

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

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| In the Matter of Elm Hills Utility) Operating Company, Inc.'s Request for) a Water and Sewer Rate Increase) | Case No. WR-2020-0275 |
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**REPLY TO ELM HILLS RESPONSE TO OPC'S OBJECTION TO NON-
UNANIMOUS DISPOSITION AGREEMENT AND REQUEST FOR AN
EVIDENTIARY HEARING**

COMES NOW the Office of the Public Counsel ("OPC") and for its *Reply to Elm Hills Response to OPC's Objection to Non-Unanimous Disposition Agreement and Request for an Evidentiary Hearing*, states as follows:

A Hearing in this Case is Necessary

1. "Section 393.150.2 places the burden of proving that an increased rate is just and reasonable on the public utility." *State ex rel. Mo. Gas Energy v. PSC*, 186 S.W.3d 376, 384 (Mo. Ct. App. 2005).
2. As of yet, there is no evidence in the record to support a rate increase as there is currently no evidence in the record at all.¹
3. Therefore there is, as of yet, not sufficient evidence to support any rate increase requested by Elm Hills Utility Operating Company ("Elm Hills").

¹ The Non-Unanimous Disposition Agreement filed into the Commission's electronic filing and information system by the Staff of the Commission and Elm Hills Utility Operating Company is not evidence in and of itself and is also hearsay until the documents supporting it have been sworn to during the course of an evidentiary hearing. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 59 (Mo. banc 1999) ("A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and which depends upon the veracity of the statement for its value.").

4. Normally this would be resolved by having Elm Hills and the Staff of the Commission (“Staff”) present their agreement on the record and provide the necessary evidence to support it (an event colloquially known as an “on the record presentation”).

5. Because the OPC has objected to the Non-Unanimous Disposition Agreement, however, the need for an evidentiary hearing is triggered during which the Company and Staff will present evidence to support their Non-Unanimous Disposition Agreement and the OPC will present evidence against it.

6. To deny the OPC its ability to challenge the evidence presented by Staff and Elm Hills would violate due process. *Harter v. Mo. PSC*, 361 S.W.3d 52, 54 (Mo. App. WD 2011) (“In an administrative proceeding, due process is provided by affording parties the opportunity to be heard in a meaningful manner.”)

7. The Commission cannot simply approve a rate increase in the absence of any evidence to support it, so some degree of evidence must be presented on the record to support the Non-Unanimous Disposition Agreement, and there is no legal rationale that allows Elm Hills to simply present its own evidence while denying all other parties the right to challenge that evidence and present contravening evidence.

8. For this reason, an evidentiary hearing must be held in this case if a rate increase of any amount is to occur.

Elm Hills claim of OPC rule violations are unfounded

9. Much of Elm Hills’ response relies on claims that the OPC violated the small utility rate case rules. These claims are largely unfounded.

10. Elm Hills claims that he OPC violated rule 20 CSR 4240-10.075(8)(G)'s requirement that "not later than ninety (90) days after a small utility rate case is opened, provide to all parties a report regarding whatever investigation it has conducted."

11. However, Elm Hills also acknowledges that the OPC provided the workpapers underlying its independent audit to the Company at the day 90 deadline.

12. These workpapers were the OPC's day 90 report regarding whatever investigation it has conducted up to that point.

13. This behavior is consistent with how the OPC has interpreted and acted on this rule in the past (including in cases that involved Elm Hills' sister subsidiaries) and Elm Hills gave no indication that it believed the disclosure of these workpapers was inconsistent with or insufficient under the rule – either to the OPC or the Commission – at that time.

14. As such, this rule has not been violated.

15. Elm Hills next argues that the OPC violated Rule 20 CSR 4240-10.075(9)(C) by failing to provide a response to Staff's settlement offer.

16. Staff organized a phone call to discuss its settlement proposal on July 27, 2020. Based on discussion during this call, a further phone conference was held on August 13, 2020 to again discuss the Staff's settlement proposal.

17. The OPC was present and actively involved in both of these calls and raised and addressed its issue regarding the return on investment calculation in both of these calls.

18. The audits and workpapers supporting the OPC's position regarding the proper return on investment had been included in its day 90 audit information and so had already been supplied to the Company and Staff. In addition, the proffered change that the OPC had to Staff's settlement proposal to address this issue had no specific audits or workpapers to support it, as it was procedural and not numerical in nature.

19. Once again, at no point during this extensive settlement discussion did Elm Hills indicate to the OPC or the Commission its belief that a rule violation had occurred.

20. Therefore, no such violation did occur.

21. Elm Hills last claim of a rule violation concerns rules 20 CSR 4240-10.075(11)(D) and 20 CSR 4240-10.075(12)(A). The Company's assertion effectively boils down to an argument that the OPC did not provide sufficient explanation as to its objection to the Non-Unanimous Disposition Agreement. Admittedly, the OPC's initial objection that the agreement "will not result in rates that are just or reasonable" was somewhat lacking in specificity.

22. This is why, pursuant to Commission order, the OPC amended its objection to identify specifically that the sole issue the OPC wished to have addressed at the hearing was the "proper calculation of the rate of return Elm Hills Utility Operating Company, Inc. is permitted to recover."

