

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

STAFF’S INITIAL POST HEARING BRIEF

COMES NOW Staff of the Missouri Public Service Commission, by and through counsel, and files its Initial Post Hearing Brief.

BACKGROUND

The subject water and wastewater utilities are currently owned by Foxfire Utility Company (“Foxfire”) and are located within the corporate limits of the Village of Indian Point in Stone County, Missouri.¹ Currently, the systems have approximately 258 water and sewer customers.² Mr. Garah Helms (“Mr. Helms”), Foxfire’s owner, is now 70 years old and wishes to fully retire after the sale of the Foxfire assets.³ He reached out to the Ozark Clean Water Company (“OCWC”) board, and the parties agreed to a purchase price of \$1,285,400; both parties believed the price is appropriate.⁴ If the transaction is completed, OCWC will pay an acquisition premium of \$1,195,548, which is thirteen times over Staff’s estimated rate base of \$89,852.⁵

¹ Ex. 200, *Rebuttal Testimony of Jarrod J. Robertson*, P. 1: 22-24.

² Ex. 1, *Direct Testimony of Garah (Rick) Helms*, P. 3:12-13.

³ Id. at P. 4: 14-15.

⁴ Id. at P. 5: 7-17.

⁵ Ex. 200, Schedule JJR-r2, P. 12 of 20.

Foxfire prepared a notice of this proposed transfer and sent it to Foxfire's customers.⁶ Neither Staff nor the Commission received any public comments from the customers regarding the transfer of the assets from Foxfire to OCWC.⁷ Staff and the Missouri Department of Natural Resources ("MoDNR") investigated the Foxfire water and wastewater systems and found that both systems are well maintained and in good condition.⁸ According to MoDNR, the Foxfire water and wastewater systems are in compliance with the Missouri Clean Water Laws.⁹

Foxfire filed its *Application to Transfer Certain Water and Sewer Assets* ("Application") with the Commission on March 15, 2022, requesting authority to sell its water and sewer assets to OCWC pursuant to Section 393.190, of the Revised Statutes of Missouri ("RSMo"), 20 CSR 4240-2.060 and 20 CSR 4240-10.105.¹⁰ Foxfire also requested to be relieved of its responsibilities as a water and sewer corporation, cancelation of its certificates of convenience and necessity ("CCN") granted in File No. WA-95-31, and cancellation of its tariff sheets.¹¹

On April 8, 2022, the Commission granted OCWC's March 15, 2022, motion to intervene. OCWC is a nonprofit sewer and water company formed in accordance with Sections 393.825 through 393.861, RSMo.¹²

Staff reviewed corporation documents and takes the position that the OCWC Board of Directors properly created a nonprofit water and sewer utility under the

⁶ *Id.*, Schedule JJR-r2, P. 10 of 20.

⁷ *Id.*

⁸ *Id.*, at Schedule JJR-r2, P. 8-9 of 20.

⁹ *Id.*

¹⁰ *Id.*, at Schedule JJR-r2, P. 6.

¹¹ *Application*, P. 4.

¹² *Id.*, at P. 3.

provisions of Chapter 355, RSMo, and organized originally as a nonprofit sewer utility within the parameters of Sections 393.825 through 393.861, RSMo.¹³ Under the provisions of Section 393.829(15), RSMo, nonprofit sewer utilities may also provide services and assume responsibilities of nonprofit water utilities.¹⁴ While OCWC is not subject to the jurisdiction of the Commission, OCWC is led by a board of directors elected by the customers, who oversee and control the operations of OCWC, and preside over any customer issues, and OCWC will remain under the regulatory authority of MoDNR.¹⁵

OCWC currently maintains multiple water and sewer systems in the area, and has operated these systems in compliance with MoDNR requirements.¹⁶ OCWC appears to have the technical and financial wherewithal to operate and maintain the Foxfire system as well.¹⁷ Staff took the position that the proposed sale and transfer of assets from Foxfire to OCWC is not detrimental to the public interest, and therefore, recommended approval of Foxfire's Application.

