

**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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REPLY TO ELM HILLS' RESPONSE TO OPC'S MOTION TO DISMISS

COMES NOW the Office of the Public Counsel ("OPC") and for its *Reply to Elm Hills' Response to OPC's Motion to Dismiss*, states as follows:

1. Elm Hills' *Response to the OPC's Motion to Dismiss Case or Provide Other Relief in the Alternative* raised several arguments. The OPC responds as follows.

No Other Procedural Actions are Necessary for the OPC to Seek or for the Commission to Issue Sanctions in this Case

2. Elm Hills' *Response* insinuated that the OPC was required to seek redress under RSMo. sections 386.570.2 and 386.600 prior to requesting, or the Commission issuing, sanctions under Commission rule 20 CSR 4240-2.090(1). This is incorrect.

3. Nothing in either RSMo. sections 386.570.2 or 386.600 require they be pursued before the issuance of sanctions under Commission rule 20 CSR 4240-2.090(1), nor does 20 CSR 4240-2.090(1) state that any other procedural action must be sought prior to its application.

4. RSMo. sections 386.570.2 and 386.600 are remedies that exist separate and aside from this issuance of sanctions under 20 CSR 4240-2.090(1). The OPC could seek redress under either RSMo. section 386.570.2 or 386.600, but it has not chosen to do so at this time and it is not required to do so. All the OPC wants is access to the requested discovery.

The Commission Clearly has the Authority to Dismiss or Suspend the Present Case

5. Elm Hills cites to several cases and Commission decisions to support a legal argument that the Commission lacks authority to dismiss or suspend a rate case. This claim is groundless.

6. The cases and Commission decision cited by Elm Hills only support the proposition that, when the Commission sets rates, those rates must be “just and reasonable.”

7. Elm Hills currently has rates in effect that have previously been determined by this Commission to be just and reasonable.

8. Elm Hills has brought the present case seeking to increase those rates.

9. Elm Hills has the burden to prove its new proposed rates are just and reasonable. RSMo. § 393.150 (“At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . water corporation or sewer corporation.”).

10. As of yet, there has been no evidence offered and admitted on to the record in this case by any party.¹ Thus, there is, as of yet, no evidence to meet Elm Hills burden to prove that a rate increase is warranted.

11. Further, contrary to Elm Hills' assertions, the OPC has not entered into any agreement that Elm Hills should have a rate increase.

12. Regardless, even if there was evidence in the record, there is nothing requiring the Commission to issue a rate increase to Elm Hills. The Commission might determine that the evidence proves that "just and reasonable" means that rates must be keep as they are or even decreased.

13. Elm Hills' insinuation that the case law it cites proves it has a constitutional right to a rate increase is thus completely unsupported. In the absence of this spurious claim, Elm Hills has no grounds for asserting that the Commission lacks authority to dismiss or suspend this case.

The Relevance of the Discovery Sought has Already Been Addressed

14. Elm Hills argues that sanctions should not be imposed because the information being sought is, in its opinion, "not necessary" (*i.e.* not relevant) to determine just and reasonable rates.

¹ Testimony has been pre-filed in the Commission's Electronic Filing and Information System ("EFIS"). However this testimony has not been offered, has not been opened to objection, no cross examination has been permitted, and the Commission has accepted none of this testimony into the record.

15. The relevancy of this information (for purposes of discovery) has been addressed in previous filings and already determined by the Commission. The OPC will not retread this ground again.²

16. It is worth noting, however, that a party's position regarding the relevancy of particular evidence does not excuse that party's decision to directly disobey a Commission order. Stated differently, a sanction is just for no reason other than the fact that a party deliberately disobeyed the Commission.

Piercing the Corporate Veil is Just Under the Circumstances

17. Elm Hills maintains that it would be improper for the Commission to pierce the corporate veil because the OPC has not shown that the separation of corporate identities was used to commit any "fraud, injustice, or [] unlawful purpose."

18. Piercing the corporate veil is not so narrow as Elm Hills would have the Commission believe:

Second, the plaintiff must show a breach of duty--that this control was used by the corporation to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, **or to commit a dishonest and unjust act in contravention of the plaintiff's legal rights. It is not necessary, however, to show actual fraud.** In some situations, the corporate veil may be pierced when a corporation is undercapitalized, or when its assets are stripped to avoid creditors. Inadequate capitalization is circumstantial evidence of an improper purpose or reckless disregard for the rights of others.

² That being said, the OPC does wish to point out that Elm Hills argument relies exclusively on the claim that the requested discovery is not relevant to determining ROE, which is itself an irrelevant argument because the information the OPC is requesting is directly relevant to the questions of the proper capital structure and cost of debt to be ascribed to the Utility.

Mobius Mgmt. Sys. v. W. Physician Search, L.L.C., 175 S.W.3d 186, 188-89 (Mo. App. ED 2005) (emphasis added) (internal citations omitted).

19. In this case, the dishonest and unjust act that has been committed is the use of the corporate structure to hide relevant information related to the capitalization of the underlying utility. To reiterate what has been laid out in prior filings, the evidence gathered by the OPC supports the conclusion that Elm Hills is being largely funded (likely more than fifty percent) with capital raised through debt financing issued by or on behalf of its parent Sciens Capital Management LLC. However, this debt financing is being hidden behind a series of empty shell companies registered outside of Missouri, thus allowing the utility to claim to be one-hundred percent equity financed.

20. The sequestering of otherwise discoverable information using the corporate structure is analogous to the purposeful undercapitalization of a subsidiary to avoid liability³. As such, piercing the corporate veil is appropriate under the circumstances.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission issue an order consistent with the relief requested in the previously filed *Motion to Dismiss Case or Provide Other Relief in the Alternative* and take any such other action as is prudent.

³ In both cases the corporate structure is being used to hide something (either money or information) from those who would otherwise have a legal right to it.

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 eighth day of December, 2020.

 /s/ John Clizer