

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

In the Matter of the Application of Middlefork Water	)	
Company for an Order Initiating an Investigation	)	
to Ascertain the Value of the Company's Property	)	Case No. WO-2007-0266
Devoted to the Public Service	)	

**MIDDLEFORK WATER COMPANY'S RESPONSE IN OPPOSITION TO  
THE REQUEST FOR AN EVIDENTIARY HEARING FILED BY  
THE OFFICE OF THE PUBLIC COUNSEL**

Middlefork Water Company ("Middlefork" or "Company"), by and through its undersigned counsel, hereby files its response in opposition to the request for an evidentiary hearing that the Office of the Public Counsel ("OPC") filed on March 26, 2008. For the reasons stated in this response, Middlefork believes the Missouri Public Service Commission ("Commission") should deny the OPC's request and should proceed, as expeditiously as possible, to decide this case based on the record that has been developed to date.

The OPC's request notes that this case began in January 2007 – more than fourteen months ago – when Middlefork filed an application, pursuant to Section 393.230, RSMo, asking the Commission to ascertain the value of the Company's property devoted to the public service. Much has happened in the case since that time:

- the Commission has narrowed the issues to be decided from three to one;
- Staff has conducted a full audit of Middlefork's plant in service accounts and has issued a report setting out the results of that audit;
- Staff and the Company have filed written statements setting out their respective arguments on the major issue in this case: whether a significant portion of Middlefork's plant investment should be categorized as Contributions in Aid of Construction ("CIAC"); and
- an on the record proceeding was held to allow the parties to present arguments in support of their respective positions and to allow the Commission to ask questions of the parties.

One thing the OPC's request does not state, however, is that the OPC is a "Johnny-come-lately" to this case: the OPC has participated in only one of the aforementioned events – the on the record proceeding held February 5<sup>th</sup> of this year – and the OPC did not make its first appearance until more than a year after Middlefork filed its application. The OPC did not conduct its own audit of Middlefork's plant accounts (or file any comments to the report the Staff prepared regarding its audit) and has yet to file a written position statement regarding the CIAC issue – or any other substantive issue in this case, for that matter – that sets out for the Commission and the other parties the facts and law on which the OPC relies for that position.<sup>1</sup> And the one phase of this case in which the OPC has participated – the on the record oral argument – was not scheduled at the OPC's request. Instead, it was ordered by the Commission *sua sponte*. This is ironic since that the OPC's request for an evidentiary hearing is supposedly rooted in its concern about "an adequate record"<sup>2</sup> and in due process considerations that require "that parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner."<sup>3</sup> In reality, had the Commission not taken the initiative to schedule an on the record proceeding, it is quite possible that the OPC would not have been heard from at all in this case.

All that aside, however, the most glaring defect in the OPC's request is that it fails to specify a single fact or piece of evidence necessary to the Commission's decision in this case that is not in the record already. Instead, the OPC relies on vague generalities to support its request for an evidentiary hearing, which include the following: "the record consists of only the meager pleadings in the case file as well as the

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<sup>1</sup> The OPC did participate in the February 5<sup>th</sup> oral argument, but, while it stated its ultimate position on the CIAC, Middlefork still is unsure as to the factual and legal bases for that position.

<sup>2</sup> *Office of the Public Counsel's Request for an Evidentiary Hearing* at p. 3.

<sup>3</sup> *Id.* at p. 4.

counsels' oral arguments"; "[t]he record lacks sworn expert testimony"; and there is no "probative evidence or stipulated facts that establish the proper record based on competent and substantial evidence."

But generalities are not enough to warrant granting the OPC's request and delaying an order in this case even further. If the OPC truly believes that the arguments and pleadings currently in the record are not adequate for the Commission to decide the legal and regulatory policy questions regarding how much of Middlefork's plant investment should be categorized as CIAC, then it should have specifically identified what more is required. And if additional facts, evidence, or expert testimony is required to provide a basis for the Commission to issue a lawful order, then the OPC should have specifically identified what facts are lacking and why an evidentiary hearing is required at this time to supplement the record.

