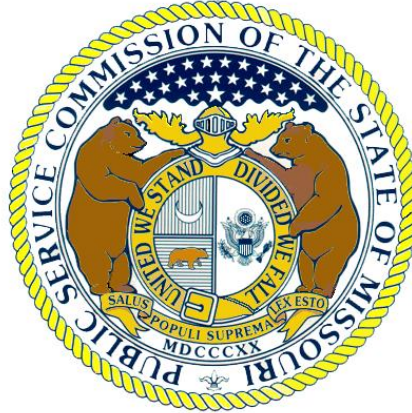


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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 Ozark Clean Water)
Company, and in Connection Therewith,)
Certain Other Related Transactions)

File No. WM-2022-0186

REPORT AND ORDER

Issue Date: December 21, 2022

Effective Date: January 4, 2023

APPEARANCES

Appearing For Foxfire Utility Company and Ozarks Clean Water Company:

Dean L. Cooper, Attorney at Law,

Jesse Craig, Attorney at Law,

Brydon, Swearingen & England, PC, 312 East Capitol, Jefferson City MO 65102

Appearing for Office of the Public Counsel:

Marc D. Poston, Public Counsel,

Department of Commerce & Insurance

200 Madison St., Suite 650, PO Box. 2230

Jefferson City, MO 65102

Appearing for the Staff of the Missouri Public Service Commission:

Scott Stacey, Staff Counsel, Governor Office Building, 200 Madison Street,
Jefferson City, Missouri 65102-0360.

Regulatory Law Judge: Ross Keeling

REPORT AND ORDER

Procedural History

On March 15, 2022¹, Foxfire Utility Company (Foxfire) filed verified applications pursuant to Section 393.190, RSMo 2016, 20 CSR 4240-2.060, and 10.105 seeking authority to sell its water and sewer assets to Ozark Clean Water Company (OCWC). Foxfire filed an application in File No. SM-2022-0187 concurrently with this case, and filed a motion to consolidate in both cases on the date the cases were filed. The Commission issued its order consolidating the files on March 16. OCWC also filed an application to intervene in both cases on March 15, and the Commission issued its order granting that application to intervene on April 8.

On June 28, Staff filed its recommendation, recommending that the Commission approve the transaction, subject to conditions. On July 8, Foxfire and OCWC filed their joint response to Staff's recommendation stating that they do not object to Staff's five conditions, and requested that the Commission issue an order approving the sale of Foxfire's water and sewer assets to OCWC.

The Office of the Public Counsel (OPC) responded to Staff's recommendation on July 8, objecting to the transaction, and stating that the approval of the transfer at the proposed price would be detrimental to the public interest because OCWC would be required to repay the \$1,195,548 acquisition premium over the next twenty years. OPC contended the Foxfire customers are still under the protection of the Commission and

¹ All dates refer to 2022 unless otherwise specified.

urged the Commission to deny the requested transfer of assets. An evidentiary hearing was held on October 25 at 9:00 a.m.

The parties jointly presented two issues to be determined by the Commission concerning Foxfire's application for approval of the sale of its assets to OCWC.

- 1. Should the Commission find that the sale or transfer of Foxfire Utility Company's (a public utility) water and waste water assets to Ozarks Clean Water Company (a nonprofit sewer company under Sections 393.825-393.861, RSMo, and a nonprofit water company under Sections 393.900-393.954, RSMo) is not detrimental to the public interest, and approve the transaction?**
- 2. If the Commission grants approval of the transaction, what conditions, if any, should the Commission impose on such approval?**

At the evidentiary hearing the Commission heard the testimony of four witnesses and received nine exhibits onto the record. Garah F. (Rick) Helms (Helms), President of Foxfire, and David Casaletto (Casaletto), President of the Board of Directors of OCWC, testified on behalf of Foxfire and OCWC, who presented their evidence jointly. Jarrod Robertson (Robertson), senior research data analyst with the Water and Sewer and Steam Department of the Commission, and Keith Foster (Foster), utility regulatory auditor supervisor for the Commission, testified on behalf of Staff. OPC offered no witnesses.

Foxfire and OCWC, Staff, and OPC all filed post-hearing briefs. On November 30, the case was deemed submitted for the Commission's determination pursuant to Commission Rule 20 CSR 4240-2.150(1), which provides that "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument."

