

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 20th day of
March, 2007.

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) **Case No. WO-2007-0266**
Devoted to the Public Service)

**ORDER PARTIALLY DISMISSING APPLICATION FOR FAILURE TO
STATE A CLAIM**

Issue Date: March 20, 2007

Effective Date: March 30, 2007

On January 12, 2007,¹ Middle Fork Water Company ("Middle Fork") filed an application requesting that the Missouri Public Service Commission commence an investigation into three issues specified therein. According to the application, Middle Fork is a Commission-regulated water corporation and public utility headquartered in Maryville which is engaged in the business of rendering water service to two wholesale customers (the cities of Stanberry and Grant City) pursuant to a certificate of public convenience and necessity granted by the Commission in Case No. WA-92-65.

Middle Fork requested that the Commission "institute an investigation to ascertain: 1) the value of the Company's current investment in plant devoted to the public service; 2) the standards and principles that will govern the valuation of future investments that the Company may make in plant betterments, improvements, additions, or extensions; and 3)

¹ Unless otherwise specified, all dates refer to the year 2007.

how these investments will be characterized and treated by the Commission for ratemaking purposes.”²

Middle Fork’s application explained that none of these three determinations were made in conjunction with its last rate case, Case No. WR-2006-0212, because “the parties to that case reached a ‘black box’ settlement that allowed [Middle Fork] the full amount of the rate increase it sought” but did not specify “any particular ratemaking principle in arriving at the amount of the annual operating revenue specified” therein. For this reason, and because Middle Fork now “needs to make additional investments in its plant and facilities” in order to “maintain and improve service to existing customers” and “effectively participate in planning processes” currently being conducted by the Missouri Department of Natural Resources, Middle Fork averred that it “requires some assurance that these future investments, as well as investments made in the past, will be properly valued and categorized for ratemaking purposes.” Middle Fork cited Section 393.230, RSMo 2000,³ as the statutory basis for filing its application and requesting that the Commission make the three specific determinations contained therein.

On January 19, the Commission ordered its Staff to file, by no later than February 2, an appropriate pleading analyzing Middle Fork’s application and setting forth Staff’s legal position as to the threshold issue of whether the facts and circumstances pled by Middle Fork in its application invoked substantive principles of law entitling Middle Fork to some or all of the relief it requested – in other words, whether or not the application stated a claim upon which relief may be granted by the Commission. The order also stated that if the

² For ease of reference, these areas of interest shall be referred to as Item #s 1, 2, and 3, respectively.

³ Unless indicated otherwise, all statutory references are to RSMo 2000.

Office of the Public Counsel or Middle Fork wished to file a response to Staff's pleading, they were required do so within ten days after it was filed.

Staff complied with the January 19 Order Directing Filing on February 2, and OPC filed its response to Staff's analysis on February 9. Their responses demonstrate that Staff and OPC are in agreement that Item #1 states a claim upon which relief can be granted under Section 393.230.1, which gives the Commission authority to make a determination of the value of Middle Fork's current investment in plant devoted to the public service. Their responses further show that Staff and OPC also agree that neither Item #2 nor Item #3 state a claim upon which relief may be granted by the Commission at this time.⁴

Although Middle Fork chose not to file a substantive reply to the pleadings of either Staff or OPC,⁵ the legal issues presented by the parties' pleadings are now ripe for determination by the Commission.

Analysis

Middle Fork relies exclusively upon Section 393.230 as authority for the requested relief. Subsection 1 thereof provides, in relevant part, as follows:

The commission shall have the power to ascertain the value of the property of every gas corporation, electrical corporation, water corporation and sewer corporation in this state and every fact which in its judgment may or does have any bearing on such value. The commission shall have power to make revaluations from time to time and to ascertain all new construction, extensions and additions to the property of every gas corporation, electrical corporation, water corporation, and sewer corporation.⁶

⁴ Staff and OPC also agree that Case No. WR-2006-0212 was not resolved via a "black box" settlement, as claimed by Middle Fork in its application. The Commission need not adjudicate those competing claims at this time.

