

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

Cathy J. Orlor, et al)	
)	
Complainants,)	
v.)	<u>Case No. WC-2006-0082</u>
)	
Folsom Ridge, LLC, Owning and Controlling)	
Big Island Homeowners Association,)	
)	
Respondent.)	
)	
AND)	
)	
In the Matter of the Application of Folsom)	
Ridge, LLC and Big Island Homeowners)	
Water and Sewer Association, Inc., for an)	
Order Authorizing the Transfer and)	<u>Case No. WO-2007-0277</u>
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.)	

**Proposed Findings of Fact & Conclusions of Law
Submitted by 393 Interveners Big Island Water Company &
Big Island Sewer Company**

COMES NOW, Pamela Holstead, attorney for above named Interveners in Case No. WO-2007-0277, requesting an order asserting P.S.C. jurisdiction over the above named Respondents for the limited purpose of authorizing the transfer of certain water and wastewater assets to the Interveners: Big Island Water Company and Big Island Sewer Company, pursuant to RSMO 393.190. In support of said request, Interveners propose the following:

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Proposed Findings of Fact

Facts : Chronology

1. Colorado based developer, Folsom Ridge, LLC (**Folsom**) purchased 350 acres of real estate on and around the area known as “Big Island” at Lake of the Ozarks in Camden County, Missouri on April 29, 1998. (Ex. 12, page 3, lines 12-20)
2. There were many existing homes on Big Island at the time of Folsom’s purchase. (Ex. 12, page 8, lines 14-23)
3. Folsom decided to install a community water and wastewater treatment system to service its new development project on Big Island. (Ex. 10, page 7, lines 10-15)
4. Folsom currently owns the land and equipment which comprise the water and sewer system on Big Island. (Ex. 9, page 3, lines 11-12)
5. Owners of pre-existing homes were given the opportunity (by Folsom) to pay tap fees to Folsom which would obligate Folsom to install utility mains proximate to the owner’s lot and provide said homeowner the right to connect to the new community water and/or wastewater system. (Ex. 10, page 8 , line 3 AND page 23, lines 3-5)
6. A Big Island homeowners associaton was formed in July 1998 for the purpose of owning and operating the proposed community water and wastewater treatment system. (Ex. 88) (Ex. 9, page 3, lines 10-11) (Ex 12, page 13, lines 16-19)
7. Big Island Homeowners Water & Sewer Association, Inc. (**HOA**) is the current name of the nonprofit entity organized for the purpose of operating, and eventually owning, the community water and wastewater services system on Big Island. (Ex. 9, page 3, lines 10-11)
8. The homeowners association bylaws provide voting shall be based on one vote per lot. (Ex. 9, page 2, line 18) & (Ex. 12, Sch BB-6, page 9)

9. Owners of the pre-existing Big Island homes, who had paid tap fees, were asked to ratify the HOA covenants and thereby join the homeowners association. (Ex. 10, page 12, lines 20-23).

10. Some of the homeowners, who had paid tap fees, refused to ratify the HOA covenants and join the HOA. (Ex. 56)

Facts: Construction of Utility Systems

11. Mr. David Lees was the compensated, on site, partner who was initially in charge of the Big Island development project for Folsom. (Ex. 10, page 7, lines 9-19)

12. DNR permit applications were filed August 7, 1998. (Exhibit 83)

13. On May 25, 1999 DNR issued a violation notice to Folsom for installing a one inch water line instead of a two inch water line on a portion of the system. (Ex. 12, page 9, Lines 21-23)

14. In April 2001, Mr. Lees was terminated and the investment partners from Colorado became more directly involved in the project. (Ex. 12, page 12, lines 3-11)

15. A test “dig” on or about January 12, 2004 confirmed water and sewer mains, which had been installed under Mr. Lees direction, had been placed side by side in the same trench. (Ex. 12, page 12, lines 17- 23 continuing to page 13)

16. Folsom entered into a settlement agreement with the Department of Natural Resources and Missouri Attorney General’s Office in April 2004 agreeing to correct all violations. (Ex.91)

17. Engineer Dave Krehbiel provided observation services in accord with the settlement agreement. (Ex. 14, page 5, lines 10-13)

18. The provisions of the settlement agreement have since been satisfied. (Ex. 92)

(Ex. 93), (Ex. 10, page 8, lines 15-19) , (Ex. 14, page 6, lines 1-4)

19. There has never been a bad wastewater system discharge report and the drinkingwater system has passed all DNR standards. (T.T. McDuffey, pg. 730, lines 1-6)

Facts: Jurisdiction

20. The homeowner association began providing water and sewer services in the year 2000 to fewer than 25 households. (Ex. 9, RR Schedule 1)

