

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

In the Matter of the Application of Foxfire)
Utility Company for Authority to Transfer)
Certain Water and Sewer Assets Located in)
Stone County, Missouri to Ozarks Clean) File No. WM-2022-0186
Water Company, and in Connection)
Therewith, Certain Other Related)
Transactions.)

**INITIAL BRIEF OF FOXFIRE UTILITY COMPANY
AND OZARKS CLEAN WATER COMPANY**

COME NOW Foxfire Utility Company and Ozarks Clean Water Company (“Foxfire” and “OCWC” respectively, or the “Companies” collectively), by and through the undersigned counsel, and state the following to the Missouri Public Service Commission (“Commission”) as their *Initial Brief*. This *Initial Brief* will address the issues described in the *Joint List of Issues, Order of Openings, Witnesses and Cross-Examination* filed in the above-captioned case on October 12, 2022:

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INTRODUCTION

The OCWC application to purchase the water and sewer assets of Foxfire presents a simple question for the Commission. Foxfire, a regulated utility, seeks approval of the proposed sale to OCWC, a not-for-profit 501(c)(3) that is not regulated by the Commission.¹ Upon consummation of the proposed sale, Foxfire will cease to hold any assets subject to the jurisdiction of the Commission.² In such a transaction, the touchstone consideration for the Commission is, would the proposed transaction be “detrimental to the public?”³

The facts in the case show that approval of the sale of Foxfire’s assets to OCWC is absolutely not detrimental to the public interest and in fact would be in the best interest of Foxfire’s current customers.

OCWC is a known provider of water and wastewater services in Missouri. OCWC’s operations are compliant with environmental laws and sufficiently financed to provide for needed repairs, replacements, and expansions. OCWC’s customer base provides economies of scale and access to assets that Foxfire is not able to match. Additionally, upon approval of the sale by the Commission, current Foxfire customers will enjoy several conveniences and services offered by OCWC not currently offered by Foxfire.

The Commission should grant Foxfire’s application to sell substantially all its water and sewer assets to OCWC based on the facts and for the reasons specifically discussed in the following pages.

¹ *Application*, p. 2.

² *Id.*

³ *State ex. rel. St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo.1934).

ISSUE 1 – Public Interest

Should the Commission find that the sale or transfer of Foxfire Utility Company's (a public utility) water and sewer assets to Ozarks Clean Water Company (a nonprofit sewer company under Sections 393.825-393.861, RSMo, and nonprofit water company under Sections 393.900-393.954, RSMo) is not detrimental to the public interest, and approve the transaction?

Foxfire

OCWC proposes to purchase substantially all of the water and sewer assets of the currently regulated systems of Foxfire.⁴ Foxfire currently provides both water and sewer service to approximately 258 customers and anticipates an additional 21 water and sewer customers in the near future.⁵ The Foxfire service area is a condominium development. Foxfire serves the condominium units, three offices, four swimming pool/hot tub areas and two irrigation systems. The condominiums typically represent second homes, investment properties, or both, for their owners.⁶

The Foxfire systems are in very good condition. There is no known need for repairs or immediate investment in the systems. There has been no deferred maintenance. Growth is likely. The service area adjoins the Silver Dollar City Property and is a very desirable recreational destination. This has favorably impacted property values and demand for properties in the service area is strong. Infrastructure to serve 13 cabin sites and one 8-unit condo is currently under construction. A total of 31 cabins, 8 sites, and 24 condo units have been designed and construction has been permitted by the Missouri Department of Natural Resources. The water and sewer systems were originally designed and constructed to serve approximately 420 units. So significant reserve capacity exists with the only cost to developers being line extension costs.⁷

⁴ EX 1, Helms Dir., p. 3.

⁵ *Id.*

⁶ *Id.* at p.4

⁷ *Id.* at p. 6.

As stated above, the condominiums typically represent second homes, investment properties, or both, for their owners. Foxfire Director and President Rick Helms testifies that there are fewer than 10 customers that reside in their condominium year around. There are also several customers that own more than one condominium.⁸ Asking prices for the condominiums are found anywhere from \$250,000 to just shy of \$500,000, depending on the age, location, and condition of those properties.⁹

Because of the nature of this customer base, Foxfire mails bills around the country. In addition to customers with primary residences in other parts of Missouri, Foxfire has customers that live (or business entities that are customers that are based) in Arkansas, Illinois, Oklahoma, California, Colorado, Florida, Indiana, Iowa, Georgia, Kansas, Louisiana, Maryland, Mississippi, Oregon, Nebraska, New Jersey, Nevada, Texas, Arizona, Utah, Washington and Wisconsin.¹⁰

Foxfire has no other water or sewer systems. The primary owner of Foxfire, Rick Helms, is now 70 years old, has been involved in the water and sewer business for approximately 48 years, and wishes to fully retire. He has no intention to be involved in any capacity with the operation, maintenance, or management of public drinking water systems or wastewater collection and treatment systems in the future.¹¹

OCWC

OCWC's mission is to protect water quality and promote public health by owning and responsibly managing wastewater and drinking water facilities throughout the Ozarks. OCWC

⁸ EX. 2, Helms Sur., p. 3.

