

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held by telephone and internet audio conference on the 28th day of October, 2020.

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

ORDER GRANTING MOTION FOR PRODUCTION

Issue Date: October 28, 2020

Effective Date: October 28, 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) filed its Motion for Order Regarding the Production of Documents (Motion). On September 25, Elm Hills responded. On September 28, OPC replied to Elm Hills' response. The Staff of the Missouri Public Service Commission (Staff) did not file any response.

OPC seeks certain books, accounts, papers, or records from US Water Systems LLC, an unnamed investment firm,² Sciens Water Opportunities Fund LP, Tom Rooney, John Rigas, and Daniel Standen (collectively "The Group").³ OPC's concern generally is with the flow of investment capital and to what extent that capital is funded with debt. OPC believes this information about the upstream ownership relates to the capital structure of

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

² The name of the firm is currently being treated as confidential and will not be stated in this order. See OPC's Motion, para. 12.

³ OPC has listed the items sought in Attachment K of its Motion, which is attached to this order with the confidential firm name redacted.

Elm Hills' parent company, and consequently Elm Hills. OPC expressly states its Motion is made under the statutory authority of Section 386.450, RSMo (2016)⁴, and not the Commission's discovery rule, 20 CSR 4240-2.090.

Elm Hills responded with several objections, summarized below.

1. The entities from which OPC seeks information are out-of-state and not parties to the case.
2. The records sought by OPC are not from a jurisdictional public utility.
3. OPC must exhaust its administrative remedies in enforcing the subpoenas it already has requested be issued before exercising a separate statutory grant of authority.
4. None of the documents or information sought by OPC is in the possession of Elm Hills.
5. The information sought is not relevant to the underlying case.
6. The jurisdiction-over-affiliates statute, Section 393.140(12), RSMo, keeps operations of certain qualifying non-utility affiliate companies away from the Commission's scrutiny.
7. The Commission does not have personal jurisdiction over The Group.

Many of Elm Hills' objections address OPC's motion under traditional discovery rules. However, OPC specified that it filed its motion pursuant to a separate statutory authority and not under the rules of discovery. Therefore, the governing statute of the OPC's Motion is Section 386.450, RSMo, which is broader than the general right to discovery allowed under Missouri's rules of civil procedure. The Commission has

⁴ Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in the year 2016.

consistently interpreted this statute broadly, given the unique grant of investigative power bestowed upon OPC and the Commission by the Missouri General Assembly via this statute.⁵

Section 386.450, RSMo, unambiguously allows for the production of out-of-state records (1). Section 386.450, RSMo, has no requirement that the subjects of OPC's investigation be parties to a case, in fact it states "any corporation, person or public utility" (1). Section 386.450 also has no requirement that the subjects be jurisdictional utilities, as it references "any corporation, person or public utility" (2). Further, Section 386.450 imposes no requirement of exhaustion of remedies (3). Section 386.450 is set out in full below:

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.

⁵ Order Granting the Office of the Public Counsel's Motion to Compel, issued June 26, 2007, File No. WR-2007-0460, p. 4 stating, "Section 386.450 allows OPC considerable latitude when making discovery requests. The statute does not place any requirement on OPC that any case exist in order for it to obtain the books, accounts, papers or records kept by any corporation upon a request and demonstration of 'good cause'." and p. 5, "Section 386.450, RSMo does not place a time restriction on such requests; Order Denying Objection to Order and Motion to Dismiss of Universal Utilities, Inc., and Nancy Carol Croasdell, issued July 15, 2008, File No. WC-2008-0331, p. 2 an emphasized finding that the statute applies to any corporation, not just public utilities; Order Compelling Universal Utilities and Nancy Carol Croasdell to Produce Books, Accounts, Papers or Records, issued January 3, 2008, File No. WC-2008-0079, p. 1, stating Section 386.450 is not a discovery statute and there is no requirement to find relevance to a specific case; Order Directing Ameren UE to Produce Documents Sought by Public Counsel, issued February 25, 2009, File No. EO-2009-0126, affirming that OPC need not make a request under the statute in connection with any formal case; Order Concerning Motion to Compel, issued December 2, 2003, File No. WR-2003-0500, p. 11, acknowledging the statute includes non-parties; Order Regarding Motion to Quash Subpoena, issued January 22, 2014, File No. WR-2013-0461, affirming the statute's grant to the Commission to require production of information from any corporation, person or public utility; Order Denying Application for Rehearing, issued May 17, 2012, File No. WR-2012-0299, p. 1, affirming the statute gives broader discover authority than the general right to discover relevant information; Order Compelling Answers, issued January 5, 1994, File No. WO-94-192, p. 2, determining that use of the statute does not require an underlying case.

