

**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.)

**REPLY 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 *Reply Brief*. *Staff’s Initial Post Hearing Brief* concludes that this transaction "promotes the public interest, it is not detrimental to the public interest, and the Commission should approve it," subject to the conditions proposed by Staff.¹ Thus, this *Reply Brief* will address certain matters raised in the *Initial Post-Hearing Brief of The Office of the Public Counsel* (“OPC”):

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¹ Staff Ini. Brf., pp. 8-9.

INTRODUCTION

The Companies wholly agree with the conclusions contained in *Staff's Initial Post Hearing Brief* and, thus, this *Reply Brief* will not address the Staff brief. Rather, the Companies will dedicate the entirety of their brief to addressing matters asserted in OPC's *Initial Post-Hearing Brief*, which makes a number of allegations without regard to the facts, or the truth of the matter.

As a whole, the OPC's primary objection seems to be with the price OCWC has agreed to pay for the assets and its comparison to "net book value" - something that has no import for OCWC or how its rates are set. What is important to both OCWC and Foxfire is that the transaction be reasonably priced. There is substantial evidence that the price to be paid by OCWC represents the fair market value of these assets. That opinion is further backed by the evidence of other transactions concerning small water and sewer systems, to include one recently approved by this Commission. Those transactions show that the price at issue is very much reasonable for the assets to be purchased and there is no evidence to the contrary.

OPC further argues that this reasonable price would somehow be a "burden" on the Foxfire customers. An examination of the current rates paid by Foxfire customers in comparison to the known expenses of operating the Foxfire water and sewer systems and OCWC's known payments associated with 2.5% owner financing (which will not change over the 20-year period) shows that the current rates are sufficient to cover those expenditures and leave funds for any unknowns that might develop. Perhaps more importantly, OCWC is an established utility with over 2,300 customers and a reserve fund equal to 75% of its annual operation and maintenance budget that will provide additional protection for the customers.² There is no evidence of any

² EX 100 Casaletto Dir., p. 4 18-19.

burden on customers that would be associated with the purchase price or created by the proposed transaction.³

Similarly, OPC argues, without evidence, that the purchase price does not represent “an arms-length transaction.” While Mr. Helms was previously a Board member of OCWC,⁴ he recused himself and did not participate in that capacity when the transaction was first considered by the Board in July of 2019. In August of 2019, he resigned from the Board of Directors. A modified version of the transaction (the one before the Commission) was later considered by the Board in December of 2019 (approximately four months after Mr. Helms’ resignation) and again approved. Lastly, the Board again considered the transaction this year (approximately three years after Mr. Helms’ resignation) and ratified the transaction. Lastly, the comparison of the agreed-to price to other transactions referenced above shows the price to be paid is very much reasonable. There is no evidence of any improper dealing in this matter.

With no evidence to support its positions, OPC attempts to personalize its argument by alleging that customers should not have to pay “for Mr. Helms’ retirement.”⁵ Of course, the price to be paid by OCWC is not being paid “for Mr. Helms’ retirement.” It represents a reasonable price for the water and sewer assets owned by the seller. It is a price OCWC can pay and still provide safe and adequate service to the Foxfire customers, at current rates, while providing customers services not currently available to them.

There is no evidence of detriment to the Foxfire customers associated with the proposed transaction. OCWC is an established good operator of water and sewer systems that will ensure good service to those customers for many years into the future and will provide customer

³ The customers seem to also recognize this fact as, while OPC states it is making this argument “on behalf of the 258 customers of Foxfire,” there is no evidence of any customer concern or discontent with the transaction.

⁴ He, of course, was not an owner of OCWC, as OCWC is a non-profit corporation and has no owners.

⁵ Mr. Helms continues to be confused as to what he has done for the OPC to take such a personal dislike to him.

conveniences not currently available. The Commission should approve this transaction at its earliest convenience.

FOXFIRE PURCHASE PRICE

As stated above, OPC's primary concern with the sale of the water and sewer assets of Foxfire to OCWC is the agreed to purchase price. OPC contends that a \$1.2 million purchase price would inevitably force OCWC to saddle its ratepayers with the repayment of the loan for the duration of the 20-year note. OPC argues that the appropriate bulwark against this scenario is the Commission applying the "net original cost rule" to the sale as if the assets of Foxfire were being sold to an investor-owner, for-profit, Commission-regulated utility. For multiple reasons, OPC's concerns are misguided and unfounded.

