

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 10th day of
April, 2008.

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| In the Matter of the Application of Middle Fork Water |) | |
| Company for an Order Initiating an Investigation |) | |
| to Ascertain the Value of the Company's Property |) | <u>Case No. WO-2007-0266</u> |
| Devoted to the Public Service |) | |

**ORDER GRANTING OPC'S REQUEST FOR AN EVIDENTIARY
HEARING**

Issue Date: April 10, 2008

Effective Date: April 20, 2008

Syllabus: This order grants the Office of the Public Counsel's request for an evidentiary hearing.

Background and Procedural History

On January 12, 2007, Middle Fork Water Company ("Middle Fork") filed a verified application requesting that the Missouri Public Service Commission commence an investigation into three issues specified therein. On March 20, 2007, the Commission issued an order dismissing two of those issues for failure to state a claim upon which relief could be granted but also determining that the Commission had the authority, by virtue of Section 393.230.1, RSMo 2000,¹ to ascertain the value of Middle Fork's current investment in plant devoted to the public service, even though "the Commission typically determines rate base as authorized by Section 393.230.1 in the context of an active rate case, rather

than in a separate proceeding brought only for the purpose of valuing a utility's property devoted to the public service."²

By order dated August 22, 2007, the Commission directed the parties to file a pleading updating the Commission on the status of the remaining portion of the case on or before September 6, 2007. On September 7, 2007, the parties filed such a pleading, in which they informed the Commission that although some relevant information had been gathered and work had begun, Staff needed additional time to visit Middle Fork's offices before it could attempt to ascertain that value. The parties further indicated that Staff would, by no later than September 21, 2007, either: (1) complete its determination of the value of Middle Fork's plant in service and submit another pleading regarding that determination; or (2) file a status report stating when it would file such a pleading.

On September 21, 2007, Staff filed a Status Report in which Staff stated that it needed another 60 days to complete its work in determining the value of Middle Fork's current investment in plant devoted to the public service. Therefore, Staff requested that it be permitted to submit its pleading regarding that issue by no later than November 20, 2007. The Commission granted that request by order dated September 25, 2007. In particular, the Commission stated:

On or before November 20, 2007, Staff shall file an appropriate pleading regarding the results of its investigation into the proper amortization of Middle Fork Water Company's Contributions In Aid of Construction, its determination of the corresponding CIAC [Contribution In Aid of Construction] balance, and

¹ Section 393.230.1 grants the Commission "the power to ascertain the value of the property of every . . . water corporation . . . in this state and every fact which in its judgment may or does have any bearing on such value."

² Order Partially Dismissing Application for Failure to State a Claim, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266 (Mar. 20, 2007) at 4.

the value of Middle Fork's current investment in plant devoted to the public service.³

On November 20, 2007, Staff filed its verified recommendation, which included three documents as attachments. In the same verified pleading, Staff requested that the Commission issue an order "accepting Staff's Findings as stated in Attachment A . . . as the proper investment in plant for Middle Fork Water Company" as of September 30, 2007.⁴

Nine days later, Middle Fork filed its "Request for Order Directing Staff to State and Explain the Factual and Legal Bases for Its Recommendation." In this pleading, Middle Fork sought a Commission order "requiring Staff to clearly and completely state and explain, in writing, the factual and legal bases for the allegation stated in its Staff Recommendation that the majority – or, indeed, any – of the Company's investment in Plant in Service qualifies and properly should be categorized as a Contribution in Aid of Construction."⁵ Middle Fork explained that it needed this information because it intended to challenge Staff's conclusion that approximately 85% of Middle Fork's net Plant in Service should be categorized as CIAC, and could not properly do so "because nowhere in its filing does Staff explain the factual or legal bases" for that conclusion.⁶ The Commission granted Middle Fork's request by order dated December 12, 2007, and on December 21, 2007, Staff filed its "Explanation of the Factual and Legal Bases for Its Recommendation That

³ Order Directing Filing, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266 (Sept. 25, 2007) at 2.

⁴ Staff Recommendation, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266 (Nov. 20, 2007) at 1.

⁵ Request for Order Directing Staff to State and Explain the Factual and Legal Bases for Its Recommendation, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266 (Nov. 29, 2007) at 2.

⁶ *Id.* at 1.

Plant In Service be Classified as Contributions In Aid of Construction,” which itself contained a number of attachments.

On December 28, 2007, Middle Fork filed a pleading titled “Request for an Opportunity to Respond to Staff’s Recommendation and Explanation,” in which it requested “the opportunity to respond, in writing, to Staff’s recommendations and to the factual and legal arguments offered in support” thereof, and asked that it be allowed until January 11, 2008 to do so.⁷ The Commission granted that request by order dated January 2, 2008, and Middle Fork timely filed its written response as directed. Finally, after noting that it “involves legal and regulatory/public policy issues that are likely to arise in future cases,”⁸ the Commission conducted an on-the-record oral argument on Middle Fork’s pending application on February 5, 2008, in which all parties, including the Office of the Public Counsel (“OPC”) participated.