⁵ In a pleading filed on March 8, Middle Fork did state that it "desires and intends to prosecute issue 1 regardless of whether the Commission dismisses issues 2 and/or 3" for failure to state a claim.

⁶ The remaining subsections of Section 393.230 are not germane to the legal issues before the Commission. Subsection 2 pertains to the hearing procedure and notice. Subsection 3 pertains to the procedure for review of the Commission's decision by a circuit court and the effect to be given to the Commission's decision in other proceedings. And Subsection 4 describes the procedures to be followed in connection with the subsequent revaluations mentioned in Subsection 1.

Section 393.230.1 clearly authorizes the Commission to do exactly what Middle Fork has asked it to do in Item #1 of the prayer for relief. It is also significant that Section 393.230.1 appears to grant this authority to the Commission unconditionally. For example, it does not say that such relief is only available to certain gas, electrical, water, or sewer corporations meeting certain procedural prerequisites, or that it is only available to claimants in certain types of proceedings (such as rate cases). Therefore, even though Section 393.230.1 does not expressly state that a particular gas, electrical, water, or sewer corporation may ask the Commission to ascertain the value of its property, the statute can reasonably be read to implicitly permit such requests, and no party has cited any case law holding otherwise.

It is true that the Commission typically determines rate base as authorized by Section 393.230.1 in the context of an active rate case,⁷ rather than in a separate proceeding brought only for the purpose of valuing a utility's property devoted to the public service. Still, it cannot be said that Item #1 is a request for single-issue ratemaking, which

⁷ See, e.g., Report and Order, *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Begin the Implementation of Its Regulatory Plan*, Case No. ER-2006-0314 (Dec. 21, 2006) at 19 ("Section 393.230 authorizes the Commission to value the property of electric utilities operating in Missouri, that is, to determine the rate base."); Report and Order, *In the Matter of the Tariff Filing of The Empire District Electric Company to Implement a General Rate Increase for Retail Electric Service Provided to Customers in its Missouri Service Area*, Case No. ER-2004-0570 (Mar. 10, 2005) at 36-37 (same).

is impermissible.⁸ This is because Middle Fork is not requesting a ratemaking at all. Indeed, if the Commission were to provide all of the relief sought by Middle Fork in Item #1, it would not have any immediate effect on the rates paid by Middle Fork's customers. Rather, it would merely determine the value of Middle Fork's present rate base. Thus, there is no risk that the Commission would be setting rates without considering all relevant factors, as required by law.⁹

Neither Staff nor OPC were able to find any reported case where the Commission determined a utility's rate base merely upon the request of the utility that it do so under what is now Section 393.230.1, which has been in continuous effect since 1913.¹⁰ Staff does cite and discuss a case, however, which the Commission evidently heard for the sole purpose of determining a public utility's rate base, *outside of the context of an active rate case*.

⁸ Section 393.270.4 provides that in determining the price to be charged for gas, electricity, or water, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended[.]" Missouri appellate courts have consistently held this means that the Commission's determination of the proper rate must be based on consideration of "all relevant factors." See, e.g., *State ex. rel. Util. Consumers' Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo. banc 1979); *State ex rel. Missouri Water Co. v. Pub. Serv. Comm'n*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 470, 479 (Mo. App. W.D. 1998). This is the source of Missouri's prohibition on single-issue ratemaking, see Order Granting Application, *In the Matter of the Application of Missouri-American Water Company*, Case No. WO-2005-0286 (July 21, 2005), which is more accurately characterized as a prohibition on less-than-all-issues ratemaking.

