

**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,	)	Case No. WM-2022-0186
Missouri to Ozarks Clean Water	)	
Company, and in Connection	)	
Therewith, Certain Other Related	)	
Transactions	)	

**REPLY BRIEF OF THE  
OFFICE OF THE PUBLIC COUNSEL**

The initial brief of Foxfire Utility Company (“Foxfire”) and Ozarks Clean Water Company (“OCWC”), and the initial brief of the Public Service Commission’s Staff (“Staff”), do not satisfy Foxfire’s burden<sup>1</sup> of proving the transfer would not be detrimental to Foxfire customers. The Office of the Public Counsel’s (“Public Counsel”) offers this reply to those briefs.

**1. OPC supports a transaction selling Foxfire to OCWC; the monetary term for the sale is the only concern**

The OPC does not disagree that Foxfire may sell to OCWC without the acquisition being detrimental to the public interest. OCWC appears to be a well-respected and capable company, and Foxfire customers would likely find value in the billing conveniences they would gain from OCWC’s acquisition. The point of contention in this case is limited to the \$1.2 million debt that this transaction would impose upon OCWC’s customer base for a utility asset worth \$89,852. While the additional conveniences in how they pay their water bill may be helpful,

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<sup>1</sup> See § 386.430 RSMo.

convenience does not offset the resulting \$1.2 million financial burden. The only other purported benefit of the transfer is a claim of “economies of scale.” However, there is no evidence that OCWC intends to combine the Foxfire systems with any other systems to allow for economies of scale benefits, nor is there any analysis showing how any economies of scale would be sufficient enough to offset the \$1.2 million debt.

This proceeding is intended to protect the customers of Foxfire, ensure their water and sewer system service remains adequate and safe, and prevent transfers that are detrimental to their interest. The evidence overwhelmingly supports a finding that this transfer of assets would be detrimental due to the massive amount of debt it would inflict on customers. This detriment would exist regardless of whether the debt affects customers in a month, a year, or several years after the transfer. The proposed transfer must therefore be denied.<sup>2</sup>

**2. Without the \$1.2 million sale, those funds would be available for future costs and expenses**

The estimated rate base calculated by Staff is \$89,852,<sup>3</sup> but the purchase price is \$1,285,400, 13 times above staff’s estimation. However, total recovery by Mr. Helms over 20 years, factoring in the 2.5% interest, is actually more than **sixteen times the estimated rate base.**<sup>4</sup>

Foxfire’s brief states, “[a] detriment...is any direct or indirect effect of the transaction that tends to make [service] less safe or less adequate, or *which*

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<sup>2</sup> § 393.190 RSMo; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980)

<sup>3</sup> Exhibit (“Ex”) 200, Rebuttal Testimony of Jarrod J. Robertson, Schedule JJR-r2, p. 12.

<sup>4</sup> \$6,499.41 per month x 240 months (20 years) = \$1,583,858; \$1,583,858 - \$89,852 = \$1,494,006; \$1,494,006 / \$89,852 = 16.62.

*tends to make rates less just or less reasonable.*"<sup>5</sup> Without question, future investments in the Foxfire system would be compromised by this 20-year debt to Mr. Helms.<sup>6</sup> Paying an unreasonably high price for a utility system that would undoubtedly cause your customers to get a rate increase sooner than otherwise makes the proposed transfer detrimental to those customers.

OCWC asserts current rates will cover the obligation to Mr. Helms and that the additional growth Mr. Helms alleged will help. However, the ability of OCWC to presently meet the \$6,600 monthly obligation to Mr. Helms under current rates does not negate the fact that Foxfire's customers will be saddled with that debt for the next 20 years.<sup>7</sup>

Moreover, the system's conceivable future growth would hardly move the needle in terms of altering the \$6,138 obligation each current customer would pay Mr. Helms.<sup>8</sup> Even if the claimed construction of infrastructure to build another 21 units actually results in 21 more customers, the monthly customer cost would change by \$1.93 per month per household, or result in \$5,677 in total paid to Mr. Helms per customer.<sup>9</sup> The \$23.65 monthly household payment would otherwise

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<sup>5</sup> Quoting from *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) (emphasis added).

<sup>6</sup> Ex. 100, Direct Testimony of David Casaletto, Schedule DC-1, Exhibit H, Promissory Note.

<sup>7</sup> *Id.*

<sup>8</sup> \$6,499.41 per month x 240 months (20 years) = \$1,583,858; \$1,583,858 / 258 customers = \$6,138. The total amount recovered from ratepayers would actually be **over 16 times rate base** when factoring in 20 years of interest (\$1,583,858 - \$89,852 = \$1,494,006; \$1,494,006 / \$89,852 = 16.62).

<sup>9</sup> \$6,599.41 per month / 279 customers = \$23.65/month. \$6,499.41 per month x 240 months (20 years) = \$1,583,858; \$1,583,858 / 279 customers = \$5,676.91

contribute to Foxfire's reserve balance for future construction and maintenance expenses.<sup>10</sup> Again, this debt is detrimental to customers.