The Office of the Public Counsel ("OPC") responded to Staff's *Memorandum*. OPC claimed the transfer would be detrimental to Foxfire's customers because the proposed purchase price is thirteen times over the estimated rate base, which would obligate each Foxfire customer to pay an additional approximately \$19.30 per month over a 20 year period.¹⁸ However, OPC did not conduct an investigation or submit testimony regarding this matter, as it relied on Staff's memorandum and other parties' testimony

¹³ Ex. 200, *Rebuttal Testimony of Jarrod Robertson*, P. 2 (September 23, 2022).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ OPC Position Statement, P. 1.

only. OPC's statement is merely an inference and contradicts OCWC's testimony that current rates would cover the payments of principal and interest on the loan funding the purchase.¹⁹

OPC requested a hearing and such hearing was held on October 24, 2022.

DISCUSSION

- I. **Should the Commission find that the sale or transfer of Foxfire Utility Company's (a public utility) water and wastewater assets to Ozarks Clean Water Company (a nonprofit sewer company under Sections 393.825-393.861, RSMo, and a nonprofit water company under Sections 393.900-393.954, RSMo) is not detrimental to the public interest, and approve the transaction?**

The transaction before the Commission is Foxfire's sale or transfer of its water and wastewater assets to OCWC. OCWC's acquisition of Foxfire's assets would not be detrimental to the public interest and the Commission should approve the transaction.

Foxfire is a Public Utility subject to the jurisdiction of the Commission and must seek authority from the Commission to sell or transfer its assets. Section 393.190, RSMo states in pertinent part: "no water or sewer corporation shall sell or transfer its assets without having first secured authorization from the Commission." The Commission granted Foxfire a CCN on March 28, 1995, to provide sewer and water services in Stone County.²⁰ Foxfire currently provides services to approximately 258 customers.²¹

¹⁹ Ex. 101, *Surrebuttal Testimony of David Casaletto*, P. 5-6 (October 11, 2022).

²⁰ Ex. 200, Schedule JJR-r2, P. 7 of 20.

²¹ *Id.*

OCWC is a nonprofit sewer and water company formed in accordance with Sections 393.825 through 393.861, RSMo, and is not rate regulated by the Commission. It is however, regulated by MoDNR.²²

The Commission must authorize the transfer of a regulated utility's assets, unless the transfer is shown to be detrimental to the public interest.²³ In approving the transfer, the Commission must determine that the sale is "not detrimental to the public interest."²⁴

The Commission does not regulate OCWC, nor does it have jurisdiction over OCWC's board of directors or the future rates set by that board; however, these concerns may be allayed since OCWC has no motive for seeking profits as it is a nonprofit entity and its directors are answerable to its members.²⁵

OCWC currently provides water and sewer service to approximately 2,380 customers and has qualified personnel to provide safe and adequate service to not only its current customers, but to the newly-acquired Foxfire customers as well.²⁶ OCWC has economies of scale, experience, technical ability, and financial wherewithal that will enable it to provide water and sewer services to all of its customers, including Foxfire.²⁷

The main issue of controversy in this matter is whether the negotiated price of \$1,285,400 for Foxfire assets is detrimental to the public interest. OPC believes that this amount will increase Foxfire's customers' rates by approximately \$19.00 per month

²² Ex. 200, Schedule JJR-r2, P. 3 of 20.

²³ *Environmental Utilities, LLC v. Public Service Comm'n of Missouri*, 219 S.W.3d 256, 265 (Mo. App. W.D. 2007).

²⁴ See, *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 335 Mo. 448, 457-60, 73 S.W.2d 393, 399-400 (Mo. 1934).

²⁵ See *Love 1979 Partners v. Public Service Comm'n of Missouri*, 715 S.W.2d 482 (Mo. 1986).

²⁶ Ex. 100, P. 3-4.

