

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

In the Matter of the Application of Elm Hills)
Utility Operating Company, Inc. for a)
Certificate of Convenience and Necessity.) **File No. SA-2018-0313**

OPC’S REPLY

COMES NOW, the Office of the Public Counsel, by and through undersigned counsel,
and for *OPC’s Reply*, states as follows:

1. On August 15, 2018, the Missouri Public Service Commission ordered Staff of the Public Service Commission and Elm Hills Utility Operating Company, Inc. to file any responses to the *OPC Response to Proposed Conditions in Staff Recommendation*.
2. On August 20, 2018, the Staff responded that the Commission should ignore the question of whether Elm Hills’s current request would cause Elm Hills to be in breach of its financing agreement. (“There is absolutely no need for the Commission to interject itself into the relationship of Elm Hills and its lender.”) Staff Response, Pg. 2, Paragraph 4. The Staff also responded that the Commission should ignore examining whether the Commission’s prior financing authority order would have granted Elm Hills the authority to apply debt proceeds to newly acquired assets because Staff believed it would be “inappropriate” to consider this question.
3. The same day, Elm Hills filed its response. Elm Hills took a different position. Instead of addressing the issue of a potential breach of its debt agreement, Elm Hills corrected the record and explained that Elm Hills would not be in breach of its financing agreement or a prior Commission order because it would *not* be applying debt proceeds to fund the improvement of the newly acquired system. Elm Hills Response, Pg. 2, Paragraphs 6-7. (describing Elm Hills’s representation to Staff relating to applying debt proceeds to

improve newly acquired assets as “in artfully stated”). Instead of debt financing, Elm Hills plans to fund improvements to its acquired systems by offering equity or by obtaining financing from Company generated funds. *Id.*

4. Elm Hills’s response renders most of the OPC’s concerns and the Staff’s response to the OPC’s concerns moot. But Elm Hills’s response also raises new concerns because Elm Hills has not applied for authority to issue stock under 4 CSR 240-3.320. Elm Hills concedes this point by doubling down on its position that it is not seeking “new financing authority.” *Id.* As previously stated, Elm Hills goes further and states that they intend to fund capital improvements for the newly acquired system through “Company generated funds” or “additional equity contributions.” *Id.* It is unclear what is meant by “Company generated funds;” however, to the extent Elm Hills could issue “additional equity contributions,” then Elm Hills needs to comply with 4 CSR 240-3.320, which addresses what an application must contain to request authority to issue stock. This application does not request any such authority.
5. In light of this change in circumstances, the OPC withdraws its conditions 1-4. If and when Elm Hills seeks Commission authority to make “additional equity contributions,” the OPC reserves its right to suggest additional conditions. The OPC also reserves its right to file a complaint in the event that the OPC discovers that additional equity contributions were made without Commission approval.
6. As to the OPC’s fifth condition relating to prudence findings, the Staff describes the OPC’s fifth condition as “unnecessary” because “the prudence of a transaction may always be considered in the future rate proceeding.” Staff Response, Pg. 3, Paragraph 7.

Elm Hills states that it “has no idea as to the meaning of this language.” Elm Hills Response, Pg. 6, Paragraph 17.

7. The OPC might have previously agreed with Staff that such a condition would be unnecessary – that is, until the Indian Hills Utility Operating Company, Inc. filed its appeal in the Missouri Court of Appeals, Western District. To refresh the memory of Elm Hills who claims to have “no idea” why the OPC would make such a recommendation, Indian Hills’s brief, for their second point-relied-on, states as follows:

The Public Service Commission erred in issuing its Report and Order because the order is unlawful, unreasonable, arbitrary, capricious, and an abuse of discretion in that the Commission’s use of an imputed cost of debt of 6.75% instead of Appellant’s actual contractual cost of 14% to determine its weighted average cost of capital *is at odds with its presumptive determination of the reasonableness of the terms of Appellant’s acquisition financing at the time it acquired the drinking water operations of IHU.*” Brief of Appellant, WD81661, Pg. 2. (emphasis added)

8. Because the affiliates of Elm Hills are evidencing a confusion about how Commission acquisition cases and how Commission financing cases operate, the OPC believes it is appropriate for the Commission to be pellucidly clear¹ that it is making no “presumptive determination” of prudence in these proceedings. Therefore, the OPC continues to recommend that the Commission modify Staff’s enumerated condition number 16 to state, “Make no finding of the value and no finding of the prudence of this transaction...”
9. Finally, Elm Hills’s response made efforts to mitigate the OPC’s concerns over whether Elm Hills’s business model is an affordable solution for distressed utilities. Although the

¹ For an interesting history of the usage of the term “pellucidly clear” by various courts, see: <http://www.newyorkcourtwatcher.com/2009/12/pellucidly-clear-at-supreme-court-ny.html> (e.g., “‘Pellucidly clear’ appears in 16 cases in Supreme Court history”).

OPC did not expressly condition its recommendation on an offer of proof relating to affordability, Elm Hills offers a proxy for the OPC to consider.

10. At a future rate case, Elm Hills is welcome to present proxies such as the one it described. The OPC is receptive to evaluating the identified proxy, and other proxies, in assessing the prudence of the cost of debt or in assessing the prudence of other expenditures incurred by Elm Hills.

WHEREFORE, the OPC continues to ask that the Commission adopt the OPC's condition relating to prudence, consider the *OPC's Reply* withdrawing the other conditions, and order any other relief the Commission deems just.

Respectfully submitted,

/s/ Ryan Smith

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**ATTORNEYS FOR THE OFFICE
OF THE PUBLIC COUNSEL**

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on August 30, 2018 to all counsel of record.

/s/ Ryan D. Smith