

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

The Staff of the)	
Missouri Public Service Commission,)	
)	
Complainant,)	
)	<u>Case No. WC-2014-0101</u>
v.)	
)	
Port Perry Service Company,)	
)	
Respondent.)	

**MOTION TO ABROGATE
ORDER OF DEFAULT AND ORDER AUTHORIZING STAFF TO SEEK PENALTIES
AND APPROVE UNANIMOUS STIPULATION AND AGREEMENT**

COME NOW Staff of the Missouri Public Service Commission ("Staff") and Port Perry Service Company ("Port Perry"), by and through their respective undersigned counsel, and file this Motion with the Missouri Public Service Commission ("Commission") to state as follows:

1. On October 16, 2013, Staff filed a *Complaint* against Port Perry before the Missouri Public Service Commission ("Commission") stating that Port Perry is a water and sewer company operating under a Certificate of Convenience and Necessity granted to it by the Commission. Staff's *Complaint* further stated that Port Perry had failed to cure deficiencies in its calendar year 2011 annual report and failed to submit its calendar year 2012 annual report.

2. On October 17, 2013, the Commission issued notice of Staff's *Complaint* to Port Perry and directed Port Perry to file an answer no later than November 16, 2013. Port Perry failed to file an answer.

3. On December 4, 2013, the Commission issued its *Order Of Default And Order Authorizing Staff To Seek Penalties* (“*Default Order*”), in which the Commission deemed the averments in Staff’s *Complaint* admitted, entered an order of default against Port Perry and authorized Staff to seek penalties in circuit court against Port Perry.¹

4. Subsequent to the *Default Order*, Port Perry hired the undersigned counsel of the firm Brydon, Swearingen & England, and began discussions with Staff’s counsel.

5. The Commission has the statutory authority to change or abrogate its *Default Order* pursuant to Section 386.490.2, RSMo (Supp. 2012) that states:

Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or *until changed or abrogated by the commission*, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

(emphasis added). See *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 29-30 (Mo. banc 1975)(Court recognized the Commission’s authority pursuant to Section 386.490, RSMo to amend or abrogate a prior order after it becomes final.)

6. Staff and Port Perry desire to settle the issues raised in the *Complaint* by entering into the Stipulation and Agreement (“*Agreement*”) attached hereto. Port Perry has stated to Staff that it is working to improve its internal corporate systems and procedures to ensure timely filings in the future. Staff and Port Perry believe the

¹ On the same date the Commission issued a subsequent order correcting the order finding Port Perry in default to authorize the Commission’s General Counsel, rather than Staff, to seek penalties in circuit court.

Agreement is in the public interest because it will provide funds to the Missouri school fund, eliminates the need for further prosecution of this case, leads to a broader resolution of issues and provides a reasonable and just solution to resolve the matters raised in the *Complaint*. Therefore, Staff and Port Perry respectfully recommend the Commission abrogate the *Default Order* and reopen this matter to consider and approve the *Agreement* attached hereto.

WHEREFORE, Staff and Port Perry respectfully request the Commission abrogate its *Order Of Default And Order Authorizing Staff To Seek Penalties* and reopen this matter to consider and approve the *Stipulation and Agreement* attached hereto.

Respectfully submitted,

/s/ Jennifer Hernandez

Jennifer Hernandez #59814
Alex Antal #65487

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Attorney for Port Perry Service Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically mailed to all counsel of record this 24th day of January, 2014.

/s/ Jennifer Hernandez

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STIPULATION AND AGREEMENT

COME NOW Staff of the Missouri Public Service Commission ("Staff") and Port Perry Service Company ("Port Perry"), by and through their respective undersigned counsel, and stipulate and agree as follows in settlement of the captioned case:

Background

1. On October 16, 2013, Staff filed a *Complaint* against Port Perry before the Missouri Public Service Commission ("Commission") stating that Port Perry is a water and sewer company operating under a Certificate of Convenience and Necessity granted to it by the Commission. Staff's *Complaint* further stated that Port Perry had failed to cure deficiencies in its calendar year 2011 annual report and failed to submit its calendar year 2012 annual report.

2. On October 17, 2013, the Commission issued notice of Staff's *Complaint* to Port Perry and directed Port Perry to file an answer no later than November 16, 2013. Port Perry failed to file an answer.

3. On December 4, 2013, the Commission issued its *Order Of Default And Order Authorizing Staff To Seek Penalties*, in which the Commission deemed the

averments in Staff's *Complaint* admitted, entered an order of default against Port Perry and authorized Staff to seek penalties in circuit court against Port Perry.¹

4. Staff and Port Perry desire to settle the issues raised in the *Complaint* by entering into this Stipulation and Agreement ("Agreement"). Port Perry has stated to Staff that it is working to improve its internal corporate systems and procedures to ensure timely filings in the future. This Agreement is in the public interest because it will provide funds to the Missouri school fund, eliminates the need for further prosecution of this case, leads to a broader resolution of issues and provides a reasonable and just solution to resolve the matters raised in the *Complaint*.

The Agreement

5. Port Perry admits it was deficient in the filing of its calendar year 2011 annual report and delinquent in the filing of its calendar year 2012 annual report.

6. Within thirty (30) days of the effective date of a Commission Order approving this Agreement, Port Perry shall remit a payment for the Missouri Public School Fund of Two Thousand, Five Hundred Dollars (\$2,500.00) made payable to the Missouri Director of Revenue, and sent addressed to the Missouri Public Service Commission, Budget and Fiscal Services Department, Attn: Helen Davis, 200 Madison Street, P.O. Box 360, Jefferson City, MO 65102, for the sole purpose of settlement of the *Complaint*. Port Perry agrees that it will not make this payment the subject of any advertising or promotion.

