BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Cathy J. Orler, et al.	)	
	)	
Complainants,	)	
v.	)	Case No. WC-2006-0082, et al.
	)	
Folsom Ridge, LLC,	)	
	)	
and	)	
	)	
Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association, Inc.	)	
	)	
Respondents.	)	
	)	
	)	
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' POST HEARING BRIEF

I. INTRODUCTION and SUMMARY

What began as a series of complaints filed in this Commission by nine individuals was reduced to the claims of three at the joined hearing in these two matters. Five complainants,[1] who fought so bitterly to be included in that party alignment, save one (Mr. Stan Temares), never set foot in the hearing room, and had been absent from numerous proceedings held previously by

[1] The Complaint of Mr. Duane Stoyer was dismissed by the Commission at the suggestion of his death. See *Order Dismissing Complaint,* Case No. WC-2006-0129, August 13, 2006.

order of the Commission. The other five, including Mr. Temares, did not supply any evidence in support of their complaints and offered no evidence in support of the other three. Folsom Ridge LLC (Folsom) and Big Island Homeowners Water and Sewer Association, Inc. (the Association) (collectively the "Respondents" or "Applicants") may justifiably move for dismissal of the nonparticipating party complainants and the dismissal of the complaint filed by Mr. Temares.

The three complainants that remain share some salient common characteristics. None of the complainants is connected to the Big Island water distribution system that is the subject of these matters; (Tr. 335, 433, 501)[2] none has any present intentions to connect to the water distribution system, if they have any idea of connecting at all (Tr. 335, 433, 505) none has training in civil engineering; none has any background or work experience with the construction, maintenance or management of a water distribution system or wastewater treatment and collection system.

Regarding the subject of Big Island's wastewater facilities, of the three extant complainants only Benjamin Pugh is connected to that system. Mr. Pugh appears to be content with the service he receives. He has not disconnected from the service. The other two complainants, Ms. Orler and Ms. Fortney, are not connected to that system and have no idea when they may decide to connect. Ms. Orler recently replaced a septic tank on her property but made no effort to connect to Big Island's centralized wastewater system, (Tr. 340) although that would have been highly recommended by the Missouri Department of Natural Resources (DNR) because of its environmental benefits. (Tr. 860)

There are sixty (60) customers connected to the Big Island wastewater treatment and collection system. Only one (1) of those customers is a party complainant and as mentioned

[2] Reference to the Transcript shall be by the abbreviation "Tr." followed by a page number.

above, is apparently satisfied with his service. There are 49 water customers connected to the Big Island water distribution system. None of those customers is a complainant in this case.

The Commission's records show that a company affiliated with the Respondents attempted to obtain certification as a regulated water and sewer company on Big Island (Case No. WA-2006-0480) in response to the complaints filed in Case No. WC-2006-0082, but this was met with objection by the same complainants who plead for a regulated company in this action. Their inconsistency in positions between the two cases cannot be rationally explained. The certification case was dismissed while a new effort at reconciliation with the complainants was initiated at considerable cost and energy with the filing of the application in Case No. WA-2007-0277.

Two not for profit organizations (the 393 Companies) have been formed under provisions of law that would not subject them to regulation by the Commission as they engage in water and sewer services offered to residents on Big Island. Respondents have agreed to transfer a very expensive inventory of assets to the not for profit entities and eliminate the appearance of developer control[3] of the water and sewer systems on Big Island. In hindsight, it is not surprising that the three complainants object to control of the utility systems by their neighbors. The complainants have shown that they consider themselves exceptional and entitled to do as they please without subjecting themselves to the laws, regulations and procedures which their neighbors—the neighbors actually connected to the systems—follow currently and are willing to follow after the proposed transfer.

Their complaints about the construction of the systems, systems now considered in

[3] The three remaining complainants objected to developer control of the water and sewer systems. The evidence at hearing showed that developer "control" was never exercised in any decisions affecting the systems. The Developer's vote, when counted as a single vote, joined significant majorities on decisions made at meetings. (Tr. 645)

complete harmony with DNR compliance regulations (Tr. 866), and their claims that they are unsafe, unreliable or inadequate are chimerical. As lay people they were unqualified to render opinions or conclusions as to the quality of construction and operation of each system. **No expert was qualified by any complainant to dispute the opinions and conclusions of the Respondents' engineer, Mr. David Krehbiel, the Association's operation and maintenance contractor, Mr. Michael McDuffey or Mr. James Crowder, construction manager for the water main replacement and relocation project done pursuant to the Settlement Agreement.**[4] Without any supportable basis, Complainants refuse to believe the experts in the field or DNR inspectors about the condition of the systems. (Tr. 337-339) They refuse to accept the laws of the state which confer authority on people like Ms. Pamela Holstead and the board of directors of the new not for profits.

The complaints about each system raised by the complainants were repeated *ad nauseum* and with increasing volume. However, loud repetition of the unproved and un-provable is not evidence. Lay opinions of the complainants derived from superficial observations of conditions they may not have understood are inadmissible on issues of scientific or a technical nature and those lay opinions amounted to no more than guesswork, speculation and conjecture. Complainants' testimony, and the material offered by them at hearing is probative of nothing about the present status of the water and sewer systems and their condition upon transfer to the Section 393 companies,[5] but rather prove more significantly that the complainants are intractable.

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[4] See BB Schedule 5 of Ex. 12, Brunk Direct.

[5] "The general rule is that '[t]he testimony of a witness must be based upon [personal] knowledge.' " *Hemeyer v. Wilson*, 59 S.W.3d 574, 581 (Mo.App. W.D. 2001), citing *Francis v. Richardson*, 978 S.W.2d 70, 73 (Mo.App.1998) . "If the testimony of a witness, read as a whole, conclusively demonstrates that whatever he may have said with respect to the issue under investigation was a mere guess on his part and that, in fact, he did not know about that concerning which he undertook to speak, his testimony on the issue cannot be regarded as having any probative value." *Id.*

The hallmark of the Commission is protection of the public interest. In this matter, the public interest is preserved in the 60 customers who are connected to the water and sewer systems on Big Island. It cannot possibly reside in the complainants here, who are not connected to either system and have no present intention to connect, or with respect to Mr. Pugh, who has no objection to the system to which he is already connected. These complainants have filed suit in Camden County against the two new not for profit organizations. Ex. 36. It appears they claim an ownership interest in the assets to be transferred. [6] They claim that the reason for the filing of the suit was to protect themselves. (Tr. 351) It can be readily seen that the complaints were not filed to protect the customers who are already connected and satisfied with the systems and the rates charged for service. Indeed those customers distrust the complainants and are very unhappy if not resentful about these complaints, and the manner they have been carried on. (Tr.1001) Rather, these complaints have been filed and prosecuted to advance some submerged private agenda that is divorced from any valid consideration of the public interest.

