and operates under current permits from DNR, and is being improved to meet additional demand contemplated from full build out of the Big Island development.

The water distribution system and the wastewater treatment and collection system on Big Island are free of any unsatisfactory features, are not subject to any DNR notices of violation or any enforcement actions. There is nothing about the systems which offends DNR rules, regulations or applicable statutes.

A super majority of customers (over 80%) connected to the systems are in favor of the transaction.

Respondents stipulated on the record that if the Commission asserts jurisdiction and approves the transfer, it will 1) install shut off valves for each water and sewer connection; 2) provide plans or drawings showing the location of those valves; and 3) will mark the valves in the field as either water or sewer shut off valves.

It is the conclusion of the Commission that the proposed transfer will not be detrimental to the public interest and should be approved subject to the stipulation provided by Respondents during hearing.

CONCLUSIONS OF LAW

The Missouri Public Service Commission has reached the following conclusions of law:

1. Neither Folsom nor the Association constitutes "public utilities" subject to the regulation of the Commission.

[ALTERNATIVE CONCLUSIONS]

1. The Association constitutes a "water corporation" and a "sewer corporation" and hence a "public utility" subject to the regulation of this Commission.

2. The proposed transfer of the water distribution and wastewater collection and treatment systems to the 393 Companies is not detrimental to the public interest and the transaction is approved subject to the condition that the Respondents will 1) install shut off valves for each water and sewer connection; 2) provide plans or drawings showing the location of those valves; and 3) will mark the valves in the field as either water or sewer shut off valves.

IT IS THEREFORE ORDERED:

1. The application of Folsom Ridge LLC and Big Island Homeowners Water and Sewer Association, Inc. (the Applicants) for an order authorizing the transfer and assignment of certain water and sewer assets to Big Island Water Company and Big Island Sewer Company filed on January 23, 2007 is approved, subject to the conditions outlined in the body of this order.

2. Folsom Ridge LLC and Big Island Homeowners Water and Sewer Association, Inc. are authorized to take any and all lawful actions necessary to carry out the proposed transfer of assets.

3. Applicants shall file a report in this case stating the status of the transactions no later than May 30, 2007, and continuing every 30 days until it has notified the Commission that all the transactions have been completed.

4. All parties excepting Cindy Fortney, Cathy J. Orler and Benjamin Pugh are dismissed.

5. The extant complaints of Cindy Fortney, Cathy J. Orler and Benjamin Pugh are hereby dismissed as moot.

6. This order shall be effective on _____, 2007.

BY THE COMMISSION

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 30th day of April, 2007, to General Counsel's Office at gencounsel@psc.mo.gov; and Office of Public Counsel at opcservice@ded.mo.gov and via U.S. Mail, postage prepaid, to:

Pamela Holstead, 3458 Big Island Dr., Roach, MO 65787,
William T. Foley, II, 15360 Kansas Ave., Bonner Springs, KS 66012,
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Arthur W. Nelson, 2288 Big Island Dr., Roach, MO 65787,
Sherrie Fields, 3286 Big Island Dr., Roach, MO 65787,
Tom and Sally Thorpe, 3238 Big Island Dr., Roach, MO 65787,
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Geary and Mary Mahr, 1886 Big Island Dr., Roach, MO 65787,
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/s/ Mark W. Comley