

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

In Re the Matter of the Joint Petition of)	
Frimel Water System, Inc. and Lake Lorraine)	
Property Owners' Association for Authority)	Case No. WM-2006-0459
for Frimel Water Systems, Inc. to Transfer)	
Its Assets and Cease Operations)	

**RECOMMENDATION FOR APPROVAL OF TRANSFER OF ASSETS AND
CANCELLATION OF CERTIFICATE OF CONVENIENCE AND NECESSITY**

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and for its Recommendation for Approval of Transfer of Assets and Cancellation of Certificate of Convenience and Necessity ("Recommendation") respectfully states as follows:

1. On June 5, 2006, Frimel Water System, Inc. ("Frimel") and Lake Lorraine Property Owners' Association (the "Association") filed a joint petition with the Missouri Public Service Commission ("Commission") requesting authority to transfer Frimel's assets to Association and to cease Frimel's operations. The parties have also requested permission to cancel the certificate of convenience and necessity currently held by Frimel. The Commission determined that the proper parties should be given notice and an opportunity to intervene. The Commission set an intervention deadline of July 10, 2006. No parties have intervened.

2. The sale of utility assets is governed by Section 393.190 RSMo (2000). Applications to the Commission for approval of utility asset sales are governed by Commission rules 4 C.S.R. 240-2.060 and 4 C.S.R. 240-3.310. The Commission may approve an asset transfer if the transfer is "not detrimental to the public interest." *State ex. Rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980).

3. Section 393.190(1) RSMo (2000) requires water and sewer corporations to obtain the Commission's approval prior to transferring their facilities or systems to another entity. The

Association has recently acquired Frimel's stock. The Association intends to dissolve Frimel once it has acquired its assets.

4. Staff does not oppose ownership or control of utility facilities by a subdivision association. While utility operations owned and controlled by such associations are arguably subject to the Commission's jurisdiction, it is common for the Commission not to exert its jurisdiction over systems owned or controlled by an association. An exception may exist in cases where the developer, as opposed to the subdivision residents, maintains primary control of the association and of the utility facilities. An exception may also exist where certain customers may have more powerful votes than other customers based on lot ownership versus utility system usage.

5. The Commission has outlined a test that is helpful in determining when the Commission will or will not exert its jurisdiction over a system owned or controlled by a subdivision association. Generally, the Commission will not exert its jurisdiction over a system owned or controlled by a subdivision association if the association meets the following criteria: (1) the association must have as membership all of its utility customers, and operate the utility only for the benefit of its members; (2) the association must base its voting rights regarding utility matters on whether or not a person is a customer, as opposed to allowing one vote per lot which would not be an equitable situation if one person owned a majority of lots irrespective of whether each of those lots subscribed to the utility service; and (3) the association must own or lease the utility system so that it has complete control over it. *In the Matter of the Application of Rocky Ridge Ranch Property Owners Association for an Order of the Public Service Commission Authorizing Cessation of PSC Jurisdiction and Regulation Over Its Operations*, Case No. WD-93-307, July 7, 1993.

6. The Staff has reviewed the Association's proposal and has concluded that the association may not strictly meet the first of the *Rocky Ridge Ranch* criteria because membership in the association is optional and there are a very small number of utility customers who are not residents of the subdivision.

7. Counsel for the Association has informed Staff that the association is considering modifying its constitution and by-laws to allow non-residents of the subdivision who are utility customers to have a vote on utility matters and to eliminate currently-existing initiation fees and annual dues.

8. The Staff believes that the Association would meet the test set out in *Rocky Ridge Ranch* if it takes the steps outlined in Paragraph 7, and that it would thus not be necessary for the Commission to regulate the association.

9. A review of the Commission's records shows that Frimel has not paid its fiscal year 2007 assessment. This assessment was due on July 15, 2006. There are no other past due assessments.

10. A review of the Commission's records also shows that Frimel has not submitted annual reports for calendar years 2001 and 2002. Staff requests that annual reports be submitted for these calendar years. However, the failure to file these annual reports is not a factor in Staff's recommendation that the transfer of assets be approved because the statutory period in which Frimel could have been penalized for its failure to file said reports has expired.

11. As is explained fully in the Staff's case file memorandum ("Memorandum") that is included in Appendix A attached hereto, the Staff has concluded that the transfer of the utility assets from Frimel to the Association would not be detrimental to the public interest, if the modifications to the Association's constitution and by-laws discussed in Paragraph 7 are made.