Middlefork also notes that Section 393.230, RSMo., which confers on the Commission the authority to determine the value of the Company's plant devoted to the public service, does not require the Commission to hold a hearing before it makes that determination. Instead, the statute states:

For the purpose of ascertaining the matters and things specified in this section, concerning the value of the property of gas corporations, electrical corporations, water corporations and sewer corporations, the commission *may* cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. (emphasis added)

The record before the Commission is more than adequate to allow a decision on the sole issue remaining in this case: the valuation of Middlefork's current investment devoted to the public service.<sup>4</sup> Staff has conducted an audit of the Company's plant in service accounts and has determined a net value for that investment as of September 30, 2007, and Middlefork has accepted that valuation for purposes of this case. A related

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<sup>4</sup> See *Order Partially Dismissing Application for Failure to State a Claim*, issued March 20, 2007, in the present case.

sub-issue, and the only contested issue in the case, is how much of Middlefork's plant should be categorized as CIAC. All facts relevant to that issue already are on the record and are not in dispute, and both Staff and the Company have filed written pleadings setting out the applicable legal standards and regulatory policy considerations. The Commission, therefore, can, and should, make a fully informed decision based on the current record.

The OPC's request suggests that failure to schedule an evidentiary hearing in this case will make it impossible for the Commission to issue a lawful order because such an order would not be based on competent and substantial evidence. But it is axiomatic that not all orders of the Commission need to be supported by competent and substantial evidence: that requirement applies only to a final order issued in a contested case where a hearing is required by law and evidence must, therefore, be presented. Because Section 393.230, RSMo, does not require the Commission to hold a hearing, the current case is not a "contested case" as that term is defined by statute.<sup>5</sup> So failure to grant the OPC's request for an evidentiary hearing will not prevent the Commission from issuing a lawful order.

Middlefork also questions the timing of the OPC's request. This case has been open for more than fourteen months and it has been fully briefed (at least by Staff and the Company) and argued. In addition, the Commission has discussed how it intends to resolve the case at at least one of its regular agenda meetings. After all that, why did the OPC only recently conclude that an evidentiary hearing is not only desirable but necessary? The OPC's request provides no clue as to the answer to that question, and because it does not the Commission would be wise to view the request with a healthy

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<sup>5</sup> Section 536.010(2), RSMo, states, "[c]ontested case' means a proceeding before an agency in which legal rights, duties or privileges or specific parties *are required by law* to be determined after hearing . . ." (emphasis added)

degree of skepticism as the OPC's request may be motivated more by its concern about the outcome of this case than it is by its concern about due process.

The OPC's request also fails any reasonable cost/benefit test. If the OPC's request is granted, Middlefork will be forced to dig into its own pockets to pay experts and attorneys to take it through proposed evidentiary hearings. But, as has been pointed out previously in this response, the purpose of those additional hearings is at best questionable and the costs to the Company of participating in those hearings far outweigh any benefits that the OPC, the Commission, or anyone else will derive from the hearings. The OPC seems to forget that Middlefork is a small water company whose annual net income, before taxes, is less than \$70,000.<sup>6</sup> To require a company with such meager resources to bear the expense of evidentiary hearings – in addition to the expense it already has incurred in this case – would be unconscionable unless there is a clear and compelling reason to do so. This is especially true when the Commission considers that under traditional modes of regulation there is no way for the Company to recoup, through rates, the extraordinary expenses it has and will incur to prosecute this case. But the OPC's request fails to provide a compelling reason for additional hearings that would justify the crushing cost burden such hearings would impose on Middlefork.

WHEREFORE, for the reasons stated above, Middlefork asks the Commission to deny the OPC's request for an evidentiary hearing. Instead, the Commission should proceed, as expeditiously as possible, to decide this case based on the existing record, which is adequate to completely satisfy the Commission's legal obligations to all parties.

In the alternative, but only if the Commission believes that additional evidence is required or would be helpful in reaching a decision in this case, the Commission should order the OPC to specifically identify each fact and piece of evidence that it believes is

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<sup>6</sup> See *Water and/or Sewer Annual Report, Small Company, to the Missouri Public Service Commission* (for the year ending December 31, 2006), filed by Middlefork on May 21, 2007.

required to augment the current record in this case. After the OPC does so, the parties can investigate the possibility of adding evidence to the record through stipulation, thereby making additional evidentiary hearings unnecessary.

Respectfully submitted,



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ATTORNEYS FOR MIDDLEFORK WATER  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of March, 2008, a true and correct copy of the response filed by Middlefork Water Company that same date was delivered, by first class mail, electronic mail, or hand delivery, to the following:

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