It is the Respondents' position that the Commission should decline to exercise jurisdiction over their water and sewer operations on Big Island. If the Commission accepts jurisdiction, then it should approve the transaction proposed between the Respondents and the Section 393 entities. The Commission should then dismiss the complaints as moot. Respondents should not be punished for endeavoring at every stage to solve questions concerning water and sewer services rendered on Big Island only to have persons not connected to the systems invent new and meritless issues to vent before this Commission. Moreover, as between the complainants and the Respondents, it is the Respondents who have done most to serve the

[6] "I'm claiming that I do have an interest – a $4,800 interest in the sewer system, and I don't want it transferred." (Tr. 453. Cross examination of Ben Pugh.)

interests of the real public involved in this case—the persons who are actually connected and receiving service. The complainants have proved themselves unreasoning and inflexible. They do not change their minds and cannot change the subject. They have asserted grossly inexact and unsupportable allegations without restraint and have admitted that the interests they strive to protect in these complaints are their own, whatever those interests might be. Their actions are directly detrimental to the genuine public interest—the interest of the public which is served by and paying for the service provided.

II. THE JURISDICTIONAL ISSUES

Whether the Commission has jurisdiction over the Respondents is the pivotal issue in the joined cases. The Commission expressed the issues related to jurisdiction in this fashion:

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?

Secondary Issues to be Resolved in Relation to Issue 1 above:

1A.) Is Folsom Ridge 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?

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?

Section 386.020(42)[7] 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. Respondents' discussion of jurisdiction will focus on whether either 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:

> **"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;

Respondents contend that neither of them qualifies as a sewer corporation or water corporation as defined in Section 386.020 and the Commission must decline jurisdiction.

A. **Folsom Ridge**

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

The evidence shows that 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. Folsom Ridge also purchased an adjacent 190 acres. Shortly after purchasing the property, Folsom Ridge proceeded to install the necessary infrastructure to develop the land. (Ex. 12, Brunk Direct, page 2).

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. Reconfiguration of those lots will require an amendment to the PUD. The exact location and configuration of the future phases has not been determined, but 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. (Exhibit 12, Brunk Direct, page 8; Ex. 14, Krehbiel Direct, page 3).

B. **The Big Island Water and Sewer Systems and the Association.**

The water and sewer systems to support all of the Big Island PUD "filing 1" development have been installed. (Ex. 12, Brunk Direct, page 5). 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. 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. (Ex. 14, Krehbiel Direct, page 3).

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. (Ex. 14, Krehbiel Direct, page 3)

Title to these facilities has remained in the name of Folsom (Ex. 9, Rusaw Direct, page 3) but operation and maintenance of those assets has been the obligation of the Association. The Association has been in existence since July, 1998 (See Exhibit 2 attached to the Application in WO-2007-0277) and has been operating the system since the first customers were connected in early 2000. Association billing for services commenced in January, 2001 and continues today. (Ex. 12, Brunk Direct, page 13). Rules and regulations pertaining to the water and sewer services and the power of the Association to govern the systems are set out in a set of declarations and restrictions attached to Ms. Brunk's direct testimony (See BB Schedule 6 attached to Ex. 12).

At the time of hearing, there were sixty (60) customers receiving sewer service and forty-eight (48) customers receiving water service. (Tr. 653) (Ex. 12, Brunk Direct, page 14) 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. The rates had been billed on a quarterly basis until July, 2006 when monthly billing commenced. (Ex. 12, Brunk Direct, page 15).

Respondents sponsored the testimony of William H. Hughes, a Certified Public Accountant, in connection with a description of the financial operations of the Association. Based upon his review of relevant financial records of the Association, Mr. Hughes made it absolutely clear that the Association is not organized to make a profit, and declares no dividend or derives a return on investment. He confirmed that the Association accrues a fund balance (or sinking fund), unrelated to a concept of profit, in order provide for future possible expenses including extraordinary repairs or other activities but also confirmed that the reports he reviewed indicated that the Association is not engaging in its business for profit and has no profit. (Ex. 13, Hughes Direct, page 3-4)

No dividends have been paid to Folsom in connection with the Association's operation of the systems. In the years of 2002 and 2004, the Association did reimburse Folsom for costs and expenses advanced by Folsom as start up funding for the Association. The Association also paid Folsom $2,284 for a reimbursement of the construction costs related to an item referred to as the Caldwell Crossing. However, none of the payments were dividends and did not constitute a commission or fee. There is no evidence that Folsom receives payments derived from provision of water and sewer services to the customers. The Association is the only entity that bills and collects, and deposits revenue from the operations of the water and sewer system. Regarding members, the Association has not paid fees or dividends to its members. (Ex. 13, Hughes Direct, page 4)

With respect to the Association's rates for water and sewer service, Mr. Hughes confirmed that they 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. The Association is recovering its costs and is able to maintain a comfortable fund balance. (Ex. 13, Hughes Direct, pages 3-4)

The Association offers water and sewer services to property outside of that described in the Amended and Restated Declaration of Covenants and Restrictions (see BB Schedule 6 attached to Exhibit 12) but the offer of water and sewer service is limited to the facilities that have been installed. 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. (Ex. 9, Rusaw Direct, page 10).

Moreover, the Association was created to offer water and sewer service to its "members." As Mr. Rusaw stated in his direct testimony,

> The concept was for members to 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.

(Ex.9, Rusaw Direct, page 9). It was not created to offer service to anyone else. 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. (Ex. 11, Rusaw Surrebuttal, page 2-3) Generally, these are property owners who have homes that were not covered originally by the recorded Covenants and Conditions. Mr. Pugh is one of these property

owners. He is connected to the wastewater system but despite efforts to have him join the Association he has refused. (Tr. 465). He has participated in or observed most every annual meeting however. (Tr. 466-467)

The Covenants and Conditions set out the rights and duties of each owner connected to the system. Some households connected and receiving service from the Association have refused to become members. The Association has no control over that decision. The Association has preferred to keep these customers connected to the system because there are environmental and public health benefits involved and basically because the Association wants to allow them to receive service. Although there are homeowners connected who have not formally accepted the terms of the Covenants and Conditions, the Association has treated them as "members" and given them a voice at meetings of the membership, and it is up to them to become a voting member. (Ex. 11, Rusaw Surrebuttal, page 3).