⁹ *Id.* at p. 4.

¹⁰ *Id.* at pp. 3-4.

¹¹ EX. 1, Helms Dir., p.4

was established from an Environmental Protection Agency grant to help with the protection of water quality in Table Rock Lake.¹²

OCWC is a nonprofit sewer company under §§ 393.825-393.861, RSMo, and a nonprofit water company under §§ 393.900-393.954, RSMo. OCWC currently provides water and sewer service to approximately 2,380 locations consisting of 1,860 sewer connections, 300 water-only connections, and 220 water and sewer connections at the same property, all provided through 13 water systems, 19 permitted sewer systems, 1 sewer treatment system, 2 sewer collection systems, and 1 interceptor sewer that does not require permits.¹³ OCWC enjoys a positive working relationship with the Missouri Department of Natural Resources, which has relayed to Staff that there are “no outstanding concerns with service issues” with any OCWC system.¹⁴

OCWC’s financial structure is layered to address multiple improvement and maintenance plans for all its properties. OCWC rates include operation, maintenance, administration, overhead, and reserve for repair. Currently, OCWC’s Board of Directors has established a reserve account funded at 75% of its annual operation and maintenance budget.¹⁵

Standard

As stated above, Foxfire requests in this case authority from the Commission to sell its water and sewer assets to OCWC. As OCWC is a nonprofit water and sewer utility and therefore not subject to the authority of the Commission, it need not seek a certificate of convenience and necessity. However, the sale of Foxfire’s currently Commission-regulated water and sewer assets must be approved by the Commission¹⁶

¹² EX 100, Casaletto Dir., p. 3.

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ § 393.190.1, RSMo.

The Missouri Supreme Court’s assessment of the appropriate standard for transactions involving the sale of public utility property begins with the constitutional concept of property rights – that owners of property have a constitutional right to determine whether to sell their property or not. “To deny them that right would deny them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public.”¹⁷ This standard was further explained by the Missouri Supreme Court as follows:

To prevent injury to the public, in the clashing of private interests with public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be *benefitted*, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public *detriment*. ‘In the public interest,’ in such cases, can reasonably mean no more than ‘not detrimental to the public.’¹⁸

The Commission has appropriately viewed its task to call for a *netting* of detriments and benefits when determining whether a transaction is detrimental to the public. The Commission has applied the standard as a no-net detriment standard in which “all the benefits and detriments in evidence are considered.”¹⁹ The Commission has described this standard as follows:

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that [utilities] provide safe and adequate service to its customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the [service] less safe or less adequate, or which tends to make rates less just or less reasonable. The presence of detriments, thus defined, is not conclusive to the Commission’s ultimate decision because detriments can be offset by attendant benefits. The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.²⁰

¹⁷ *State ex. rel. St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo.1934).

¹⁸ *Id.* (emphasis added).

¹⁹ *See, Re Union Electric Company*, 13 Mo.P.S.C.3d 266, 293, Case No. EO-2004-0108 (2005).

²⁰ *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc.*, Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 454-455 (MoPSC July 1, 2008), quoting *Re Union Electric Company*, Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005).

Public Interest

The Commission has stated as follows as to the “public interest”:

The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charges with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.

* * *

The public interest is a matter of policy to be determined by the Commission. It is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The “public interest” necessarily must include the interest of both the ratepaying public and the investing public; however, as noted, the rights of individuals groups are subservient to the rights of the public in general.²¹

The Proposed Transaction

Pursuant to the Asset Purchase Agreement, OCWC proposes to purchase substantially all the water and sewer assets of Foxfire as specifically described in the agreement and under the terms and provisions further described in the agreement.²² The agreed to purchase price is \$1,285,400 – of which Mr. Helms and his wife will finance \$1,245,400 over a twenty-year period at an interest rate of 2.5%.²³ Both OCWC President David Casaletto and Mr. Helms, based on their experience and knowledge of the market, testify that this represents a fair market

²¹ *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc.*, Report and Order, Case No. EM-2007-0374, 2008 Mo. PSC LEXIS 693, 458-459 (MoPSC July 1, 2008).