First, OPC seems to apply the wrong comparison under the "not detrimental" standard. The proper comparison under statute and caselaw is a comparison of the ownership of the assets by OCWC going forward, versus Foxfire's continuing ownership. OPC seems to ignore this comparison and instead essentially tries to assess the purchase of the assets by OCWC at one price, versus OCWC's purchase of those assets at some lower, hypothetical purchase price.

OPC's argument never addresses the possibility that Foxfire might have to make improvements or repairs or raise rates over the next twenty years. It further never addresses how a free-standing small utility company, with over 70-year-old ownership (over 90 years of age by the end of the twenty-year period), will obtain financing for any improvements or repairs. OCWC, on the other hand, is not dependent on any individual owners and 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.⁶ OCWC's size and diversity of customer locations puts it in a much better position to own, operate, and care for these assets on a going-forward basis.

Secondly, OCWC is a not-for-profit 501(c)(3) water and sewer company formed in accordance with sections 393.825 through 393.954, RSMo. The concepts of "rate-base, acquisition premium, net original cost" and "rate of return" have no meaning and no import in the world of a non-profit water and sewer company such as OCWC, which is not subject to the Uniform System of Accounts and does not set its rates with a return on equity. Membership to OCWC is obtained by applying for and receiving services from OCWC.⁷ The board of OCWC is comprised of its members, no dividends are paid, and no board members have ever received compensation from OCWC.⁸ OCWC has no profits, and any surplus from annual income stays in the company and goes to the operating budget or is kept as reserve for repair.⁹ Applying the net original cost rule to a purchaser with no profit motive would be unnecessary, inappropriate, and beyond the authority of the Commission.

OPC argues that the Commission should reject a purchase price for Foxfire that is "13 times above its net book value." However, in the end, the evidence in this case indicates that the agreed upon price for Foxfire is reasonable. OCWC President David Casaletto testified that given his approximately 20 years of experience in the water and sewer industry, he believes that the purchase price represents fair market value for the assets to be acquired.¹⁰ Mr. Casaletto reaches this conclusion applying a prevailing water and sewer industry system of valuation based

⁶ EX 100, Casaletto Dir., p. 3.

⁷ *Id.* p.3 6-13.

⁸ *Id.* at p.1 19; p. 7 19-20.

⁹ TR p. 38 1-13.

¹⁰ EX 100, Casaletto Dir., p. 5.

upon setting a reasonable purchase price at \$2,000 per connection for both water and sewer¹¹ connections.¹² Applying this formula to Foxfire's current 258 customers would set a total estimated value of \$1,032,000,¹³ which is in fact higher than the proposed effective price of \$1,000,000 for the Foxfire assets.¹⁴ At the effective price of \$1,000,000, the per customer price for Foxfire is \$1,937.98. Factoring in the anticipated 21 new customers drops this number to \$1,792.12 per customer.

As recently as August of this year, the Commission approved an analogous transaction involving the sale of Rex Deffenderfer Enterprises, Inc., d/b/a RDE Water Company to the non-regulated City of Nixa for \$2,500,000. At 1,300 customers, the per-customer price of that purchase was \$1,923.08, virtually identical to the proposed per-customer price in question.¹⁵ Indeed, a compilation of appraisals of 15 water and sewer systems containing sale price per customer filed with the Commission in File No. WA-2022-0311 corroborates Mr. Casaletto's conclusion that the proposed purchase price is a reasonable one. This compilation indicates 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.¹⁶ Even applying the full contract purchase price of \$1,285,000, the per customer purchase price agreed to by Foxfire and OCWC equals \$2,491 per customer at 516 customers and \$2,304 per customer factoring for known growth, both well below the median and mean per customer prices for similar sales.¹⁷

¹¹ Foxfire provides both water and sewer service connections to its approximately 258 current customers, see EX 1 Helms Dir., p. 3.

