

**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 TO DENY  
HUNT MIDWEST’S MOTION TO SUSPEND TARIFFS  
AND ALTERNATE PROPOSAL REGARDING INTERIM CONNECTION FEE**

COMES NOW Timber Creek Sewer Company (Timber Creek) by its counsel, Jeremiah D. Finnegan, and for its Suggestions to Deny Hunt Midwest’s Motion to Suspend Tariffs and Alternate Proposal Regarding Interim Connection Fee, states as follows:

1. On October 4, 2007, Hunt Midwest filed its application to intervene, motion to suspend tariffs and schedule an evidentiary hearing. In support of its request for intervention, Hunt Midwest stated that it engages in residential development within the certificated area, that the proposed increase in the service connection fee from \$1,600 to \$2,650 will have a direct impact on Hunt Midwest’s business, that it has a direct interest entirely different from the general public. and that its intervention would serve the public interest.
2. On October 16th, the Commission issued its Order in which it found that Hunt Midwest had articulated an interest in the proposed rate (connection fee) and that it had an interest that will not be represented by the current parties, including Public Counsel, and granted Hunt Midwest’s intervention.
3. With respect to its motion to suspend tariffs and schedule evidentiary hearing, Hunt Midwest posited only that the tariffs filed by the Company to implement its rate increase are

unlawful, unjust and unreasonable and the Commission should suspend same and conduct an investigatory hearing into their lawfulness and reasonableness. The Commission in its October 16th Order noted that the only support for Hunt Midwest's motion was a comment letter Hunt Midwest had sent in May in regard to the original rate increase request for the connection fee from \$1,600 to \$3,200 and Hunt Midwest's statement that it believed the rate increase to be unjust and unreasonable. The Commission did not grant the motion but reserved its determination until the legal briefs (later rescinded by Order dated October 19, 2007) and Public Counsel's position statement had been submitted. Public Counsel filed same on October 24, 2007.

4. Also, on October 24, 2007, Hunt Midwest filed a pleading entitled Intervenor's Further Suggestions in Support of Motion to Suspend Tariffs. In such suggestions, Hunt Midwest noted that the tariffs are to become effective November 1, 2007 and that if an evidentiary hearing is to be held, the dates reserved for the possible hearing were December 5-7, 2007. Hunt Midwest then stated: "To conduct a hearing in this matter as anticipated, the effective date of the tariff **must** be suspended". Its only support therefor, however, is a citation of a selected portion of Section 393.150.1, RSMo 2000, which provides that the "Commission **may** initially suspend such tariffs" for a period a one hundred twenty days beyond their effective date and that under Section 393.150.2 "the Commission **may** extend the time of suspension for an additional six months".

5. What Intervenor fails to cite is any authority as to how the word "may" suspend found in the statute becomes "must" suspend. Intervenor also fails to provide any of the additional

qualifying language as to the Commission's decision to exercise its authority to suspend tariffs

being discretionary. Section 393.150, actually states in pertinent part as follows:

393.150. 1. Whenever there shall be filed with the commission by any... sewer corporation any schedule stating a new rate... **the commission shall have, and it is hereby given, authority**, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested ... sewer corporation, but **upon reasonable notice, to enter upon a hearing concerning the propriety of such rate ... and pending such hearing and the decision thereon, the commission upon** filing with such schedule, and **delivering to the... sewer corporation affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule** and defer the use of such rate..., but not for a longer period than one hundred and twenty days beyond the time when such rate... would otherwise go into effect; **and after full hearing, whether completed before or after the rate... goes into effect, the commission may make such order in reference to such rate... as would be proper in a proceeding initiated after the rate... had become effective.** [Emphasis added.]

2. If any such hearing cannot be concluded within the period of suspension, as above stated, **the commission may, in its discretion, extend the time of suspension** for a further period not exceeding six months.... [Emphasis added.]

It is, thus, perfectly clear not only from the use of the word "may" instead of "must," but also from the language in the statute Intervenor failed to disclose, that while the Commission has the authority to suspend tariffs, it also has the discretion to suspend or not suspend. If it does suspend, the Commission is required to deliver its reasons in writing to the Company, as subsection 1 of the statute clearly provides, so the Commission may not suspend without reason. And, as subsection 1 further provides, the Commission may, after full hearing, whether completed before or after the rate goes into effect, make such order in reference to such rate as would be proper in a proceeding initiated after the rate had become effective.

Thus, it is clear from the language of the statute itself, authorizing the Commission with the power to suspend tariffs, that exercising such power is purely discretionary and the

Commission has expressly been given the power to make the same order in reference to such rate no matter whether the rate was allowed to go into effect or was suspended.

Further, as clearly provided in subsection 2, if the hearing cannot be concluded within 120 days, the Commission "**may, in its discretion**" extend its suspension for another six months. Clearly, "may, in its discretion" means what it says clearly and unambiguously - the Commission may or may not suspend for an additional six months even if the hearing has not been concluded.