21. Sewer connections reached 25 households in the year 2001 and water connections numbered 25 sometime in the year 2002. (Ex. 9, RR Schedule 1)

22. Community sewer service is currently provided to 60 residents of Big Island, of which 49 also receive community water service. (Ex. 9, page 8, lines 21-23)

23. Residents who connected to the community water and/ or sewer facilities are charged a monthly fee for service by the HOA. (Ex. 12, Page 15, lines 12-16)

24. In 2000, the homeowners association (HOA) voted to charge a smaller monthly fee (sometimes called availability fees) to everyone who had purchased the right to connect, but had not yet connected to the system. (Ex. 10, page 29, lines 5-7; also Ex. 62) & (Ex. 12, Page 15, lines 14-16)

25. The HOA holds all monthly fees, in excess of operating expenses, in reserve with no profits being paid to any entity. (Ex. 13, page 3, lines 4-15)

26. Folsom has received payments from the HOA which have been categorized as debt repayment or reimbursement of costs advanced. (Ex. 13, pages 3-4, lines 19-23 et al)

Facts: Pugh Complaint

27. Complainant Pugh receives sewer services only, has not ratified the HOA covenants and does not consider himself a member of the HOA. (Ex. 4, page 2, lines 1-2)

28. Mr. Pugh favors PSC regulation because he believes ,”each user is a customer only and it requires no membership for the homeowners.” (Ex. 4, Page 1, line 18-19)

29. Mr. Pugh sees PSC regulation as a solution to construction violations and controversies. (Ex. 4, Page 11, Lines 1-3)

30. Mr. Pugh is concerned that service lines are not being installed or regulated properly. (Ex. 5, Page 5, lines 10-14)

31. There are currently no governmental regulations over individual “service lines” buried on a homeowner’s property for the purpose of servicing the homeowner’s residence. (Ex. 118, Page 5, lines 10-22).

Facts: Fortney Complaint

32. Ms. Fortney is not a member of the HOA and takes issue with the HOA billings to tap owners who are not connected, “ How can he be billed if we are not members and not receiving service?” (Ex. 7, page 6, lines 1-3)

Facts: Orler Complaint

33. The prior owner of Complainant Orler’s home paid for the right to a water tap and a sewer tap; however, Ms. Orler has not elected to connect to the community system. (Ex. 10, page 2, lines 18-19)

34. Ms. Orler, like Mr. Pugh, refused to ratify the homeowner association Covenants, and does not consider herself a member of the HOA. (Ex. 1, Page 3, Lines 14-16)

35. In August 2005, Ms. Orler filed a complaint with the the P.S.C. (WC-2006-0082) which was prompted by HOA attempts to collect the monthly availability fee for her **unconnected** utility taps. (Ex 1, Page 8, Lines 11-15)

36. Ms. Orler objects “to the imposed membership of the unregulated 393 Not for Profit Water and Sewer Corporations” (Ex. 1, page 2, lines 9-10)

37. Ms. Orler also objects “to the liabilities associated with this utility system, being imposed upon me, through this forced membership”. (Ex. 1, Pge 2, Lines 11-12)

Facts: Proposed Transfer of Assets to the 393 Companies.

38. The February 9, 2006 P.S.C. Staff Report of Investigation concluded that a group of Big Island utility customers could create a RSMo chapter 393 nonprofit utility company as a possible solution to the utility issues on Big Island. (Ex. 104, Appendix A)

39. Voting under chapter 393 rules would be “one vote per customer” thereby assuring customer control. (Ex. 9, page 2, lines 18-20).

40. A group of Big Island utility customers organized the RSMo Chapter 393 companies when 40 of the 60 utility customers gave their approval. (Exhibit 102)

41. The Board of Directors of the 393 companies did a walk through inspection of the facilities in December 2006 with an engineer, the construction contractor, and two representatives of the management company and found everything to be in good order and acceptable. (Ex. 99, page 3, lines 2-5)

42. An application and proposed transfer agreement has been filed with the Public Service Commssion seeking PSC approval transferring the utility assets to the 393 Companies. (Exhibit 20).

43. The current water and wastewater utilities on Big Island are managed by the management company, “Lake Ozark Water and Sewer” (LOWS) under the supervision of Mr. Michael McDuffey. (Ex. 9, page 7, lines 9-14) . LOWS manages approximately 80 other water or sewer systems including some larger and some smaller than Big Island. (Ex. 17, page 8) Mr.