12. The Staff's recommendations regarding this case are set out on Page 3 of the Staff's Memorandum. Specifically, the Staff recommends that the Commission issue an order approving the requested transfer of assets, but with that order being conditioned on the following:

- a. That Frimel's past-due assessment of \$165.48 for fiscal year 2007 be paid;
- b. That the Association be required to submit evidence of changes to its Constitution & By-Laws that will allow all water utility customers to vote on water utility matters, regardless of membership in general;
- c. That, in conjunction with item subpart b above, the Association be required to submit evidence that the notice to its members regarding the proposed changes to its Constitution & By-Laws clearly stated that approval of the changes would result in the water system no longer being regulated by the Commission; and
- d. That the Association be required to inform the Commission when the transactions related to the transfer of assets have been completed.

In addition to the above, the Staff also notes that after the transfer of assets is complete, the Commission will need to issue an order canceling Frimel's Certificate and Tariff.

WHEREFORE, the Staff respectfully submits its Recommendation in this case for the Commission's consideration.

Respectfully Submitted,

/s/ Jennifer Heintz

Jennifer Heinz
Assistant General Counsel
Missouri Bar No. 57128

Attorney for the Staff of the
Missouri Public Service Commission

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Recommendation have been mailed with first class postage, hand-delivered, transmitted by facsimile or transmitted via e-mail to all counsel and/or parties of record this 7th day of September 2006.

/s/ Jennifer Heintz

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

AFFIDAVIT OF JAMES A. MERCIEL, JR.

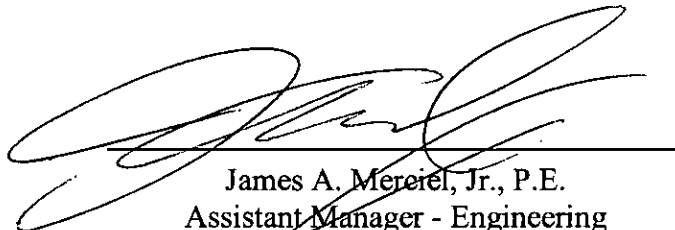
STATE OF MISSOURI)

) ss

Case No. WM-2006-0459

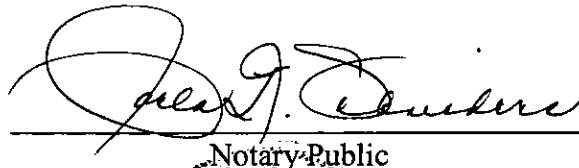
COUNTY OF COLE)

James A. Merciel, Jr., of lawful age, on his oath states: (1) that he is the Assistant Manager – Engineering in the Water and Sewer Department of the Missouri Public Service Commission; (2) that he participated in the preparation of the foregoing *Recommendation for Approval of Transfer of Assets and Cancellation of Certificate of Convenience and Necessity* (Recommendation), and the Memorandum included as Appendix A to the Recommendation; (3) that he has knowledge of the matters set forth in the foregoing Recommendation and the Memorandum; and (4) that the matters set forth in the foregoing Recommendation and the Memorandum are true and correct to the best of his knowledge, information and belief.

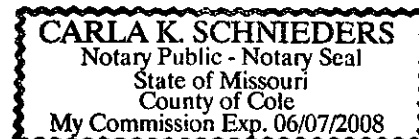
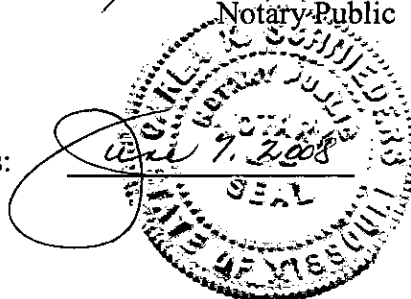


James A. Merciel, Jr., P.E.
Assistant Manager - Engineering
Water & Sewer Department
Utility Operations Division

Subscribed and sworn to before me this 5th day of September 2006.


Notary Public

My Commission Expires:



APPENDIX A

STAFF'S CASE FILE MEMORANDUM

CASE No. WM-2006-0459

MEMORANDUM

TO: Missouri Public Service Commission Official Case File
Case No. WM-2006-0459
Frimel Water System, Inc. and
Lake Lorraine Property Owners' Association

FROM: Dale Johansen – Water & Sewer Department
Jim Merciel – Water & Sewer Department
Greg Meyer – Auditing Department

<u>/s/ Dale W. Johansen</u>	<u>09/07/06</u>
Project Coordinator	Date

<u>/s/ Jennifer Heintz</u>	<u>09/07/06</u>
General Counsel's Office	Date

SUBJECT: Staff's Recommendation Supporting Cancellation of
Certificate of Convenience and Necessity

DATE: September 05, 2006

GENERAL BACKGROUND

On June 5, 2006 Frimel Water System, Inc. ("Frimel") and Lake Lorraine Property Owners' Association (the "Association") filed a PETITION FOR AUTHORITY TO TRANSFER ASSETS AND CEASE OPERATION ("Petition"), seeking authority to transfer the water utility assets of Frimel to the Association, and to cancel the Certificate of Convenience and Necessity ("Certificate") held by Frimel. Though not specifically addressed in the Petition, if the requested authority is granted, the Commission will also need to cancel Frimel's Tariff.

