

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

In the Matter of Elm Hills Utility Operating)
Company, Inc's Request for a Water and)
Sewer Rate Increase) File No. WR-2020-0275

**ELM HILLS' RESPONSE TO OPC'S MOTION FOR ORDER
REGARDING THE PRODUCTION OF DOCUMENTS
AND REQUEST FOR RULE WAIVER**

COMES NOW Elm Hills Utility Operating Company, Inc. ("Elm Hills" or "Company"), by and through the undersigned counsel, and for its response to the Office of the Public Counsel's ("OPC") *Motion for Order Regarding the Production of Documents* ("*Motion for Production*") and OPC's *Response to Commission Order and Request for Rule Waiver* ("*Request for Waiver*"), states as follows to the Missouri Public Service Commission ("Commission"):

INTRODUCTION

1. On September 18, 2020, OPC filed its *Motion for Production*, seeking a Commission order directing the production of certain documents from a variety of out-of-state entities that are not parties to this case. Also on September 18, 2020, OPC filed its *Request for Waiver* in which, among other things, OPC requested a waiver of the Staff Assisted Rate Procedure rules such that this case is *suspended* until its discovery efforts have run their course.

ELM HILLS DOCUMENTS

2. As a starting point to this response, Elm Hills emphasizes that there is no suggestion, and no reasonable position, that the records sought by OPC are records of a jurisdictional public utility. Elm Hills' books and records have been made available in

this case, as well as have records of its holding company and the parent of the holding company, CSWR, LLC. It also must be emphasized that none of the documents or information sought by OPC is in the possession of Elm Hills; Elm Hills Utility Holding Company, LLC; Missouri CSWR, LLC; CSWR, LLC; or Central States Water Resources, Inc.

RESPONSE TO MOTION FOR PRODUCTION

3. The *Motion for Production* was purported to have been made pursuant to Section 386.450, RSMo, which states as follows:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

4. All Commission statutes, including Section 386.450, must be read in conjunction with the limits of the Commission’s jurisdiction and other powers, and the powers of the State of Missouri vis-à-vis persons and corporations outside the state with no minimum contacts to the state.¹ Absent this context, one would have to assume that a single state statute could obliterate concepts of state sovereignty and render any

¹ See *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (“The canonical opinion in this area remains *International Shoe*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has ‘certain minimum contacts with [the State] such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”’”). See also *Smoot v. Fischer*, 248 S.W.2d 38, 41 (Mo. App. 1952) (“Generally speaking, the jurisdiction of a state is merely coextensive with its boundaries . . .”).

constitutional limitation on the Commission's powers (or the powers of the State of Missouri) null and void as to all corporations, persons, and documents, of any type, no matter where located.

5. Section 386.250(3) and (4) provide in relevant part as follows:

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

(3) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state

(4) To all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same.

(emphasis added).

6. Additionally, the statute granting the Commission power to issue subpoenas limits this power to the state of Missouri. Section 393.140(10)) states that the Commission shall “[h]ave power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it, in reference to any matter under sections 393.110 to 393.285.” (emphasis added). There is no allegation that the entities or persons in question are either domiciled in Missouri, conduct business in Missouri, or have been served – or can be served – in Missouri.

7. Additionally, as in all requests for discovery, the information sought by the OPC must be relevant to the action at hand. Essentially, OPC asks the Commission to order the production of voluminous documents and information from real or imagined equity investors regardless of the fact those investors are located outside the State of

Missouri and therefore are not subject to the state's jurisdiction. Every investor-owned utility regulated by the Commission has equity investors. But that fact alone does not make the kind of investor-specific information OPC seeks relevant to Commission cases involving those utilities. And the Commission does not concern itself with detailed information about those investors, including the corporate structure of those equity investors or whether, and to what extent, those equity investors may or may not have used debt to acquire their equity interest in the utility. Such questions are irrelevant in cases involving other Missouri investor-owned utilities and are equally irrelevant in this case.

8. Moreover, there is no evidence the entities or individuals from which OPC seeks information are "affiliates" as that term is defined in the Commission's rules. But even if the entities were viewed as affiliates, Section 393.140(12) provides, in relevant part, that the Commission does not have jurisdiction over an affiliate that is not engaged in regulated activities if the operations of that affiliate are conducted such that its operations are "substantially kept separate and apart" from the public utility. If anything is clear from OPC's *Motion for Production*, it is that the entities in which it is interested, if they are even remotely related to Elm Hills, are substantially kept apart and separate from that utility. Elm Hills has had no transactions with these entities or individuals and there is no evidence any costs from or related to those entities and individuals have been directly charged or allocated to Elm Hills or otherwise are included in the revenue requirement proposed to set rates in this case.