OCWC's status as a non-profit company has no impact on the debt this sale creates, or customer responsibility for that debt. OCWC cannot pay \$1.2 million off with "good intentions." Money is required, and that money will come from Foxfire's customers.<sup>11</sup> In addition, there are no accountability measures that would ensure the Foxfire customers do not face a rate increase within the next year. Even a one-year rate increase moratorium provides little comfort when facing a massive million-dollar, 20-year burden.

**3. The lack of negotiation for the sale, the relationship between the negotiating parties, and the personal monetary benefits bestowed upon both Mr. Helms and Mr. Casaletto are all reasons in and of themselves to reject the proposed transfer**

The Foxfire and Staff briefs do not attempt to explain why it is reasonable that the sale price involved no negotiation, a close relationship between Mr. Helms and Mr. Casaletto, or monetary benefits to each from the sale. To be clear, the owner of Foxfire was both an incorporator and one of the first directors of OCWC when it was formed in 2004.<sup>12</sup> Of the 18 years OCWC has existed, Mr. Helms has held a leadership position for 11 of them.<sup>13</sup> The current OCWC director, Mr. Casaletto, was also an original incorporator and one of the first directors of OCWC.<sup>14</sup> He has held a leadership position for almost the entire

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<sup>10</sup> Transcript ("Tr") p. 38.

<sup>11</sup> Ex. 300.

<sup>12</sup> Ex. 200, Schedule JJR-r2, page 10.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

duration of OCWC's existence.<sup>15</sup> In fact, the only other known president of OCWC is Mr. Helms.<sup>16</sup>

Mr. Helms was on OCWC's board of directors when the Foxfire acquisition was first brought up and the board decided to move forward with the acquisition.<sup>17</sup> Mr. Helms did recuse himself from the initiating discussion with the rest of the board, and resigned from the board in August 2019. The board still voted to purchase Foxfire a few months later, on December 31, 2019.<sup>18</sup> This after-the-fact resignation does not change the conflict that already existed when Mr. Helms and Mr. Casaletto decided upon the terms of the sale as two close colleagues, OCWC incorporators, and sitting board members.

There was no negotiation between the buyer and seller on the purchase price.<sup>19</sup> Instead, "[t]he purchase price was an agreed-to price between the buyer and seller based on their respective knowledge of the market."<sup>20</sup> An opaque and undefined conversation between experts and friends is not how public utility systems should be valued and transferred.

Lastly, the 20-year monetary benefits Mr. Helms will receive from the sale price, and the monetary benefits Mr. Casaletto will receive due to OCWC maintaining Mr. Casaletto's business as the operator of the Foxfire system if it transfers to OCWC, make their assertions on valuation wholly unreliable.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Ex. 200, Schedule JJR-r2, p. 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

**4. This purchase would be the first asset transfer to OCWC with a purchase price over \$10**

In its Memorandum, Staff highlighted that every other property acquired by OCWC has been donated or sold at or below \$10, and did not address or remedy this valid concern in its brief.<sup>21</sup> The Staff Memorandum cites Case Nos. SO-2008-0094, SM-2010-0241, SO-2011-0020, WO-2015-0113, and WM-2016-0094 to point out this discrepancy.<sup>22</sup> There is a reason that this property is being over-valued to such an extent while other properties have been offered to OCWC at such a low rate - to aid in Mr. Helms' retirement ("Further, my acceptance of this price was informed by my own financial situation, including assets, debts, and income sources with an eye towards my own retirement").<sup>23</sup>

**5. The Staff's Position in this Case is Due to Perceived Commission "Guidance" and Not Expert Opinion**

The Staff's initial brief does not acknowledge or explain how it arrived at its position in this case. It makes no mention of the Staff's concerns with acquisition premiums, Staff's concerns with agreements that lack negotiation, and the reasons Staff chose to change its normal recommendation. To put the Staff's position into proper context, it is important to remember that the Staff's Memorandum emphasizes that its recommendation relies on previous Commission guidance. Staff expresses valid concerns due to the acquisition premium, lack of negotiation, and close relationship between buyer and seller, but it still recommends approval of the transfer in recognition of "guidance" from

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<sup>21</sup> *Id.*, pp. 11-12.

<sup>22</sup> *Id.*

<sup>23</sup> Ex. 1, p. 5.

two prior Commission orders.<sup>24</sup> In these cases from 2015 and 2017, involving different companies and facts, the Commission rejected the Staff's concerns with ratepayer impacts due to acquisition premiums and close relationships between buyers and sellers.<sup>25</sup> As a result, the Staff now appears to represent in this case what it perceives to be the Commission's guidance regarding a predetermined position on these issues.<sup>26</sup> The Staff explained:

In recommending approval of the sale, Staff relies on previous guidance by the Commission [*citing* WM-2017-0186 and WM-2015-0231]. In situations where a utility is being purchased by an entity that is not regulated by the Commission, the Commission previously approved transactions where affiliation exists between the parties. The Commission has also approved transactions with a significant acquisition premium, finding that customers must utilize other protections, such as voting out board members if they are displeased.