C. **Jurisdiction of the Commission.**

The Commission's jurisdiction over water and sewer corporations is textually committed to statute and the expressed elements for a determination of jurisdiction are free of imprecision. To conclude in this case that the Respondents, or either of them, is a water or sewer corporation, the commission must find and determine that they are (or it is) engaging in the water or sewer business "**for gain."**

1. **Rocky Ridge Ranch**

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 concluded that it no longer should exercise jurisdiction over the Property Owners Association (POA) acknowledging early on that the POA "**is a not-for-profit corporation and as such does not distribute or sell water 'for gain.**'" [emphasis added] Although the statute is explicit that "gain" is an essential corporate attribute of the Commission's jurisdiction, that the POA was not in the business "for gain" was apparently not enough to end its regulation at the Commission. Staff recommended three criteria for what was termed a "legitimate" association:

1) It must have as membership all of its utility customers, and operate the utility only for the benefit of its members;

2) It must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to, allowing one (1) vote per lot which would not be an equitable situation if one (1) person owned a majority of the lots irrespective of whether each of those lots subscribed to the utility service; and

3) It must own or lease the utility system so that it has complete control over it. [8]

The Commission determined that **only one** of these criteria was important to its decision. As it explained in its final paragraph of discussion in the order:

> 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).**[9] [Emphasis added]

As the evidence in this case confirms, it is the Association which has control over the facilities

[8] None of these criteria is statutorily based.
[9] In the current revision of the Missouri Revised Statutes, the definition is found in Section 386.020 (58)

used to provide water and sewer services for customers on Big Island. Folsom's interests in the facilities is in name only.[10] The Association 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, Respondents submit that the Commission conclusively has no jurisdiction over the Association. First and foremost, 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 (BB Schedule 6, attached to Ex. 12, Brunk Direct) 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. (See Article II, Section 1, and Article III Section 1 of the Covenants). By the terms of its governing documentation, the Association has limited its service to members of the Association.

Mr. Pugh has not ratified the Covenants despite the Association's invitation to him to join as a member. (Tr.465) Though he not agreed to be a member, for reasons of his own, he is currently enjoying the benefits of membership through his connection to a centralized sewer system operated by the Association. He is a de facto member of the Association and is treated as such by its managing board. The fact that Mr. Pugh, and others who receive service without ratifying the Covenants, refuse to become members of the Association has no effect on whether

[10] Folsom receives no compensation of any sort from the Association for operation of the systems, not even rent for the facilities. Since it is a passive owner of facilities only, it cannot qualify as a water or sewer corporation under the definitions, whether "gain" or "compensation" is part of the test. See discussion *infra.*

the Commission has jurisdiction. The complainants would have the Commission believe that a system, in which 60 customers are unquestionably "members" of the not for profit operating POA, can be subjected to Commission regulation if one customer unilaterally declares that he or she is no longer a member. The jurisdiction of the Commission should not turn on whether a person voluntarily rejects membership in a not for profit organization or contends that he or she is not a member. It is the intention, conduct and decisions of the Association, not the decision of one of its customer base, which should be evaluated in determining jurisdiction. Otherwise the Commission's jurisdiction could be determined by an agreement between water or sewer customers that they "no longer shall be members" of the Association providing them service. The Commission's jurisdiction cannot be conferred by agreement. *Livingston Manor, Inc. v. Dept. of Social Services*, 809 S.W.2d 153, 156 (Mo.App.W.D.1991) (Subject matter jurisdiction of an administrative agency cannot be enlarged or conferred by consent or agreement of the parties.)

Under the analysis used in *Rocky Ridge Ranch*, the Association is not a water or sewer corporation as defined in Section 386.020.

2. Osage Water Company v. Miller County Water Authority, Inc.

Another case is apposite in these proceedings, and its holding at first blush is not favorable to the Respondents' arguments. In *Osage Water Company v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (S.D. 1997), 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.

The statute construed in *Osage Water* was Section 523.010.4, which provided then as it does now:

> 4. Except as provided in subsection 5 of this section, nothing in this chapter shall be construed to give a public utility, as defined in section 386.020, RSMo, or a rural electric cooperative, as provided in chapter 394, RSMo, the power to condemn property which is currently used by **another provider of public utility service,** including a municipality or a special purpose district, when such property is used or useful in providing utility services, if the public utility or cooperative seeking to condemn such property, directly or indirectly, will use or proposes to use the property for the same purpose, or a purpose substantially similar to the purpose that the property is being used by **the provider of the public utility service. [emphasis added]**

In affirming the trial court, the Southern District examined the nature and conduct of MCW's operations. It did not stop at a determination of whether MCW was "**another provider of public utility service."** The Court went a major step further and concluded that MCW, even though it was not certificated by the Commission, was a *de jure* "water corporation" under the definition set out in Section 386.020. The Southern District does not discuss the meaning of "gain" in the statute and apparently did not have the benefit of amicus filings by the Commission itself on its manner of interpreting this section. The Commission's interpretation of this section, and its history of concluding, as in *Rocky Ridge Ranch*, that "gain" meant profit, would be entitled to great weight.[11] The Southern District ignored the word "gain" in the statute and

[11]" Our courts consistently observe the principle that the construction placed upon a statute by a governmental

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. There should be little argument in this Commission that "gain" and "compensation" are not synonymous.[12] In the absence of Commission participation on appeal, the Southern District 1) created a definition of "water corporation" so broad that it would bring into the Commission's regulatory sweep every grocery store selling bottled water;[13] and 2) lowered the regulatory threshold at this Commission to the point it included entities offering water and sewer services which because of their not for profit status posed no threat of destructive competition or monopoly abuses to customers, the two evils which regulation is chiefly designed to control or eliminate.