²² Ex. 100, Casaletto Dir., p. 5.

²³ EX 101, Casaletto Sur., p.2.

value for the assets to be sold.²⁴ This is especially true given that the owner has agreed to finance the purchase over a twenty (20) year period at an annual interest rate of 2.5%. As a result, OCWC needs no separate financing associated with this acquisition.²⁵

OCWC president Casaletto is confident that the cash flows from the existing rates will be adequate for OCWC to cover the obligation associated with the purchase price and continue to provide quality service to its customers.²⁶

Mr. Helms contacted OCWC President David Casaletto regarding his desire to sell the assets of Foxfire and retire. Based on his own personal knowledge of the Foxfire systems, Mr. Casaletto understood these assets to be desirable to OCWC.²⁷ The purchase of the Foxfire assets was initially discussed by the OCWC board at a July 15, 2019 meeting, from which Mr. Helms recused himself.²⁸ Subsequently, on December 9, 2019, after Helms' resignation in August of that year, the board discussed a modified version of the offer discussed at the July board meeting.²⁹ The OCWC board approved the purchase at that December 9, 2019 meeting and later ratified that decision during the pendency of this Case.³⁰

Customer Benefits

The Foxfire assets will be acquired by OCWC, a not-for-profit corporation. OCWC is answerable to its members, who comprise the board of OCWC. OCWC is fully qualified, in all respects, to own and operate the systems to be acquired and to otherwise continue providing safe and adequate service. In addition, OCWC, as a charitable non-profit corporation, has as its

²⁴ EX 100, Casaletto Dir., p. 5; EX 1, Helms Dir., p. 6.

²⁵ EX 100, Casaletto Dir., p. 5.

²⁶ *Id.*

²⁷ EX 101, Casaletto Sur., p.2.

²⁸ EX. 1, Helms Dir., p.7

²⁹ TR, p. 36.

³⁰ TR, p. 37.

mission, to own and responsibly manage wastewater and drinking water facilities throughout the Ozarks protecting water quality and public health.³¹

Customers will receive several conveniences not currently available with Foxfire. These benefits include ACH autopayment, e-mail billing, online payments and account histories, text alerts, and a nearby office and drop box for payments.³² The ACH payments and other electronic communication methods are especially helpful in area such as that served by Foxfire where most of the customers own their property as second homes, or investment property, and do much of their business with the utility provider from afar.³³

OCWC proposes to use the existing rates for Foxfire customers for at least one year following the acquisition.³⁴

Conclusion

The proposed transaction is not detrimental to the public and the Commission should authorize the proposed transfer of assets.

ISSUE 2 - Conditions

If so, what conditions, if any, should the Commission impose on such approval?

Staff Conditions

The Staff of the Commission recommends that the Commission should authorize the transfer of assets from Foxfire to OCWC subject to the following:³⁵

- a. Require Foxfire to notify the Commission of closing on the transfer of water and sewer assets to OCWC within five (5) days after closing;

³¹ EX 100, Casaletto Dir., p. 7.

³² EX 101, Casaletto Sur., p. 6.

³³ *Id.*

³⁴ EX 100, Casaletto Dir., p. 6.

³⁵ EX 200, Robertson Reb., Sched. JJR-r2, page 13 of 20.

- b. Authorize Foxfire to cease providing services immediately after closing on assets;
- c. If closing on Foxfire's assets does not take place within thirty (30) days following the effective date of the Commission's order, require Foxfire to submit a status report, in File No. WM-2022-0186 within five (5) days after this thirty (30) day period regarding the status of closing, and additional status reports within five (5) days after each additional thirty (30) day period, until closing takes place, or until Foxfire determines that the transfer of assets will not occur;
- d. If Foxfire determines that a transfer of the assets will not occur, require Foxfire to notify the Commission of such; and
- e. After the above notice of transfer of assets to OCWC is received from Foxfire, cancel the CCN applying to Foxfire's Village of Indian Point service area.

The Companies do not object to these conditions.

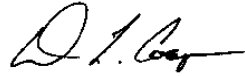
CONCLUSION

The Commission should approve the transfer of the water and sewer assets of Foxfire Utility Company to Ozarks Clean Water Company, subject to the conditions described by Staff.

WHEREFORE, Foxfire Utility Company and Ozarks Clean Water Company respectfully request the Commission consider their *Initial Brief*.

Respectfully submitted,

[Signature Block on Following Page]



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**ATTORNEYS FOR FOXFIRE UTILITY
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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent to all counsel of record by electronic mail this 16th day of November, 2022.

