

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

Office of the Public Counsel,)	
An agency of the State of Missouri,)	<u>Case No. WC-2015-0288</u>
Complainant,)	
)	
v.)	
)	
The Tranquility Group, LLC d/b/a)	
Branson Cedars Resort Utility)	<u>Case No. SC-2015-0289</u>
Company LLC,)	
A Missouri water and sewer corporation,)	
Respondents.)	

MOTION TO DISMISS

COMES NOW the Staff of the Missouri Public Service Commission, by and through counsel, and hereby states as follows:

1. On August 15, 2014, Respondents filed an application for a Certificate of Convenience and Necessity (CCN) in Case No. WA-2015-0049, but the application was re-filed on August 21, 2014 upon Commission order that Respondents file entries of appearance by an attorney.

2. On October 29, 2014, Respondents filed an application for a CCN in Case No. SA-2015-0107. The Commission consolidated WA-2015-0049 and SA-2015-0107 on November 6, 2014, under Case No. WA-2015-0049 ("CCN case").

3. On May 5, 2015, the Office of the Public Counsel (OPC) filed its Complaints in Case Nos. WC-2015-0288 and SC-2015-0289 ("these cases") with allegations against Respondents of charging for water and sewer services without an approved tariff.

4. Since the filing of this case, there have been several filings in the case, to include Staff's *Response to OPC's Complaints and Motion to Consolidate Cases*

(filed May 19, 2015), OPC's *Statement in Opposition to Staff's Response* (filed May 21, 2015), Respondents' *Motion to Consolidate Cases* (filed in WC-2015-0288 on June 5, 2015), Respondents' *Answer to the Office of Public Counsel's Complaint* (filed in WC-2015-0288 on June 5, 2015), Staff's *Motion to Hold Cases in Abeyance* (filed June 29, 2015), OPC's *Objection and Request for Commission Order to File Interim/Emergency Tariffs* (filed July 9, 2015), and OPC's *Notice of Withdrawal of Counsel* (filed November 4, 2015). The Commission has not ruled on any of the motions, nor has the Commission issued an order in the case since its initial May 6, 2015, order directing Respondents to file an answer.

5. On August 26, 2015, the Commission granted the Respondents' CCNs, and on October 22, 2015, the Commission approved the tariffs, tracking nos. YW-2016-0096 and YS-2016-0097, which became effective November 1, 2015. The CCN case was closed on November 2, 2015.

6. The conclusion of the CCN case should have resolved all of the issues identified in OPC's Complaints in these cases over which the Commission has authority to act. Therefore, the concerns no longer need to be pursued in these Complaint cases.

7. Staff now moves to dismiss these Complaints against Respondents, Case Nos. WC-2015-0288 and SC-2015-0289, because the Commission lacks subject matter jurisdiction over the remedy OPC seeks, namely, the refund of all fees and charges collected by Respondents for water and sewer service prior to the grant of the CCNs. It is well-established that the Commission lacks subject matter jurisdiction over a refund request. 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.”¹ 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.² “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.”³ 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 whether or not an act of the commission is authorized by the statute.”⁴

The Commission is without authority to award money damages or to order refunds.⁵ Even in the ***State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission*** (“UCCM”) case,⁶ 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.”⁷ In a recent appellate case discussing another attempt by OPC to extract refund from a small sewer company, the Court commented:

¹ ***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).

² ***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).

³ ***State Tax Commission***, *supra*.

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

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

⁶ 585 S.W.2d 41 (Mo. banc 1979).

⁷ *Id.*, pp. 59-60.

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.⁸

The Commission is unable to grant the relief requested by OPC. For that reason, the *Complaints* must be dismissed.

WHEREFORE, Staff urges the Commission to dismiss OPC's *Complaints* in Case Nos. WC-2015-0288 and SC-2015-0289 and to grant such other and further relief as is just in the circumstances.

Respectfully submitted,

/s/ Marcella L. Mueth

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⁸ ***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).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, on this 9th day of March, 2016.

/s/ Marcella L. Mueth