McDuffey is licensed and certified by the Missouri Dept. of Natural Resources in drinking water systems operations and certified as a Class C wastewater operator. LOWS has been certified as a drinking water laboratory and testing lab for wastewater sampling & reporting. (Ex. 17, page 2)

44. The 393 organizers put out a mailing January 8, 2007 to all Big Island residents stating under 393 ownership, no more charges would be assessed for unconnected taps; monthly water rates would increase to \$14 and sewer to \$21 to offset the loss of revenue; and management of the system would remain with the current management company. (Exhibit 102).

45. The January 8, 2007 mailing to all Big Island residents also addressed the issues of **membership** (Mo. Statutes require all 393 customers be considered members); and the issue of **liability** (Mo. Statutes provide no 393 member shall be liable for the debts of the company.) (Ex. 102)

46. On January 29, 2007, fifty (50) of the sixty (60) Big Island utility customers cast ballots favoring transfer of Big Island utility assets to the 393 companies. Five (5) opposed the transfer. (Ex. 9, page 8, lines 21-24).

47. On March 2, 2007 the 393 companies provided notice to Big Island residents their bylaws would be amended to address the issue of individual service lines and would adopt guidelines suggested by PSC personnel. (Ex. 115, CO Schedule 3, beginning bottom of page 2).

Facts: Funding & Reserve Requirements for Unregulated Utilities

48. Under the terms of the proposed transfer agreement, Folsom Ridge would continue to receive a tap fee , collected from pre-existing homeowners who have not yet purchased the right to connect to the system, for a period of 10 years. (Ex. 20, Appendix 1, pages 5-6)

49. Folsom will receive tap fees , \$2,000 for water and \$4,800 for sewer, purchased by a pre-existing homeowner during the 10 year period. (Ex. 20, Appendix 1, page 5-6).

50. The 393 companies will waive all tap fees from new homes constructed by Folsom, or its successor. (Ex. 101, Water Bylaws, p.12 top of page) The 393 Bylaws provide that all homeowners who have paid tap fees, but not connected to the system, may connect to the system anytime they wish at no additional charge, provided they pay for the actual cost of connecting their home to the main.

51. Under 393 ownership, the current water rate of \$10 per month would increase to \$14 per month and the current sewer rate of \$15 per month would increase to \$21 per month. (Ex. 99, page 3, lines 18-19)

52. A proposed budget prepared by the 393 group anticipates first year expenses of \$20,980 and income of \$23,436. (Ex. 99, Schedule A)

53. Missouri DNR has published guidelines for the amount of “reserve funds” which should be maintained by non-regulated utilities. (Ex. 104, page 5, lines 20-21)

54. Operating expenses for the Big Island utilities in 2006 averaged \$1,705 per month [\$20,460 year] and in 2005 monthly expenses averaged \$1,448 per month [\$17,374 year]. (Ex. 99, page 3, lines 21-22) and Financial Statement provided as (Ex. 13, Sch. 1, page 2)

55. As part of the transfer, the 393 companies will receive the bank account of the HOA with a balance of approximately \$7,000 – 9,000. (Ex. 10, page 19, lines 13-16).

56. The HOA began billing customers for utility services in January 2001. (Ex. 12, page 13, lines 22-23.)

57. The HOA Board has been conservative in allowing for revenues in excess of expenses. (Ex. 13, page 4, lines 18-22)

Proposed Conclusions of Law

LAW: Jurisdiction

1. Under RSMo 386.020 (42) , a “Public Utility” includes every “water corporation” and “sewer corporation” as defined within RSMo 386.020. (48) and (58)

“Water Corporations”, as defined under RSMo. 386.020 (58) include every corporation or association owning, operating, controlling or managing any plant or property selling or supplying water , **for gain.**

2. “Sewer Corporations”, as defined under RSMo 386.020 (48) include every corporation or association that owns, operates, controls or manages any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state **for gain**, except for systems with fewer than **twenty-five outlets.**

3. Beginning in 2001 (when sewer connections reached twenty-five outlets) the Big Island homeowners association, as operator and controller of the community sewer & water systems on Big Island, and Folsom Ridge, as owner of the real property on which the water and sewer systems have been constructed, were both water corporations, sewer corporations, and public utilities as defined in RSMo. 386.101 (58), (48), and (42) and therefore subject to the jurisdiction, control and regulation of the Commission **if they were providing services for “gain”.**

LAW: The Meaning of “Gain”

4. Black’s Law Dictionary (Fifth Edition) Defines “Gain” as being synonymous with “Profits” or the “excess of revenue over expenses”. Gain derived from capital is described as value proceeding from the property....”received or drawn by claimant for his separate use, benefit, and disposal.” Id. Quoting: *Commissioner of Internal Revenue v. Simmons*

Gin Co. C.C.A. 10 , 43 F. 2d 327, 328. While the Big Island Homeowners Association did collect monthly fees in excess of expenses, those amounts were retained as reserve funding with no money being paid out to any member of the association. No evidence was presented that Folsom received any monetary payments from the H.O.A. other than those characterized as reimbursement of actual costs or expenses. However, Folsom Ridge owns the majority of undeveloped lots on Big Island and does enjoy increased property values as a result of the installation of the community utilities. If the Commission were to characterize the increase in property values as “gain”, Folsom would be subject to P.S.C. jurisdiction.