¹² EX 101 Casaletto Surr., pp. 3-4 Mr. Casaletto notes that this formula typically accounts for systems requiring "significant work", which Foxfire does not require.

¹³ $(258 \times 2) 516 \times 2,000 = 1,032,000$.

¹⁴ *Id.* at p.3 "From OCWC's standpoint, the agreed purchase price of \$1,285,400 is the equivalent of a \$1,000,000 sales price, if a more common market interest rate of 5% is applied. The total price for OCWC over the course of the loan is the same." See also EX 300.

¹⁵ *Id.* at p.4 14-17; See *Order Granting Application to Sell Assets*, File No. WM-2022-0246 (August 17, 2022).

¹⁶ *Id.* at p. 5 1-10; Schedule DC-s1.

¹⁷ *Id.* at p. 5 15-19.

OPC asserts, without evidence, that OCWC customers will be required to pay approximately an additional \$25.58 each per month to subsidize the purchase of Foxfire's assets. However, this simply is not the case. As Mr. Casaletto has testified to, and as OCWC's own internal communications indicate, and OPC's own *Initial Post-Hearing Brief* acknowledges,¹⁸ OCWC's average annual income will easily cover the fixed principal and interest payments for the purchase of Foxfire's assets over the next 20 years while still covering average annual operation and management, overhead, and administrative costs while leaving ample surplus revenue for reserve and repair.¹⁹ Additionally, OCWC's financial structure is layered to address multiple improvement and maintenance plans for all its properties. OCWC's board has established a reserve account funded at 75% of its annual operation and management budget.²⁰ Despite OPC's baseless assertions to the contrary, it is difficult to imagine a situation in which OCWC would have to resort to burdening its customers with the cost of purchasing Foxfire.

ARMS-LENGTH TRANSACTION

OPC goes through great effort attempting to portray the proposed sale as nefarious self-dealing between Mr. Helms and Mr. Casaletto that enriches them at the expense of their customers. However, no matter how hard Public Counsel attempts to color the transaction as untoward (and entirely without evidence), the offer to sell and the decision to buy the assets of Foxfire are completely above-board.

OPC insists that the agreed to purchase price is purely the product of Mr. Helms and Mr. Casaletto's close working relationship and designed solely to benefit each other – by allegedly

¹⁸ *Initial Post-Hearing Brief of The Office of Public Counsel*, p. 26

¹⁹ *Id.* at p. 6 1-5; EX 300 (\$200,000 annual income - \$80,000 P&I - \$60,000 O&M - \$20,000 electricity - \$15,000 administration costs = \$25,000 annual surplus/reserve/repair).

²⁰ EX 100, Casaletto Dir., p. 4 15-19.

paying for Mr. Helms' retirement and by continuing to employ the services of Ozarks Environment Services (of which Mr. Casaletto is president) – and not the product of good-faith negotiation. But the evidence in the case as cited in OPC's *Initial Post-Hearing Brief* wholly contradicts this allegation.

First, Public Counsel insinuates that Mr. Helms' and Mr. Casaletto's shared history with OCWC taints the transaction. While it is true that between 2004 and 2019 Mr. Helms and Mr. Casaletto both served on the OCWC board in multiple capacities including President, the facts show that Mr. Helms properly distanced himself from the OCWC board throughout its consideration of the transaction. Mr. Helms recused himself from the July 2019 board meeting in which the acquisition of Foxfire was first discussed and resigned from the board in August of 2019.²¹ It was not until December of 2019 that the board of OCWC voted to purchase the Foxfire assets, and not until 2022 that the board ratified the decision to purchase Foxfire – nearly three years after Mr. Helms' departure from the board. As if these facts alone aren't enough to discredit OPC's allegations, OPC's argument does not attempt to explain why the remaining board members of OCWC would commit to such an allegedly unreasonable purchase price *three times in a row*. Mr. Helms holds no influence over the OCWC board and Mr. Casaletto has no ability to bind OCWC to anything unilaterally.

