

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

In the Matter of the Small Company)	
Rate Increase Request of Timber Creek)	Case No. SR-2008-0080
Sewer Company.)	

**SUGGESTIONS OF TIMBER CREEK SEWER COMPANY IN OPPOSITION TO
PUBLIC COUNSEL’S REQUEST FOR AN ON-THE-RECORD PRESENTATION**

COMES NOW Timber Creek Sewer Company (Timber Creek) by its counsel, Jeremiah D. Finnegan, and for its Suggestions in Opposition to Public Counsel’s Request for an On-The-Record Presentation states as follows:

1. Concurrent with Public Counsel’s Request for an On-The-Record Presentation, Public Counsel also filed a Request for Local Public Hearing. A review of the Sewer Utility Small Company Rate Increase Procedure Rule, 4 CSR 240-3.330, discloses after an agreement is entered into between Staff and Company without Public Counsel’s joinder and the Company files its tariff sheets that Public Counsel is authorized by the rule to file a request for a local public hearing. However, nowhere in the rule is there any language authorizing Public Counsel to file a request for an on-the-record presentation.

Inasmuch as Public Counsel has filed a request for a public hearing subsection (1)(D) of the rule is no longer applicable and subsection (1)(E) is applicable. The pertinent language is as follows:

(1)(E) A request for a local public hearing may be filed after the tariff sheet(s) is filed by the company. The request shall be filed within twenty (20) days of the filing of the tariff sheet(s) by the company. Public counsel shall file a pleading indicating agreement

or disagreement with the tariff sheet(s) within seven (7) days after the local public hearing;

Thus, it is clear that by filing a timely request for public hearing, public counsel's role is limited by rule to filing a pleading agreeing with or disagreeing with the tariffs within seven (7) days after the local public hearing. Thus, public counsel's request is not authorized at this time. Furthermore, there is no authorization anywhere in the rule for the public counsel to request an on-the-record presentation and request the filing of briefs by the parties, which has resulted in the company, of necessity, engaging the services of an attorney and substantial expenses being incurred by the company, which would ultimately be borne by the ratepayers.

2. This is not the first time in this proceeding that Public Counsel has failed to heed the clear language of the rule and caused Company to engage legal counsel. The rule, which was clearly designed to allow small companies avoid the necessity of incurring substantial legal fees and expert witness fees as would of necessity be incurred following the formal procedure of the file and suspend rule for large utilities. It is also clear that the intent of the rule was that small company rate requests be handled expeditiously, with a 150 day requirement for action rather the 11 month requirement for large company rate cases filed under the file and suspend statutes.

Nevertheless, in this case, on August 7th, Public Counsel sent the company 22 data requests, many of which were unduly burdensome and oppressive. Inasmuch as the 150th day was to expire less than two weeks later on August 20th, there was no possible way to answer them adequately and keep within the Commission prescribed time limit for action.

Moreover, such untimely data requests clearly violated Paragraph (1)(A) of the rule which provides in pertinent part:

(1)(A) ... Upon receipt of the company's request, the commission staff shall schedule an investigation of the company's operations and an audit of its financial records. When the investigation and audit are complete, the commission staff shall notify the company and public counsel whether the requested additional revenue is recommended in whole or in part, of the rate design proposal for the increase, and of any recommended operational changes. If public counsel wishes to conduct an investigation and audit of the company, it **must** do so within the same period as staff's investigation and audit;

Inasmuch as the Company's request was filed on March 22, 2007, and staff's investigation and audit was completed on June 25, 2007, the Public Counsel's attempt at discovery on August 7th was clearly beyond the time the rule mandatorily required the Public Counsel to investigate and audit the company. The rule is clear, it states that the public counsel **must** conduct its investigation and audit at the same time as the staff, which in this case was between March 22nd and June 25th. Furthermore, contrary to the rule's clear intent to keep down costs and expedite the handling of the request, as a result of Public Counsel's late, late, late data requests, Company was required for the first time to confer with and use the services of counsel thereby incurring expenses for legal service, expenses that will ultimately be borne by the ratepayers.

