BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Water and Sewer LLC for an Increase in its Rates and Charges for Sewage Disposal Service	)))	CASE NO. 11-4509-ST-AIR

POST-HEARING BRIEF OF
INTERVENOR, THE VILLAGE OF RICHFIELD, OHIO

Intervenor, the Village of Richfield, Ohio, by and through the undersigned, hereby submits its post-hearing brief relative to the evidentiary hearing held on May 10, 2012, in this matter.

I. Introduction.

This proceeding involves a neighborhood brought to the brink of crisis by sewer rates that have exploded in the last 12 years. The rate increase proposed by Water and Sewer LLC ("W&S") at issue in this proceeding would increase rates from $1,330.14 per year to $1,836.66 per year, as opposed to $280 per year in 2000 when W&S acquired the utility. The very small base of customers in the Briarwood neighborhood cannot continue to pay these rates. Residents' testimony at the local public hearing illustrates the crippling effect of the combination of the extreme rates and the drop in property values. It is incumbent on the Commission to ensure a just and reasonable sewer rate with due regard to the totality of the facts and circumstances in this case.

II. The rate increase sought by W&S would be unjust and unreasonable for its customers.

W&S, the applicant in the within matter, is a small, privately-owned utility with a total customer base of only 77 residential dwellings ("Briarwood Residents"), most of which are

located within the corporate boundaries of the Village of Richfield. In this matter, W&S seeks its third sewer rate increase since acquiring the sewer utility in 2000.

When W&S acquired the facility, the average sewer rate for a W&S customer was approximately $280 per year. In its 2003 rate case (03-0318-WS-AIR), W&S was permitted an annual rate of $1,057.20, representing an increase of 277.5%. In its 2008 rate case (08-227-WS-AIR), the rate was further increased by 25.84%, to $1,330.14 annually. Now, in the present rate case, W&S seeks to increase its rates by another 40%, to $1,863.66 per year. (See Supplemental Testimony of William Ross Willis, filed May 3, 2012, at p.4, lines 1-15; Staff Exhibit 4.) The rates sought by W&S are so unreasonably high that they are patently unconscionable.

To put the rates proposed by W&S in this proceeding into context, residents of the Village of Richfield that receive sewer service from the Village on a flat rate basis pay approximately $679 annually. (Evidentiary Hearing Transcript at p. 79, lines 18-23.) Residents charged on the basis of usage pay an average of $433 per year. (Id., at lines 8-15.) Furthermore, as of 2009, W&S's customers were paying $1,330.14 annually versus the State of Ohio annual average of $519, according to the 2009 Ohio EPA Sewer and Water Rate Survey, or 256% of the State average. (See 2009 Ohio EPA Sewer and Water Rate Survey, submitted within the written public comment of Summit County Council Member Nick Konstandaras, Sr., filed on April 17, 2012.)

The extreme rates *currently* charged by W&S constitute a real and substantial financial hardship to the Briarwood Residents. Further, the *proposed* rates, approximately 40% higher than the current rates, would greatly exacerbate an already untenable situation. Moreover, the disparity between the utility rates of the Briarwood Residents and other Richfield residents has a substantial and detrimental impact on the marketability and value of the Briarwood Residents'

homes. At the public hearing on this matter, held on April 11, 2012, one Briarwood Resident articulated the hardship incurred by the residents of the Briarwood community:

> I do want to note the financial hardship that this utility has inflicted on this neighborhood. It goes far beyond the 40 percent rate increase being requested and the exponential increases that have taken place since Mr. Kertesz purchased the utility solely for a penny. Each rate increase negatively impacts the value of our homes. During the public hearing for the last rate increase, I indicated that the rate increase at that time would negatively impact my home value by at least $15,000. Based on recent home sales, that estimate has proved to be accurate. Potential home buyers in our neighborhood very quickly learn that they can take the money they would use to pay these exorbitant sewer rates to buy a larger home a few miles down the street, where average sewer rates are available. Based on my calculations, our home values will deteriorate by an additional $20,000 if this rate request is approved.