Elm Hills' objection that the sought information is not in its possession or control is not well taken as the documents are not being sought from Elm Hills (4).

Section 386.450, RSMo, does not express a relevance requirement. Nevertheless, the Commission will address relevance as OPC's Motion is made within the context of this file and not a separate investigation. Relevance can be established by a showing of the connection of OPC's requested information to this file, which is a rate case. Rate cases as a matter of course involve apportionment of capitalization, which involves assessments of capital structure. The Commission is expressly required to examine the dealings of regulated entities with their unregulated affiliates, and specifically to "inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses".⁶ Thus, OPC's inquiry into the upstream ownership regarding capitalization and debts is relevant to the apportionment of capitalization between Elm Hills and its owners (5). While Elm Hills argues this same statute, Section 393.140(12), RSMo, protects the upstream ownership as those entities are "substantially kept separate and apart", Elm Hills' argument fails in that the inquiry as to whether these other corporate entities are substantially kept separate and apart must necessarily precede a determination whether the entities are substantially kept separate and apart (6).

Lastly is Elm Hills' argument that the Commission does not have personal jurisdiction over The Group. It contends that Section 386.450, RSMo, must be viewed in conjunction with the limits imposed by other statutes describing the Commission's jurisdiction, and viewed in conjunction with the idea that the State's jurisdiction ends at its borders absent some minimum contacts to the state.

⁶ Section 393.140(12), RSMo.

Elm Hills is a “water corporation,” “sewer corporation” and “public utility” as defined in Sections 386.020(59), (49), and (43) RSMo, respectively. As such Elm Hills is subject to the personal jurisdiction of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes. The definitions of both water and sewer corporations include those owning, operating, controlling or managing any water or sewer system. Thus far, the ownership and corporate structure surrounding Elm Hills can be summarized as follows:

- Elm Hills is owned by Elm Hills Utility Holding Company, Inc.,
- which is owned by CSWR LLC,
- which is managed by Central States Water Resources, Inc.
- which has Tom Rooney, John Rigas, and Daniel Standen as three members of its Board of Directors.
- CSWR LLC is a wholly owned subsidiary of US Water Systems LLC,
- which was created on July 30, 2018, by Sciens Capital Management LLC.
- US Water Systems LLC was formed by investment funds affiliated and managed by the unnamed investment firm (see Footnote 2 *supra*).
- The unnamed investment firm was created on July 30, 2018.
- Sciens Capital Management LLC launched Sciens Water Opportunities Fund in 2018 to invest in the water sector, through the formation and development of companies.
- Sciens Water Opportunities Fund lists CSWR LLC among three companies in its portfolio.

- Sciens Water Opportunities Fund lists John Rigas as Chairman and CEO, Daniel Standen as Partner, and Tom Rooney as Chairman, Operating Committee.

In spite of the multi-layered nature of the corporate relationships, close ties are seen between the managing corporation of the ownership corporation of the holding company that owns Elm Hills (Central States Water Resources, Inc.) and the highest level of upstream ownership (Sciens Water Opportunities Fund) with the sharing of three board members. Corporate public relations statements are normally viewed with a critical eye, but it is probative that the Sciens Water Opportunities Fund website states “Sciens works closely with the management teams of its portfolio companies supporting them in achieving their strategic goals.” Based on the appearance of close and interwoven ownership and management ties of The Group to Elm Hills, the Commission finds it has personal jurisdiction over The Group as potential owners and managers in direct control over Elm Hills for the limited purposes of OPC’s request for production pursuant to Section 386.450, RSMo (7).

