

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

Cathy J. Orler,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2006-0082, et al.</u>
)	
Folsom Ridge, LLC,)	
)	
and)	
)	
Big Island Homeowners Association Water)	
and Sewer Association, Inc., f/k/a Big Island)	
Homeowners Association)	
)	
Respondents.)	
)	
In the Matter of the Application of Folsom)	
Ridge, LLC, and Big Island Homeowners)	
Water and Sewer Association, Inc., for an)	<u>Case No. WO-2007-0277</u>
Order Authorizing the Transfer and)	
Assignment of Certain Water and Sewer)	
Assets to Big Island Water Company and Big)	
Island Sewer Company, and in Connection)	
Therewith Certain Other Related Transactions)	

STAFF’S POST-HEARING BRIEF

COMES NOW the Staff of the Missouri Public Service Commission (Staff) and for its post-hearing brief respectfully states as follows:

This case is before the Commission on Complaints filed by individual homeowners and on Folsom Ridge, LLC (Folsom Ridge) and Big Island Homeowners and Sewer Association, Inc.’s application to transfer and assign water and sewer assets to Big Island Water Company and Big River Sewer Company (the 393 companies). The individual complaint cases were consolidated and the complaints and the application

were combined for hearing. Hearing was held from February 28 to March 2, 2007. An ancillary hearing was held on March 30, 2007.

Argument

WC-2006-0082

Issue 1. Are Folsom Ridge or BIHOA, or both of them, a public utility pursuant to Section 386.020(42) RSMo (2000)(Supp. 2006), and thus subject to the jurisdiction, control and regulation of the Missouri Public Service Commission pursuant to Section 386.250 RSMo (2000)(Supp. 2006)?

Staff Position. Folsom Ridge and/or Big Island Homeowners Association (BIHOA) are public utilities pursuant to Section 386.020(42) RSMo (2000) (Supp. 2006) and are subject to the jurisdiction, control and regulation of the Missouri Public Service Commission (Commission) pursuant to Section 386.250 RSMo (2000) (Supp. 2006).

Section 386.020(42) RSMo provides as follows:

"Public utility" includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter[.]

Folsom Ridge and BIHOA are each public utilities within the meaning of Section 386.020(42) RSMo. Each entity meets the definition of a water corporation pursuant to Section 386.020(58) RSMo. Each entity also meets the definition of a sewer corporation pursuant to Section 386.020(48) RSMo. As the entities meet the relevant definitions, they are public utilities within the meaning of Section 386.020(42) RSMo. As public utilities, the entities are subject to the jurisdiction of the Commission pursuant to Section 386.250 RSMo.

Issue 1a. Is Folsom Ridge a water corporation pursuant to Section 386.020(58) in that it owns, operates, or manages a water system, plant or property and distributes, sells, or supplies water for gain?

Staff Position. Folsom Ridge is a water corporation pursuant to Section 386.020(58) in that it owns, operates, or manages a water system, plant or property and distributes, sells, or supplies water for gain.

Section 386.020(58) RSMo¹ (Supp. 2006) defines “water corporation” as:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[.]

Folsom Ridge, LLC holds title to the water facilities currently serving customers in Big Island. (Rusaw Direct, Ex. 9, p. 3, ln. 11-12). Customers and some residents who are not yet customers have paid a tap fee to enable them to connect to the system (Rusaw Direct, Ex. 9, p. 5, ln. 13-19). Customers are billed for water usage. (Rusaw Direct, Ex. 9, p. 8, ln. 27). The customer rates currently being charged include a profit mark-up. (Rusaw Direct, Ex. 9, p. 10, ln. 9).

Because Folsom Ridge owns the water system and the water plant and property that are used to supply water to residents of Big Island for gain, Folsom Ridge is a water corporation within the meaning of Section 386.020(58).

Issue 1b. Is BIHOA a water corporation pursuant to Section 386.020(58) in that it owns, operates, or manages a water system, plant or property and distributes, sells, or supplies water for gain?

Staff Position. BIHOA is a water corporation pursuant to Section 386.020(58) in that it owns, operates, or manages a water system, plant or property and distributes, sells, or supplies water for gain.

Section 386.020(58) RSMo (Supp. 2006) defines “water corporation” as:

every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or

¹ All references are to RSMo 2000 unless otherwise noted.

managing any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water[.]

A not-for-profit company can be a public utility if it provides water service for compensation, even if it provides service only to a few subdivisions. *Osage Water Company v. Miller County Water Authority*, 950 S.W.2d 569 (Mo.App. S.D. 1997).