5. A Missouri Court concluded “gain” was synonymous with the term “compensation” and suggested any entity providing water service in exchange for a fee or compensation would be subject to P.S.C. jurisdiction. *Osage Water Co. v. Miller County Water Authority*, 950 SW 2d 569, 574 (Mo. App. S.D. 1997). Under this much broader definition of the term “gain”, RSMo 385.250 Missouri Public Service Commission has authority to assert jurisdiction over both Folsom and the H.O.A. as water utilities (subsection 3) , sewer systems (subsection 4) and public utilities (subsection 5), as defined at 386.020.

LAW: Violation for No Certificate

6. Neither the HOA or Folsom have been granted authority, by the Commission, to construct or operate a water or sewer system on Big Island. An earlier application for the appropriate Certificate was withdrawn by the parties when it was decided to instead transfer the utilities to a 393 corporation which , by statute, would not be subject to P.S.C. jurisdiction. Both entities are in a state of flux as they attempt to resolve the various issues brought before the Commission. If the Commission determines either or both of the entities are receiving “gain” as a result of their involvement in the Big Island utilities, the entity profiting from that

involvement would be in violation of RSMo 393.170 by operating a water and sewer system that now serves more than twenty-five households, without the appropriate Certificate.

LAW: Service is Safe & Adequate under RSMo 393.130.1

7. RSMo 393.130.1 requires every water and sewer corporation to provide facilities that are safe, adequate, just, and reasonable. Substantial and competent evidence indicates the quality of the drinking water on Big Island is safe and adequate, and there are no bad discharge reports in connection with the waste water. All parties concur there were problems with the initial construction installations under authority of a Mr. Lees which could have led to unsafe conditions. However, those problem areas were addressed, following Mr. Lees departure, to the satisfaction of DNR personnel and the on site engineer. The record as a whole reflects the water and sewer utility systems are currently properly equipped and providing service well within capacity. Concerns have been expressed by complainants regarding the lack of regulation over the installation of individual customer service lines; however, the Commission lacks authority to address those concerns.

LAW: No Discrimination in Rates & Charges

8. RSMo 393.130.1 requires all charges for water and sewer services be just and reasonable. The evidence indicates all customers receiving water and sewer service on Big Island are currently being charged \$10 per month for water service and \$15 for sewer service by the H.O.A.. All Big Island residents who have purchased the right to tap into the system, but have not connected to the systems, are being charged the uniform rate (availability fee) of \$5 per month for each tap by the H.O.A.. Houses that were in existence prior to the construction of the

facilities were allowed to purchase the right to tap into the water system for a lump sum of \$2,000 and the right to tap into the sewer system for \$4,800 with all of said fees going to the developer to help offset its construction costs. No evidence was presented that any resident was being charged a fee that differed from that of any other similarly situated resident and no evidence was presented to suggest the fees were unreasonable in amount. Therefore it must be concluded the fees charged have been just and reasonable with no discrimination.

LAW: Transfer is Not Detrimental to Public Interest

9. If the HOA or Folsom fall under the jurisdiction of the Commission, an order must be secured from the Commission in order for a transfer of assets to be valid as required by RSMo 393.190.

10. Generally speaking, the courts allow transfers to take place under RSMo. 393.190 if the transfer is not detrimental to public interest. *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W. 2d, 400 (Mo. Banc 1934).

11. The courts are obviously concerned that safe and adequate service to the public is not halted, interrupted or endangered, which is why the Commission has considered such factors as experience, history, financial health, and the ability to operate the assets safely and efficiently. (See *Frimel Water System et al Authority to Transfer Assets and Cease Operations Case No. WM-2006-0459 (Report and Order issued November 7, 2006, 2006 WL 3371567 (Mo. P.S.C.)*

12. The current management company for the Big Island utilities is Lake Ozark Water and Sewer (LOWS) whom the record reflects is licensed, certified, and has a substantial amount of experience in the management of water and wastewater treatment facilities. Since the same

management company will remain in place upon a transfer of assets to the 393 companies, and given the experience and qualifications of the management company, it is logical to believe the operation of the systems will continue to be safe and efficient.