The majority's overreaching was noted by the concurring opinion of Judge Garrison who observed:

> As I interpret the majority opinion, it proceeds, in part, on the theory that

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agency charged with its execution and enforcement is entitled to great consideration and should not be disregarded or disturbed, unless clearly erroneous-particularly when that construction has been followed and acted upon for many years." *State ex rel. Harline v. Public Service Commission*, 343 S.W.2d 177, 182 -183 (Mo.App.1960). Why the Southern District avoided this well entrenched principle of statutory construction is not known and truly is inexplicable.

[12] 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."

[13] Is there any doubt that a number of storefronts in this state are at least "controlling or managing . . . property . . selling … any water" for compensation. The statute makes no distinction between water from a faucet or water from a bottle. Maybe stores sell bottle water at a mark up, hence a gain, but definitely each is compensated for the sale. There are a myriad of impracticalities for the Commission to suddenly extend its jurisdiction to grocery or convenience stores, or to bottle beverage plants accepting compensation for bottled water. Those same impracticalities are involved in this case as well.

> the phrase "another provider of public utility service" actually means another public utility. I am not satisfied that this is a correct interpretation of § 523.010.4. I do not believe that section is ambiguous. Rather, I believe that it clearly expresses an intention by the legislature that the power of condemnation shall not be exercised against another "provider" of public utility service **whether or not that provider would otherwise qualify as a public utility pursuant to § 386.020(32**)(amended and re-numbered as § 386.020(42), RSMo Cum. Supp. 1996). I would, however, reach the same result as the majority by holding that Defendant is a "provider of public utility service." [emphasis added]

Osage Water at 576.

Osage Water is an unstable platform from which to conclude that the Commission has jurisdiction over Respondents' water and sewer services. First, the Commission was not a party to this case and was apparently not requested to advise the court of its historic interpretation of the "water corporation" definition. By default, its jurisdiction over non profit entities was dramatically altered without its input. Second, this case concerns the interpretation of a statute conferring rights of eminent domain. Such statutes are strictly construed. *City of Smithville v. St. Luke's Northland Hosp. Corp.*, 972 S.W.2d 416, 420 (Mo.App. W.D. 1998). The Commission's jurisdiction over MCW was not directly in issue. Third, the opinion apparently was not followed by the Commission. 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 holding in *Osage Water* is distinguishable and should not bar the Commission from applying its historical interpretation to the definition of "water corporation" and in like vein, its definition of "sewer corporation" in this case. As in Missouri, the absence of profit in the operations of water and sewer corporations has long been a decisive factor used by other jurisdictions in exempting those corporations from regulation.

In *West Valley Land Co., Inc. v. Nob Hill Water Association,* 107 Wash.2d 359, 729 P.2d 42 (Wash.,1986), the court was presented with an issue as to whether a not for profit water company was a statutory "public service company." Briefly, a real estate developer sought recovery of charges it had paid to Nob Hill for water services on grounds that Nob Hill was a public service company and had not acquired approval from the State Utilities and Transportation Commission (UTC) for the rates charged. The trial court concluded that Nob Hill was not a public service corporation subject to regulation and dismissed the plaintiff's complaint. The Supreme Court of Washington affirmed.

> We find from our application of the principles set forth to the actions of Nob Hill that it is not a public service corporation and, therefore, not subject to regulation by the UTC. Nob Hill conducts its business in accordance with the privileges granted and the limitations prescribed by law. But of greater consequence is that Nob Hill has not dedicated or devoted its facilities to public use, nor has it held itself out as serving, or ready to serve, the general public. As observed in *Inland Empire*, 199 Wash. at 539-40, 92 P.2d 258:
>
> > But more important than that is the controlling factor that it has not dedicated or devoted its facilities to public use, nor has it held itself out as serving, or ready to serve, the general public or any part of it. **It does not conduct its operations for gain to itself, or for the profit of investing stockholders, in the sense in which those terms are commonly understood.** It does not have the character of an independent corporation engaged in business for profit to itself at the expense of a consuming public which has no voice in the management of its affairs and no interest in the financial returns. **Its members do not stand in the relation of members of the public needing the protection of the public**

> **service commission in the matter of rates and service supplied by an independent corporation.**
>
> On the contrary, it functions entirely on a cooperative basis, typifying an arrangement under and through which the users of a particular service and the consumers of a particular product operate the facilities which they themselves own. The service, which is supplied only to members, is at cost, since surplus receipts are returned ratably according to the amount of each member's consumption. There is complete identity of interest between the corporate agency supplying the service and the persons who are being served. It is a league of individuals associated together in corporate form for the sole purpose of producing and procuring for themselves a needed service at cost. In short, so far as the record before us indicates, it is not a public service corporation.

The Utah Supreme Court when faced with a similar problem adopted the reasoning of *Inland Empire* stating:

> *Inland Empire Rural Electrification, Inc. v. Dept. of Public Service of Washington,* 199 Wash. 527, 92 P.2d 258, ... held that a rural electric service cooperative was not a public utility under Washington's laws. We believe the reasoning in the Inland Empire case to be convincing and sound.

[emphasis added] *West Valley Land Co., Inc. v. Nob Hill Water Association,* 107 Wash.2d 359, 366-367, 729 P.2d 42, 46-47 (Wash. en banc 1986). The holding in *West Valley* is still followed. *United and Informed Citizen Advocates Network v. Washington Utilities,* 106 Wash.App. 605, 24 P.3d 471, 475-476 (Wash.App. Div. 1, 2001).

Osage Water's holding should be limited to decisions respecting a utility's power to condemn the property of another "provider of public utility service;" nothing in the opinion should be construed to recalibrate the Commission's lack of regulatory control over not for profit water and sewer associations which restrict their services to a select group of members.

The Commission lacks jurisdiction over the Respondents and should not exercise jurisdiction over the respondents.

III. ISSUES CONTINGENT ON A DETERMINATION OF JURISDICTION

The discussion following is material only if the Commission determines that the Respondents, or one of them, are a water or sewer corporation. The arguments submitted by Respondents should not be construed as a waiver of their position that the Commission lacks jurisdiction in this case.

Issue:

> **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?**

Respondents contend that this is not a proper issue before the Commission. None of the complaints filed in this case allege violations of Section 393.170. Motions for more definite statements of the complaints were overruled with the Commission finding that the allegations were adequate. As a consequence, this issue is beyond the scope of the pleadings and should not be considered. Moreover, construction of facilities for the Big Island area started in 1998 to 1999 (Ex. 77 and 78). Issues pertaining to lack of preconstruction certification are barred by the statute of limitations. Discussion of this issue is subject to this objection.

