

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

The Office of the Public Counsel,  
An agency of the State of Missouri,

Complainant,

vs.

The Tranquility Group, LLC d/b/a  
Branson Cedars Resort, Branson  
Cedars Resort Utility Company, LLC,  
A Missouri water and sewer corporation,

Respondents.

**Case No. WC-2015-0288**

**Case No. SC-2015-0289**

vs.

Ridge Creek Development, LLC,  
Ridge Creek Water Company, LLC,  
Mike Stoner, Denise Stoner,  
A Missouri water corporation,

Respondents.

**Case No. WC-2015-0290**

vs.

TUK, LLC,  
Louis Mountzoures,  
Jonathan Finkelstein  
A Missouri water and sewer corporation,

Respondents.

**Case No. WC-2015-0291**

**Case No. SC-2015-0292**

**STAFF'S RESPONSE TO OPC'S COMPLAINTS  
AND MOTION TO CONSOLIDATE CASES**

**COMES NOW** the Staff of the Missouri Public Service Commission, and for its  
*Response to OPC's Complaints and Motion to Consolidate*, states as follows:

### ***Introduction:***

1. These cases concern *Complaints* brought by the Office of the Public Counsel (“OPC”) against three small water or water and sewer providers that are operating unlawfully in that they are serving and charging customers but do not yet possess either Certificates of Public Convenience and Necessity (“CCN”) or Commission-approved tariffs. However, each of the Respondents is in the process of obtaining those things and is cooperating with the Commission Staff in the process. For that reason, Staff believes that the *OPC Complaints* do not serve the public interest and should, therefore, be held in abeyance pending the completion of the certification process and dismissed when it is complete. The Commission should look to the

### ***Staff’s Response to OPC’s Complaints:***

2. Staff agrees that these Respondents are providing water services or water and sewer services without authorization from this Commission and are both billing for those services and collecting payments despite having no Commission-approved tariffs. Indeed, Staff has for that very reason brought complaints against Ridge Creek Development, LLC, and its owners, Mike and Denise Stoner (“Ridge Creek”), Case No. WC-2015-0011, and against TUK, LLC, and its owners, Louis Mountzoures and Jonathan Finkelstein (“TUK”), Case No. WC-2015-0124. The purpose of Staff’s complaints was to induce these companies and those that control them to comply with Missouri law by seeking and obtaining a CCN from the Commission, establishing Commission-approved tariffs, and conducting themselves in all respects according to the laws of Missouri and the rules and orders of the Commission.

3. Staff has not brought a complaint against The Tranquility Group, doing business as Branson Cedars Resort (“Branson Cedars”), because no inducement was required to incent Branson Cedars to comply with the law by seeking a CCN from this Commission. Branson Cedars contacted Staff voluntarily and sought guidance as to how to come into compliance with the law.

4. Each of the Respondents is currently seeking a CCN from this Commission, to-wit:

- Branson Cedars, Case No. WA-2015-0049 (including Case No. SA-2015-0107) – although Staff has recommended that the CCN be granted (subject to certain conditions), OPC has objected and thus delayed the case. It is Staff’s opinion that OPC’s objections are without substantial merit.
- Ridge Creek, Case No. WA-2015-0182 – Staff has requested an extension of the filing date of its *Recommendation* within which to finish its investigation; its *Recommendation* is now due by May 18, 2015. A Local Public Hearing was recently held in Waynesville, Missouri.
- TUK, Case No. WA-2015-0169 (including Case No. SA-2015-0170) – Staff’s *Recommendation* is due by May 22, 2015.

5. Because each of the Respondents is now seeking a CCN and cooperating with Staff, Staff has obtained all of the relief it sought from its aforementioned *Complaints*. As soon as the respective CCNs are granted, approved tariffs are in place and Staff is satisfied that the companies are operating within the law and in compliance

with its tariff and with the Commission's rules and orders, Staff expects to dismiss its *Complaints*. It is Staff's position that the public interest would not be served by litigating these complaint cases to a conclusion or by seeking penalties against the companies or operators. Small companies are typically under-capitalized and monetary penalties often have negative results for customers in terms of reduced service quality, deferred maintenance, and the like. Indeed, it is possible that penalties might cause these small companies to stop functioning altogether.

6. In each of the *OPC Complaints*, OPC requests that the Commission determine that the Respondents' current charges for water and/or sewer service are "unjust and unreasonable" and order the refund of "any and all unlawful charges." Staff notes that The Public Service Commission "is purely a creature of statute" and its "powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted."<sup>1</sup> While the Commission properly exercises "quasi judicial powers" that are "incidental and necessary to the proper discharge" of its administrative functions, its adjudicative authority is not plenary.<sup>2</sup> "Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise."<sup>3</sup> While the Public Service Commission Law is a remedial statute and thus subject to liberal construction, "neither convenience, expediency or necessity are proper matters for consideration in the determination of"

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<sup>1</sup> *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958).

<sup>2</sup> *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982), quoting *Liechty v. Kansas City Bridge Co.*, 162 S.W.2d 275, 279 (Mo. 1942).