Thus, Intervenor's claim that the tariffs must be suspended is without merit in both law and in fact.

6. Furthermore, the case law supports the Commission's discretion to suspend or not to suspend. In *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W. 2d 561, 565-566 (Mo. App. W.D. 1976), the Court held that under the above quoted language of Section 393.150, as well as its sister statute, Section 393.140.11, RSMo 2000, which together are known as the "file and suspend" statutes, the Commission clearly has such discretion to suspend or not to suspend. Section 393.140.11, provides in pertinent part:

Unless the commission otherwise orders, no change shall be made in any rate or charge ... except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. **The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe...** . [Emphasis added.]

The Court made the following holding with respect to Sections 393.140.11 and 393.150.1 and 393.150.2:

The "file and suspend" provisions of the statutory sections quoted above lead inexorably to the conclusion that **the Commission does have discretionary power to allow new rates to go into effect immediately or on a date sooner than that required for a full hearing as to what will constitute a fair and**

**reasonable permanent rate. This indeed is the intended purpose of the file and suspend procedure. Simply by non-action, the Commission can permit a requested rate to go into effect. Since no standard is specified to control the Commission in whether or not to order a suspension, the determination as to whether or not to do so necessarily rests in its sound discretion.** [Emphasis added.]

See also the recent case of *State ex rel. Sierra Club v. Public Service Commission*, 2007 M0. App. LEXIS 333, where the Western District quoted extensively from *Laclede* and followed the ruling.

7. From the above, it is clear that the Commission has no duty to suspend but has the discretion not to suspend the tariffs pending a hearing. Further, the Commission would be hard pressed in this case to deliver in writing "its reasons for such suspension" as required by Section 393.150.1. Neither the Staff nor Public Counsel, the other parties to the case, have proposed suspension of the tariffs. Only Hunt Midwest has proposed suspension but has given no reasons for the suspension. All it argued was that to "conduct a hearing in this matter as anticipated, the effective date of the tariffs must be suspended". Of course, under the statutes and case law, the Commission is not required to suspend. It may do so in its discretion but there is no "must" in the statutes and case law.

8. Furthermore, this is not a typical case where a utility has filed a tariff out-of-the-blue. The process did not start on September 14th with the filing of the Company's original tariff, it commenced over 7 months ago on March 22, 2007, when the Company filed its request under the small company rate procedure. Hunt Midwest has had actual notice since at least May 3rd when it sent its letter to the Commission. The tariff filed in this case is the result of extensive discovery, investigation by the Staff and Public Counsel and the result of negotiations between the Company and the Staff. As a result of such efforts, the Staff and the Company entered into

an Agreement on September 13th. The tariff filing on September 14th, with an effective date of November 1, 2007<sup>1</sup>, was the culmination of those efforts.

9. On October 19th, as a result of a further true-up study by Staff, the Company filed substitute tariffs reducing its original requested increase from \$129,837 to \$115,310 with the same effective date of November 1st. This substitute tariff is not an unknown quantity without an unknown background. It is the product of extensive vetting and the Staff has signed off on it without any changes after a public hearing was held in Platte City on October 17th. On October 24, 2007, the PSC Staff filed its Recommendation in which it recommended that the Commission issue its order approving "the proposed substitute tariff sheets that the Company submitted to the Commission on October 19 to be effective for service rendered on and after November 1."

10. In addition, after the public hearing, Public Counsel filed its required Response in which it stated that had this case followed the normal small rate case procedure, Public Counsel may not have objected nor opposed the tariffs requesting an increase of \$115,310, however, to protect and not waive any of its rights if an evidentiary hearing is held, Public Counsel expressed its dilemma that it could say no more than "there is the likelihood that Public Counsel would not have objected to the updated revenue increase of \$115,310 and would not have any opposition to the October 19, 2007 tariffs designed to implement that increase" but for the potential public hearing.

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<sup>1</sup> The Company thus gave 48 days notice or 18 days more than required under the 30 day notice requirement of a formal rate case filing,

11. In other words, Public Counsel is neither agreeing to nor objecting to the increase going into effect on November 1, 2007, without suspension. because if there are hearings it does not want to be in a position where it has waived its rights to participate fully or provide positions on any and all issues. One thing is clear from Public Counsel's pleading is that nowhere in such pleading is there a recommendation by Public Counsel that the rates be suspended.

12. That leaves only Hunt Midwest and its hollow argument that as a matter of law the Commission **must** suspend the rates in order to conduct a hearing. As shown above, this is a misstatement of the law and contrary to both the statutes and the case law. Further, its argument is totally devoid of any supporting factual basis.

13. Furthermore, Hunt Midwest is seeking a suspension of all the proposed tariffs, even though the only tariff it has an interest in is the connection fee as it is not a residential customer. Since it is the actual residential customers and not Hunt Midwest, who would actually pay for sewer service, those customers are represented by Public Counsel and Public Counsel has not requested a suspension of the residential sewer rates or any other rates. Furthermore, Staff, in its Recommendation requested that all the tariffs go into effect on November 1st. Hence, there is no need to suspend any of the rates and charges.