Findings of Fact

The Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate the Commission has failed to consider relevant evidence, rather that the omitted material was not dispositive of this decision. Any finding of fact reflecting that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.²

1. Foxfire is a Missouri corporation, active and in good standing with the Missouri Secretary of State, with its principal office and place of business at 3478 Smyrna Road, Rogersville, Missouri 65742.³

2. Foxfire currently provides water and sewer service to approximately 258 billed locations within the corporate limits of the Village of Indian Point in Stone County, Missouri, pursuant to certificates of convenience and necessity (CCN) granted by the Commission in Case No. WA-95-31.⁴

² An administrative agency, as fact finder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. S.D. 2009). With respect to the appellate standard for reviewing Commission decisions, this case stated, further:

“[I]f substantial evidence supports either of two conflicting factual conclusions, ‘[we are] bound by the findings of the administrative tribunal.’ [citation omitted] The determination of witness credibility is a subject best left to the Commission, ‘which is free to believe none, part, or all of [a witness's] testimony.’ [citations omitted] We will not re-weigh the evidence presented to the Commission. [citation omitted].”

³ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 6 of 20.

⁴ Ex 2, Helms Direct, p. 3; Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 7 of 20.

3. Helms is the Director and President of Foxfire. Helms is also the Trustee of the Rick and Janet Helms Revocable Trust dated 8/29/2014, which holds 100% of the shares of Foxfire.⁵

4. Helms was on the board of OCWC until he resigned in August of 2019.⁶

5. Helms recused himself from OCWC's July 15, 2019, board meeting in which the acquisition of Foxfire was first discussed, and resigned from OCWC's board of directors in August of 2019, before the December 31, 2019, vote to purchase Foxfire's assets.⁷

6. The Foxfire systems are in very good condition. There is no known need for repairs or immediate investment in the systems and there has been no deferred maintenance.⁸

7. OCWC is a Missouri 501(c)(3) water and sewer corporation that was formed in March of 2004 for the specific purpose of owning and operating individual and clustered wastewater systems. OCWC was formed in accordance with sections 393.825 to 393.861, RSMO, and is a not-for-profit corporation with voluntary membership. Membership is gained by applying for and receiving services from OCWC.⁹

8. OCWC currently provides water and sewer service to 2,380 locations, consisting of 1,860 sewer connections, 300 water only and 220 water and sewer connections at the same property, all provided through 9 permitted and 4 non-permitted

⁵ Ex. 1, Helms Direct, p. 1.

⁶ Ex. 1, Helms Direct, p. 7.

⁷ Id.

⁸ Ex. 1, Helms Direct, p. 6

⁹ Ex. 100, Casaletto Direct, p. 4.

water systems, 19 permitted sewer systems, 1 sewer treatment system, 2 sewer collection systems, and 1 interceptor sewer that does not require permits.¹⁰

9. 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.¹¹

10. Casaletto is the President of the OCWC Board of Directors.¹²

11. Neither Casaletto, nor any board members, have ever received any compensation from OCWC.¹³

12. Foxfire and OCWC have entered into an Agreement for Sale and Purchase of Assets dated December 10, 2019 (Agreement). Pursuant to the Agreement, OCWC agrees to obtain and acquire substantially all of the water and sewer assets of Foxfire under the terms and provisions described in the Agreement.¹⁴

13. Staff conducted a site inspection of the OCWC facility on March 31, 2022, and found Foxfire's systems to be in good condition.¹⁵

14. The Missouri Department of Natural Resources ("MoDNR") has informed Staff that it has no outstanding concerns with service issues at any of the current OCWC-run systems.¹⁶

¹⁰ Id.

¹¹ Id.; Transcript, p. 8: 17-19

¹² Ex. 100, Casaletto Direct, p. 1.

¹³ Id.

¹⁴ Ex. 100, Casaletto Direct, p. 5.

¹⁵ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 8 of 20.

¹⁶ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 7 of 20.

15. The purchase price of the assets transferred in the Agreement is \$1,285,400.00.¹⁷

16. Staff's calculation of the estimated "rate base" for Foxfire's combined water and sewer service is \$89,852.¹⁸

17. The "acquisition premium" is \$1,195,548, which is the amount the purchase price exceeds the rate base.¹⁹

18. The \$1,285,400 purchase price includes an approximately \$1.2 million acquisition premium, which is thirteen times over the estimated rate base of approximately \$90,000.²⁰

19. The acquisition price in excess of the calculated rate base represents the buyer's annual debt obligation to the seller/financer in the amount of \$6,600 per month²¹, which is 40% of present revenues.²²

20. Under the Agreement, Foxfire shall finance the purchase of its assets over a twenty-year period at an annual interest rate of 2.5%.²³

21. 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.²⁴

22. In his testimony, Casaletto proposed to use the existing rates for Foxfire customers for at least one year following the acquisition.²⁵

¹⁷ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 2 of 20.

¹⁸ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 12 of 20.

¹⁹ Id.

²⁰ Transcript, pp 16:11-17:1.

²¹ Transcript, p. 21:5-8.

²² Transcript, p. 21:13-16.