Section 393.170 provides in part:

> 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

The statement of the issue in bold type above includes the subject of "operating" a water and sewer system which is not covered by Section 393.170. Respondents will treat that part of the issue as duplicative of the jurisdictional issues already addressed above. It will not be given additional argument in this section.

Regarding the acquisition of a preconstruction certification for either water or sewer facilities, there is no violation of this section. The definition of "water corporation" and "sewer corporation" are written in the present tense. Only those entities "owning, operating, controlling or managing" any sewer system or plant used for water service are therefore obligated to acquire preconstruction certification to build another. In this case, at the time construction of each system commenced in 1998 to 1999, neither Respondent was a "sewer corporation" or "water corporation" as defined in the statute in that neither had any ownership of assets then in service for provision of water or sewer service. Neither Respondent would have become a sewer corporation for example (presuming either has ever become a sewer corporation) until more than 25 units were served.

The definitions of "water corporation" and "sewer corporation" are not written to apply to entities "**planning** to build, own, operate, control or manage" water or sewer service facilities. The definitions place responsibilities on existing owners of those facilities only. Even if this issue were properly before the Commission, Section 393.170 has not been violated by the Respondents.

Furthermore, the Commission has at least on one occasion interpreted Section 393.170, in conjunction with its broad supervisory powers over utilities set out in Section 393.140, to give it authority to **retroactively** approve the construction of facilities covered by that section even though those facilities were ruled illegally constructed by a court of law. See, *In the Matter of the Application of Aquila, Inc. For Permission and Approval and a Certificate Of Public Convenience and Necessity Authorizing it To Acquire, Construct, Install, Own, Operate, Maintain, and Otherwise Control and Manage Electrical Production and Related Facilities in Unincorporated Areas of Cass County, Missouri, Near the Town of Peculiar*, Case No. EA-

2006-0309 (Report and Order, May 23, 2006).[14] In this case there were no injunctions issued against construction of desperately needed centralized water distribution and centralized sewer collection and treatment facilities, and there are no contentions that the facilities so constructed are unnecessary or located in areas not zoned for their use. Assuming *arguendo* that Respondents qualified as a "water corporation" or "sewer corporation" at the time of construction (which they deny) and further assuming the Commission has the authority to retroactively issue certificates approving their construction of facilities, Respondents are at least entitled to the same treatment Aquila received from the Commission following the illegal erection of a 315 megawatt peaking plant.

Issue:

> **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.**

Like the issue directly above, Respondents contend that this is not a proper issue before the Commission. None of the complaints filed in this case allege violations of Section 393.130.1. Motions for more definite statements of the complaints were overruled with the Commission finding that the allegations were adequate. As a consequence, this issue is beyond the scope of the pleadings and should not be considered. Discussion of this issue herein is subject to this objection.

No resident of Big Island connected to the water system appeared at hearing and raised issues with the safety or adequacy of water service. With the exception of Mr. Pugh, whose chief complaints, all of which were unsupported by any professional analysis, centered on the

[14] The Commission's decision in this case has been challenged on appeal however. *State ex rel. Cass County v. Public Service Commission,* Missouri Court of Appeals, Western District, Case No. WD67739.

water system, no resident of Big Island connected to the centralized sewer system appeared at hearing to raise issues about the safety or adequacy of sewer service.

Respondents surmise that this issue was suggested by the Staff in its proposed issue list because of the extent to which the complainants spotlighted the Settlement Agreement, which is attached to Ms. Brunk's Direct Testimony (Exhibit 12) as BB Schedule 5, and the circumstances giving rise to that agreement. Respondents have not concealed from the Commission that during initial construction of the systems an error was made with respect to separation of the water and sewer mains. As Ms. Brunk testified, 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.

There is no dispute that Mr. Pugh and other residents on Big Island were instrumental in bringing the improper separation of the lines to the attention of the DNR and to Folsom and the Association. Up to the point of the test drillings in January of 2004, Mr. Rusaw and Mr. Golden believed the lines had been installed correctly; such was the assurance of their partner, Mr. David Lees.

Mr. Lees was responsible for oversight of the day to day operations of the development in Missouri. He was the "man in the field" and was the Folsom point of contact for many of the residents on the Island. He was also in charge of directing and supervising the installation of the water and sewer lines. Mr. Golden and Mr. Rusaw did not have direct involvement in the initial

construction of these facilities. They were intended to be investment partners only. (Ex. 12, Brunk Direct, page 12) Mr. Lees and the engineers involved in the project advised Mr. Rusaw and Mr. Golden that the lines had been installed in accordance with DNR regulations. (Ex. 10, Rebuttal, page 5).

When the test holes were dug on or about January 12, 2004, it was discovered that the water and sewer lines in the same trench had not been constructed in accordance with the approved plans and specifications or applicable design guide requirements. As a result, Folsom entered the Settlement Agreement, paid all fines and corrected the problem by installing a new water line in a separate trench. The initially constructed line was abandoned in place. As Mr. Rusaw stated at hearing, "We were wrong." He followed with "We fixed that" (Tr. 603) and the evidence truly supports his statement as set out in subsequent sections of this brief.

Mr. Lees' membership in Folsom ended in April 2001. Folsom has filed suit against Mr. Lees to recover its damages in connection with the water line replacement on Big Island.

The last party to sign the Settlement Agreement was the DNR on April 26, 2004. Folsom's engineers wasted no time and in sixteen days submitted plans for the remedial water main replacement project to DNR on May 13, 2004 (Ex. 110). 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. (Ex 92). It was not until October 21, 2004, five months after submission of the plans, that DNR approved the plans and specifications for the water line replacement project. (Ex 116).