14. With respect to suspending only the sewer connection fees, there is no support other than Hunt Midwest's letter of May 3rd regarding the original rate increase request, which at that time included a increase in the connection fee from \$1,600 to \$3,200, and its bald-faced assertions that it believes that the rate increase is unjust and unreasonable. Who knows when Hunt Midwest will actually need to incur a connection fee. It certainly gave no indication concerning that matter in its letter and certainly alleged no additional facts in its Further Suggestions. If Hunt

Midwest has an immediate need for sewer connections, it has had from sometime before May 3rd through October 31st to apply while the current rate is in effect. Furthermore, we are rapidly approaching the winter lull in the commencement of new construction and, of course, there already exists a downturn in the housing market, which further makes any need for a delay in placing the connection fee in effect on November 1 patently unnecessary. Consequently, there is no good reason for the Commission to suspend the tariffs, not even a suspension of only the connection fee, and further delay Timber Creek's much needed relief.

Staff after its extensive investigation and negotiations has recognized this need and recommended that the tariffs go into effect on November 1 without suspension and, furthermore, also pointed out that the amount of the service connection fee has no effect on the revenue requirement or rate design agreed to in this case, consequently, there is no need to suspend it. Public Counsel has not recommended any suspension of the effective date of any rate, much less the connection fee.

15. Nevertheless, despite the fact that there is no need to suspend any tariff at this time, Timber Creek, in an effort to get all the necessary rates placed into effect as expeditiously as possible without suspension, is willing to agree to a compromise suggested by the Staff in its Recommendation. Since it is apparent that Hunt Midwest is only concerned with the proposed connection fee going into effect on November 1st and no other party is concerned with the other rates taking effect on November 1st, Timber Creek is willing to agree to Staff's suggestion made at Page 3, Paragraph 10 of its Recommendation that: "the Company Staff-agreed upon service connection fee be approved on an interim basis, subject to refund, if it is determined that a

hearing is necessary to determine if the connection fee should be different from what was agreed upon."

16. To make Timber Creek's proposed agreement perfectly clear, Timber Creek is not agreeing to the suspension of any of its proposed tariffs, including the proposed connection fee. Timber Creek is only agreeing to Staff's proposal to place into effect on November 1, 2007 on an interim basis, subject to refund, the service connection fee only, *i.e.*, the Contribution-in-Aid-of-Construction (CIAC)..... \$2,650/connection (applicable to the Platte County service area only). That is not the same as agreeing to a suspension of that fee.

In other words, Timber Creek is only offering to make this agreement should the Commission order all rates, including the connection fee, to be effective for service rendered on and after November 1. If such is agreed, Timber Creek's agrees that: 1) if it is determined that a hearing is necessary, the connection fee, and only the connection fee, shall be in effect from November 1, 2007 on an interim basis, subject to refund. However, if it is determined that no hearing is necessary, such connection fee would be a permanent tariff and not subject to refund; and 2) if there is a hearing, such connection fee, and only the connection fee, would be and remain in effect on an interim basis, subject to refund from November 1, 2007 until such time as the Commission makes its determination regarding whether the connection fee should be greater or less than \$2,650. At such time, Timber Creek would file a permanent connection fee in the amount the Commission determined to be reasonable, provided it is agreed that such new permanent connection fee would be permitted to go into effect on less than thirty days notice, without suspension or further hearings.

17. Once again, Timber Creek is not offering nor agreeing to placing any other fee or charge or any other tariff change into effect on an interim basis, subject to refund, only the connection fee and only under the terms and conditions set forth hereinabove.

**WHEREFORE**, Timber Creek respectfully requests that the Commission deny Hunt Midwest's motion to suspend tariffs and adopt Staff's Recommendation that the Commission issue an order that: "(a) approves the proposed substitute tariff sheets that the Company submitted on October 19 to be effective for service rendered on and after November 1".

Alternatively, in the interest of the expeditious issuance of the Commission's order approving all rates, charges and other tariff changes, including the connection fee, effective on and after November 1, 2007, without suspension, Timber Creek is agreeable to the service connection fee, and only the service connection fee, going into effect on November 1, 2007, on an interim basis, subject to refund, under the terms and conditions stated hereinabove, with all other rates, charges and tariff changes being approved as permanent rates effective November 1, 2007.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.,

By: /s/ Jeremiah D. Finnegan

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ATTORNEYS FOR TIMBER CREEK  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing have been emailed to Christina L. Baker (christina.baker@ded.mo.gov); Keith Krueger (keith.krueger@psc.mo.gov); and Mark W. Comley (comleym@ncrpc.com) this 29th day of October, 2007.

/s/ Jeremiah Finnegan