OPC’s Request

On March 26, 2008, OPC filed its Request for an Evidentiary Hearing in this matter. Two days later, Middle Fork filed a pleading opposing OPC’s request, arguing that the Commission should determine the value of Middle Fork Water Company’s investment in plant devoted to the public service on the basis of the record currently before the Commission, the Commission’s public utility finance practice and policy, and the governing law. Finally, on April 7, 2008, Staff filed a pleading in support of an evidentiary hearing, but

⁷ Request for an Opportunity to Respond to Staff’s Recommendation and Explanation, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company’s Property Devoted to the Public Service*, Case No. WO-2007-0266 (Dec. 28, 2007) at 2.

⁸ Order Scheduling Oral Argument, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company’s Property Devoted to the Public Service*, Case No. WO-2007-0266 (Jan. 30, 2008) at 1.

for reasons different than those given by OPC. For the following reasons, OPC's request for an evidentiary hearing will be granted.

Analysis

At the outset, the Commission notes that while Section 393.230.2, RSMo 2000, *permits* the Commission to conduct an evidentiary hearing in cases such as this, it does not *require* it to do so.⁹ Therefore, the Commission rejects OPC's arguments that due process always requires that "parties be afforded a full and fair hearing" and that for the Commission to decide this case without holding an evidentiary hearing would necessarily be "contrary to due process and fundamental fairness."¹⁰

The Commission also rejects OPC's claim that "[w]ithout an evidentiary hearing, the Commission's record is inadequate to make a factual and legal conclusion based upon the law and the findings of fact" inasmuch as that record "consists of only the meager pleadings in the case file as well as the counsels' oral arguments." This is because the existing record in this case is far from "meager" and includes much more than what is present "in the case file." In fact, the record currently contains not only the verified pleadings of both Middle Fork¹¹ and Staff,¹² but also their rather extensive written arguments/position

⁹ In this regard, Section 393.230.2 provides: "For the purpose of ascertaining the matters and things specified in this section, concerning the value of the property of . . . water 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.)

¹⁰ To the contrary, Commission Rule 4 CSR 240-2.117, which is titled "Summary Disposition," authorizes the Commission to decide all or any part of a case "by disposition in the nature of summary judgment or judgment on the pleadings." In essence, this is what Middle Fork has proposed in this case.

¹¹ Middle Fork's application was supported on the oath of its President, Brock Pfost. Application of Middle Fork Water Company, *In the Matter of the Application of Middle Fork Water Company for an Order Initiating an Investigation to Ascertain the Value of the Company's Property Devoted to the Public Service*, Case No. WO-2007-0266 (Jan. 12, 2007) at 5.

¹² Staff's recommendation was supported on the oath of James Russo, an Assistant Manager in the Commission's Water and Sewer Department. Staff Recommendation at 3. It was based on the following: (1) information provided by Middle Fork in the annual reports it has filed with the Commission; (2) Middle Fork's responses, by telephone and e-mail, to Staff's numerous requests for information from Middle Fork; (3) information obtained from Middle Fork during visits to its corporate offices and facilities by Staff, during which

statements setting forth the applicable legal standards and regulatory policy considerations,¹³ as well as all of the exhibits and documents attached thereto¹⁴ and a transcript of the lengthy on-the-record oral argument conducted on February 5, 2008. Moreover, the Commission may take official notice of facts demonstrated by its own records in prior cases involving Middle Fork pursuant to Section 536.070(6), which states, in relevant part, that “[a]gencies shall take official notice of all matters of which the courts take judicial notice.”¹⁵ Therefore, the record in this case also includes all the filings in Case Nos. WA-92-65¹⁶ and WR-2006-0212,¹⁷ several of which contain relevant information cited by Staff and Middle Fork. Indeed, the Commission agrees with Middle Fork that OPC has “fail[ed] 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.”

Having said this, it is true that the record presently lacks sworn expert regulatory and accounting testimony on the CIAC issue based on the underlying facts already before the

Staff reviewed company records bearing on to the valuation of the company’s assets; and (4) Staff’s review of the water supply contracts between Middle Fork, Stanberry and Grant City, as well as the payments made thereto. Attachment A to Staff Recommendation at 2.

¹³ Although it had the opportunity to do so, OPC did not join the other parties in filing a pleading addressing the factual, legal and regulatory policy issues presented by this case. It did, however, participate in the oral argument.

¹⁴ In this regard, it is worth noting that in the context of a judgment on the pleadings, “[a]n exhibit to a pleading is a part of the pleadings.” *McGuire v. Dir. of Revenue*, 174 S.W.3d 87, 89 (Mo. App. E.D. 2005).

¹⁵ Courts may take judicial notice of their own records in other prior proceedings on their own motion or at the request of a party. See *In re Estate of Ayers*, 984 S.W.2d 193, 196 (Mo. App. S.D. 1998); *State ex rel. Callahan v. Collins*, 978 S.W.2d 471, 474 (Mo. App. W.D. 1998); *Turner v. State*, 669 S.W.2d 642, 644 (Mo. App. S.D. 1984).