**Based upon previous Commission findings,** Staff takes the position that the proposed sale and transfer of assets from Foxfire to OCWC is not detrimental to the public interest, and therefore recommends approval.<sup>27</sup>

The Staff's initial brief makes no mention of this rationale as the only reason for the position taken by the Staff. The Staff's Memorandum, however, devotes over three pages to explaining Staff's concerns with the proposal and how the sole basis for not recommending rejection is because the Commission

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<sup>24</sup> Ex. 200, Schedule JJR-r2, p. 13.

<sup>25</sup> *Id.*, pp. 12-13, citing Case Nos. WM-2017-0186 and WM-2015-0231. In the 2015 case, the Commission denied the Staff's request for an evidentiary hearing on the issue, concluding Staff lacked standing ("Staff cannot assert a right to due process, such as would require a hearing." WM-2015-0231, Order Granting Application, June 24, 2015, p. 5).

<sup>26</sup> Ex. 200, Schedule JJR-r2, p. 13.

<sup>27</sup> *Id.*, emphasis added.

disagreed with the Staff in two prior cases on similar issues.<sup>28</sup> It is not clear why the Staff chose not to provide a complete picture of its position in this case, but the Commission and the public generally, should be concerned when Staff's recommendations focus on perceived Commission precedent rather than the advice of its experts.

Unless the Commission is engaged in administrative rulemaking, prior Commission orders involving past cases, with separate companies and separate facts, have no precedence over companies and issues before the Commission today. There is no *stare decisis* for asset transfer cases.<sup>29</sup> Each case should be considered on its own merits, and the Staff recommendations based upon the advice of its experts. Staff chose not to challenge this asset transfer or discuss its concerns in its initial brief. This is akin to inserting a *stare decisis* requirement into the process, which dilutes the power of current commissioners by forcing them to rely on the methods and policy concerns of past commissioners. Fortunately, Staff's experts, who prepared the Staff Memorandum, sounded the alarm on valid concerns and explained its change in position.

## **6. Conclusion**

The benefits of investing in a public utility are the profits incurred year after year through a return on plant investments.<sup>30</sup> Foxfire ownership has been

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<sup>28</sup> *Id.*, pp. 10-13.

<sup>29</sup> "AGP cites several prior PSC decisions in which the PSC required merger applicants to file market power studies. However, an administrative agency is not bound by *stare decisis*..." *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. 2003).

<sup>30</sup> "This system is designed to protect consumers against exploitation where competition is inherently unavailable or inadequate, and to insure that these industries will serve the public interest. At the same time it provides these companies necessary assurance of an opportunity to



earning a substantial return on their investments in the small Foxfire water and sewer systems for 27 years.<sup>31</sup> The only investments not recovered, and upon which Foxfire ownership has not earned a profit, are limited to the \$89,852 of plant investments remaining in rate base.<sup>32</sup> Approval of this transfer at the \$1,285,400 purchase price would amount to Foxfire ownership earning a whopping one-thousand six-hundred sixty-two percent (1,662%) return on this remaining \$89,852 investment.<sup>33</sup> This inordinate price is highly unreasonable.

The transfer of this public system should come with no expectations of earning beyond what the Commission has already determined is a reasonable return. Owning a public utility is not like owning a competitive business. With a public utility, the certificate to operate as a monopoly provider of an essential service comes with a duty to the public unlike any competitive industry.<sup>34</sup> Transfers of such businesses must invoke a higher standard of public protection.

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earn a reasonable return on their investment and to attract capital for expansion." *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41 (Mo. 1979).

<sup>31</sup> Case No. WA-95-31, Order Granting Certificate of Convenience and Necessity and Approving Financing, March 16, 1995.

<sup>32</sup> Ex. 200, Schedule JJR-r2, p. 12.

<sup>33</sup> \$6,499.41 per month x 240 months (20 years) = \$1,583,858; \$1,583,858 - \$89,852 = \$1,494,006; \$1,494,006 / \$89,852 = 16.62.

<sup>34</sup> This concept regarding property devoted to public use has a long history that provides the foundation for the Public Service Commission's purpose, including the 1877 United States Supreme Court case of *Munn v. Illinois*, where the Court held, "[t]his brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." *Munn v. Ill.*, 94 U.S. 113 (1877).

This higher standard prohibits those transfers that are reasonably likely to result in a detriment to the utility's captive customer base.<sup>35</sup> The evidence in this case establishes there will be a detriment by burdening the relatively small number of Foxfire customers with this 7-figure debt.

As the applicant seeking to overcome the Commission's 1995 order finding it to be in the public interest for Foxfire to be regulated by the Commission,<sup>36</sup> Foxfire bears the burden of demonstrating that this proposed transfer would not be detrimental to the public interest.<sup>37</sup> If that burden is to have any meaning, Foxfire must successfully present evidence on the resulting customer benefits that would overcome the enormous detriment this transfer would force upon Foxfire's customers. Foxfire has failed.

Respectfully submitted,

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<sup>35</sup> § 393.190 RSMo; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980)

<sup>36</sup> Case No. WA-95-31, Order Granting Certificate of Convenience and Necessity and Approving Financing, March 16, 1995.

<sup>37</sup> See § 386.430 RSMo.

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 30<sup>th</sup> day of November 2022.

**/s/ Marc Poston**

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