(Testimony of Dean Uher, Public Hearing Transcript, filed April 20, 2012, at pp. 15-16.)

Under Ohio Revised Code Section 4909.15(E), when the Commission determines that the rate to be charged under a requested rate increase is unjust or unreasonable, the Commission may fix and determine a just and reasonable rate with due regard to all such other matters as are proper, according to the facts of each case, as provided therein. The Village of Richfield submits that public policy considerations are among the matters of which the Commission may take note; and further submits that public policy considerations require that the just and reasonable rate approved by this Commission must be substantially less than the rate requested by W&S.

III. Given the exorbitant sewer rates, the rate of return for W&S should be minimized.

In its Report, Staff recommended a rate of return between 9.5% and 10.5%, as the "generic" rate of return for small utility companies (of which there four in Ohio). (Evidentiary Hearing Transcript at p. 181, line 20 to p.185, line 45.)[1] However, the dire facts of this situation necessitate that a less "generic" approach be taken with respect to determining a reasonable rate of return. Specific consideration and due regard should be given to the fact that the Briarwood

[1] Staff indicated that it would be comfortable with a rate of return "anywhere in that range." (Hearing Transcript at p. 181, line 20 to p. 182, line 6.)

residents are already paying the exorbitant amount of $1,330.14 annually for sewer service and that the increase sought by W&S would result in sewer rates exceeding $1,800 annually - nearly three times as much as other Village residents.

As noted in Staff's Report, a regulated company should be able to cover operating expenses and capital costs incurred under prudent, honest and efficient management. (Staff Report, filed February 22, 2012, at p.8; Staff Exhibit 1.) In this case, the testimony of Ross Willis was that W&S has been utterly unable to contain its costs of doing business and that W&S is not financially sustainable or viable in its present form. (Hearing Transcript at p. 176, line 20 to p. 177, line 15; Prefiled Supplemental Testimony of William Ross Willis, filed May 3, 2012, at p. 4, lines 12-15; Staff Exhibit 4.) This despite sewer rates that, as of 2008, have been hiked to nearly five times their level in 2000 (and which would further increase, if W&S's proposed rates were approved, to nearly seven times their level in year 2000).

Moreover, Staff cites the United States Supreme Court decisions in the Bluefield and Hope cases for the proposition that a utility is not entitled to a speculative return.[2] (Staff Report, filed February 22, 2012, at p. 8; Staff Exhibit 1.) As pointed out by Briarwood resident Dean Uher at the local public hearing, it may be argued that the W&S rate cases have not properly taken into account the fact that the W&S sewer operation is, in many ways, wholly speculative, considering the desire of its owners to develop 125 acres of adjacent land owned by its sister company RFRA. Indeed, at the hearing, Kenneth Rosselet, Jr., witness for W&S, alluded to the expectation that the W&S facility would eventually serve customers located on the adjacent land, following its development. (Evidentiary Hearing Transcript at p. 39, lines 1-6.) W&S's current

[2] *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm. Of W.Va*., 262 U.S. 679 (1923) and *Fed. Power Comm. v. Hope Natural Gas Co*., 320 U.S. 591 (1944).

customers, the residents of Briarwood, should not be forced to continue to subsidize this speculative development venture that may never come to fruition.

Under the totality of the circumstances, the Commission should minimize the rate of return applied in determining the rate to be approved in this case.

IV. One-half of the insurance expenses sought by W&S should be allocated to unregulated entities who are named insureds, co-equal with W&S, on the insurance policies at issue.