Staff and Company are not the only parties that are bound by the rule. Public Counsel is likewise bound even though it has chosen throughout the 150 day time period and beyond to ignore the rule's constraints on its activity, thereby thwarting expeditious consideration and the desire to process these matters with little outside expense for a small company in the conduct of a small sewer company rate increase request.

3. In addition, throughout Public Counsel's request there are numerous statements that are inaccurate and misrepresentations:

a) In Paragraph 5, in objecting to a \$70,000 salary for a General Manager being included, Public Counsel incorrectly states that "Timber Creek has not previously employed a General Manager nor does it currently employ one." That is patently false. The Company has employed a General Manager, Willis Sherry, the company's founder, since it began operations as a public utility in 1990. Mr. Sherry is currently serving as General Manager as has been repeatedly discussed with Public Counsel. He has not, however, been compensated for his services in the past because Mr. Sherry believed that due to the small customer base during the start-up years the revenues were not there to pay a general manager without raising rates substantially, something he did not desire to do. Thus, while he worked as General Manager since 1990, he refrained from paying himself a salary until such time as the customer base had grown enough to support such payroll expense without substantially raising rates. Now that the customer base has grown from less than 50 in 1990 and 268 in 2000 to 1192 in 2006, the customer base is there to support a reasonable salary and it is now time to begin to draw one. Effective September 24th, the company began to pay Mr. Sherry a well-deserved salary of \$70,000 for running what, in counsel's mind, may be the best small sewer company in Missouri. Apparently, by raising this issue, Public Counsel subscribes to the theory that: "No altruistic action should go unpunished."

b) Also in Paragraph 5, Public Counsel complains about estimated expenses that have been included for items Timber Creek has agreed to perform nor paid for at this time. What Public Counsel fails to tell the Commission is that such costs are for items recommended by the Staff and which the Staff gave the Company until September 30th, the end of the true-up period, to perform and if they were not performed by such date such would be removed from the cost of service and Company would submit substitute tariff revisions that would be lower, but not higher, than the proposed rates it filed on September 14th. See pages 3-4, Paragraphs (12) through (19) of the Company/Staff Disposition Agreement filed on September 25th. Furthermore, under Paragraphs (20) and (21), Staff will, and OPC may, conduct follow-up reviews which would be enforced by a formal complaint being filed by either the Staff or OPC. Such items were performed by the Company prior to September 30th as the attached email response by Derek Sherry to the PSC Staff and its Response to Disposition Agreement and its attachment discloses.

c) In Paragraph 7, Public Counsel complains about lack of notice of the tariff increase in excess of the original request. There was, however, such notice given. In addition to the initial notice to customers that Timber Creek request an increase of \$120,000 in rates and that the impact would be \$35.67 on a monthly bill that was given on April 6, 2007, a second notice was given on September 19th after the tariffs designed to produce \$129,837 were filed with an effective date of November 1, 2007. Such notice filed in compliance with the rule, disclosed that customers in the Platte County service area would see a monthly increase from \$26.97 to \$35.80, which was 13 cents per month more than the initial notice of April 6th. Clay County monthly bills would remain

unchanged. Copies of such September 19th notices were sent to the Commission and Public Counsel and are found in the case file.

4. Counsel, without waiving its argument that Public Counsel's request is both premature and an unauthorized motion under the small company rate case rule, will respond to the main thrust of Public Counsel's request, which is its argument that no increase may be more than the amount requested by the utility company originally. Counsel would agree that such is the rule for formal utility rate cases originated by the filing of a tariff under the file and suspend statutes, Sections 393.140 and 393.150, RSMo,¹ This, however, is not a formal rate case where the utility files its tariffs together with its testimony and exhibits of its expert witnesses supporting such tariffs which begins running the 11 month clock for the Commission to act or the rates go into effect. This is not a formal contested case where parties intervene and then they, Staff and Public Counsel file counter testimony and exhibits of their own expert witnesses followed by formal hearings in which attorneys cross-examine witnesses and then file briefs in support of their respective positions.