Mr. Clinton Finn, a professional engineer with DNR, was dispatched to inspect the waterline replacement and extension project that was approved under the Settlement Agreement. The report of his final inspection and approval of the project is found at Exhibit 93. Mr. Finn

appeared for deposition pursuant to notice and was designated by DNR as an authorized witness to speak on its behalf. Portions of his deposition were read into evidence. Mr. Finn, speaking for the Department, confirmed without qualification that based upon his inspection the water main had been "replaced in conformity with DNR requirements and design regulations." (Tr. 953)

The Settlement Agreement's waterline relocation and replacement project included a segment on the Big Island "causeway." At hearing, Mr. Pugh provided a photograph of blue flexible piping that appeared to connect the replacement water main to existing customer service lines above it. (Ex. 63) Mr. MacEachen, called by the Commission, was examined by Commissioner Gaw about his understanding of service lines[15] in general and also the blue piping. Mr. MacEachen testified that he assumed the blue piping in the photograph shown to him was untrustworthy and was "burst rated" at 80 pounds. He also assumed that it had been buried in coarse rock , all of which led him to believe that premature failure of the pipe was a possibility. Mr. MacEachen was forthright that he was not qualified as an engineer (Tr.849-850) and had no design experience in the field for at least five years (Tr.878) and was merely assuming what he believed the pipe's design rating was (Tr.877) and had no way of knowing how the pipe was eventually covered. (Tr.882).

At the Respondents' request an ancillary hearing was conducted for purposes of clarifying the role of the flexible blue piping on this project. At that hearing it was shown that the blue piping was part of Mr. Krehbiel's specifications for the service connections involved in the project. On page 9 of the attachment to Exhibit 110, Mr. Krehbiel recommended:

[15] Mr. MacEachen testified that DNR has no regulatory authority over customer service lines. Service line design or maintenance is not in the DNR design guide. DNR does not venture into the "private aspect" of the water system, the served household side. (Tr. 776) There are no known local codes which govern service line installation on Big Island. (Tr. 875).

> D. Service Connections –Service connection shall be ½" Copper pipe shall be rigid cold drawn type. Copper shall be completely deoxidized and conform to Federal Specifications ASTM B88,latest edition, Type K **or ¾", SDR9, 200 psi, PE-3408 Eagle Pure Core Blue HDPE Tubing.** [emphasis added]

Respondents also offered the testimony of Mr. James Crowder. Mr. Crowder was hired to act as the construction manager for the water main relocation and replacement project. He monitored and inspected the work done by the contractor, Kenny Carroll Excavating, Inc., on a daily basis. Mr. Crowder was also responsible for approving and sometimes purchasing the materials the contractor used on the water main replacement project. (Ex. 106, Crowder Direct, page 2) He gave this description of the blue pipe that was used on the causeway for connecting the water main to the customer service lines:

> This flexible piping is called CenCore HDPE (high density polyethylene) and is a product manufactured by Centennial Plastics LLC. The pipe was acquired from a local supplier, Jack's Hardware in Camdenton. The specifications for this pipe are found on the manufacturer's specifications sheet which I have attached as Crowder Direct Schedule 1. This product is available in variable pressure ratings. The pipe installed for service lines on the Big Island replacement water line is 1 inch in diameter, rated at 200 psi and has a Standard Dimension Ratio (SDR) of 9 CTS. It has an ASTM rating of D2737.
>
> The line is burst rated at 1600 psi

(Ex. 106, Crowder Direct, page 3-4).

Mr. Crowder also described for the Commission the way in which the blue flexible line was backfilled after connection was complete.[16] Two types of bedding or backfill were used. Mr. Crowder explained:

> For installations of the flexible pipe that were on relatively level grades, the bedding and cover were the limestone dust I referred to in my direct testimony. A workman would be positioned in the excavation and the pipe was raised so that the limestone dust could be laid underneath the pipe. Then the workman would

[16] In his direct, Mr. Crowder also described the mechanical connection used to link the blue pipe at the customer's service lines and at the main. At both locations the pipe was joined with a **compression fitting**, the tightest fitting in the industry. (Ex.106, Crowder Direct, page 3). An actual segment of the pipe and its fitting were admitted in evidence as Exhibit 112.

> lower the pipe into the limestone dust. After that, the blue pipe was covered with the limestone dust. For the lines that "went up a hill" the bedding used was ¾ inch limestone base rock. This size of aggregate is widely accepted for underground pipeline backfill. The base rock was used for compaction and for stability. The issue on an incline, like the one on Exhibit 63, is erosion around the excavation. The base rock bedding was selected to stabilize the site and minimize the effects of rainfall. This type of backfill will also keep the flexible pipe from moving.

During Public Counsel's cross examination of Mr. Crowder, questions sometimes centered on the way to classify this flexible blue line. Mr. Crowder resisted the idea to classify it as a "main" although the one inch line could conceivably serve two homes. (Tr. 1158). Mr. Crowder preferred to call the line a "main extension" (Tr. 1189) or a "service connection." (Ex.107, Crowder Surrebuttal, page 2). Anticipating that issues may be raised in other briefs about the DNR design guide preferences for ten feet of separation between water and sewer mains, Respondents direct the Commission to Mr. David Krehbiel's surrebuttal testimony where he supplies the DNR design guide regulations for separation of water and sewer mains. Construction of the water line relocation and replacement project conformed to these guidelines as Mr. Krehbiel testifies in his rebuttal (Ex. 15, Krehbiel Rebuttal, page 2) and as Mr. Finn's final inspection attests. (Ex. 93). There is no evidence that water and sewer mains were located too closely under the DNR design guide in connection with the water main relocation and replacement project under the Settlement Agreement.

Finally, as Mr. Crowder explained at hearing, use of the blue piping was a field change order approved by Mr. Krehbiel. Mr. Krehbiel's specifications called for an "Eagle Pur Core" brand of HDPE pipe but the CenCore product possesses the same specifications he called for, except one. Mr. Krehbiel and DNR approved use of ¾" flexible piping. Folsom installed one inch (1") flexible HDPE pipe thus exceeding the engineer's recommend specifications.

Contrary to Mr. MacEachen's assumptions, the flexible blue line installed along the causeway is rated at 200 psi, not 80 or 160 psi, has a burst rating of 1600 psi, and for applications in which the line was installed "up a hill" base rock of ¾" was used to stabilize the line rather than the rock Mr. MacEachen observed on Exhibit 63, Mr. Pugh's photo. Moreover, it was part of an overall project inspected by two professional engineers–one private, one public–both of whom have testified in this Commission that the project met relevant engineering and DNR requirements and specifications. The quality of the connection supplied by the flexible blue line is a nonissue in this case. [17]

Respondents produced David Krehbiel, Krehbiel Engineering, Mr. Michael McDuffey, Lake Ozark Water and Sewer L.L.C., and testimony from Missouri Department of Natural Resources staff concerning the integrity and components of the system. These witnesses confirmed that:

- There have been no complaints about the quality of service provided by the treatment system. The complaint received occasionally is about the odor of the water. The odor is natural and is caused by benign minerals in the water. This is not a problem unique to Big Island but is common to many wells drilled in the Lake of the Ozarks area. The odor is most noticeable when the water is heated and with the addition of sacrificial anodes to a customer's water heater, the odor is significantly reduced or eliminated. (Ex. 17, McDuffey Direct, page 7)
- There are occasional reductions in water pressure in the delivery of water to residences at the high points in the system, but those are rare and easily corrected. (Ex. 17, McDuffey Direct, page 7)

[17] See also page 7 of the Osage Beach Design Specifications admitted as Exhibit 113. The City specifies HDPE flexible piping of this nature for water meter service lines and city service lines. It is the only kind of pipe specified by the City for this purpose.