The evidence presented at the evidentiary hearing established that W&S paid the premiums on two insurance policies: (1) a "pollution policy;" and (2) a "commercial package policy," which has several components including general liability coverage. (Evidentiary Hearing Transcript at p. 17, lines 4 – 22; p. 30, line 10 to p. 31, line 5.) Both policies have *two* named insureds. The first named insured is W&S; the second is an unregulated entity known as Richfield Furnace Run Associates ("RFRA"). RFRA is the owner of the land upon which W&S's utility sits. (Evidentiary Hearing Transcript at p. 18, lines 7-9.) The two entities are closely related; indeed, the very same people who are the owners of W&S are the members of RFRA. (Evidentiary Hearing Transcript, at p. 18, lines 19-22.) Again, RFRA owns a large, 125-acre tract of land adjacent to the Briarwood neighborhood service area, located in Richfield Township outside the corporate boundaries of the Village of Richfield, which it seeks to develop.

It is apparently undisputed that RFRA benefits from coverage under the insurance policies. Indeed, Mr. Rosselet, expert witness for W&S, admitted that RFRA receives a benefit. Thus, the Staff properly allocated some of the insurance premium costs to unregulated entities (i.e., RFRA) based on the insurance benefit shared by W&S and RFRA.

Mr. Rosselet attempted to analogize RFRA's being a named insured on the policy to the situation in which a mortgagee is listed as an additional insured on a homeowners' policy.

(Evidentiary Hearing Transcript at p. 31, line 15 to p. 32, line 5.) But RFRA's position is very different from a mere mortgagee in that RFRA, as the owner of the land upon which the utility sits, could directly cause liability by being a property owner and could be held directly responsible for damages. By contrast, a mere mortagee would not be in a position to cause liability and would not likely be held directly responsible for damages.

Recognition of the possibility that RFRA could be named as a defendant in a lawsuit, along with the need for a defense and the possibility of direct liability for damages, was discussed by Mr. Rosselet in his direct testimony filed with the Commission:

> …the utility facilities owned by Water and Sewer were acquired from the previous owner as a part of a larger transaction …. [A]t closing, Water and Sewer, which was created to operate the utility facilities as a public utility, took title to the utility facilities, RFRA took title to the real property, and the total purchase price was allocated between the two companies. … [I]n view of the manner in which the interests were transferred, the management of W&S and RFRA foresaw the possibility that **RFRA could be named as a defendant in an action for damages** in connection with the sewer operations, notwithstanding that Water and Sewer was the owner of the sewer facilities. Thus, RFRA was also identified as a named insured on the Water and Sewer [sic] **to provide RFRA with protection in the event it were to be named in such an action**.

(Emphasis added.) (Direct Testimony of Kenneth Rosselet, Jr., filed March 23, 2012, at p.12, line 6 to p. 13, line 4.)

W&S also argues that the cost of the insurance policies was not increased when RFRA was "added" to the pollution policy some time after it was originally issued. Nonetheless, it is clear from the testimony presented at the hearing that RFRA was intended to be on the policy from the beginning and that not including RFRA initially was a mere oversight. (Evidentiary Hearing Transcript at p. 26, lines 1-25.) Therefore, it would be logical to conclude that the cost of coverage for RFRA's real property ownership was already factored into the premium calculation from the out-set as well. Thus, it is not surprising that there was no need to change

the premium when the paperwork was corrected to reflect what had apparently been the intent of the parties to that insurance transaction all along.

Moreover, on the basis of the "oversight" or "clerical error" theory, it could just as easily be argued that had W&S, rather than RFRA, been inadvertently omitted from the policy, subsequently adding W&S to the policy as a named insured would also not have had any impact on the premium cost. Certainly, W&S would not argue that such a scenario should mean that the entire cost of the policy would be properly allocated to the unregulated entity. Common sense and the co-equal receipt of the benefits of insurance coverage by two entities, one regulated and one unregulated, clearly support a 50-50 allocation of insurance expense.

In accordance with the Staff's recommendation, therefore, the Commission should find that one-half of the insurance expense should be allocated to RFRA.

V. Amortized costs from prior rate cases should be excluded from the allowable expense, as recommended in the Staff Report.