Similarly, OPC argues that Mr. Casaletto is engaging in self-dealing as President of Ozarks Environmental Services ("OES"), who maintains the water and wastewater systems of Foxfire. OPC asserts that "Mr. Casaletto benefits financially from Foxfire's continued use of OES to operate the Foxfire system." It is first important to note that OES is a 501(c)(3) not-for-profit. Further, while Mr. Casaletto does receive compensation from OES,²² OES currently

²¹ EX 1 Helms Dir., p. 7.

²² TR. 32.

provides this same service to Foxfire and that benefit exists to OES whether Foxfire sells to OCWC or not. OPC does not explain why this fact would motivate Mr. Casaletto to promote a certain purchase price to the OCWC board, nor why the board would accept such an offer. It further does not address the evidence that the agreed-to purchase price is reasonable, based on comparison to unrelated transactions.

Additionally, OPC mischaracterizes Foxfire's response to Data Request No. 0015, which states "there was no 'calculation' of a purchase price . . . the purchase price was an agreed-to price between a buyer and a seller based upon their respective knowledge of the market"²³ to mean that there was "no negotiation between the buyer and seller." But the fact is that evidence OPC cites in its own brief contradicts this conclusion. The July 10, 2019 email sent by Mr. Casaletto to the OCWC board notes that "Rick [Helms] does not have a shortage of buyers as there are the large players already wanting to buy [the Foxfire] system, but he is giving OCWC the first shot."²⁴ Furthermore, Mr. Casaletto testified that as the owner and operator of OCWC, he had "entertained potential purchases from time to time" and understands the general rules of valuation of systems.²⁵ This reinforces the conclusion that the \$1.2 million purchase price is informed, just as the response to DR #0015 states, by the buyer and seller's mutual knowledge of the value of the system in question based on previous offers. This would reflect a fair market value of the system and not an arbitrary and inflated price invented by Mr. Helms and Mr. Casaletto and inexplicably embraced by the OCWC board.

²³ EX 200 Robertson Reb., Schedule JRR-r2, page 10 of 20.

²⁴ EX 300.

²⁵ EX 101, Casaletto Sir., p. 3 19-21.

Finally, OPC indulges in some ad hominem arguments against Mr. Helms regarding the transaction, stating that the “loan”²⁶ to OCWC is meant to finance Mr. Helms’ retirement. What a seller intends to do with the amount paid to them is immaterial to any analysis of the reasonableness of the purchase price. As illustrated above, the purchase price reflects a reasonable price for the assets for sale in an owner-financed transaction that Staff acknowledges has “low equity and a below-market interest rate of 2.5%.”²⁷

PAST COMMISSION DECISIONS

While OPC mentions *State ex rel. St. Louis v. P.S.C.*, 73 S.W.2d 393, 399 (Mo. 1934)²⁸, the context of the Court’s reasoning is a good place to start. The Missouri Supreme Court stated within the context of such public utility sales that “To deny them that right would be to 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.”²⁹ The Court further indicated as follows:

To prevent injury to the public, in the clashing of private interest 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 *benefited*, 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.'³⁰

In making its arguments, OPC relies heavily on *In the Matter of the Joint Application of UtiliCorp United Inc and St. Joseph Light & Power Company with and into UtiliCorp United*

²⁶ OPC describes the transaction as one in which Mr. Helm would “lend” OCWC the purchase price at 2.5% per annum, placing the word “lend” in quotation marks. However, OPC never explains how this scenario is anything but a “loan” in any meaningful sense of the word.

²⁷ EX 200 Robertson Reb., Schedule JJR-r2, p. 11 of 20.

²⁸ OPC Ini. Brf., p. 13.

²⁹ *Id.* at 400 (Mo. 1934), citing *City of Ottawa v. Public Service Commission*, 288 Pac. (Kan.) 556 (emphasis added).

³⁰ *Id.*

Inc., and, in Connection Therewith, Certain Other Related Transactions, Case No. EM-2000-292 and 17 additional cases for authority that the Commission should reject the proposed transaction.

