

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 26th day of
June, 2007.

In the Matter of S. K. & M. Water and Sewer)	<u>Case No. WR-2007-0460</u>
Company's Rate Increase Request)	Tariff No. YW-2007-0864

In the Matter of S. K. & M. Water and Sewer)	<u>Case No. SR-2007-0461</u>
Company's Rate Increase Request)	Tariff No. YS-2007-0865

**ORDER GRANTING THE OFFICE OF THE PUBLIC COUNSEL'S
MOTION TO COMPEL**

Issue Date: June 26, 2007

Effective Date: June 26, 2007

On October 19, 2006, S. K. & M. Water and Sewer Company ("S. K. & M.") initiated small water and sewer company rate increase actions pursuant to Commission Rules 4 CSR 240-3.330 and 4 CSR 240-3.635. On May 31, 2007,¹ after working with the Commission's Staff, S. K. & M. filed tariffs, bearing effective dates of July 16, 2007, designed to increase its rates for water and sewer service.² On June 7, 2007, Staff filed Company/Staff Agreements Regarding Disposition of Small Water Company Rate Increase Request and Disposition of Small Sewer Company Rate Increase Request ("Disposition

¹ S. K. & M. agreed to two extensions of the 150-day tariff rule, and S. K. & M. filed its written consent to these extensions pursuant to Commission Rules 4 CSR 240-3.330(1)(F) and 4 CSR 240-3.635(1)(F). S. K. & M.'s cover letters and dates of issue on its submitted tariffs was June 1, 2007.

² Staff provided the Office of the Public Counsel the results of its investigation and its recommendations for resolutions of S. K. & M.'s request.

Agreements”). OPC did not join the Disposition Agreements, but it has also not stated a position at this time as to whether it agrees or disagrees with S. K. & M.’s tariffs.³

On June 21, 2007, OPC filed a Motion to Compel Discovery and a Request for Expedited Treatment of that motion. OPC states that on April 10, 2007, it sent a series of data requests to S. K. & M. requesting information designed to clarify concerns of improper charges by the utility. S. K. & M. did not respond. On May 10, 2007, OPC mailed a follow up letter to S. K. & M. again seeking answers to the data requests, and on May 16, 2007, S. K. & M. sent a letter to OPC stating that its data requests were improper as part of the small utility rate request procedure and denied any obligation to respond.

Specifically, S. K. & M. claimed that Commission Rules 4 CSR 240-3.330(1)(A) and 4 CSR 240-3.635(1)(A) require that any investigation and audit by OPC must be completed within the same time period as the Commission’s Staff’s investigation and audit for small utility rate increases. Because the Commission’s Staff completed its investigation and audit on or about February 20, 2007, it is S. K. & M.’s position that OPC’s data requests were untimely submitted.

On May 17, 2007, OPC mailed another letter to S. K. & M. stating that any objection to OPC’s data requests were untimely as they were not served in writing within ten (10) days of receiving the data requests as required by Commission rule 4 CSR 240-2.2.090(2). OPC asserts that despite the provisions of the Commission’s Rules concerning investigations and audits during small utility rate increase cases that its data requests were proper under Section 386.450, RSMo 2000. OPC’s May 17, 2007 letter again sought

³ A local public hearing in this matter was scheduled and conducted on June 25, 2007.

answers to the April 10, 2007 data requests, but none were received. OPC requested an informal discovery conference which was held on June 21, 2007, with Judge Stearley, S. K. & M., Staff and OPC all in attendance.

Following the discovery conference, and having fulfilled the requirements of the Commission's Discovery Rule, 4 CSR 240-2.090, OPC sought an order compelling discovery. OPC also sought expedited treatment of that motion, given the effective date of the proposed tariffs filed by S. K. & M. is rapidly approaching. Consequently, the Commission directed S. K. & M., and any other parties to this matter, to respond to OPC's motions no later than 8:00 a.m. Monday, June 25, 2007.

On June 25, 2007, the Commission's Staff responded. Staff states that it completed its investigation and audit on February 20, 2007 and that it forwarded its results to OPC on February 28, 2007. Applying the Commission's rules on small utility rate increases, Staff argues that February 28, 2007 was the latest date for OPC to complete any investigation and audit it wished to conduct in relation to these two cases, and that OPC's April 10, 2007 data requests were untimely.