²³ Ex. 2, Helms Direct, p. 2. Ex. 100, Casaletto Direct, p. 5.

²⁴ Ex. 101, Casaletto Surrebuttal, p. 5-6.

²⁵ Ex. 100, Casaletto Direct, p. 6.

23. OCWC's Board of Directors has established a reserve account funded at 75% of its annual operation and maintenance budget.²⁶

24. An Email from Casaletto to the OCWC Board of Directors states OCWC can readily meet its financial obligations with a \$25,000 annual surplus reserved for future repairs at the existing rates²⁷.

25. OCWC has the technical and financial ability to manage the Foxfire systems.²⁸

26. Compilations of transactions in Missouri and Illinois on a per customer basis by certified appraisers, as per 2021, indicate a range of water and sewer system sale prices of \$649 to \$5,263 per customer, with a Median of \$3,213 per customer and a Mean of \$3,095 per customer.²⁹

27. The contract price of \$1,285,000, results in the per customer price of \$2,491 per customer, not including projected growth.³⁰

28. Under a sales comparison approach, showing market data pertaining to utility systems that included water and sewer, the sale price of \$3,400 per customer is within the range indicated by the market data.³¹

29. Staff found that the transaction is not detrimental to the public interest and recommended approval of the transfer of assets from Foxfire to OCWC.³²

²⁶ Ex. 100, Casaletto Direct, p. 4.

²⁷ Ex. 300, Email from Casaletto to the OCWC Board (July 10, 2019).

²⁸ Ex. 200, Robertson Rebuttal, p. 2.

²⁹ Ex. 101, Casaletto Surrebuttal, p. 5.

³⁰ Id.

³¹ Ex. 101, Casaletto Surrebuttal, Schedule DC-s1.

³² Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 13 of 20.

30. Helms was both the president of Foxfire, and a board member of OCWC during the time the matter of the transaction was introduced to the board at OCWC.³³

31. Helms recused himself from OCWC's July 15, 2019 board meeting in which the acquisition of Foxfire was first discussed, and resigned from OCWC's board of directors in August of 2019, before the December 31, 2019 vote to purchase Foxfire's assets at the negotiated price in question.³⁴

32. In its recommendation, Staff recommended approval of the sale and transfer of the assets subject to the following conditions:

- 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;
- b. Authorize Foxfire to cease providing service 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 the 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

³³ Ex. 1, Helms Direct, p. 7

³⁴ Id.

- 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.³⁵

Conclusions of Law

A. The Commission "is a Missouri administrative agency charged with the regulation of all public utilities."³⁶

B. Foxfire is a "water corporation," a "sewer corporation," and a "public utility" as those terms are defined in Section 386.020, RSMo, and is subject to the jurisdiction and supervision of the Commission as provided by law.³⁷

C. OCWC is a nonprofit sewer and water company formed in accordance with Sections 393.825 through 393.861, RSMo.³⁸

D. The Commission does not have jurisdiction over the construction, maintenance or operation of the wastewater facilities, service, rates, financing, accounting, or management of any nonprofit sewer company.³⁹

E. The lawfulness of an order issued by the Commission is determined by whether statutory authority for its issuance exists.⁴⁰ As a creature of statute, an administrative agency's authority is limited to that given it by the legislature.⁴¹

F. The Commission has jurisdiction to rule on the application because Section 393.190.1, RSMo, requires that no water or sewer corporation shall sell or transfer its

³⁵ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, pp. 4-5 of 20.

³⁶ *In Matter of Verified Application and Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 522 (Mo. banc 2015).

³⁷ Ex. 200, Robertson Rebuttal, Appx. A, Schedule JJR-r2, p. 7 of 20.

³⁸ *Id.*

³⁹ Section 393.847, RSMo.

⁴⁰ *State ex rel. Missouri Public Defender Com'n v. Waters*, 370 S.W.3d 592, 598 (Mo. banc 2012).

⁴¹ *Id.*

assets without having first secured authorization from the Commission. The Commission must authorize the transfer of a regulated utility's assets, unless the transfer is shown to be detrimental to the public interest.⁴²

G. The Commission does not regulate OCWC, nor does it have jurisdiction over OCWC's board of directors or the future rates set by that board.⁴³

H. A utility's rate base is the capital investment devoted to, and necessary for, providing reasonable adequate service to customers. . . A utility company is entitled to a rate of return only on investments included in its rate base."⁴⁴

I. The Commission has supervisory powers over all water corporations, all sewer systems, and their operations within this state, and may impose conditions on Foxfire as Staff has recommended. ⁴⁵

Decision

Foxfire and OCWC assert that the Commission should grant Foxfire's application to sell substantially all its water and sewer assets to OCWC because it is in the public interest. In such a transaction, the touchstone consideration for the Commission is, whether the proposed transaction is "detrimental to the public."

