# BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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| 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** |

## STAFF'S POST-HEARING REPLY BRIEF

**COMES NOW** the Staff of the Missouri Public Service Commission ("Commission"), through counsel, and submits its post-hearing reply brief.

## INTRODUCTION

Throughout its initial brief, the Office of the Public Counsel ("OPC") urges the Commission to focus solely on the Foxfire Utility Company ("Foxfire") water and wastewater systems' proposed price, which it considers detrimental to the public interest. If the transaction is completed, Ozarks Clean Water Company ("OCWC") will pay an acquisition premium of $1,195,548, which is 13 times the systems' estimated rate base. While OPC focuses on the transaction's potential detriments, it fails to balance these against the benefits that would flow from OCWC's acquisition of the Foxfire systems.

OPC would have the Commission believe the transaction has no benefit to OCWC customers; however, the evidence indicates otherwise. Rick Helms, Foxfire's owner, is 70 years old and no longer wants to own and operate the systems. He has confidence in OCWC's ability to provide service.[1] OCWC is organized as a nonprofit, with a mission to own and responsibly manage OCWC's facilities in order to protect water

[1] Ex. 1, Helms Direct, P. 4:11-5:1.

quality and public health.[2] It has no motive to seek a profit or boost shareholders' dividends. In fact, if it does make a profit, it risks losing its nonprofit status.[3]

If the Commission approves the transaction, the OCWC board, which is composed of OCWC ratepayers, will manage operation of the Foxfire systems, as well as the other systems OCWC owns. Ratepayers will have control over who is elected to their board and have a voice in OCWC affairs. As the operator of 70 other water and sewer systems, there is no dispute that OCWC is qualified to own and operate the systems. OCWC will maintain current rates for Foxfire customers for at least one year following the acquisition, and future rate increases will be based on increased operating and maintenance expenses, as approved by the OCWC board.[4] Furthermore, OCWC will institute billing and payment options that are available to customers of larger utilities.[5]

Another benefit of OCWC ownership is continuity of service. Ozarks Environmental Services Inc. ("OES"), a nonprofit water and sewer maintenance company, has been servicing the Foxfire systems and will continue to service them under OCWC ownership. Although OPC views OES' continued service of the Firefox systems as a negative and evidence of self-dealing,[6] it is actually a positive. In Staff's experience, it is common for the same operator to continue to operate the systems after an acquisition.

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[2] Ex. 100, Casaletto Direct, P. 7:18-24.
[3] On page 26 of its Initial Post-Hearing Brief, OPC claims that the July 15, 2019 OCWC meeting minutes (Ex. 301) shows that the OCWC board may raise rates to make a profit. According to the minutes, a board member made a statement about seeking "a greater profit margin." The board member's statement is clearly misguided and should be discounted.
[4] Ex. 100, Casaletto Direct, P. 6:2-7.
On page 7 of its initial brief, OPC highlights a statement from the July 10, 2019 email from Mr. Casaletto to board members (Ex. 300) informing them of Foxfire's availability for purchase. In this email, Mr. Casaletto writes that, "OCWC can raise rates after we acquire the system." OPC draws attention to this statement to imply that OCWC will raise Foxfire customers' rates. This statement was made over three years ago and since then, Mr. Casaletto testified that he can meet the systems' payments to Mr. Helms at current rates. Ex. 101, Casaletto Surrebuttal, P. 5:20-6:5.
[5] Ex. 101, Casaletto Surrebuttal, P. 6:7-18.
[6] OPC Initial Post-Hearing Brief, P. 16.

If the systems are well-serviced – as the Firefox systems have been – Staff sees this continuity of operation as a strength that weighs in favor of supporting the transaction.

In sum, the benefits of this transaction – OCWC's lack of profit motive, ratepayer participation in OCWC governance, OCWC's experience as a water and sewer operator, OCWC's promise to not raise rates for a year, OCWC's institution of enhanced billing and payment options, and continuity of servicing by OES – outweigh the negatives. "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."[7] Staff shares Foxfire's and OCWC's opinions that OCWC's acquisition of the Foxfire systems will not be detrimental to the public interest. Here, Staff responds to OPC's initial brief, stating and explaining its points in opposition.

## DISCUSSION

### I. OPC's reliance on the relationship between Rick Helms, Foxfire's seller, and David Casaletto, an OCWC board member, as evidence of public detriment is misplaced.

