

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

In the Matter of Hickory Hills Water and	)	
Sewer Co., Inc. Small Company Rate	)	<u>Case Nos. WR-2009-0151 &</u>
Increase.	)	<u>SR-2009-0154</u>

OFFICE OF THE PUBLIC COUNSEL’S REQUEST FOR CLARIFICATION

COMES NOW the Office of the Public Counsel (Public Counsel or OPC) and for its Request for Clarification states as follows:

1. On March 19, 2009, Public Counsel filed a Request for Local Public Hearing stating that Public Counsel believed that scheduling a local public hearing would allow the Missouri Public Service Commission (Commission) and the Staff of the Public Service Commission (Staff) the opportunity to gather information which may be crucial in setting fair and reasonable rates in this case.
2. As the Commission had yet to act on Public Counsel’s request, on April 27, 2009 Public Counsel filed a Request for Ruling wherein Public Counsel requested that the Commission issue a ruling on its request for a local public hearing as soon as possible and if possible, schedule any local public hearing a few business days before May 21, 2009 so that the gathered information could be reflected in the upcoming Executed Disposition Agreement.
3. In its requests, Public Counsel stated its belief that the information gathered at a local public hearing would have a direct bearing on the upcoming Executed Disposition Agreement, which was scheduled to be filed by May 21, 2009. Public Counsel also stated an additional concern of the customers is the fact that their utility is now under the control of a court appointed receiver. Public counsel pointed out that the question and answer session normally scheduled

before a local public hearing would give Staff, Public Counsel and Mr. Cover the opportunity to meet with the customers and provide information regarding the receivership process.

4. On May 6, 2009, the Commission issued its Order Regarding Public Counsel's Request for Local Public Hearing. In this Order, the Commission granted Public Counsel's request for a local public hearing, but determined that the hearing would not be scheduled until after May 21, 2009 when the Executed Disposition Agreement would be filed. However, throughout this Order the Commission claims that Public Counsel's request for a local public hearing was "premature." The Commission Order states "The Commission's regulation that establishes the small company rate increase procedure allows Public Counsel to ask the Commission to hold a local public hearing, but it contemplates such a hearing after a disposition agreement has been filed." With this statement, the Commission order references 4 CSR 240-3.050 (15) and (17) in a footnote. No other rules or statutes were cited by the Commission as a basis for its claims that Public Counsel's request for a local public hearing was "premature."

5. On May 11, 2009, a Concurring Opinion of Commissioner Terry M. Jarrett was filed in the case. In his Concurrence, Commissioner Jarrett states: "I voted for the scheduling of the local public hearing in these cases. However, I have expressed **serious concerns** about the granting of these requests, **in direct contravention** of the Commission's rules. Those concerns are detailed in the Dissenting Opinion of Commissioner Terry M. Jarrett in File Nos. WR-2009-0150 and SR-2009-0153. My vote in these cases in no way diminishes or eliminates the concerns expressed in that dissent." [Emphasis added.] Commissioner Jarrett does not explain his "concerns" or cite to any rule or rules of which he believed there was a direct contravention. Instead, Commissioner Jarrett incorporates his Dissent in WR-2009-0150 and SR-2009-0153 as the source of more detail for his Concurrence in this case.

6. In his Dissent in WR-2009-0150 and SR-2009-0153, Commissioner Jarrett states that Public Counsel's motion for a local public hearing should not have been granted by the Commission. Commissioner Jarrett goes so far as to opine that: "The Office of the Public Counsel's ("OPC") motion **did not comply with the rules** promulgated by the Missouri Public Service Commission ("Commission") regarding the setting of local public hearings in small company rate increase proceedings." [Emphasis added.] Commissioner Jarrett did not cite any rule or rules with which he believed Public Counsel failed to comply. Commissioner Jarrett goes on to say "The Commission's deviation from the rules in this case, disguised as "policy", disregards the properly promulgated and adopted rules of the Commission in favor of an *ad hoc* approach to regulation." Commissioner Jarrett also states "I have raised concerns about tactical maneuvers by OPC in these matters and how OPC's maneuvering calls into question the very foundation upon which the small company rate increase procedures were set, which was to encourage utilities to timely file for rate increases, streamline the process for seeking such an increase, as well as decreasing the expenses associated with the process, all while preserving due process rights." No specific rules or statutes were cited by Commissioner Jarrett as a basis for his statements or for his dissent. Nor did Commissioner Jarrett enlighten the reader as to what "tactical maneuvers" and "maneuvering" by Public Counsel he believed "called into question the very foundation upon which the small company rate increase procedures were set."