- There is no component of either system which is in violation of any DNR regulation or the regulation of any other agency that has jurisdiction over these systems. (Ex. 17, McDuffey Direct, page 7)
- The distance between some customer service lines for water and customer service lines for sewer does not pose a health risk. The preference is to separate each, and preferably have each in a separate excavation or "pit," but because of ground conditions, such as rock, and the expenses of digging extra cavities for these lines, they often are installed in the same pit. (Ex. 18, McDuffey Rebuttal, page 1) DNR has no regulations setting out a minimum separation for service lines.
- **There is no evidence in the record to support a finding that there have been any discharges of active sewage from the treatment facility.** The incident described in the evidence about standing water near Duane Stoyer's property involved treated wastewater, suitable for discharge in the downstream receiving lake, not active sewage. (McDuffey redirect at Tr. 733)
- Regarding the water main replacement project which was done pursuant to the Settlement Agreement with DNR, there is no risk to public health because the relocated water main may be below a sewer main on an incline. The relocation of the water main is in full compliance with the regulations of DNR and otherwise in accord with applicable engineering standards. (Ex. 15, Krehbiel Rebuttal, page 2). The project was installed according to Mr. Krehbiel's plans which were approved by DNR. Mr. Krehbiel made daily inspections of the work as it progressed. (Tr. 1186)

Mr. McEachen of DNR verified:

- At this time, DNR has reported no unsatisfactory features about these systems. (Tr. 867).

- No enforcement actions are being considered and there are no DNR notices of violation being considered. (Tr. 863)
- "[M]y personal rating of the system, as far as compliance, I would consider them to be a very good system in terms of meeting those regulatory requirements." (Tr. 866-867)

Staff witness Jim Merciel testified:

- [T]o my knowledge, there isn't any existing condition that's of an imminent safety matter. (Tr. 1093).

Water distribution and wastewater treatment and collection services provided by the Association on Big Island have been, and continue to be, safe, adequate and reliable.

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?

Like the two issues above, Respondents contend that this is not a proper issue before the Commission. None of the complaints filed in this case allege any acts of rate discrimination. Motions for more definite statements of the complaints were overruled with the Commission finding that the allegations were adequate. As a consequence, this issue is beyond the scope of the pleadings and should not be considered. Discussion of this issue herein is subject to this objection.

Ms. Brunk testified on direct examination that the Association's rates for sewer service are $15.00 per month and the rates for water service are $10.00 per month. Persons who have paid tap fees but who are not yet connected to the systems are billed a charge of $5.00 per month for water and $5.00 per month for sewer. (Tr. 581) There are approximately 30 households that receive this billing. (Tr. 582) These latter charges are not for utility services but rather to cover costs of making facilities available for connection and maintaining those facilities. (Ex. 12,

Brunk Direct, page 15). All of these fees and charges are uniform.

Tap fees paid by residents were in exchange for the right to connect to the systems. (Ex. 10, Rusaw Rebuttal, page 8) Folsom charged $2,000 for a tap to the water system and $4,800 for a tap to the sewer system. Folsom did not charge itself these fees for its own lots because it would be no more than paying itself. (Tr. 649). There is no variance or discrimination in connection with the tap on fee structure.

The $5.00 per month maintenance fee per system was initiated by the Association after several residents suggested it. Mr. Pugh himself was one of a group involved in getting the fee started although he advocated that the fee be voluntarily paid (Tr. 473). Ms. Orler herself paid these fees up until at least January 1, 2003.[18] (Ex. 76) (Tr. 326). These fees are historically unregulated by the Commission and discrimination, if any, (and none appears in the evidence) in their amount or collection by the Association is not offensive to the Public Service Commission Law. During cross examination, Mr. Jim Merciel, a member of the Commission's staff, explained that there are currently three regulated companies that charge a "maintenance" or "availability" fee. One of those companies tariffs the charge, the other two do not. Staff has not recommended that the two companies tariff that charge. (Tr. 1093-1096) These two companies have levied the charge since 1972 and because it is untariffed the charge has not been approved by the Commission. The charge is not for a utility service. (Tr. 1095)

The Commission's jurisdiction is generally prescribed in Section 386.250 which is quoted in pertinent part below:

> The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:
>
> * * *

[18] Ms. Orler's payments of the maintenance fees for nearly four years (See Exhibits 43 and 76) would indicate some sense of amiability with the Association notwithstanding her several representations to the Commission that she has been in a dispute with the Association and Folsom for seven or more years.

> (6) To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service **and billing for public utility service**. [emphasis added]

Since an availability or maintenance fee is not a billing for a public utility service, the charge is not subject to the Commission's jurisdiction.

The rates charged by the Association are uniform. Even if this issue were properly before the Commission, there is no evidence that the Association has ever discriminated in the rates it charges.

IV. Case No. WO-2007-0277

A. Dismissal of Certain Interveners

On February 7, 2007, the Commission granted the applications to intervene filed by 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. [19] Of these interveners only three have appeared in these proceedings. The other ten have failed to appear at prehearing conferences; failed to appear at hearing;[20] failed to present evidence regarding their purported interest in the outcome of this case, and additionally, regarding all but Mr. Foley, failed to submit answers to data requests timely propounded to them by the Respondents even after an order of the Commission compelling them to answer those data requests.[21] 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 should be dismissed as parties.

[19] *Order Granting Applications to Intervene* , February 7, 2007.
[20] Judge Stearley confirmed the absence of each of these parties on the first day of hearing. (Tr. 78-79).
[21] *Order Granting Motion To Waive The Requirements Of 4 CSR 240-2.090(8) And Granting Motion To Compel,* February 27, 2007

B. **Issues**

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?