Frimel, which originally was started by the developer of Lake Lorraine, obtained a Certificate from the Commission in Case No. 15,398, which was closed on December 2, 1964, to provide water service in a subdivision known as Lake Lorraine in Jefferson County, MO. It serves approximately 75 customers. Construction of the water system began in the 1960s. It has adequate capacity to serve the existing customers, has no water quality compliance issues, and since there is no growth in the subdivision there are no present plans for improvement or expansion.

The Association represents that it recently acquired the stock of Frimel, and records at the Missouri Secretary of State's office reflect that Frimel changed its registered agent on April 6, 2006 to the same person who is the registered agent of the Association. After acquisition of the assets, the Association intends to dissolve Frimel.

STAFF'S INVESTIGATION

The Staff does not oppose the concept, generally, of a subdivision association owning and controlling its utility facilities. Further, it is the Staff's position that the Commission need not regulate utility systems that are owned and controlled by the system's customers, if the customers actually have legitimate control over the operation of the utility system. Often, however, developers have as much or more control of homeowners associations than customers do, or some customers may have more powerful votes than other customers. In such cases, the homeowners association may still be subject to regulation by the Commission.

The Staff believes that the Commission decision of July 7, 1993 in Case No. WD-93-307, *In the matter of the application of Rocky Ridge Ranch Property Owners Association for an order of the Public Service Commission authorizing cessation of PSC jurisdiction and regulation over its operations*, is helpful in this situation. That Commission decision outlined several characteristics of associations that would not be subjected to regulation by the Commission, which the Staff generally refers to as the "Rocky Ridge Ranch Points" and which are set out below:

1. The association must have as membership all of its utility customers, and operate the utility only for the benefit of its members;
2. The association must base the voting rights regarding utility matters on whether or not a person is a customer, as opposed to allowing one vote per lot which would not be an equitable situation if one person owned a majority of lots irrespective of whether each of those lots subscribed to the utility service; and
3. The association must own or lease the utility system so that it has complete control over it.

The Staff has reviewed the Constitution & By-Laws of the Association, and believes that the proposal contained in the Petition in this case may not strictly meet the first of the Rocky Ridge Points, the reasons being that membership in the Association is optional, and that apparently there are a very small number of utility customers who are not a part of the subdivision and thus cannot be members of the Association. However, the Staff was informed by counsel for the Association that the Association is presently considering some modifications to the Association's Constitution & By-Laws that would allow non-subdivision residents who are utility customers to have voting rights regarding water matters, and would eliminate the initiation fee and annual dues that are presently in place, thereby providing that any water customer would automatically become a voting member of the Association. If these changes are made, it would then be the Staff's opinion that the Association would satisfactorily meet the Rocky Ridge Ranch points. Since Lake Lorraine is not a recreational subdivision, the Staff believes that there are very few or no lots owned by Association members where utility service is not used. As a result, non-customers voting on water utility-related matters is really not a factor in this particular situation.

OTHER MATTERS

Upon checking the Commission's records regarding assessments, the Staff finds that Frimel is past due on its fiscal year 2007 PSC assessment; the amount owed is \$165.48. There are no other past due assessments. This record review includes fiscal years 2000 through the present fiscal year.

The Staff has also reviewed the annual report records from calendar year 1997 through calendar year 2006, and finds that there were no annual reports submitted for calendar years 2001 and 2002. The Staff is of the opinion that all past due annual reports should be submitted, however the Staff also recognizes that, from a practical standpoint, the records needed to prepare the annual reports might no longer be available, and additionally, compliance enforcement may be impossible due to the statute of limitations. There are no other outstanding deficiencies with regard to annual report filings.

STAFF'S CONCLUSIONS

The Staff believes that, if minor changes as proposed are made to the Association's Constitution & By-Laws regarding water utility matter voting rights, it would not be detrimental to the public interest for the proposed transfer of assets to take place.

STAFF'S RECOMMENDATIONS

Based on the above, the Staff recommends that the Commission issue an order approving the requested transfer of assets, but with that order being conditioned on the following:

1. That Frimel's past-due assessment of \$165.48 for fiscal year 2007 be paid;
2. That the Association be required to submit evidence of changes to its Constitution & By-Laws that will allow all water utility customers to vote on water utility matters, regardless of membership in general;
3. That, in conjunction with item 2 above, the Association be required to submit evidence that the notice to its members regarding the proposed changes to its Constitution & By-Laws clearly stated that approval of the changes would result in the water system no longer being regulated by the Commission; and
4. That the Association be required to inform the Commission when the transactions related to the transfer of assets have been completed.

In addition to the above, the Staff notes that after the transfer of assets is complete, the Commission will need to issue an order canceling Frimel's Certificate and Tariff.