In the Staff's Report, the Staff excluded from the adjusted test year O&M expense four specific expense amortizations approved in W&S's prior rate cases which have not yet expired, as follows:

a. Sludge removal: 10 year amortization of $7,122 approved in 2003 rate case, expiring on or about December 1, 2014;

b. Sludge management plan: 10 year amortization of $3,700 approved in 2003 rate case, expiring on or about December 1, 2014;

c. Emergency septic hauling: 10 year amortization of $25,000 approved in 2008 rate case, expiring on or about May 27, 2019;

d. Road repair: 4 year amortization of $14,920 approved in 2008 rate case, expiring on or about May 27, 2013.

(Evidentiary Hearing Testimony at p. 41, lines 11-24.)

The Village of Richfield supports the Staff's exclusion of the amortizations, particularly the three amortizations that will expire in 2013 and 2014 (i.e., the sludge removal, sludge management plan, and the road repair amortizations). Of course, it is not known when, or even if, W&S will initiate its next rate case. There is additional uncertainty for such a timeframe in light of the Village of Richfield's intentions and efforts to work with W&S to effectuate a take over of the sewer service for the Briarwood neighborhood, allowing W&S to exit the sewer business entirely.[3] (See Evidentiary Hearing Transcript, at p. 55, lines 9-17; See Joint Exhibit 1, "Joint Stipulation of Intent of Water & Sewer LLC and the Village of Richfield.")

If the Commission were to allow old amortizations that will expire within the next 1 to 2 1/2 years to continue to be included in W&S's rate base, there would be a substantial risk of over-recovery of those expenses to the detriment of the ratepayers. In its prior opinions, the Commission has recognized the need to "minimize the risk that ratepayers will be subject to rates which have costs built into them that have already been recovered." See Columbus and Southern Ohio Electric Company, Case No. 77-545-EL-AIR (March 31, 1978), at p. 24.

In order to avoid the risk of over-recovery from the continuing amortizations and in light of the excessively high sewer rates already charged by W&S, the Commission should, at a minimum, exclude from the new rate the three amortizations that will expire in 2013 and 2014.

VI. CONCLUSION

As previously stated, the rate increase proposed by W&S would increase rates from $1,330.14 per year to an unconscionable $1,836.66 per year. The Village of Richfield has spent, or committed to spend, in excess of $100,000 to date to study a long-term solution to the Briarwood sewer problem, involving the construction of two pump stations and 7000 feet of

[3] See Hearing Testimony of Said AbouAbdallah, testifying that the Village has contracted for the design of Village sewer facilities for the Briarwood neighborhood at a cost of $65,000. (Evidentiary Hearing Transcript at p. 70, lines 1-4.)

sanitary sewer force main pipeline. The Village is committed to exploring this option with the owners of Water & Sewer, who have stated that they would like to be out of the sewer business. The perpetuation of an exorbitant sewer rate for such an unhealthy and unsustainable business as W&S is improper - and will not help to facilitate a long-term solution.

Based on the evidence presented in this matter and the Commission's authority under Ohio Law, the Village of Richfield respectfully submits that the Commission should exclude previously-approved expense amortizations from allowed O&M expense and should further allocate one-half of the insurance expenses submitted by W&S to its unregulated sister company, RFRA. In addition, given the specific and extraordinary facts of this case, the Commission should not apply the "generic" rate of return for small utilities, but should instead utilize an appropriate and significantly reduced rate of return, in order to diminish the proposed increase to the maximum possible extent. Finally, the Village of Richfield respectfully urges the Commission to take all further steps necessary to ensure that the customers of W&S do not incur further substantial increases to the already-exorbitant rates they pay for sewer service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of The Post-Hearing Brief of Intervenor, the Village of Richfield was served upon Barth E. Royer, Esq., counsel for Water and Sewer LLC, Bell and Royer Co., L.P.A., 33 South Grant Avenue, Columbus, Ohio 43215-3900 by regular U.S. mail, postage prepaid, this 1st day of June, 2012.

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Summary: Brief Post-Hearing Brief of Intervenor, The Village of Richfield, Ohio electronically filed by Ms. Leslie G. Wolfe on behalf of The Village of Richfield