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

1. The Asset Transfer Agreement

In his direct testimony, Mr. Rick Rusaw, President of the Association, explained the proposed sale of the water and sewer assets. The form of the transfer agreement (the Agreement) is attached as Appendix 1 to the Application. (Ex. 20)

Folsom and the Association are the Sellers under the Agreement and two new nonprofit companies organized by Big Island residents are the Buyers. The names of the new nonprofit companies are Big Island Sewer Company and Big Island Water Company. Both have been organized under sections of Chapter 393, RSMo respecting nonprofit water and nonprofit sewer companies (the "393 Companies") and they are interveners in this case. The 393 Companies were organized by Ms. Pam Holstead, an attorney who represents the 393 Companies in this case, along with Gail Snyder, Don Bracken, Bill Burford, and Jim Grayum, all property owners or local residents on Big Island.

Folsom is not affiliated with the 393 Companies. They will be independent of Folsom or any developer. Also, the voting in the 393 Companies will be different from the right to vote in the Association. The Association follows a "one vote per lot" rule. According the bylaws for each (Ex. 101), the 393 Companies will follow a "one vote per connection" rule. In this way the 393 Companies are customer controlled. Folsom would have voting rights but only for each residence it owns (on separate lots) that was connected to and taking service from the systems. If Folsom had only one residence connected to a system, it would have only one vote in the 393

Company even though it might own many more unoccupied lots in the service area.

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. 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.

The assets are being transferred 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. The households subject to this particular provision will be identified on Exhibit E to the Agreement.

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. (Ex. 101)

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. The extension agreement will require the extension to be constructed in accordance with the bylaws of the affected 393 Company. No extension will be accepted by the 393 Company unless approved by

its engineer or other qualified employee, agent or contractor. A specimen of an extension agreement is attached to the Agreement as Exhibit G.

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. It is possible that the permits currently in force could be transferred or the 393 Companies may need to apply for permits. The 393 Companies have started the process to acquire the necessary permits from DNR.

Operation and maintenance of the system will be the responsibility of Lake Ozark Water and Sewer LLC (LOWS), Mr. McDuffey's company. 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. Mr. Gail Snyder, Vice President of both 393 Companies, testified that the proposed rates after transfer would be $14 per month for water and $21 a month for sewer. This is a modest increase.

The membership of the Association has approved the transfer of assets and there is wide support for the transfer among the residents on Big Island particularly those who are connected to the systems. 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. **Over 80% of the customers connected to the systems voted in favor of the resolution.** 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. The percentage in favor was 76.09% of the total

billed by the Association. 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. The percentage in favor was 69.53% of all owners of property on Big Island.

C. **The Standard for Approval for the Transfer of Assets**

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 can readily find and determine that the transfer of the wastewater assets and the water system assets from Folsom and the Association to the 393 Companies is not detrimental to the public interest. The evidence is overwhelming that the proposed transfer would serve the public interest.

The evidence is clear that the 393 Companies will 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 in the future.

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. The public who are connected to the systems should be given the greater deference in this regard, much more than the complainants who refuse to connect and who are oblivious to the adverse effects they inflict on their neighbors.

In sum, if the Commission determines that it has jurisdiction over the Respondents or one of them, the Commission should approve the transfer of the water and wastewater facilities to the 393 Companies subject to the terms of the Agreement, and the conditions to which Respondents have already agreed.[22]

V. DISMISSAL OF THE COMPLAINTS

Respondents do not retreat from their position that the Commission lacks jurisdiction in this matter. However, if the Commission rejects Respondents' arguments and asserts jurisdiction, and then approves the transfer of assets to the 393 Companies, Respondents contend the complaints should then be dismissed as moot. With governance of the water and wastewater assets in the control of a customer-controlled organization with authorization by law to manage, maintain and operate each system, the principal objective of the complaints will have been

[22] 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. (Tr. 1083-1084).

achieved, irrespective of the complainants' weak objections[23] to having their neighbors in charge. Furthermore, declaring the complaints moot dispenses with whether a penalty should be sought.

During the opening remarks on February 28, 2007, the Commission inquired of Staff counsel and Public Counsel concerning the authorization to seek penalties in the event the Commission concluded that the Respondents acted as public utilities without proper certification. Staff counsel stated that seeking penalties under the circumstances involved in this case was unnecessary (Tr. 126); and Public Counsel stated that any violations involved were not egregious and did not warrant penalties (Tr. 150). Another important fact must be considered. The complainants have filed suit against the Respondents and the 393 Companies in Camden County Circuit Court. (Ex. 36) Counterclaims are under consideration (Ex. 10, Rusaw Rebuttal, page 21) As mentioned in an earlier segment of this brief, Mr. Pugh, if not all of the complainants who are parties in that case, claim an ownership interest in the assets being conferred under the Agreement. (Tr. 453) Respondents contest any claim of ownership in the assets made by the complainants, yet, since they admit that they consider themselves part "owners" of the assets Folsom and the Association have employed for provision of water and sewer service, the complainants, as co-owners of those facilities, therefore will be jointly and severally liable for any penalty sought and imposed. This and other considerations of the public interest militate against any residual action for penalties.

[23] Complainants' appear to have appointed themselves as the guardians for those who are connected to the systems and consider themselves superior to their neighbors and know what is best for them, even if it means more costs for their neighbors. Their attitude has instilled unhappiness among those who are customers and some who are not. (Tr. 1001) Complainants presume their neighbors were uninformed when they voted overwhelmingly in favor of the transfer but they offered no voter as a witness who claimed to be confused or misinformed about the measure. Ms. Orler considers Ms. Holstead unfit to act as an officer in the 393 Companies' management but there is nothing in the record which impeaches Ms. Holstead's abilities to preside, or the abilities of the board of directors that organized the companies. For any of these objections to have weight, customers actually connected to <u>each</u> system would need to come forward. None did. The complainants' objections are hollow and presumptuous.

VI. **Conclusion**

On the basis of the above and foregoing, Respondents pray the Commission dismiss the complaints. Alternatively, if the Commission extends jurisdiction over the Respondents, or one of them, Respondents pray the Commission approve the transfer of the assets described in the Application to the 393 Companies and further dismiss the complaints as moot.

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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:

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