

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 7th day of
November, 2006.

In Re the Matter of the Joint Petition of)
Frimel Water System, Inc. and Lake Lorraine)
Property Owners' Association for Authority)
for Frimel Water System, Inc., to Transfer Its)
Assets and Cease Operations)

Case No. WM-2006-0459

ORDER APPROVING TRANSFER OF ASSETS WITH CONDITIONS

Issue Date: November 7, 2006

Effective Date: November 17, 2006

Syllabus: This order approves the transfer of the assets of Frimel Water System, Inc., to Lake Lorraine Property Owners' Association with certain conditions.

On June 5, 2006, Frimel Water System, Inc. ("Frimel") and Lake Lorraine Property Owners' Association ("Association") filed a Joint Petition seeking authority for Frimel to transfer its assets to the Association. On June 8, 2006, the Commission issued notice and set an intervention deadline of July 10, 2006. The Commission also directed that any requests for a hearing should be filed by July 10, 2006. No requests for intervention or for a hearing were filed.

Frimel is a certificated utility and the Association is a not-for-profit corporation operated by its membership, which is comprised of the lot owners in Lake Lorraine Subdivision. Frimel's assets include all equipment and apparatus incidental to the furnishing of potable water for the residents of Lake Lorraine Subdivision. Frimel is currently being managed by a water management firm.

The Joint Petitioners provided the Commission with a copy of their Special Sales Contract executed on January 26, 2006, which provides for the Association's acquisition of Frimel's assets for the purchase price of \$5000.00. The Joint Petitioners further submitted a copy of a Dissolution Resolution ("plan in substitution of the Sale Agreement which would be applicable if the assets of Frimel Water System, Inc. were being sold"), whereby the shareholders of Frimel unanimously consent to the transfer of assets to the Association. Additionally, the Association acquired one hundred percent of the corporate stock of Frimel on or about March 31, 2006.

The Joint Petitioners state that the proposed transaction is not detrimental to the public interest, or to any party, and will promote the best interests of the public, because:

- (a) The prior owners of Frimel Water System, Inc. were no longer actively developing the Lake Lorraine Subdivision and therefore had no vested interest in the water distribution system;
- (b) The prior owners of Frimel Water System, Inc. were, at best, absentee owners, having no direct involvement in the water company;
- (c) The management of the water company had long ago been transferred to a third party management firm, whose employees are the real operators of the water system;
- (d) Eliminating absentee owners improves the quality and integrity of the system, decreases response time to trouble calls and eliminates a layer of profit which was added to the expense of the third party management firm;
- (e) Eliminating the absentee owners will lower water rates, improve the integrity of the system and cause the operator to be directly responsive to the ultimate consumers of the system at hand;
- (f) A not-for-profit water system operation, not being subject to Public Service Commission regulation, will avoid incurring regulatory-related expenses translating into additional discounts to the present water service rates.¹

¹ Joint Petition Pages 3 and 4.

On September 7, 2006, the Staff of the Commission filed its verified recommendation and memorandum, which is hereby admitted into evidence. In its recommendation, Staff states that the Commission may approve this transaction upon a finding that it is not detrimental to the public interest.²

Staff states that after fully reviewing the proposed sale of Frimel's assets to the Association that the sale is not detrimental to the public interest if the conditions Staff recommends are implemented. First, Frimel must pay its overdue fiscal year 2007 assessment. Second, the Association must make certain changes to its Constitution and By-Laws in order to remain free from the jurisdiction of the Commission.

Staff does not oppose ownership or control of utility facilities by a subdivision association. Staff asserts that it is common for the Commission not to exert its jurisdiction over systems owned or controlled by an association except in instances where the developer, as opposed to the subdivision residents, maintains primary control of the association and of the utility facilities, or if certain customers have more powerful votes than other customers based on lot ownership versus utility system usage. Staff notes that the proper test for the Commission's exercise of jurisdiction over a system owned or controlled by a subdivision association is articulated in the case *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*.³

² Staff Recommendation, paragraph 2; *State ex rel. city of St. Louis v. Public Service Comm'n*, 73 S.W.2d 393, 400 (Mo. Banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

³ Case No. WD-93-307, July 7, 1993.