<sup>3</sup> *State Tax Commission*, *supra*.

whether or not an act of the commission is authorized by the statute.”<sup>4</sup> It is well-established that the Commission is without authority to award money damages or to order refunds.<sup>5</sup> Even in the ***State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission (“UCCM”)*** case,<sup>6</sup> where a refund of an unlawfully-collected surcharge was ordered, it was not the Commission that did so, but the Missouri Supreme Court in an exercise of its “inherent power to afford redress.”<sup>7</sup> In a recent appellate case discussing another attempt by OPC to extract refund from a small sewer company, the Court commented:

We note that, even if the Office of Public Counsel had met its burden of proof in the complaint case, it would have been unlawful for the Commission to have authorized a refund of the sewer commodity charge into the new tariff. “The Commission ... does not have the authority to retroactively correct rates or to order refunds. ‘Nor can the Commission take into account overpayments when fashioning prospective rates.’” ***State ex rel. Pub. Counsel v. Pub. Serv. Comm’n of State of Mo.***, 259 S.W.3d 23, 31 (Mo. App.2008) (citations omitted). Indeed, in its *Revised Report and Order*, the Commission recognized that it had no authority to order Emerald Pointe to make a refund to its customers and that it merely had the authority to determine whether Emerald Pointe violated its tariff. The Commission further noted that, if a party wanted to seek a refund, it would have to seek relief in the appropriate circuit court.<sup>8</sup>

The Commission is unable to grant this aspect of the relief requested by OPC.

7. In each of the *OPC Complaints*, OPC also requests that the Commission authorize its General Counsel to seek “any and all penalties allowed by law.” Staff notes that the Commission’s penalty authority is discretionary. The Commission

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<sup>4</sup> *Id.*, quoting ***State ex rel. Kansas City v. Public Service Commission***, 301 Mo. 179, 257 S.W. 462 (banc 1923).

<sup>5</sup> ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952, 955 (Mo. 1943).

<sup>6</sup> 585 S.W.2d 41 (Mo. banc 1979).

<sup>7</sup> *Id.*, pp. 59-60.

<sup>8</sup> ***In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Co.***, 438 S.W.3d 482, 490 n. 8 (Mo. App., W.D. 2014).

is not required to authorize its General Counsel to seek penalties in cases where it is alleged that a utility tariff or a Commission rule or order or a statute administered by the Commission has been violated. Thus, the penalty power is properly seen as a tool, to be used, like any tool, in the appropriate circumstances, to achieve the desired result. Certainly, penalties lie for the conduct engaged in by Respondents.<sup>9</sup> Staff reiterates, however, that the imposition of penalties in these cases would serve no public purpose. The Respondents have cooperated with the Staff in the process of seeking CCNs and establishing lawful tariffs. The Respondents' customers depend on the services provided by the Respondents and would likely have to vacate their homes or shutter their businesses if those services are disrupted. Monetary penalties may well force the Respondents out of business. Staff urges the Commission to refuse to direct its General Counsel to seek penalties in Circuit Court as prayed by OPC.

***Staff's Motion to Consolidate Cases:***

8. Staff notes that the CCN process for an operating-but-unauthorized-provider includes a full audit by Staff and facility inspections in order to determine such things as revenue requirement and rate base. Because the Respondents' recordkeeping is often poor and because these companies were never intended to be regulated public utilities by their founders, Staff must often use estimates where actual figures are unobtainable. The audit process, therefore, is often lengthy.

9. Each of the Respondents currently provides water service or water and sewer service to private homes located within a residential development. Two of the

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<sup>9</sup> In one case, in which it was determined that an uncertificated entity acted unlawfully as a public utility between September 22, 2005, and December 30, 2005, the Circuit Court imposed a penalty of \$20,000, which was upheld on appeal. ***Missouri Public Service Commission v. Hurricane Deck Holding Company***, 302 S.W.3d 786 (Mo. App., W.D. 2010).

three Respondents possess the requisite permits from the Missouri Department of Natural Resources; Ridge Creek does not, but is in the process of becoming permitted by DNR. Each of the Respondents is the only source of water and/or sewer services in the area that it serves.

- Branson Cedars serves 52 residences currently and expects to serve 400 when the development is complete. Branson Cedars also has 12 commercial customers. Branson Cedars is a resort and has no permanent residents. Branson Cedars is in the business of renting temporary lodging to vacationers.
- Ridge Creek serves 136 residential customers in a development outside of Waynesville, Missouri. These customers are year-round residents and Ridge Creek serves their primary residences.
- TUK serves about 90 customers at a trailer park and at several residences in Jefferson County, Missouri. These customers are year-round residents and TUK serves their primary residences.

10. Each of *OPC's Complaints* presents common questions of law and similar questions of fact. In the unusual circumstances presented by OPC's mass filing of complaints, Staff suggests that case management efficiency and the conservation of scarce administrative resources would be enhanced by consolidating these cases.

**WHEREFORE**, Staff prays that the Commission will (1) refuse to order refunds herein; (2) refuse to order its General Counsel to seek penalties herein; (3) hold these complaints in abeyance pending the completion of the associated CCN-cases, and then

dismiss them; (4) consolidate these cases to facilitate their efficient management; and grant such other and further relief as is just in the circumstances.

Respectfully submitted,

**/s/ Kevin A. Thompson**

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### **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing has been served electronically, or by hand-delivery, or by First Class United States Mail, postage prepaid, upon all parties and counsel of record as shown in the Service Lists maintained for each of these cases by the Commission's Data Center on this 19<sup>th</sup> day of May, 2015.

**/s/ Kevin A. Thompson**