²⁷ *Id.*

for the next 20 years and customers will not be protected because they will no longer be regulated by the Commission.²⁸ However, as stated earlier, OPC did not submit testimony or present evidence on its issue of potential rate impact to customers. Furthermore, OPC's statement directly testifies the evidence of David Casaletto, President of the OCWC Board of Directors, that the monthly payments on the loan financing the purchase is covered by current rates. When asked how OCWC will pay the loan's principal and interest costs, Mr. Casaletto responded:

We already know the monthly payment for each of the twenty (20) years after closing as it is included in the sample promissory note that is attached to the purchase agreement. This amount is easily covered by current rates. The growth identified by Mr. Helms will only help that situation, leaving more than sufficient funds to address the current costs OCWC will incur for administration, overhead, operation and maintenance, and continuing to build the reserve OCWC maintains for repair.²⁹

OCWC's opinion is that the cost of Foxfire's assets represents the fair market value for those assets, and that is especially true given the owner of Foxfire has agreed to self-finance the purchase price over a twenty-year period at a below-market interest rate of 2.5%.³⁰ OCWC testified that it needs no separate financing associated with the acquisition and is confident that cash flows from existing rates will be adequate for OCWC to cover the obligation associated with the purchase price and to continue to provide quality service to its customers.³¹ OCWC testified that it would not raise existing rates for Foxfire customers for at least one year following the acquisition, and any increase would

²⁸ OPC Position Statement, P. 1-2.

²⁹ Ex. 101, *Surrebuttal Testimony of David Casaletto*, P. 5-6 (October 11, 2022).

³⁰ Ex. 100, P. 5.

³¹ *Id.*

be based on increased operating and maintenance expenses as approved by the Board of Directors.³²

Staff contends that this transfer of assets from a regulated entity to a non-regulated (not-for-profit) entity would not be detrimental to the public interest, as OCWC is an experienced company that does not seek profits, has the financial ability to absorb the assets through its existing rates, has indicated that it would not raise rates for Foxfire customers for at least a year (if at all), and it will raise rates only if approved by the Board of Directors.

OCWC currently maintains multiple water and sewer systems in the area and has kept them in compliance with MoDNR requirements, and has the technical and financial wherewithal to operate and maintain Foxfire system as well.

Staff takes the position that the proposed sale and transfer of assets from Foxfire to OCWC is not detrimental to the public interest and recommends approval.

II. If so, what conditions, if any, should the Commission impose on such approval?

Staff recommends approval of the sale and transfer of the assets subject to the following conditions:

- a. Require Foxfire to notify the Commission of closing on the transfer of water and sewer assets to OCWC within five days after closing;³³
- b. Authorize Foxfire to cease providing service immediately after closing on assets;³⁴

³² *Id.* at P. 6.

³³ *Rebuttal Testimony of Jarrod Robertson*, Schedule JJR-r2, P. 4 (September 23, 2022).

³⁴ *Id.*

c. If closing on Foxfire's assets does not take place within thirty days following the effective date of the Commission's order, require Foxfire to submit a status report, in File No. WM-2022-0186 within five days after this thirty day period regarding the status of closing, and additional status reports within five days after each additional thirty (30) day period, until closing takes place, or until Foxfire determines that the transfer of the assets will not occur;³⁵

d. If Foxfire determines that a transfer of the assets will not occur, require Foxfire to notify the Commission of such;³⁶ and

e. After the above notice of transfer of assets to OCWC is received from Foxfire, cancel the CCN applying to Foxfire's Village of Indian Point service area.³⁷

Foxfire and OCWC are agreeable to these conditions. Staff recommends that the Commission accept Staff's proposed conditions.

CONCLUSION

The transfer of Foxfire's assets to OCWC is not detrimental to the public interest, because OCWC is an experienced owner and operator of these systems; has the financial ability to absorb the costs of the transaction through its existing rates; has indicated that it will not increase rates for at least one year; any future rate increases will be based upon increased operation and maintenance expenses; and future rate increases must be approved by the Board of Directors, who are elected by the customers. There is no challenge to OCWC's financial capacity to absorb this proposed transaction or its ability

³⁵ *Id.*, at PP. 4-5.

³⁶ *Id.*, at P. 5.

³⁷ *Id.*

to successfully operate additional water and wastewater utilities efficiently and economically.

Balancing the customers' rights against the seller's rights, the customers will enjoy the same – and likely a higher – level of service under OCWC ownership. Allowing the sale respects the owner's property rights to sell the systems pursuant to the negotiated transaction. The Foxfire-OCWC transaction promotes the public interest, it is not detrimental to the public interest, and the Commission should approve it subject to the conditions proposed above.

Respectfully submitted,

/s/ J. Scott Stacey

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been transmitted by electronic mail to counsel of record this 16th day of November, 2022.

/s/ J. Scott Stacey