7. In reading the Order of the Commission and Commissioner Jarrett's Concurrence which references his Dissent in WR-2009-0150 and SR-2009-0153, it is obvious that the Commission believes Public Counsel's actions have run afoul of the small company rate procedure rule, 4 CSR 240-3.050, in some manner. However, Public Counsel is at a loss as to where this has occurred.

8. The only clue to this is the Commission Order which states “The Commission’s regulation that establishes the small company rate increase procedure allows Public Counsel to ask the Commission to hold a local public hearing, but it contemplates such a hearing after a disposition agreement has been filed.” Apparently, the Commission is under the impression that Public Counsel’s request for a local public hearing runs afoul of 4 CSR 240-3.050 and is premature because it was requested before a disposition agreement was filed by staff. But, Public Counsel fails to see where in 4 CSR 240-3.050 Public Counsel is required to wait to file its request for a local public hearing until after a disposition agreement has been filed.

9. In rule interpretation, one must look to the plain language of the rule. 4 CSR 240-3.050 provides two references to Public Counsel’s right to request a local public hearing. 4 CSR 240-3.050 (15) states in its entirety:

No later than five (5) working days after the end of the comment period for the notice referenced in section (14), the public counsel shall file a pleading stating its position regarding the utility/staff agreement and the related tariff revisions, or requesting that the commission hold a local public hearing or an evidentiary hearing, and providing the reasons for its position or request. [Emphasis added.]

4 CSR 240-3.050 (17) states in its entirety:

No later than five (5) working days after the end of the comment period for the notice referenced in section (16), the public counsel shall file a pleading stating its position regarding the utility/staff agreement and the related tariff revisions, and providing the reasons for its position, and stating whether it will participate in the proposed arbitration process. The public counsel’s request for a local public hearing or an evidentiary hearing, and the reasons for its request, shall also be included in this proceeding. [Emphasis added.]

In both references, the rule states the last day on which a request for a local public hearing must be filed in order for that request to be timely. The rule makes no statements which limit how early that request can be made.

10. 4 CSR 240-3.050 (15) and (17) are separate, stand-alone sections in the rule which merely reference the disposition agreement in its calculation of the last day on which a request for a local public hearing must be filed in order for that request to be timely. While these sections follow sections (14) and (16) which apply “If the disposition agreement filed by the staff...” there is no such leading text for sections (15) or (17). Therefore, the plain language of the rule indicates that Public Counsel may file a request for a local public hearing **at any time** before five (5) working days after the end of the comment period for the notice referenced in section (14) or section (16) without running afoul of the rule.

11. In his Dissent in WR-2009-0150 and SR-2009-0153, Commissioner Jarrett points out that 4 CSR 240-3.050 contains no waiver provisions, and states “the rule cannot be waived and the Commission’s grant of the motion is not supported by the Commission’s rules.” Again, Public Counsel is at a loss as to why the Commissioner believes a waiver of 4 CSR 240-3.050 would be necessary in order for Public Counsel’s request for a local public hearing to be granted by the Commission.

12. As pointed out above, the plain language of 4 CSR 240-3.050 states the last day on which a request for a local public hearing must be filed in order for that request to be timely. The rule makes no statements which limit how early that request can be made. The rule contains no waiver provisions pertaining to Public Counsel’s request because none are necessary.

13. Public Counsel takes offense at Commissioner Jarrett’s derision of what he states were Public Counsel’s “tactical maneuvers” and “maneuvering” which “called into question the very foundation upon which the small company rate increase procedures were set.” Given the plain language of the rule, Public Counsel cannot see how its request for a local public hearing, which would give the customers the opportunity to have a say in the formation of a disposition

agreement which Public Counsel would be asked to sign on the customers' behalf, would even remotely call into question the foundation of the small company rate increase procedures. Public Counsel filed its request for a local public hearing when it did because it believed that a hearing at that point would provide customer input when it would be most useful. If Commissioner Jarrett disagrees, it would be helpful to learn exactly when he believes local public hearings should be held. Simply learning that Commissioner Jarrett considers such requests "tactical maneuvering" provides little help in guiding Public Counsel's future requests, nor does it reveal why Commissioner Jarrett found the request in this case (and other similar requests) to be so inapposite. Similarly, it would be helpful to learn which rule or rules Commissioner Jarrett believes Public Counsel "did not comply with."

14. For the above reasons, Public Counsel requests clarification from the Commission and Commissioner Jarrett as to exactly how Public Counsel has run afoul of 4 CSR 240-3.050. Public Counsel seeks this clarification because there are many small rate cases pending before the Commission and Public Counsel believes that clarification would greatly assist in processing them.

WHEREFORE, Public Counsel requests clarification from the Commission and Commissioner Jarrett as to exactly how Public Counsel has run afoul of 4 CSR 240-3.050.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 12th day of May 2009:

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