BIHOA was formed to perform the day-to-day operation and maintenance of the water system. (Rusaw Direct, Ex. 9, p. 9, ln. 9-15). BIHOA operates the water system supplying water to the customers in Big Island. (Rusaw Direct, Ex. 9, p. 3, ln. 10). BIHOA also maintains the accounts of the water system. (Rusaw Direct, Ex. 9, p. 3, ln. 10). One of the accounts maintained by BIHOA is a reserve account for unexpected expenses associated with the operation of the water or sewer system. (Rusaw Direct, Ex. 9, p. 4, ln. 19-21). Customers are billed by the Association for water usage. (Rusaw Direct, Ex. 9, p. 8, ln. 27). BIHOA is a non-profit entity. (Rusaw Direct, Ex. 9, p. 10, ln. 1). BIHOA offers water service to those residents who have property proximate to the system and who have paid the required tap fees. (Rusaw Direct, Ex. 9, p. 10. ln. 19-21).

BIHOA is a water corporation within the meaning of Section 386.020(58). It is an association that has been operating and managing the water system on Big Island for gain. The association also maintains accounts on behalf of the water system. The statute specifically includes associations and does not carve out an exception for homeowners associations. A not-for-profit association with only a limited service area can be considered a water corporation subject to the jurisdiction of the Commission.

Issue 1c. Is Folsom Ridge a sewer corporation pursuant to Section 386.020(48) RSMo (2000) (Supp. 2006) in that it owns, controls, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain?

Staff Position. Folsom Ridge is a sewer corporation pursuant to Section 386.020(58) in that it owns, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain.

Section 386.020(48) RSMo provides as follows:

"Sewer corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets[.]

Folsom Ridge, LLC holds title to the sewer facilities currently serving customers in Big Island. (Rusaw Direct, Ex. 9, p. 3, ln. 11-12). Customers and some residents who are not yet customers have paid a tap fee to enable them to connect to the system (Rusaw Direct, Ex. 9, p. 5, ln. 13-19). Customers are billed for wastewater usage and treatment. (Rusaw Direct, Ex. 9, p. 8, ln. 27). The customer rates currently being charged include a profit mark-up. (Rusaw Direct, Ex. 9, p. 10, ln. 9). There are currently 60 customers connected to the wastewater system. (Rusaw Direct, Ex. 9, p. 8, ln. 22).

Because Folsom Ridge owns the sewer system and the wastewater treatment plant and property that are used to treat wastewater for more than twenty-five residences on Big Island for gain, Folsom Ridge is a sewer corporation within the meaning of Section 386.020(48).

Issue 1d. Is BIHOA a sewer corporation pursuant to Section 386.020(48) RSMo (2000)(Supp. 2006) in that it owns, controls, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain?

Staff Position. BIHOA is a sewer corporation pursuant to Section 386.020(58) in that it owns, operates, or manages sewer plant with twenty-five or more outlets and is in the business of collecting, carrying, treating, or disposing of sewage for gain.

Section 386.020(48) RSMo provides as follows:

"Sewer corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets[.]

A not-for-profit company can be a public utility if it provides service for compensation, even if it provides service only to a few subdivisions. *Osage Water Company*, 950 S.W.2d 569 (Mo.App. S.D. 1997).

BIHOA was formed to perform the day-to-day operation and maintenance of the sewer and wastewater system. (Rusaw Direct, Ex. 9, p. 9, ln. 9-15). BIHOA operates the sewer system treating wastewater for residents of Big Island. (Rusaw Direct, Ex. 9, p. 3, ln. 10). BIHOA also maintains the accounts of the sewer system. (Rusaw Direct, Ex. 9, p. 3, ln. 10). One of the accounts maintained by BIHOA is a reserve account for unexpected expenses associated with the operation of the water or sewer system. (Rusaw Direct, Ex. 9, p. 4, ln. 19-21). Customers are billed by the Association for wastewater treatment. (Rusaw Direct, Ex. 9, p. 8, ln. 27). BIHOA is a non-profit entity. (Rusaw Direct, Ex. 9, p. 10, ln. 1). BIHOA offers wastewater treatment service to those residents who have property proximate to the system and who have paid the required tap fees. (Rusaw Direct, Ex. 9, p. 10, ln. 19-21). There are currently 60 households connected to the wastewater system. (Rusaw Direct, Ex. 9, p. 8, ln. 22).

BIHOA is a sewer corporation within the meaning of Section 386.020(48). It is an association that has been operating and managing the sewer system on Big Island for gain. The association also maintains accounts on behalf of the sewer system and serves

more than 25 households. The statute specifically includes associations and does not carve out an exception for homeowners associations. A not-for-profit association with only a limited service area can be considered a sewer corporation subject to the jurisdiction of the Commission.

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Issue: Would Applicants' proposed transfer of the water and sewer assets to Big Island Water Company and Big Island Sewer Company be detrimental to the public interest?

Staff Position: The proposed asset transfer would not be detrimental to the public interest.