OPC argues that the sale of Firefox from Mr. Helms to OCWC is not in the public interest, because it is not an arm's length transaction.[8] As OPC writes, Staff is concerned that the relationship between Mr. Helms and David Casaletto may have influenced the sale.[9] Mr. Helms and Mr. Casaletto were OCWC board members on July 10, 2019

[7] *Report and Order*, In the Matter of the Joint Application of Great Plains Energy Inc., Kansas City Power & Light Co., & Aquila, Inc., for Approval of the Merger of Aquila, Inc., with A Subsidiary of Great Plains Energy Inc. & for Other Related Relief., 266 P.U.R.4th 1 (July 1, 2008) (quoting Re Union Electric Company, Case No. EO-2004-0108, 13 Mo.P.S.C.3d 266, 293 (2005)).
[8] OPC Initial Post-Hearing Brief, P. 15-18.
[9] Ex. 200, Robertson Rebuttal, P. 10-11.

when Mr. Helms first approached Mr. Casaletto about selling Foxfire to OCWC.[10] At that time, Mr. Casaletto was president of the OCWC board and Mr. Helms was OCWC's secretary.[11] For background, Mr. Helms and Mr. Casaletto were among OCWC's incorporators.[12] They were also members of OCWC's first board of directors and their terms on the board, including their service as officers, overlapped.[13]

Mr. Helms recused himself from the July 15, 2019 board meeting, during which the Foxfire acquisition was first discussed, and he resigned from the OCWC board on August 19, 2019.[14] As of October 28, 2022, when OCWC filed its annual registration with the Missouri Secretary of State, Mr. Casaletto is still a board member.[15] On December 9, 2019, the OCWC board approved a resolution to enter into a contract to purchase the Foxfire assets for $1,285,400.[16]

Corporate directors have fiduciary duties to the corporation, which includes a duty of loyalty and a duty to promote the corporation's best interests.[17] OPC does not claim that Mr. Helms or Mr. Casaletto violated their fiduciary duties to OCWC. Instead, OPC argues that Mr. Helms and Mr. Casaletto have an interest in the transaction that inflated the purchase price to include an acquisition premium, which is detrimental to Foxfire customers.[18]

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[10] *Id*. at 11.
[11] *Id*.
[12] *Id*. at 10.
[13] *Id*.
[14] Ex. 1, Helms Direct, P. 7:16-21.
[15] CorrespondenceItemViewHandler.ashx (mo.gov)
[16] Ex. 200, Robertson Rebuttal, P. 11.
[17] *Nixon v. Lichtenstein*, 959 S.W.2d 854, 859 (Mo. App. E.D. 1997) ("…the most fundamental is the duty of loyalty…. Part of this duty precludes self dealing…."); *see also*, *McDaniel v. Frisco Emp. Hospital Ass'n*, 510 S.W.2d 752, 759 (Mo. App. St. L. 1974) ("Trustees … are to be held to a standard of scrupulous good faith in the fiduciary role as guardians of the corporate welfare.").
[18] OPC Initial Post-Hearing Brief, P. 16-17.

OPC's evidence of suspected self-dealing is that Mr. Helms and Mr. Casaletto would both benefit from the sale price.[19] If the transaction is completed, Mr. Helms will benefit but not in any way different from most business sellers. In fact, he could have possibly benefited more if he sold the systems outright, or on market terms. The Rick and Janet Helms Trust will prospectively finance OCWC's Firefox purchase. The general financing terms are that OCWC will make a $40,000 down payment (just over 3% down), with the trust to finance the balance over 20 years at an annual interest rate of 2.5%.[20] As interest rates are steadily increasing, this is clearly a below-market interest rate. This, coupled with the low down payment and lengthy term, illustrates the reasonableness of the agreed provisions. Moreover, Mr. Casaletto stated in his July 10, 2019 email to the OCWC board, without cross-examination from OPC, that other parties were interested in purchasing the systems.[21] It is possible that Mr. Helms could have financed the systems to another party at current market terms, or sold the systems outright and not waited 20 years to recoup his investment.

OPC claims that Mr. Casaletto benefits from the transaction because as president and an employee of the service company, OES, he will continue receiving payment to service the Foxfire systems.[22] However, Staff does not see how Mr. Casaletto or OES would benefit from this proposed transaction, which would only maintain the status quo regarding the Foxfire systems' servicing. It could be argued that Mr. Casaletto may

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[19] *Id*. at 16.
[20] Ex. 100, Casaletto Direct, Schedule DC-1, Section II and P. 5:13-14.
[21] Ex. 300, Email from Mr. Casaletto to the OCWC Board (July 10, 2019). ("Rick does not have a shortage of buyers as there are large players already wanting to buy Rick's system, but he is giving OCWC the first shot.")
[22] OPC Initial Post-Hearing Brief, P. 16 and Tr. 32:10-15

indirectly benefit from the sale as an OES employee. However, as OPC writes, OES operates 70 other water and sewer systems.[23] It is unlikely that a change in the number of systems OES operates will effect Mr. Casaletto's salary.