13. The Commission will want to examine the financial health of the new companies prior to approving a transfer. The D.N.R. has adopted guidelines pertaining to appropriate reserve amounts for non-regulated utilities which can be found at www.dnr.mo.gov/services/tmfc-assessment.pdf (page 4) and suggest ten percent of each years operating expenses be placed into an **operating reserve** during the first ten years of operation. In addition, it is recommended an **additional equipment reserve** be maintained in the amount necessary to replace the most expensive piece of equipment within the system.

14. The HOA has been collecting fees since January 2001 (6 years). The record reflects annual expenses in 2005 of \$17,374 and in 2006 of \$20,460. If one were to assume average annual expenses of \$15,000 per year over the past 6 years, the amount of operating reserves at the end of 2006 should have been ($\$1,500 \times 6 = \$9,000$) nine thousand dollars, plus an additional reserve amount representing replacement cost of the most expensive piece of equipment.

15. The 393 companies have no assets prior to the transfer and the record reflects they will be receiving the HOA bank balance of approximately \$ 7,000 - \$9,000 at the time of transfer. It appears the reserve amount contemplated by the transfer agreement will be less than that recommended by the DNR and since the 393 companies will be waiving tap permit fees for the developer and tap fees for pre-existing households for a period of ten years, the only opportunity to make up the shortage is through monthly charges to customers.

16. The Big Island Customers are aware their water and sewer rates will escalate

40%, upon the transfer of assets, to a flat rate of \$14 per month for water and \$21 per month for sewer and the 393 budget contemplates first year expenses of nearly \$21,000 which will leave an overage of approximately \$2,500 for deposit into a reserve account at the end of the year. If more customers are added, the amount available for reserves will escalate.

17. The 393 companies appear to have taken the Complainants concerns into consideration in drafting their bylaws. Their bylaws make it clear residents (like Complainants Orlor and Fortney) who have unconnected taps, will no longer be charged a small monthly availability fee. They have also addressed Complainant Pugh's concerns about individual service lines by agreeing to amend their bylaws to include regulations concerning service lines. The RSMo Chapter 393 statutes themselves address the issues raised by Complainants regarding membership and liability.

18. The Commission may not withhold approval of transfer unless said transfer is detrimental to public interest. *State ex rel Fee Trunk Sewer, Inc. v. Litz*, 596 S.W. 2d 466, 468 (Mo. App. 1980).

Conditions on Transfer

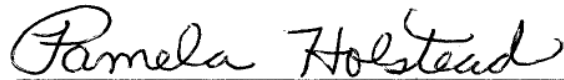
19. The proposed transfer of assets appears to be clearly in the public's best interest with the exception of the one area of possible inadequate reserve funding. If any condition is to be imposed on the transfer, it should be a condition that brings the reserve funding being transferred to the 393 companies in harmony with Missouri Department of Natural Resources standards as outlined in their Financial Capacity Assessment guidelines.

CONCLUSION

The residents of Big Island were promised from the first day of construction that they would one day own and operate the community water and sewer systems installed on Big Island by the developer, Folsom Ridge. At the present time, the developer owns the land and equipment and the homeowners association manages the water and sewer systems. Since the homeowner association allocates “one vote per lot” and the developer owns the majority of the lots, an allegation has been made that it is really the developer who is in control and not the customers. However, it is understandable no developer would be anxious to relinquish control of a water and sewer system, which the developer installed, until the development is complete.

The P.S.C. Staff, in their abundance of experience and wisdom, recommended early on that ownership and control be transferred to the utility customers, under the provisions of RSMo Chapter 393, with written assurances to the developer regarding its ongoing development projects on Big Island. The customers need a clearly defined entity in charge of the water and wastewater systems on Big Island and have followed the P.S.C. staff recommendations toward that goal. The 393 Company bylaws have been drafted to provide the developer with needed assurances associated with Folsom’s growth on Big Island. It is in the best interest of the public and especially Big Island utility customers for the Commission to assert jurisdiction for the limited purpose of approving the transfer to the 393 companies with the only condition being that of adding language to the transfer agreement insuring the amount of reserve funding being transferred to the 393 companies is compatible with DNR Financial Capacity Assessment guidelines.

Respectfully submitted:

A handwritten signature in cursive script that reads "Pamela Holstead". The signature is written in black ink and is positioned above a horizontal line.

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Big Island Sewer Company

Certificate of Service

I hereby certify that a true and correct copy of the foregoing document was sent via electronic mail on this 30th day of April, 2007 to :

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/s/ Pamela Holstead