The Commission turns to the good cause requirement of Section 386.450, RSMo. OPC argues two facts support a finding of good cause: 1) the inability to secure the information through conventional means; and 2) the importance of the information sought as it relates to the capital structure of Elm Hills. Elm Hills argues that the first OPC argument for good cause fails as OPC has offered no proof of its inability to secure the information, and in fact has not sought to enforce subpoenas it had previously requested in this case. The Commission agrees that OPC’s inability to gain the information is not a

proper foundation for good cause due to OPC's failure to follow-up on other avenues, such as its previously issued subpoenas.⁷

However, the Commission agrees with OPC's second rationale for good cause, the importance of the information. The Commission is statutorily required to ensure that Elm Hills' rates are just and reasonable.⁸ The Commission's setting of just and reasonable rates includes an evaluation of the capital structure (funding) of Elm Hills. A utility's capital structure is comprised of debt and equity. Capital structure is typically stated as the ratio of debt compared to equity that make up a company's total capital (e.g. a company may have \$60 million in debt, and \$40 million in equity, equaling total capital of \$100 million, with the capital structure ratio of the utility being sixty percent debt to forty percent equity).

The costs for debt and equity are then applied to the capital structure ratio, which produces a weighted cost for each (e.g. ten percent cost of debt multiplied by the capital structure's sixty percent debt equals a weighted cost of debt of six percent). Thus, the weighted cost of capital is the addition of the weighted cost of debt plus the weighted cost of equity.

In the above example (a utility with a sixty-forty debt to equity capital structure ratio), a ten percent cost of debt produces a weighted cost of debt of six percent. However, the cost of equity is typically higher. The cost of equity reflects the competing investment choices available to a potential owner, and the return necessary to attract an equity

⁷ This is distinct from the Commission's finding in this order that there is no requirement of exhaustion of remedies within Section 386.450, RSMo. Here, OPC is directly claiming that good cause exists *because* it could not access the information, when the pleadings clearly demonstrate OPC has requested subpoenas, but not sought to further enforce them.

⁸ Section 393.130, RSMo.

investment. When the weighted costs of debt and equity are combined, the total weighted cost of capital is essentially the equivalent of a fair rate of return.⁹

There is an inherent difference in the cost of debt compared to the cost of equity, and leveraging is when a utility is funded by debt in addition to equity provided by its stockholders.

Double leveraging is an extension of the leveraging concept to a parent-subsidary corporate relationship. For example, Company A is an operating utility financed partly with debt capital and partly with equity capital. It uses leverage as explained above. However, the common stock of Company A is owned by Company B, the parent company. Company B obtained the funds it invested in the common stock of Company A by raising its own capital through the sale of stock and from a debt issue. Thus Company A enjoys its own leverage factor plus the leverage factor of Company B. This is the essence of the meaning of double leverage.¹⁰

The court continued:

If the cost of capital to the utility is considered without regard to the double leverage enjoyed in a parent subsidiary relationship, an *excessive return* to the ultimate common *stockholders* could result *at the expense of utility ratepayers* (italics in original).¹¹

Thus, establishing just and reasonable rates without excessive earnings necessarily includes combating double leveraging. Addressing double leveraging means correctly understanding the capital structure of a utility and its owners. To appropriately understand the capital structure therefore requires an understanding of the capital structure of the upstream ownership. Multi-layered corporate relationships with holding companies, managing companies, investment partnerships and other corporate entities

⁹ State ex rel. Associated Natural Gas Company v. Public Service Comm'n, 706 S.W.2d 870, 875 (Mo. App. W.D. 1985).

¹⁰ State ex rel. Associated Natural Gas Company v. Public Service Comm'n, 706 S.W.2d 870, 876 (Mo. App. W.D. 1985)(internal citations omitted).

¹¹ State ex rel. Associated Natural Gas Company v. Public Service Comm'n, 706 S.W.2d 870, 876 (Mo. App. W.D. 1985).

make it difficult for the Commission to know where the capital funding is coming from. Knowing the source and type of capital directly addresses the risk that the capital structure is being manipulated to increase equity which in turn unjustly increases rates.

Therefore, the Commission finds that OPC's motion is relevant to the underlying case. The Commission further finds good cause exists in carrying out OPC's (and the Commission's) statutory duties with respect to Elm Hills and the apportionment of its capitalization, earnings, debts, and expenses.

The Commission notes that OPC's request included no time limit for delivery and no arrangement for the delivery of the files. The Commission will set these terms and also allow for a reasonable amount of time to produce the information sought by OPC.