The quote from *UtiliCorp* used by OPC sets forth an explanation of the “net original cost rule” for valuation, which generally excludes acquisition adjustments from a utility’s rate base.³¹ The Commission explained that is “has consistently applied the net original cost standard when placing value on assets for the purpose of establishing a utility’s rates.”³²

Therein lies the issue with OPC’s argument. Both the *UtiliCorp* case and the 17 additional Commission cases cited by OPC as authority to reject the instant transaction concern the sale of an asset to a regulated entity whose rates are set by the Commission and not a not-for-profit, non-regulated entity.³³ In fact, when confronted with the sale of an asset to a non-regulated entity, the Commission has rejected applying the net original cost rule or otherwise over-extending its authority.³⁴

Similarly, the primary appellate case addressing the issue of acquisition premium is *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732 (Mo. 2003). The *AG Processing* case concerned UtiliCorp’s attempt to purchase St. Joseph Light & Power. The Court sent the case back to the Commission for additional findings as the Commission did not address acquisition premium and instead said it could be addressed in a future rate case. UtiliCorp was a regulated company (as was SJLP), whether it was going to be allowed recovery on and of any acquisition premium arguably would have a direct impact on future rates.

The Court’s reasoning was as follows:

³¹ *Second Report and Order*, February 26, 2004, p. 4.

³² *Id.* at p. 6 (emphasis added).

³³ The various purchasers in the 17 cases cited by OPC are Missouri-American Water, Ozark International (including Moore Bend Water Utility, LLC, Bilyeu Ridge Water Company, LLC, and Valey Woods Utility, LLC), Algonquin Water Resources of Missouri, LLC (Liberty Water), UtilitCorp United, Inc., Southern Union Company (Missouri Gas Energy), Cass County Telephone Company, and Union Electric Company.

³⁴ See Case Nos. WM-2017-0186 and WM-2015-0231.

The fact that the acquisition premium recoupment issue could be addressed in a subsequent ratemaking case did not relieve the PSC of the duty of deciding it as a relevant and critical issue when ruling on the proposed merger. While PSC may be unable to speculate about future merger related rate increases, it can determine whether the acquisition premium was reasonable, and it should have considered it as part of the cost analysis when evaluating whether the proposed merger would be detrimental to the public.³⁵

As stated previously, this concept of regulated ratemaking has no import in this situation. OCWC is a nonprofit water and sewer company not regulated by the Commission and does not set rates within a regulated utility format calling for return on and of investments. There is no motivation for OCWC, as a nonprofit water and sewer company, to seek profits.

OPC mentions that *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466 (Mo. App. E.D. 1980) further describes the standard for Commission approval of transactions such as that that is the subject of this case.³⁶ *Fee Fee* states, in part, as follows:

Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. Section 393.190, RSMo. (1969). ***The obvious purpose of this provision is to insure the continuation of adequate service to the public served by the utility.*** 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. *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934).³⁷

OCWC is immensely qualified to continue the provision "of adequate service to the public served by" Foxfire.

EFFECTIVE DATE OF ORDER

³⁵ *State ex rel. AG Processing, Inc. v. PSC*, 120 S.W.3d 732, 736 (Mo. 2003).

³⁶ OPC Ini. Brf., p. 11.

³⁷ *State ex rel. Fee Fee Trunk Sewer v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980) (emphasis added).

If the Commission decides to approve this transaction, OCWC and Foxfire request that the Commission consider an effective date shorter than the thirty (30) day period commonly used.

The Applicants initiated this matter with the filing of a *Notice of Intended Case Filing* on January 13, 2022. Their application was filed sixty (60) days later on March 15, 2022. This time was chosen in order to provide sufficient time for review and decision to allow for a January 12, 2023 closing date (*See* Exh. 100, Casaletto Dir., Sched. DC-1, Sec. 6.01).

Section 386.490.2, RSMo, states in part that “Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided. . . .” Case law indicates that the Commission has the authority to set an effective date at least as short as ten (10) days. *Harter v. Missouri Public Service Commission*, 361 S.W.3d 52 (Mo.App W.D. 2011).

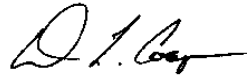
A ten (10) day effective date for any order approving the transaction would allow the matter to move forward on the planned schedule.

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, and upon issuance of an order approving the transaction, grant the Companies’ request for a ten (10) day effective date of said order.

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

Respectfully submitted,



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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 30th day of November, 2022.