In approving the transfer of a regulated utility's assets, the Commission must determine that the sale is "not detrimental to the public."⁴⁶ The Commission must

⁴² *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. 1934).

⁴³ See *Love 1979 Partners v. Public Service Comm'n of Missouri*, 715 S.W.2d 482 (Mo. 1986).

⁴⁴ *State ex rel. Missouri Office of the Public Counsel v. Public Service Com'n of State*, 293 S.W.3d 63 (Mo. App. 2009).

⁴⁵ Section 386.250, RSMo.

⁴⁶ See *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 335 Mo. 448, 457-60, 73 S.W.2d 393, 399- 400 (Mo. 1934).

authorize the transfer of a regulated utility's assets unless the transfer is shown to be detrimental to the public.⁴⁷ OPC argues that the contract price for Foxfire's utility assets incorporates an acquisition premium that will cause harm to Foxfire's customers under OCWC's ownership. Staff, Foxfire, and OCWC disagree, and presented evidence showing the details of the transaction and the likely impact the transaction will have on the rates for service and quality of service provided.

None of the evidence presented explains why the estimated rate base is relevant or appropriate for use in determining the proposed price of a transaction in the sale of utility assets to a private entity outside of the Commission's jurisdiction. None of the evidence presented rebuts OCWC's claim that it can readily meet its financial obligations at the existing rates or show that OCWC is not capable of managing the additional assets upon completion of the transaction. Without a clear indication that OCWC's rates will be excessive, or that the service provided to its customers will decline due to the acquisition of Foxfire's assets, the Commission cannot find that the proposed transaction is detrimental to the public. Also, there was no evidence that the relationship between Helms and Casaletto renders their negotiated price invalid.

The Conditions recommended by Staff are not conditions to the Agreement, but a list of tasks that Foxfire must comply with regarding their relationship with the Commission during the period of the transaction. Neither Foxfire nor OCWC object to these conditions, and OPC has not commented. The Commission will grant Staff's request to include them in its order.

⁴⁷ *Environmental Utilities, LLC v. Public Service Comm'n of Missouri*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007).

The Commission finds that the proposed transfer of assets is not detrimental to the public interest. The Commission will grant the application with the conditions Staff has recommended.

In their Agreement for Sale and Purchase of Assets, Foxfire and OCWC had previously set a closing date for the transaction of Thursday, January 12, 2023. To accommodate this arrangement, the Commission will issue this Report and Order with an effective date shorter than 30 days.

THE COMMISSION ORDERS THAT:

1. Foxfire's application to sell its water and sewer assets to OCWC is granted.
2. Foxfire is authorized to sell and transfer to OCWC the water and sewer utility assets located in Stone County described in the application.
3. Foxfire is authorized to do and perform, or cause to be done and performed, all such acts and things, as well as make, execute and deliver any and all documents as may be necessary, advisable and proper to the end that the intent and purposes of the approved transaction may be fully effectuated.
4. Foxfire shall notify the Commission of closing on the water and sewer assets with the OCWC within five days of closing.
5. Foxfire shall cease providing service immediately after closing on the assets.
6. If closing on Foxfire's assets does not take place within thirty days following the effective date of the Commission's order, Foxfire shall file a status report within five days after this thirty-day period regarding the status of closing, and additional status

reports within five days after each additional thirty-day period, until closing takes place, or until Foxfire determines that the transfer of the assets will not occur.

7. If Foxfire determines that a transfer of the assets will not occur, Foxfire shall notify the Commission of such.

8. Foxfire's CCN and tariff are cancelled, effective when Foxfire notifies the Commission that the water and sewer assets have been transferred to OCWC.

9. This order shall become effective on January 4, 2023.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Silvey, Chm., Rupp, Coleman, Holsman, and Kolkmeier CC., concur and certify compliance with the provisions of Section 536.080, RSMo (2016).

Keeling, Regulatory Law Judge


STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 21st day of December, 2022.





Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

December 21, 2022

File/Case No. WM-2022-0186

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounsel@psc.mo.gov

Office of the Public Counsel
Marc Poston
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@opc.mo.gov

Foxfire Utility Company
Dean L Cooper
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

Foxfire Utility Company
Jesse W Craig
312 East Capitol Avenue P.O. Box 456
Jefferson City, MO 65102
jcraig@brydonlaw.com

Missouri Public Service Commission
Scott Stacey
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Scott.Stacey@psc.mo.gov

Ozarks Clean Water Company
Dean L Cooper
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
dcooper@brydonlaw.com

Ozarks Clean Water Company
Jesse W Craig
312 East Capitol Avenue P.O. Box 456
Jefferson City, MO 65102
jcraig@brydonlaw.com

Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.