The most important fact in its discussion of the Helms-Casaletto relationship, which OPC overlooks, is that the OCWC board ultimately approved the transaction on December 9, 2019. Mr. Helms has not been an OCWC board member since August 19, 2019. Board members were aware that Mr. Helms is Foxfire's seller and that OES will continue to service the Foxfire systems if OCWC purchases them. Any effect the Helms-Casaletto relationship had on the transaction was ameliorated by the OCWC board's decision.

## II. On a per connection basis, the proposed purchase price for the Firefox systems is less than other acquisitions the Commission recently approved.

Like OPC, Staff is concerned about Foxfire ratepayers paying an acquisition premium of 13 times Staff's estimated net book value. OPC is also concerned about the burden on OCWC ratepayers of OCWC's monthly payments to Mr. Helms. However, Mr. Casaletto stated, without cross-examination from OPC, that OCWC can pay the systems' payments with existing rates and that he does not plan for a rate increase.[24] In its brief, OPC reproduces part of a draft Foxfire budget under OCWC ownership,[25] which is taken from a July 10, 2019 email from Mr. Casaletto to OCWC directors.[26]

[23] OPC Initial Post-Hearing Brief, P. 6.
[24] Ex. 101, Casaletto Surrebuttal, P. 5:20-6:5.
[25] OPC Initial Post-Hearing Brief, P. 7.
[26] Ex 300, Email from Mr. Casaletto to the OCWC Board (July 10, 2019).

According to this budget, at current OCWC rates and number of connections, OCWC can readily meet its financial obligations, with $25,000 surplus reserved for future repairs.[27]

OPC does not dispute Mr. Casaletto's qualifications of having 20 years in the water and sewer industry.[28] Mr. Casaletto described in his surrebuttal testimony that he estimates $12,000 per connection to build a sewage treatment plant and distribution system and two-thirds of this, or $8,000 per connection, to drill a well and build a water distribution system. At the time of his surrebuttal testimony, Foxfire had 258 connections, which equals an estimated construction cost of $5,160,000.[29] In valuing the systems for resale (not book value), Mr. Casaletto stated that he estimates $2,000 per water or sewer connection for systems in poor condition needing significant work. Based on 258 Foxfire customers receiving both water and sewer service, this would mean a purchase price of $1,032,000.[30] Staff found that Foxfire's systems are in good condition meeting Missouri Department of Natural Resources ("DNR") standards.

The Commission is aware that book value and appraised value are not the same. The proposed purchase price of the Foxfire systems is not based on book value, and it is less, on a per connection basis, than the recent acquisition by Missouri-American Water Company ("MAWC") of the City of Eureka water and sewer assets. The Commission recently approved this acquisition at appraised values of $4,500 per water connection

[27] *Id*.
[28] Ex. 100, Casaletto Direct, P. 5:11-12.
[29] Ex. 101, Casaletto Surrebuttal, P. 3:6-11.
258 * 12,000 = $3,096,000
258 * 8,000 = $2,064,000
$3,096,000 + $2,064,000 = $5,160,000
[30] *Id*. at 3:20-4:5.
258(2) * 2000 = $1,032,000

and $2,500 per sewer customer.[31] The Commission found credible Staff's testimony that the Eureka water system is in fair to good condition. In contrast, the Eureka sewer system does not meet DNR standards and needs extensive modernizations. In fact, MAWC characterized the Eureka sewer system as distressed.[32] At the Eureka per connection valuations, and with 258 connections, the Foxfire systems could be valuated, at a minimum, at $1,161,000[33] for the water system and $645,000[34] for the sewer system, for a total of $1,806,000. Considering that the Firefox systems are better maintained than the Eureka systems, the Firefox purchase price may be low.

## III. Staff's recommendation is consistent with the Commission's decisions in WM-2017-0186 and WM-2015-0231. Further, OPC's list of prior cases in which the Commission rejected an acquisition premium are irrelevant, because these cases did not involve transfer to an unregulated utility.