5. This is an informal proceeding, *sui generis* to small utilities, and governed by its own set of rules. Under such rules, the Company requests an increase by filing a letter asking for the change and is specifically directed by the rule **not** to file any tariffs. The filing of the letter does not open a formal case with a docket number assigned to it. The Company does not engage expert witnesses or attorneys, but relies upon the Commission Staff to investigate its operations and audit its books as provided by the rule. Public Counsel is also authorized by the rule to

¹ Shortly after leaving as the Commission's General Counsel in 1973, counsel on behalf of Jackson County on judicial review in Jackson County Circuit Court successfully obtained an immediate reversal of a Commission Report and Order granting KCPL an increase in rates that was \$2 million more than requested by the company in its tariff filing on such grounds.

conduct an investigation and audit concurrently with the Staff, however, it **must** do so within the same time period as the Staff and not lollygag or sandbag since the rule only provides for a 150 day period from the time the letter is filed and the time an agreement is to be reached unless the Company consents in writing to an extension of such time.

The goal of the procedure is to reach an agreement between Company, Staff and Public Counsel concerning, *inter alia*, "additional revenue requirements" and failing that three-way agreement, an agreement between Company and Staff. It is only after the agreement is reached that the Company files its tariffs for the first time and a formal case is instituted. Once the tariffs, with a forty-five (45) day effective date are filed, the Company sends notice to its customers of the proposed tariffs and indicates that customers' responses may be sent to the Secretary of the Commission and the Public Counsel within twenty (20) days. If a public hearing is requested by Public Counsel, as here, Public Counsel then has seven (7) days after the hearing to file a pleading indicating agreement or disagreement with the tariffs.

6. Under the small company rate increase procedure, the Company is solely dependent upon the Staff of the Commission to ascertain its revenue requirement. If it cannot reach an agreement with Staff, its remedy is not to seek judicial review but rather the initiation of a standard rate case by filing proposed tariffs and commencing the 11 month period for a decision. See Paragraph (1)(G) of the rule. In this case, the Staff determined that Timber Creek's additional revenue requirement was in excess of Company's initial request by \$9,837. Such revenue requirement amount was based upon the Staff testimony and exhibits filed under oath by affidavit on September 25th, which not having been objected to within seven (7) days as required by Section 536.070(12), RSMo, are now admitted as evidence supporting the revenue requirement

ascertained by Staff. Since the Company is so dependent on Staff's investigation and audit, it is only fitting that the Staff, whose testimony supports the revenue requirement may also agree to and direct the Company to file tariffs that would produce such additional revenue requirement based upon such evidence even were such amount in excess of the original informal request, which original request amount was not based on any evidence of expert witnesses nor upon any tariffs.

Furthermore, since the procedure only applies to small company rate increase cases brought informally without the filing of any tariffs at the time of the request, it does not violate any long standing rule, law or policy pertaining to granting rates in excess of the amount the tariffs were filed for applicable in formal rate cases brought by the filing of tariffs pursuant to the file and suspend statutes. Quite obviously, there were no tariffs filed until September 14th after the Staff determined the Company's revenue requirement at \$129,837.

WHEREFORE, for the foregoing reasons, the Commission should deny Public Counsel's premature, unauthorized and baseless request for an on-the-record presentation.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.,

By: /s/ Jeremiah D. Finnegan

JEREMIAH D. FINNEGAN MO#18416
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111
(816) 753-1122
(816) 756-0373 FAX

ATTORNEYS FOR TIMBER CREEK
SEWER COMPANY

CERTIFICATE OF SERVICE

I hereby certify the copies of the foregoing have been emailed to Christina L. Baker (christina.baker@ded.mo.gov) and Keith Krueger (keith.krueger@psc.mo.gov) this 4th day of October, 2007.

/s/ Jeremiah Finnegan