

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held by telephone
and internet audio conference on
the 9th day of December, 2020.

In the Matter of Elm Hills Utility Operating)	<u>File No. WR-2020-0275</u>
Company, Inc.'s Request for a Water and)	Tariff Nos. YW-2021-0057 and
Sewer Rate Increase)	YS-2021-0058

ORDER REGARDING REQUEST FOR SANCTIONS

Issue Date: December 9, 2020

Effective Date: December 9, 2020

On March 6, 2020,¹ Elm Hills Utility Operating Company, Inc. (Elm Hills) opened two staff assisted rate cases, water and sewer, which have subsequently been consolidated. On September 18, the Office of the Public Counsel (OPC) requested the production of certain financial documents from Elm Hills' upstream owners pursuant to Section 386.450, RSMo (2016).² Elm Hills was not subject to the order issued under Section 386.450, RSMo. OPC indicates the upstream owners did not provide the information to OPC and therefore did not comply with the Commission's order, which had a deadline of November 18. On December 2, OPC filed a motion seeking sanctions against Elm Hills (suggesting three alternative sanctions: dismiss the case; postpone the evidentiary hearing until compliance with the production order; or strike all of Elm Hills' testimony). On December 8, Elm Hills responded. Staff did not respond. OPC filed a rebuttal response on December 8. This order denies OPC's motion for sanctions.

In its request for sanctions against Elm Hills, OPC argues that the actions of the upstream owners, who are not parties, should be imputed to Elm Hills under the theory

¹ All dates hereafter refer to the year 2020, unless otherwise stated.

² Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016.

of piercing the corporate veil. OPC then requests sanctions against Elm Hills pursuant to 20 CSR 4240-2.090(1), the Commission's discovery rule. The three sanctions sought by OPC all fall within Missouri Civil Procedure Rule 61, regarding enforcement of discovery.

Elm Hills contends that OPC effectively has short-circuited statutory enforcement mechanisms which could be used to compel production and instead proceeded straight to a request for sanctions.³ Elm Hills also raises a constitutional objection that the Commission has no authority to dismiss or suspend its rate case because the Commission has a duty to set rates that are just and reasonable. As all parties agree to some level of increased rates, Elm Hills concludes that Commission action to stop or delay the rate case would amount to rendering the current rates as unjust, unreasonable and confiscatory.⁴ Elm Hills also argues that the information OPC seeks is not necessary to determine just and reasonable rates. OPC responds that the information is relevant and necessary, however the necessity or relevance of the information is not at issue presently.

For the motion for sanctions against Elm Hills to succeed, OPC must first demonstrate that Elm Hills should be held accountable for the actions of its upstream owners, commonly referred to as piercing the corporate veil (also referred to as the alter ego theory). The standard set forth for piercing the corporate veil requires proving three elements: 1) control; 2) wrongdoing, fraud, or improper conduct; and 3) proximate cause.⁵

Elm Hills argues that it has no legal authority to obtain the information from its upstream corporate ownership, thus it would be unfair and unwarranted to impose

³ OPC correctly states that Elm Hills cites no obligation that OPC must attempt enforcement prior to requesting sanctions, and due to the discussion *infra*, the Commission will not take up Elm Hill's enforcement-prior-to-sanctions argument.

⁴ Due to the discussion *infra*, the Commission will not take up Elm Hills' objection, nor OPC's rebuttal response regarding the Commission's authority to dismiss or suspend Elm Hill's rate case.

⁵ *Real Estate Investors Four, Inc. v. American Design Group Inc.*, 46 S.W.3d 51, 56 (Mo. App. E.D. 2001).

sanctions on Elm Hills. Elm Hills further contends that the pleadings submitted by OPC do not show evidence of fraud or wrongful conduct that would justify piercing of the corporate veil. OPC's rebuttal response asserts that the dishonest and unjust act is the use of the corporate structure to hide relevant information. The record is not developed enough for the Commission to make a determination on whether the elements for piercing the corporate veil are met. The Commission need not determine this issue due to the discussion below.

OPC made its limited request for a production order pursuant to Section 386.450 RSMo, specifically indicating that the request was not made pursuant to 20 CSR 4240-2.090 (the Commission Rule on discovery).⁶ The Commission's order noted the distinction made by OPC and issued its order under Section 386.450 RSMo, and not under its discovery rules as requested by OPC.⁷ OPC now seeks sanctions under the discovery rules.

The Commission Rule on discovery is 20 CSR 4240-2.090 and is used in conjunction with the Commission Rule on subpoenas, 20 CSR 4240-2.100, and Section 386.440 RSMo. These rules, in part, limit discovery to information that is relevant to that case, limit access to non-admissible information unless it appears reasonably calculated to lead to the discovery of admissible evidence, set time limits for responses and objections, establish processes to resolve discovery disputes prior to the filing of discovery motions, and permit sanctions.

In contrast, Section 386.450 RSMo is a unique grant of power in that it allows for broad information gathering in or outside of a case, without discovery limitations on the

⁶ Motion for Order Regarding the Production of Documents, filed September 18, 2020, para. 1, 2, 45, 46, and Wherefore clause.

⁷ Order Granting Motion for Production, filed October 28, 2020.

information sought. A finding of good cause is the only statutory requirement needed to issue an order that information be produced under Section 386.450 RSMo.

OPC requested an order for information available under Section 386.450 RSMo from the upstream owners of Elm Hills specifically noting it was not requesting information pursuant to Rule 2.090, but now asks the Commission to use those discovery rules to sanction Elm Hills. The Commission ordered the documents be produced by the upstream owners of Elm Hills pursuant only to Section 386.450 RSMo, and will not now issue sanctions pursuant to the Commission's discovery rules.

The request for discovery sanctions by OPC is therefore denied as the order for production given was pursuant to Section 386.450 RSMo and not pursuant to the Commission's discovery rules.

THE COMMISSION ORDERS THAT:

1. OPC's Motion to Dismiss Case or Provide Other Relief in the Alternative is denied.
2. This order shall be effective when issued.



BY THE COMMISSION

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

Morris L. Woodruff
Secretary

Silvey, Chm., Kenney, Rupp, Coleman, and
Holsman CC., concur.

Hatcher, Regulatory Law Judge