The Commission's decisions in Case Nos. WM-2017-0186 and WM-2015-0231 inform Staff's recommendation that the Commission approve OCWC's proposed Foxfire acquisition.[35] In these two cases, Staff recommended that the Commission find public water supply districts' acquisitions of regulated utilities detrimental to the public interest, because the districts would pass acquisition premiums onto customers through higher rates. The Commission stated that it lacks authority over these utilities after their transfers to public entities and finding no detriment, approved the transactions. Nevertheless,

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[31] *Amended Report and Order*, In the Matter of the Application of Missouri-American Water Company for a Certificate of Convenience and Necessity Authorizing it to Install, Own, Acquire, Construct, Operate, Control, Manage and Maintain a Water System and Sewer System in and Around the City of Eureka, Missouri, Case No. WA-2021-0376 (June 29, 2022).
[32] Svindland Direct, P. 24:4-12, In the Matter of the Application of Missouri-American Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas, Case No. WR-2022-0303 (July 1, 2022).
[33] 258 * 4,500 = $1,161,000
[34] 258 * 2,500 = $645,000
[35] Ex. 200, Robertson Rebuttal, P. 12.

OPC confusingly argues in its initial brief that "[t]he Commission's inability to protect ratepayers in the future if it approves the Application does not negate its obligation to protect these customers today."[36]

The Commission has clearly stated that it does not have jurisdiction to regulate public water districts' future rates and that the potential of future higher rates is not detrimental constituting reason to deny an application for transfer.

> The Commission does not regulate the District, nor does it have jurisdiction over the District's board of directors or the future rates set by that board. Nevertheless, Staff's concerns about the future rates for the District's customers may be allayed since the District is a political subdivision that has no motive for seeking profits. The District is answerable to voters, and is obligated by statute to set reasonable rates.[37]

OPC accurately points out that the purchaser in WM-2017-0186 hired an independent appraiser, unlike the present case.[38] But as discussed earlier in this brief, the proposed purchase price of the Foxfire water and sewer systems, on a per connection basis, is less than what the Commission recently approved in the Eureka case. An independent appraisal of the Foxfire assets would not assist the Commission.

Lastly, the Commission can discount OPC's recitation of prior cases in which the Commission prohibited the acquiring company from including an acquisition premium in rate base.[39] All of these cases involved transfer to regulated utilities, while this case

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[36] OPC Initial Post-Hearing Brief, P. 27.
[37] *Order Authorizing Sale, Transfer, and Assignment of Water and Sewer Assets*, P. 3, In the Matter of the Application of Lake Region Water & Sewer Co. and Camden County Public Water Supply District #4, Case No. WM-2017-0186 (Apr 13, 2017).
*See also Order Granting Application*, P. 8, In the matter of the Application of Ozark Shores Water Company, North Suburban Public Utility Company and Camden County Public Water Supply District Number Four, Case No. WM-2015-0231 (June 24, 2015): "Staff cites no authority showing the Commission has any authority over those events when they occur within a public water supply district."
[38] OPC Initial Post-Hearing Brief, P. 26.
[39] *Id*. at 18-24.

involves transfer to a nonregulated utility.  The Commission will not have jurisdiction over future OCWC rates if it approves this transaction, so OPC's cases are irrelevant.

**SUMMARY**

OPC argues that if the Commission approves this transaction, OCWC ratepayers cannot effectuate meaningful change in the board to contain rate increases.[40] In establishing that the Commission's jurisdiction does not extend to nonprofit organizations, the legislature determined that oversight of the district through a board of ratepayers elected by the ratepayers takes the place of a regulatory commission. "Public agencies have no motive for seeking profits and political pressures arguably exert downward pressure on rates."[41]  The same is true for nonprofit organizations.  OCWC ratepayers who are unhappy with the board's decisions may vote; appear and speak at meetings; campaign for and against board candidates; and even run for the OCWC board themselves.  By enacting sections 393.825 through 393.861 and 393.900 through 393.954, RSMo, the legislature has determined that these processes adequately protect nonprofit utility ratepayers.  OCWC ratepayers are not as defenseless as OPC characterizes them.

The fact of the matter is that OCWC has substantial experience and a history of DNR compliance.  Under OCWC ownership, Firefox customers will enjoy more than safe and adequate service.  When the benefits to this transaction are considered, OCWC's acquisition of the Firefox assets is not detrimental to the public interest and the Commission should approve it, with Staff's recommended conditions.

[40] *Id*. at 26.
[41] *Love 1979 Partners v. Public Service Com'n*, 715 S.W.2d 482, 489 (Mo. en Banc 1986).

**WHEREFORE**, Staff files this reply brief for the Commission's information and consideration.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the foregoing was electronically mailed to all parties and/or counsel of record on this 30th day of November, 2020.

***/s/ Karen E. Bretz***