⁹ The Commission's determination of Middle Fork's rate base – in the present case – could, of course, be used to help determine its rates in a subsequent rate case. But if that were to occur, the rate base determined in this case would likely be used in the future case to determine the appropriate rates *in conjunction with all other relevant factors*. See *State ex rel. Dyer v. Pub. Serv. Comm'n*, 341 S.W.2d 795, 799 (Mo. 1961) (holding that in determining the price to be charged for water under Section 393.270.4, the fair value of the property owned by the utility as ascertained by the Commission under the authority of Section 393.230.1 "is a relevant factor for consideration in the establishment of just and reasonable rate schedules and must be considered in its proper relationship to all other facts that have a material bearing upon the establishment of 'fair and just' rates as contemplated by our statutes and decisions.")

¹⁰ What is now Section 393.230 was originally enacted in 1913. It was codified as Section 10487 in RSMo 1919, Section 5199 in RSMo 1929, Section 5655 in RSMo 1939, and has been codified as Section 393.230 since RSMo 1949.

The case is *Aluminum Goods Mfg. Co. v. Laclede Gas Light Co.*, 16 Mo. P.S.C. 114 (1926). That case was apparently “originally brought” by Laclede in 1918 as a rate case.¹¹ The Commission thereafter issued several interim rate orders and then, in 1923, “ordered its Engineering Department to make an appraisal of the company’s property” as of December 31, 1923.¹² This apparently created a new case. Later, the Commission’s Accounting Department audited Laclede’s books “to determine the amount of additions and betterments” made to the property between January 1, 1924 and September 30, 1925.¹³

The Commission issued Report and Order in the *Aluminum Goods* case on November 20, 1926. The first numbered paragraph of that Order fixed the fair value of the property of Laclede’s Gas, Electric, and Pintsch Departments,¹⁴ as well as other property which was owned by Laclede but not devoted to the public service, to be \$52.26 million as of October 1, 1925.¹⁵ The Commission entered no order whatsoever with regard to rates or to any other substantive issue.¹⁶ A subsequent rate case, which Laclede filed in April 1927, eventually reached the Missouri Supreme Court in 1931.¹⁷ Meanwhile, the proceedings in the earlier *Aluminum Goods* case before the Commission were repeatedly referred to

¹¹ *Aluminum Goods*, 16 Mo. P.S.C. at 115.

¹² *Id.* at 116. Unfortunately, the Report and Order does not say whether this was done at Laclede’s request or if the Commission acted *sua sponte*.

¹³ *Id.* The Commission’s internal records in the case make it clear that this was done at the request of Laclede, which had prayed for an immediate appraisal to establish the value of its property.

¹⁴ The curious reader may be wondering just what Laclede’s “Pintsch Department” sold. Named after its German inventor, Julius Pintsch, Pintsch gas was a synthetic fuel derived from distilled naphtha which was widely used in place of oil lamps to illuminate railroad and street cars during the mid 19th and early 20th centuries. Recognizing the declining use of that fuel, one witness at the hearing conducted by the Commission referred to “the encroaching obsolescence” of Laclede’s Pintsch gas business. *Id.* at 157.

¹⁵ *Id.* at 200.

¹⁶ *Id.*

¹⁷ *State ex rel. City of St. Louis v. Pub. Serv. Comm’n*, 47 S.W.2d 102, 103 (Mo. banc 1931). The Commission issued its order authorizing Laclede to increase its rates in January 1929. *Id.* That order was based, in part, on the valuation the Commission had placed on the property of Laclede’s natural gas department back in 1926. *Id.* at 104.

throughout the Court's opinion as the "Valuation Case."¹⁸ Moreover, the Court made it clear that the rate case before it was "an independent proceeding, and therefore collateral to the proceeding in the valuation case."¹⁹

Just as the *Aluminum Goods* case sprang from an earlier rate case, Middle Fork's application here sprang from the small company rate increase case that Middle Fork filed in 2005 (Case No. WR-2006-0212). That case was settled and a rate increase order was entered, but some issues were left unresolved. In Item #1 of its application, Middle Fork now asks the Commission to resolve one of those unresolved issues (the precise value of its property), just as the Commission did in the *Aluminum Goods* case.²⁰

For all these reasons, the Commission concludes that since Section 393.230.1 grants it "the power to ascertain the value of the property of every gas corporation, electrical corporation, water corporation and sewer corporation in this state," Item #1 of Middle Fork's application, which asks the Commission to exercise that power, states a claim upon which relief may be granted by the Commission and will not be dismissed.