A water corporation or a sewer corporation must obtain the approval of the Commission prior to sale or transfer of its assets. Section 393.190.1 RSMo (2000). The filing requirements for a sewer utility applying to sell or transfer assets are found in 4 CSR 240-3.310. The filing requirements for a water utility applying to sell or transfer assets are found in 4 CSR 240-3.605. "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. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. E.D. 1980) (*State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo.banc 1934)). The Commission does not have jurisdiction over nonprofit sewer corporations. Section 393.847.2 RSMo (2000). The members of a nonprofit sewer company do not have personal liability for the debts of the sewer company. Section 393.861 RSMo (2000). The Commission does not have jurisdiction over nonprofit water corporations. Section 393.933 RSMo (2000). The members of a nonprofit water company do not have personal liability for the debts of the water company. Section 393.951 RSMo (2000).

Staff's position is that the transfer of assets from Folsom Ridge and BIHOA would not be detrimental to the public interest. As the situation currently stands, there is no utility company operating with a certificate of convenience and necessity on Big Island. The not-for-profit water and sewer companies organized under Chapter 393 would not be subject to the Commission's jurisdiction. However, the utilities would be in the ownership and control of the member homeowners, as opposed to the developer and the homeowners association formed by the developer. It is Staff's belief that companies operating in accordance with Chapter 393 would be preferable than the continuation of the current situation because the homeowners would be responsible for decisions about their utility service and because the service would be governed according to the by-laws that may be amended and repealed as decided by the members. The individual members of the 393 companies would not have personal liability for the companies. The transfer of assets has not been shown to be detrimental to the public interest and the Commission should approve the transfer.

Issue: What conditions, if any, should be imposed on the proposed transfer?

Staff Position: The Commission should not impose any conditions on its approval of the asset transfer to the 393 companies.

In his Rebuttal testimony, Staff witness James A. Merciel, Jr. referred to the testimony of Martin Hummel filed in the prior application Case No. WA-2006-0480. (Merciel Rebuttal, p. 2, ln. 7-10). At hearing, the admission of Mr. Hummel's testimony was limited to page 4, line 17 through page 6, line 16. (Tr., Vol. 7, p. 1039, ln. 24-25, p. 1040 ln. 1-25). Lines 19-23 on page 5 of Mr. Hummel's testimony were also excluded. (Tr., Vol. 7, p. 1044, ln. 1-5). Respondents indicated that if the transfer was approved they were willing to accept a condition that utility-owned shut-off valves would be

installed for each water and sewer connection and that each valve would be properly marked. (Tr., Vol. 7, p. 1083, ln. 19-25, p. 1084 ln. 1-7). Michael McDuffey, the current contract operator for the system, has verified that a shut-off valve has been installed for each water and sewer connection. (McDuffey Surebuttal, p. 2, ln. 14-15). Staff opines that the remainder of the issues pointed out in Mr. Hummel's testimony as adopted by Mr. Merciel should be addressed by the entity that owns the assets. (Hummel Rebuttal, p. 4, ln. 17-19, as incorporated by Merciel Rebuttal, p. 4, ln. 19-21). Mr. Merciel testified that he is unaware of any conditions that pose an imminent safety risk. (Tr., Vol. 7, p. 1093, ln. 6-7).

Mr. McDuffey testified that the current installation of the water and wastewater systems do not pose a greater than normal risk of cross-contamination. (Tr., Vol. 6, p. 673, ln. 17-22). Mr. McDuffey also testified that the current location of the water and sewer lines will not impair the provision of water and sewer service. (*Id.* at ln. 12-16). Mr. McDuffey testified that he is unaware of any risk to public health posed by the reinstalled systems. (Tr., Vol. 6, p. 671, ln. 24-25, p. 672, ln. 1-2).

Staff recognizes that if the transfer is approved, the 393 Companies, as non-regulated entities, would have discretion as to how to address the remaining technical issues Staff has identified. (Merciel Rebuttal, p. 5, ln. 1-2). Staff recognizes that some of the issues raised by Mr. Hummel and adopted by Mr. Merciel have been addressed in the bylaws of the 393 companies. (Tr., Vol. 7, p. 1085, ln. 3-25, p. 1086, ln. 1-6).

Staff's position is that a legitimate utility needs to be established to provide service on Big Island. (Tr., Vol. 8, p. 1297, ln. 16-24). Staff does not recommend that the Commission place any condition on approval of the transfer of the facilities to the 393

companies with regard to the service lines which were the subject of the ancillary hearing on March 30, 2007. (Merciel Surrebuttal, p. 5, ln. 6-9).

Conclusion

Staff takes the position that Folsom Ridge and BIHOA are public utilities subject to the Commission's jurisdiction. Staff's position is that Commission approval is required for the transfer of assets to the 393 companies. The proposed transfer of assets is not detrimental to the public interest. Staff recommends that the Commission approve the proposed transfer of assets. Staff is unaware of any water or sewer conditions that impose an imminent safety risk to the residents of Big Island. Staff does not have a recommendation as to any specific condition that should be placed on approval of the transfer. However, Staff does note that there are several technical issues with regard to the water and sewer systems that should be addressed by the entity in control of the assets.

Respectfully submitted,

/s/ Jennifer Heintz

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all parties and counsel of record this 27th day of April 2007.

/s/ Jennifer Heintz