

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

In the Matter of the Joint Application of)
South Jefferson County Utility Company)
and the Summer Set Property Owners)
Association for Cancellation of a Certificate)
of Convenience and Necessity and)
Associated Tariff Sheets)

Case No. WD-2006-0157

RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel and, for its Response to Order Directing Filing, states to the Missouri Public Service Commission as follows.

1. On October 11, 2005 (unless noted otherwise, all dates herein refer to the year 2005), the South Jefferson County Utility Company ("Company") and the Summer Set Property Owners Association ("POA") filed their Joint Application for authority for the Company to transfer its water and sewer utility systems to the POA and for cancellation of the Company's certificates of convenience and necessity and tariffs pertaining to the Company's Commission-regulated water and sewer utility services. Further, the Joint Application set forth the basis for the POA's position that it would not be subject to the Commission's jurisdiction subsequent to the Commission granting the relief requested in the Joint Application.

2. On October 19, the Commission issued an **Order Directing Filing**, in which it ordered the Staff to file its recommendation for this case on or before November 1.

3. On November 1, the Staff filed its recommendation, in which it recommended, among other things, that the Commission authorize the Company to transfer its water and sewer utility systems to the POA and cancel the Company's certificates of convenience and necessity and tariffs pertaining to the Company's Commission-regulated water and sewer utility services.

4. The Staff concluded that the POA would not be subject to the Commission's jurisdiction if the Commission granted the relief requested in the Joint Application. In the recommendation that it filed on November 1, the Staff implied, but did not explicitly state, that it based its recommendation upon the premise that the Commission would not have jurisdiction over the POA.

5. On November 23, the Commission issued a second **Order Directing Filing** ("November 23 Order"), in which, among other things, it discussed certain legal issues regarding its possible continued jurisdiction over the POA and ordered the Company and the POA to supplement the record regarding the specific issue of whether the POA is a non-profit water corporation or a non-profit sewer corporation under the provisions of Chapter 393, RSMo.

6. On December 19, the Company and the POA jointly responded to the Commission's November 23 Order. In that response the Company and the POA addressed each of the legal issues raised in the November 23 Order and presented arguments as to why the Commission's jurisdiction would not extend to the POA subsequent to the Commission granting the authority requested in the Joint Application.

7. The Staff has reviewed the Commission's November 23 Order, the cases and statutes cited in that order, and the joint response of the Company and the POA to that order. Based upon that review, and related research, the Staff states that it concurs with all of the legal arguments that the Company and the POA advanced in their joint response. The Staff therefore continues to maintain that the POA will not be subject to the Commission's jurisdiction subsequent to the Commission granting the relief requested in the Joint Application.

8. In particular, the Staff believes that the precedent set by the Commission's decision in the Rocky Ridge Ranch case (Case No. WD-93-307) should govern in this case. In that case, the Commission found that, because the property owners association would only provide service to its

members, it did not meet the statutory definition of a “water corporation,” and that it was not subject to the jurisdiction of the Commission. The crucial factor, in determining whether the property owners association was a “water corporation” or not, was not whether the property owners association sought to make a profit, but whether it sold water to persons who were not members.

9. Four years after the Commission’s Report and Order in the Rocky Ridge Ranch case, the Southern District issued its opinion in *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569 (Mo. App. S.D. 1997). The *Miller County* case was an eminent domain case, in which the court had to determine whether the Miller County Water Authority was a “water corporation.” The Water Authority sold water to residents in two subdivisions, Dogwood Park Estates and Woodland Cove. The Staff could not find support for the statement, in the November 23 Order, that the Water Authority sold water “only to the residents of those two subdivisions,”¹ but it appears certain that the residents of those two subdivisions were not members of the Water Authority.²

10. The Southern District held that, even though a corporation is “not-for-profit,” it may nonetheless be a “water corporation,” if it “is in the business of operating, managing and providing water service to the public for compensation.” The court cited, with approval, another case that held that by professing public service and furnishing service to the general public, a service may be considered a “public utility.” The court concluded that the Water Authority had undertaken the responsibility to provide water service to everyone within its capability, not merely for particular persons, and that it was, therefore, a public utility.

¹ The court stated that the Water Authority “provides water service to residents in Camden and Miller County, Missouri,” and that Dogwood Park Estates and Woodland Cove are in Camden County. It therefore appears that some of the Water Authority’s customer do not reside in either subdivision.

² See, for example, the discussion of the negotiations between the Water Authority and the Dogwood Park Estates homeowner’s association. *Miller County, supra* at 575.

11. The decisive factor in the *Miller County* case was, therefore, not the fact that the Water Authority was a “not-for-profit corporation,” nor that it sold water “for compensation,” but that it sold water to *the public* – *i.e.* to persons who were not members of the Water Authority.

12. So long as the POA does not sell water to persons who are not members of the POA, the POA will not be subject to the Commission’s jurisdiction subsequent to the Commission granting the relief requested in the Joint Application.

WHEREFORE, the Staff respectfully suggests that the Commission should issue an order in this case consistent with the recommendation that the Staff filed in this case on November 1.

Respectfully Submitted,

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/s/ Keith R. Krueger

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Response have been mailed with first class postage, hand-delivered, transmitted by facsimile or transmitted via e-mail to all counsel and/or parties of record this 30th day of December 2005.

/s/ Keith R. Krueger