¹⁶ In that case, the Commission granted Middle Fork a certificate of convenience and necessity to supply wholesale water service to the northwest Missouri communities of Stanberry and Grant City, and also approved its financing plan. See Order Granting Certificate of Convenience and Necessity and Approving Financing, *In the Matter of the Application of Middlefork Water Company for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage, and Maintain a Water Storage and Distribution System to Supply the Cities of Stanberry and Grant City, Missouri; and for Authority to Borrow up to \$2,000,000 from the Missouri Environmental Improvement and Energy Resources Authority*, Case No. WA-92-65 (Mar. 31, 1992).

¹⁷ In that case, the Commission authorized Middle Fork to increase its rates for water service by a total of \$30,000 annually. See Order Approving Small Company Rate Increase, *In the Matter of a Small Company*

Commission. For its part, Staff has indicated that it “desires to have the opportunity to present the expert testimony of an accounting witness regarding the proper classification of the surcharge payments that the cities of Grant City and Stanberry have made to Middlefork,” and that it “also desires to have the opportunity to present evidence concerning the treatment of surcharges that have been paid to water and sewer utilities in similar circumstances.”¹⁸ As does OPC, Staff believes that the Commission would benefit from receiving such testimony in reaching its decision.

It is important to recognize that after conducting an audit of Middle Fork’s plant in service accounts, Staff has determined a net value for that investment as of September 30, 2007, and the company has accepted that valuation for purposes of this case. The only issue left to be decided is *how much* of Middle Fork’s investment in its plant should be categorized as CIAC for purposes of determining the company’s rate base. In the Commission’s view, this is a case- and fact-specific question of public utility finance and accounting practice and policy, which falls squarely within the Commission’s discretionary “power to ascertain the value of the property of every . . . water corporation . . . in this state and every fact which *in its judgment* may or does have any bearing on such value.”¹⁹ Since the very purpose of expert testimony is to “assist the trier of fact to understand the evidence

Rate Increase Request Between the Middle Fork Water Company and Commission Staff and the Office of the Public Counsel, Case No. WR-2006-0212 (Dec. 15, 2005).

¹⁸ Staff also contends that because Middle Fork’s position in this case is based upon a version of the Uniform System of Accounts (“USOA”) different from that prescribed for use by water utilities in Commission Rule 4 CSR 240-50.030(1), the Commission “would benefit from hearing testimony regarding the application of the correct version of the USOA to the facts in this case.” In making this argument, however, Staff appears to have overlooked 4 CSR 240-50.030(4), which expressly provides: “In prescribing these systems of accounts the commission does not commit itself to the approval or acceptance of any item set out in any account for the purpose of fixing rates or in determining other matters before the commission.”

¹⁹ Section 393.230.1 (emphasis added). *See also State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 80 (Mo. 1960) (holding that the Commission has “the power to determine what items should be included in a utility’s operating expense and what items should be excluded, and how excluded items, if any, should be handled and treated[.]”)

or to determine a fact in issue,”²⁰ receiving such testimony from a qualified expert witness or witnesses could clearly be of some value in helping the Commission properly exercise that judgment. Accordingly, even though “[w]here the facts purported to be in dispute are only opinions over the legal effect of documents determinative of legal rights, there is no dispute of material fact,”²¹ OPC’s request for an evidentiary hearing will be granted.

Having reached this conclusion, the Commission wishes to reassure the parties that it has not simply ignored or overlooked the two other concerns expressed by Middle Fork in its pleading opposing an evidentiary hearing. In particular, the Commission is aware that this case has already been pending for almost fifteen months (*i.e.*, longer than a full-blown rate case), and that conducting an evidentiary hearing involving one or more expert witnesses will lead to further delay. The Commission is also aware that Middle Fork is a small water company which had a net income before taxes of less than \$70,000 in 2006,²² for which the expense of paying its attorney to represent it through hearing and potentially hiring an expert of its own could be significant and might not be fully recoverable in rates. For these reasons, and because this case readily lends itself to such an accommodation, the Commission will, as requested by Middle Fork, order the parties to submit a set of stipulated facts at least two weeks in advance of the hearing date.

IT IS ORDERED THAT:

1. The Office of the Public Counsel’s request for an evidentiary hearing in this matter is granted.

²⁰ Section 490.065.1, RSMo 2000. The Missouri Supreme Court has held that this statutory standard governs the admission of expert testimony in both administrative proceedings and regular civil actions. See *St. Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003).

²¹ *Kinney v. Schneider Nat’l Carriers, Inc.*, 213 S.W.3d 179, 183 (Mo. App. W.D. 2007).

²² See Middle Fork’s Water and/or Sewer Annual Report, Small Company, to the Missouri Public Service Commission For the Year Ending December 31, 2006, Tracking No. BMAR-2007-1374 (filed May 21, 2007).

2. The parties shall jointly prepare and file a proposed procedural schedule by no later than April 24, 2008.

3. The parties shall jointly prepare and file a set of stipulated facts at least two weeks in advance of the hearing date contained in the proposed procedural schedule.

4. This order shall become effective on April 20, 2008.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Clayton and Jarrett, CC., concur,
Murray, C., dissent.

Lane, Regulatory Law Judge