9. The OPC alleges that it is seeking the requested information for three

purposes:

- (1) What is the actual business structure underlying Sciens Capital Management LLC's investment in CSWR LLC (and consequently Elm Hills Utility Operating Company, Inc.);
- (2) Has any entity from the Sciens Water Opportunities Fund to US Water Systems LLC (or anywhere else in the business structure) issued or otherwise raised debt financing as part of Sciens Capital Management's investment in CSWR LLC; and
- (3) Has any entity from the Sciens Water Opportunities Fund to US Water Systems LLC (or anywhere else in the business structure) entered into any covenants or similar contractual arrangements (including debt instruments) that would preclude CSWR LLC or its subsidiaries from issuing debt in their own right.²

10. The first two questions are beyond Elm Hills' ability and knowledge to answer and are irrelevant, as stated above. The third question is the only one that Elm Hills can address even indirectly. The answer to the third question is there are no covenants or similar contractual arrangements, including debt instruments, that would preclude CSWR, LLC, or its affiliates from issuing debt" on their own. Indeed, CSWR, LLC, has been in discussions with non-affiliated commercial lenders for several months seeking debt financing for its utility operating affiliates and is hopeful such financing will be obtained in the near-term future.

11. OPC asserts that the "good cause" that supports the issuance of the requested order of production is premised on the "inability of the OPC to secure the information requested through conventional means coupled with the importance of the information being sought as it relates to the capital structure of CSWR (and

² *Motion for Production*, pp. 5-6.

consequently its subsidiary Elm Hills Utility Operating Company, Inc.). . . .”³

12. But OPC supplies no proof to support that argument. In fact, it appears OPC has not attempted to obtain the information it seeks through “conventional means.” In its pleading, OPC complains subpoenas previously issued by the Commission have been ignored. Under 20 CSR 4240-2.100(5), if a party fails to respond to a Commission subpoena the party requesting the subpoena “may apply to a judge of the circuit court . . . for an order enforcing the subpoena or subpoena *duces tecum*.” To Elm Hills’ knowledge, OPC has not availed itself of this option.

13. In addition, OPC’s argument in support of the order it now seeks assumes: 1) the Commission has the authority to issue the requested order; 2) the information requested is somehow relevant to the setting of water and sewer rates in this Staff Assisted rate case; and, 3) that OPC has exhausted its remedies for seeking production of that information through conventional means.

14. The issue of authority is discussed above. Additionally, the entities from whom documents are sought are entities whose operations are kept separate and apart from Elm Hills, which means those entities do not fall within the scope of Section 386.450, RSMo.

15. The documents and information sought by the *Motion for Production*,⁴ is far ranging and well beyond the “capital structure of CSWR” and “its subsidiary Elm Hills Utility Operating Company, Inc.” As stated previously, it is well known that the capital structure of each is currently 100% equity, and no party has proposed such a capital

³ *Motion for Production*, p. 10.

⁴ *Motion for Production*, Attachment K – Confidential.

structure for the purpose of setting rates in this case. Based on information provided by each of the parties to the current case, all are in agreement the appropriate capital structure for setting rates in this case is one composed of 50% debt and 50% equity, which is reasonable based on other similarly situated water/sewer utilities.

16. Lastly, as noted previously, OPC has not exhausted its remedies in regard to the subpoenas. The Commission's subpoena rule provides a mechanism for enforcing subpoenas, and OPC should be required to exhaust that remedy before the Commission even considers issuing the letter OPC requests in its *Motion for Production*.⁵

RESPONSE TO REQUEST FOR WAIVER

17. In substantive part, the *Request for Waiver* asks for "suspension of this case" until such time as Elm Hills Utility Operating Company, Inc. and the identified entities produce the documentation requested by the OPC.

18. First, it should be stated again that none of the documentation requested by the OPC is a part of the books and records of Elm Hills. Elm Hills has supplied full access to its books and records, as required by law.

19. Second, the Commission should be mindful that the purpose of this case is to set just and reasonable rates for Elm Hills. Elm Hills has made significant improvements to various water and sewer systems to bring those systems in compliance with environmental statutes and regulations, and has implemented an operations and maintenance process that will keep the systems in good condition for many years to come. Staff and Elm Hills (as well as OPC, as a practical matter) have


⁵ Rule 20 CSR 240-2.100(5).

taken positions that indicate Elm Hills is entitled to a significant increase in rates currently charged. The requested waiver and “suspension,” which could abate this case indefinitely, will extend the period of time during which Elm Hills is legally required to charge rates all parties agree are not fair and reasonable.

20. There is no justification for an indefinite suspension of the timeline in this case based on OPC’s pursuit of irrelevant information from entities many layers above the public utility, Elm Hills, and over which the Commission – or the State of Missouri – has no jurisdiction. Elm Hills therefore asks that the *Request for Waiver* be denied.

WHEREFORE, Elm Hills Utility Operating Company, Inc. respectfully requests that the Commission deny the OPC’s *Motion for Order Regarding the Production of Documents* and deny OPC’s *Request for Waiver* for the reasons stated herein.

Respectfully submitted,



Dean L. Cooper, MBE #36592
Jennifer L. Hernandez #59814
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P.O. Box 456
Jefferson City, MO 65012
(573) 635-7166 telephone
(573) 635-0427 facsimile
dcooper@brydonlaw.com
jhernandez@brydonlaw.com

**ATTORNEYS FOR ELM HILLS UTILITY
OPERATING COMPANY, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic mail on this 25th day of September 2020, to all counsel of record.



D. J. Coyle