7. Port Perry agrees that it will maintain updated contact information in EFIS and file its Annual Reports in a timely manner in the future.

¹ On the same date the Commission issued a subsequent order correcting the order finding Port Perry in default to authorize the Commission's General Counsel, rather than Staff, to seek penalties in circuit court.

8. During the pendency of negotiating this Agreement, Port Perry has developed and shared with Staff a plan (Compliance Plan) by which to eliminate any delay in the preparation and proper filing of Port Perry's yearly filing requirements. A description of the Compliance Plan is attached hereto as Exhibit A. Port Perry shall update EFIS as appropriate to reflect Port Perry's contact for the Commission's annual and periodic reporting requirements. Staff believes that this plan is a reasonable response to the problems identified in the *Complaint*, and if the plan is effectively implemented, Staff believes that Port Perry will come into compliance with future reporting requirements.

9. If Port Perry successfully performs its agreements, duties and responsibilities as set forth in this Agreement, Staff agrees to forgo refiling an action asking the Commission to authorize the General Counsel to seek penalties on the basis of any allegations in the *Complaint* and the admissions made herein.

10. In the event that Port Perry fails to comply with the terms and conditions of this Agreement, Staff reserves the right to ask the Commission to authorize the General Counsel to seek penalties on the basis of the admissions made by Port Perry herein.

11. Port Perry has agreed to each and every term and provision of this Agreement as a compromise to avoid further expense and to terminate all controversy concerning the *Complaint*.

12. This Agreement has resulted from extensive negotiations among the signatories and the terms hereof are interdependent. In the event the Commission does not adopt this Agreement in total, then this Agreement shall be void and no signatory shall be bound by any of the agreements or provisions hereof. The agreements herein

are specific to the resolution of this proceeding and are made without prejudice to the rights of the signatories to take other positions in other proceedings.

13. In the event the Commission accepts the specific terms of this Agreement, the parties and participants waive, with respect to the issues resolved herein: their respective rights pursuant to Section 536.080.1, RSMo, to present testimony, to cross-examine witnesses, and to present oral argument or written briefs; their respective rights to the reading of the transcript by the Commission pursuant to Section 536.080.2, RSMo; and their respective rights to seek rehearing pursuant to Section 386.500, RSMo; and to seek judicial review pursuant to Section 386.510, RSMo. Port Perry and Staff agree to cooperate in presenting this Agreement for approval to the Commission and shall take no action, direct or indirect, in opposition to the request for approval of the Agreement.

14. Staff shall also have the right to provide, at any agenda meeting at which this Agreement is noticed to be considered by the Commission, whatever oral explanation the Commission requests, provided that Staff shall, to the extent reasonably practicable, provide Port Perry with advance notice of when Staff shall respond to the Commission's request for such explanation once such explanation is requested from the Staff. Staff's oral explanation shall be subject to public disclosure, except to the extent it refers to matters that are privileged or protected from disclosure.

WHEREFORE, the signatories respectfully request the Commission to issue its Order approving the terms of this Stipulation and Settlement Agreement.

Respectfully submitted,

/s/ Jennifer Hernandez

Jennifer Hernandez #59814
Alex Antal #65487

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Attorney for Port Perry Service Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically mailed to all counsel of record this 24th day of January, 2014.

/s/ Jennifer Hernandez

COMPLIANCE PLAN

During the first week of January of each calendar year, Port Perry's counsel will send a letter to Mr. Yamnitz and to the company's outside accountant reminding them that the company's sewer and water utility annual reports for the previous year are due to be filed on or before April 15, and suggesting that they begin to take the steps necessary to ensure each annual report is filed on time. This letter also will include copies of the Commission's rules governing annual report filings for sewer and water utilities, 4 CSR 240-3.335 and 4 CSR 240-3.640, respectively.

Port Perry's counsel will also send follow-up letters on or about February 15th and March 15th. Each of these follow-up letters will again remind both Port Perry and its outside accountant that annual report filings must be made by April 15th. In addition, the mid-March letter will ask that a status report regarding each annual report filing be provided to counsel on or before April 1st. Port Perry agrees to send a copy of the status report regarding each annual report filing to the Manager of the Commission's Water and Sewer Department on or before April 1st. If, based on the status report, it appears an extension of the filing date will be required, a request for an extension will be prepared and submitted as authorized by 4 CSR 240-3.335(6) and 4 CSR 240-3.640(6). If a request for an extension is submitted the annual report filing must be made by May 15th. The mid-March letter also will include information as to how the annual report is to be filed in EFIS.

If the Commission Staff is required to notify Port Perry that it has failed to timely file one or both of its annual reports, or that an annual report, although timely filed, contains deficiencies that need to be corrected, the Commission Staff will send a copy of each such notice to Port Perry's counsel. Upon receipt of any such notices, the company's outside counsel will work with Port Perry and the Commission Staff to ensure that all deficiencies are corrected within a timeframe reasonably acceptable to the Commission Staff. Unless otherwise agreed to by Commission Staff, Port Perry will have twenty (20) days to respond to any notice of deficiency as provided by Commission rule 4 CSR 240-3.335 (3) and 4 CSR 240-3.640 (3). If Port Perry fails to comply with the provisions of this compliance plan for calendar year 2014 and each future calendar year's filing requirements, Commission Staff reserves the right to file a complaint against Port Perry as prescribed by its rules and governing laws. Notices to Port Perry's counsel can be sent, via e-mail, to rmitten@brydonlaw.com.

Port Perry and its counsel agree to notify in writing the Manager of the Commission's Water and Sewer Department and the Deputy Counsel for Water and Sewer in the Staff Counsel's Office within 14 days of the modification or termination of this Compliance Plan.