

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

In the Matter of the Small Company Rate)	
Increase Request of Hickory Hills Water &)	<u>Case No. WR-2006-0250</u>
Sewer Company, Inc.)	

**PUBLIC COUNSEL’S RESPONSE IN OPPOSITION TO
STAFF’S MOTION TO MODIFY PROCEDURAL SCHEDULE**

COMES NOW the Office of the Public Counsel and for its Response in Opposition to Staff’s Motion to Modify Procedural Schedule states as follows:

1. On March 3, 2006, the Staff of the Commission filed a proposed procedural schedule that all parties agreed to. On March 7, the Commission adopted that schedule.

2. On April 5, Staff filed a motion to modify the procedural schedule it agreed to just a month earlier. In that motion, Staff requests the Commission allow it another round of testimony not contemplated in the schedule that the parties agreed to. Staff’s argument in support of that “bonus round” of testimony, although not entirely clear, appears to be based on its belief that Public Counsel would file direct testimony. Staff discusses the fact that, but for Public Counsel’s objection, the rate increases that the Staff supports would likely not have received a hearing. Staff seems to be of the belief that, by objecting to the proposed increase, Public Counsel has become the moving party. Staff misinterprets the law. Section 393.150.2 RSMo 2000 clearly states that: “At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the ... water corporation or sewer corporation...” This burden does not shift.¹

¹ While it is not clear whether Hickory Hills can lawfully meet this burden by relying almost entirely on the Commission’s own Staff, it is certainly clear that it cannot avoid this burden by shifting it to Public Counsel and requiring Public Counsel to prove that the requested increase is not just and reasonable.

Staff appears to rely on one section in 4 CSR 240-2.130(7) that refers to cases in which all parties file direct testimony. However, that section refers to direct testimony as the place for a party to present its case-in-chief. Black's defines "case in chief" as "That part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." Black's Law Dictionary 196, (Henry Campbell Black ed., Fifth Edition, West 1979). Public Counsel does not have the initial burden of proof in this case, and does not have a case in chief. Public Counsel is simply presenting evidence to show that the case presented by Staff on behalf of Hickory Hills is flawed. Public Counsel's role in this case is not to prove that Hickory Hills' rates are adequate, but rather to show that Hickory Hills and Staff have not proved that they are inadequate.

3. Indeed, that same section of the Commission's rules (4 CSR 240-2.130(7)) recognizes that in some cases, only the moving parties will file direct testimony. 4 CSR 240-2.130(7)(C) states that "Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case...." This is just such a case; Hickory Hills is the moving party, along with the Staff advocating on its behalf. Public Counsel's rebuttal testimony includes all testimony that explains why the case presented by the moving parties is insufficient to justify any rate increase for water service, and insufficient to justify the entire requested sewer increase. There is no Public Counsel "case in chief" as contemplated by the Commission's rules, and no reason for Public Counsel to present its rebuttal testimony as direct.

4. Staff states that it and the company understood that all parties would file direct testimony. Certainly, there have been meetings between Staff and the company to which Public Counsel was not invited, and perhaps such a requirement was discussed at those meetings. But a

requirement – explicit or implied – for all parties to file direct testimony was never discussed at the meetings at which the undersigned counsel was present. Staff may have, as it states in its pleading, come to that understanding “[b]ased on the discussions leading up to the Staff’s filing” of the proposed schedule. Public Counsel has no basis to challenge the truth of that assertion. But given that the topic was never broached during the discussions among all the parties, Public Counsel submits that it is not reasonable to change the schedule now because Staff jumped to an unsupported conclusion, or because Staff reached an understanding based on discussions at which Public Counsel was not present.

5. The fact that Staff expected Public Counsel to file direct testimony is no reason to allow Staff a bonus round of testimony at this point. The testimony filings have played out in a perfectly reasonable fashion: the moving parties filed direct testimony in an attempt to prove that a rate increase is necessary, and the challenging party filed rebuttal testimony to show the flaws in the moving parties’ case in chief. Moreover, not only is this a reasonable way to proceed, it is exactly in accordance with the proposal that Staff filed on behalf of all the parties and that the Commission adopted.

6. Staff opines that Public Counsel opting to file its case in rebuttal violates “the spirit” of the proposed schedule. With all due respect, the Staff filing entitled “Proposed Procedural Schedule” is a half a page long – it isn’t complicated; it doesn’t have a spirit. The schedule is simple and Public Counsel complied with it.

The issues are equally simple: Public Counsel believes that Staff included too many miles, and too many hours with too much compensation. Those are the only issues in the case; there is surely no need for three rounds of prefiled testimony to address them.

WHEREFORE, Public Counsel respectfully requests that the Commission deny the Commission Staff's Motion to Modify Procedural Schedule.

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 7th day of April 2006:

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