THE COMMISSION ORDERS THAT:

1. OPC's Motion is granted.
2. Sciens Water Opportunities Fund LP, US Water Systems LLC, an unnamed investment firm (see footnote 2 *supra*), Tom Rooney, John Rigas, and Daniel Standen shall produce the books, accounts, papers, and records listed in Attachment K of OPC's Motion (attached hereto in redacted form) at the OPC's offices at 200 Madison Street, Suite 650, Jefferson City, Missouri 65101, no later than on November 18, 2020, at 10:00 a.m.
3. Although service by mail is acceptable pursuant to Section 386.490.1, RSMo, and 20 CSR 4240-2.080(16)(B)2, the Data Center shall serve this order by mailing it via certified mail with a copy of the unredacted Attachment K to the following entities at their last known address: Sciens Water Opportunities Fund LP; US Water Systems LLC; an unnamed investment firm (see footnote 2 *supra*); Tom Rooney; John Rigas; and Daniel

Standen.

4. Upon each mailing, the Data Center shall complete a certificate of service and file it in EFIS under this file.

5. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in dark ink that reads "Morris L. Woodruff". The signature is written in a cursive style.

Morris L. Woodruff
Secretary

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

Hatcher, Regulatory Law Judge

Books, accounts, papers, or records the OPC Seeks

Regarding US Water Systems LLC:

1. Documents that fully define the organization structure which may include but are not limited to the LLC agreement, membership agreement, operating agreement, and/or management agreement.
2. Minutes, presentations, financial reports, financial statements and/or other handouts provided pursuant to any organizational meetings.
3. Federal and State income tax returns for 2018 and 2019. If US Water Systems LLC does not file separate tax returns, then provide the consolidated tax return for the entity that files returns on behalf of US Water Systems LLC.
4. General ledger since July 30, 2018.
5. Audited and unaudited quarterly and annual financial statements (to include, but not be limited to a balance sheet, income statement and a cash flow statement) for US Water Systems LLC since July 30, 2018. If US Water Systems LLC does not create financial statements, then please provide the financial statements of the entity that reports the financial performance of US Water Systems LLC to its equity owners.
6. Documentation of all debt instruments issued by US Water Systems LLC.
7. Financial reports since July 30, 2018, provided to US Water Systems LLC's equity members.

Regarding [REDACTED] [REDACTED] [REDACTED] and any entities managed by [REDACTED]
[REDACTED]:

1. List of entities managed by [REDACTED] and an explanation of the purpose for such entities.
2. Documents that fully define the organization structure which may include but are not limited to the LLC agreement, membership agreement, operating agreement, and/or management agreement.
3. Minutes, presentations, financial reports, financial statements and/or other handouts provided pursuant to any organizational meetings.

4. Federal and State income tax returns for 2018 and 2019. If [REDACTED] and the entities it manages do not file separate tax returns, then provide the consolidated tax return for the entity that files returns on behalf of [REDACTED] and/or the entities it manages.
5. General ledger since July 30, 2018.
6. Audited and unaudited quarterly and annual financial statements (to include, but not be limited to a balance sheet, income statement and a cash flow statement) for [REDACTED] and the entities it manages since July 30, 2018. If [REDACTED] and the entities it manages do not create financial statements, then please provide the financial statements of the entity that reports the financial performance of [REDACTED] and/or the entities it manages to its equity owners.
7. Documentation of all debt instruments issued by [REDACTED] and the entities it manages.
8. Financial reports since July 30, 2018, provided to investors of [REDACTED] and the entities it manages.

Regarding Sciens Water Opportunities Fund Lp and any other intermediate funds between Sciens Water Opportunities Fund Lp and its indirect ownership interest in CSWR LLC or Fresh Start Venture LLC:

1. Statement of assets and liabilities
2. Schedule of investments
3. Statement of operations
4. Statement of changes in partners' capital
5. Statement of cash flows
6. Notes to financial statements
7. 2018 and 2019 State and Federal Tax Returns

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

**WITNESS my hand and seal of the Public Service Commission,
at Jefferson City, Missouri, this 28th day of October, 2020.**




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

October 28, 2020

File/Case No. WR-2020-0275

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Unnamed Investment Firm
CONFIDENTIAL

Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.