23. To put this in perspective, consider that, in addition to the rate of return calculation, a general rate case will also concern and consider: the proper calculation of rate base, the prudence of plant investment made by the utility, the calculation of depreciation rates, the prudence of incurred expenses including both materials (like

the chemicals used to treat a water system) and labor (like the cost of contractors hired to operate the system), review of the billing systems and costs thereof, review of general overhead costs including the allocation of parent company costs when appropriate, customer satisfaction and service issues, class cost of service analysis, and rate design among many other possible issues. Almost all of these concerns were reviewed by the OPC as part of its internal audits and many were addressed explicitly in settlement negotiations.

24. Despite all of these possible issues, the OPC has raised one and only one issue for hearing: the calculation of the proper rate of return.

25. To suggest this is not sufficiently specific is absurd.

26. Contrary to the picture Elm Hills attempts to paint, the OPC has been actively and extensively involved in this case. Moreover, the OPC's issue and position on same has been discussed with the Company repeatedly and has been addressed as part of several different discovery disputes.

27. Elm Hills has known the exact nature of the OPC's issue for several months and if it truly believed the OPC had failed to comply with the Commission rule in explaining that issue then it should have stated so long before now.

Elm Hills has no justifiable claim for lack of due process

28. Elm Hills' response claims that it will suffer a violation of its due process rights if an evidentiary hearing occurs.

29. The OPC's initial response is to again simply point out that "[s]ection 393.150.2 places the burden of proving that an increased rate is just and reasonable

on the public utility.” *State ex rel. Mo. Gas Energy v. PSC*, 186 S.W.3d 376, 384 (Mo. Ct. App. 2005).

30. Elm Hills’ argument can thus be translated as: it would violate our right to due process if the Commission requires us to present evidence to meet our burden of proof.

31. The irrationality of this position should be apparent on its face.

32. As a utility, Elm Hills is not entitled to a rate increase. It has to prove it needs one and that the rates it seeks are just and reasonable. Moreover, it has complete control over the timing for when it wishes to initiate such a rate increase request. Finally, if the Company believes that the rates approved by the Commission are too low, then it can immediately re-file for another rate increase.

33. Under this scenario, there is no possible justification for stating that a utility is deprived of its due process rights by being forced to present evidence.

34. Further, the basis of the Company’s position for an alleged due process violation lies in the idea that it claims it does not have sufficient time to develop its case. However, that assertion is itself reliant entirely on deadlines imposed by Commission rules that are subject to waiver.

35. In fact, the OPC has already moved to have the Commission waive its rules and extend the timeline of this case.

36. That fact that Elm Hills is complaining that it does not have the time to develop its case due to a Commission rule that opposing counsel is actively seeking to waive is just another sign of the complete irrationality of the Company’s position.

37. Elm Hills has no justification for saying that it will suffer a due process violation if an evidentiary hearing is held in this case (even if it is held before October 30, 2020) and can actively seek (with OPC support no less) any extension of time it feels is necessary to otherwise cure this fictitious due process violation.

Concerns regarding cost to hear this case are mistaken and inappropriate

38. The last argument that Elm Hills has to make concerns the cost to ratepayers to have an evidentiary hearing.

39. Not only is this argument based on false presumptions, it is also massively inappropriate for the utility to make.

40. First, Elm Hills contends that a hearing will dramatically increase costs because they will have to retain an expert to argue rate of return.

41. There is absolutely nothing that says that Elm Hills is *required* to obtain outside experts to argue this issue and the Company's sister subsidiaries have offered expert testimony prepared by employees of the Parent Company (CSWR LLC) to support its position on this issue in the past.

42. Moreover, if the Company spends more on preparing testimony regarding an issue than the issue is worth, the company has effectively admitted the imprudence of its business decision to litigate that issue and should not be allowed to pass those costs on to ratepayers.

43. In a similar manner, the OPC believes that the Company has acted imprudently as to the legal fees it has or intends to incur with regard to this case.

44. The OPC notes that Elm Hills parent company CSWR LLC has retained in-house legal counsel who has been actively engaged in this case and for whom Elm Hills customers are expected to pay.

45. Yet, despite having an actively engaged in-house counsel and despite also utilizing the special staff-assisted small utility rate case rule that is designed to specifically reduce the burden placed on a utility seeking a rate increase, the Company has still retained two separate attorneys from the same firm to supply additional legal counsel.

46. That means that this “small water utility” has had three separate attorneys working a rate case seeking an increase of less than \$550,000 in annual revenues under a rule for which most filers have no legal representation whatsoever.

47. Elm Hills has more legal counsel appearing in this case than do some of the larger gas and electric utilities of this State whose rate increase requests routinely range in the tens of millions of dollars.

48. This is patently unreasonable.

49. If the Company seeks to increase its revenue requirement for this case based on an evidentiary hearing, then the OPC intends to challenge the prudence of the legal fees incurred.

50. Finally, the OPC notes that it (not Elm Hills, nor Staff, nor this Commission) has the prerogative of determining what legal issues it chooses to raise and when. This includes determining when it is cost effective to try an issue and when it is not.

51. The OPC believes that this issue will have an effect on many other cases and that, by trying this issue now, it has the potential to save the public at large more than the cost of the hearing.

52. The Commission does not have the authority to deny the OPC its right to seek legal recourse on behalf of its clients based on some assumption of cost and it is **massively inappropriate** for Elm Hills to claim otherwise.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission accept this *Reply to Elm Hills' Response to OPC's Objection to Non-Unanimous Disposition Agreement and Request for an Evidentiary Hearing*, order an evidentiary hearing to be held in this case, and take all such other actions as it deems reasonable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this twenty-second day of September.

 /s/ John Clizer