In *Rocky Ridge*, it was determined that the Commission would not exert jurisdiction over a system owned or controlled by a subdivision association if: (1) the association's membership is comprised of all of its utility customers, and the utility is operated only for the benefit of the association's members; (2) the association's voting rights regarding utility matters are based 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. Staff asserts that in order to meet the *Rocky Ridge* criteria, the association would have to "modify 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."⁴

Staff recommended an order approving this transaction conditioned upon 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 and 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 and By-Laws clearly state that approval of the changes would result in the water system no longer being regulated by the Commission; and

⁴ Staff Recommendation, paragraph 7.

(d) That the Association be required to inform the Commission when the transactions related to the transfer of assets have been completed.⁵

On September 18, 2006, the Office of the Public Counsel filed its response to Staff's recommendation. Public Counsel stated that it agreed with Staff's recommendation for approval of the transfer of assets, but only if the Commission's order was conditioned as recommended by Staff.⁶ No other party filed a response.

On September 20, 2006, the Commission directed Frimel and the Association to file proof of having satisfied the conditions articulated by Staff. On October 27, 2006, Frimel and the Association filed a pleading stating that Frimel's past-due assessment of \$165.48 for fiscal year 2007 was paid. The pleading included attachments verifying that the Association provided appropriate notice to its members regarding the changes to its Constitution and By-Laws, and that the required changes were in fact adopted at the Association's regular meeting on October 22, 2006. At the direction of the Commission, Staff reviewed these pleadings, and on November 2, 2006, Staff filed its response concluding that Frimel and the Association were in compliance with the conditions they recommended for approval of the transfer.

Section 393.190 requires approval by the Commission before a regulated utility disposes of all or any part of its system. The statute does not contain a standard to guide the Commission in the exercise of its discretion; that standard is provided by the Commission's own rules. An applicant for such authority must state in its application "[t]he

⁵ Staff Recommendation, paragraph 11, 12; Staff Memorandum, page 3.

⁶ Office of the Public Counsel's Response to Staff's Recommendation for Approval of Transfer of Assets and Cancellation of Certificate of Convenience and Necessity, filed September 18, 2006, paragraph 3.

reason the proposed sale of the assets is not detrimental to the public interest.”⁷ A court has said of Section 393.190: “The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.”⁸ To that end, 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.⁹

The Commission has reviewed the Joint Application and the recommendations and responses of the parties. “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.”¹⁰ No detriment to the public interest appears on the present record; therefore, the Commission will approve the proposed sale of assets. In order for Frimel to cease operations, its certificate must be canceled. When the transactions are completed, the Commission will cancel Frimel Water System, Inc.’s certificate of authority and its tariff.

IT IS ORDERED THAT:

1. The joint application for sale of assets filed on June 5, 2006, by Frimel Water System, Inc. and Lake Lorraine Property Owners’ Association, is approved, subject to the conditions outlined in the body of this order that have been satisfied as evidenced by Applicants’ Notice of Compliance filed on October 27, 2006.

⁷ Commission Rules 4 CSR 240-3.310(1)(D) and 3.605(1)(D).

⁸ State ex rel. *Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App., E.D. 1980).

⁹ See *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C.3rd 216, 220.

¹⁰ *Fee Fee Trunk Sewer*, 596 S.W.2d at 468.

2. Frimel Water System, Inc. and Lake Lorraine Property Owners' Association are authorized to take any and all lawful actions necessary to carry out the proposed sale of assets.

3. Frimel Water System, Inc. shall file a report in this case stating the status of the transactions no later than December 7, 2006, and continuing every 90 days until it has notified the Commission that all the transactions have been completed.

4. After the transactions have been completed, the Commission will relieve Frimel Water System, Inc. of its obligation to provide water and sewer service to the public in its assigned service area and will cancel its certificate and tariff.

5. The Commission does not waive its right to seek penalties under Sections 392.210 and 386.570, RSMo, for failure to timely file annual reports or pay assessments.

6. This order shall become effective on November 17, 2006.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is positioned above the printed name and title.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur
Stearley, Regulatory Law Judge