In contrast, the relief that Middle Fork requests in the second and third items of its prayer for relief is *not* authorized by Section 393.230.1. In its application, Middle Fork claims that, pursuant to Section 393.230.1, "the Commission is, authorized by law to make determinations as to: . . . 1) the value of [Middle Fork's] current investment in plant devoted to the public service; 2) the standards and principles that will govern the valuation of future investments that [Middle Fork] may make in plant betterments; and 3) how these

¹⁸ *Id. passim.*

¹⁹ *Id.* at 105.

²⁰ Indeed, in its March 8 pleading, Middle Fork explained that it desired and intended to prosecute Item #1 regardless of whether the Commission dismissed Item #2 and/or #3 since it "believes it is important for the Commission to consider and resolve the issue of the value of [Middle Fork's] plant that is devoted to the public service because of questions that remain regarding that valuation as a result of the settlement that was reached in [its] last rate case."

investments will be characterized and treated by the Commission for ratemaking purposes.” However, unlike the situation with regard to Item #1, Section 393.230.1 in no way tracks the language of Item #2 and Item #3 and does not affirmatively authorize the Commission to take such actions. Moreover, Middle Fork has not cited any other authority for those claims, and Staff found none either.

In Item #2, Middle Fork is effectively requesting that the Commission issue an order regarding the standards and principles that will govern its valuation of certain unspecified future investments in plant improvements that Middle Fork may or may not make. And in Item #3, Middle Fork seeks a determination of how those hypothetical future investments would be characterized and treated by the Commission for ratemaking purposes should Middle Fork file another rate case in the future. Both would require the Commission to render an advisory opinion regarding hypothetical questions and future events which would bind the Commission in future, yet-to-be-filed cases involving Middle Fork. As the Commission does not decide hypothetical issues and “will not render an advisory opinion where there is no case in controversy,”²¹ neither Item #2 nor Item #3 state a claim upon

²¹ Order Denying Motion to Open Case, *In the Matter of the Necessity of Approval of Transiting Services Agreements Under Section 252 of the Telecommunications Act of 1996 and Related Issues*, Case No. TO-2005-0407 (Jun. 7, 2005). See also *State ex rel. County of Jackson v. Missouri Pub. Serv. Comm’n*, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999) (declining to review issues raised by respondent “in terms of all future cases” since that was “effectively a request for an advisory opinion on hypothetical questions”); *State ex rel. Missouri Cable Television Ass’n v. Missouri Pub. Serv. Comm’n*, 917 S.W.2d 650, 652 (Mo. App. W.D. 1996) (dismissing appeal because there was no live controversy, but “[o]nly a hypothetical question for which appellant seeks an advisory opinion.”)

which relief may be granted by the Commission. Therefore, they will be dismissed pursuant to Commission Rule 4 CSR 240-2.070(6).²²

IT IS ORDERED THAT:

1. Items #2 and #3 of Middle Fork Water Company's January 12, 2007 application are dismissed for failure to state a claim upon which relief may be granted by the Commission.

2. This order shall become effective on March 30, 2007.

BY THE COMMISSION

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

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Gaw, Clayton and Appling, CC., concur

Lane, Regulatory Law Judge

²² In relevant part, this rule provides: "The commission, on its own motion or on the motion of a party, may after notice dismiss a complaint for failure to state a claim on which relief may be granted[.]" Technically, this constitutes a dismissal for lack of jurisdiction, as the "failure to state a claim upon which relief may be granted is a jurisdictional defect." *City of Sullivan v. Truckstop Restaurants, Inc.*, 142 S.W.3d 181, 191 (Mo. App. E.D. 2004).