Staff also argues that Section 386.450, RSMo 2000, can be read in harmony with the Commission's rules and that OPC has not stated "good cause" for its untimely data requests. Staff points out that the Commission adopted the small company rate increase rules to ease the cost and burden on small companies seeking a rate increase, as well as streamline the process.⁴ Staff asserts that to grant OPC's motion to compel responses to

⁴ The rules contemplate a 150 day timeline, a timeline that has been exceeded in this case by the consent of the parties. See FN 1. The company initiated these two cases on October 19, 2006 and the 150-day deadline would have been on March 19, 2007. As of June 25, 2007, 249 days had passed since the initiation of this case. OPC's data request, served on April 10, 2007 was served 173 days from the initiation of this case.

its data requests would subvert the Commission's purpose in adopting the small company rate increase procedure.

Also on June 25, 2007, S. K. & M. filed a motion for an extension of time to file its response to OPC's motions. This motion was granted and S. K. & M. filed its response on the following day, June 26, 2007. In addition to reiterating Staff's arguments, S. K. & M. also argues that the Commission has the authority to prescribe the rules in question and that OPC's broad discovery authority under Section 386.450, RSMo 2000, can be reasonably restricted in the context of a small utility rate increase case.

Commission Rules 4 CSR 240-3.330(1)(A) and 4 CSR 240-3.635(1)(A), governing small sewer and water company rate increase procedures respectively, provide in pertinent part:

When the [Staff's] investigation and audit are complete, the commission's staff shall notify the company and public counsel whether the requested additional revenue is recommended in whole or in part, of the rate design proposal for the increase, and of any recommended operational changes. If public counsel wishes to conduct an investigation and audit of the company, it must do so within the same time period as staff's investigation and audit.

However, Section 386.450, RSMo 2000, provides:

At the **request of the public counsel and upon good cause shown** by him **the commission shall require** or on its own initiative the commission may require, **by order served upon any corporation, person or public utility** in the manner provided herein for the service of orders, **the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept** by said corporation, person or public utility **in any office or place within or without this state**, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

Consequently, in order to decide if it should grant OPC's motion to compel, the Commission must decide if the statute trumps the Commission's Rules, or can be read in harmony with

those rules, and if OPC has stated “good cause” for its requests. In order for the Commission to make this determination, it must construe the intent of the statute and its regulations.

“The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and 'the manifest purpose of the statute, considered historically, is properly given consideration.”⁵ It is also well-established law that regulations may be promulgated only to the extent of and within the delegated authority of the statute involved.⁶ Only rules promulgated by an administrative agency with properly delegated authority have the force and effect of law.⁷ When interpreting regulations, courts should employ a construction that will avoid invalidity when possible;⁸ however, when there is a direct conflict or inconsistency between a statute and a regulation, the statute, which represents the true legislative intent, must necessarily prevail.⁹

⁵ *Goldberg v. State Tax Com'n*, 639 S.W.2d 796 (Mo. banc 1982); *State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. banc 1969); *Cummins v. Kansas City Public Service Co.*, 66 S.W.2d 920, 925 (Mo. 1933). It should be noted that the title to Section 386.450 is “Inspection of out of state records;” however, “The headings of chapters, articles, or sections are not to be considered in construing our statutes; these indicia are mere arbitrary designations inserted for convenience of reference by clerks or revisors, who have no legislative authority, and are therefore powerless to lessen or expand the letter or meaning of the law.” *Killeron v. American Bankers Ins. Co. of Florida*, 733 S.W.2d 442, 444 (FN4) (Mo. banc 1987); *State ex rel. Agard v. Riederer*, 448 S.W.2d 577, 581 (Mo. banc 1969). Additionally, only “[w]hen the language of a statute is ambiguous [may] recourse be had to the title in order to ascertain the true meaning of the act.” *Phillips Pipe Line Co. v. Brandstetter*, 263 S.W.2d 880, 884 (Mo. App. 1954); *In re Graves*, 30 S.W.2d 149, 152 (Mo. banc 1930).

⁶ *Psychare Management, Inc. v. Department of Social Services Division of Medical Services*, 980 S.W.2d 311, 313 (Mo. banc 1998); *Bartlett and Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. banc 1983).

⁷ *Psychare Management*, 980 S.W.2d at 313-314.

⁸ *State Dept. of Labor and Indus. Relations, Div. of Labor Standards v. Board of Public Utilities of City of Springfield*, 910 S.W.2d 737, 741 (Mo. App. 1995).

⁹ *Parmley v. Missouri Dental Board*, 719 S.W.2d 745, 755 (Mo. banc 1986).

Section 386.450 allows OPC considerable latitude when making discovery requests. The statute does not place any requirement on OPC that any case exist in order for it to obtain the books, accounts, papers or records kept by any corporation upon a request and demonstration of “good cause.” Although the term “good cause” is frequently used in the law,¹⁰ the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.¹¹ Good cause “generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law.”¹² Similarly, “good cause” has also been judicially defined as a “substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties.”¹³

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given “must be real not imaginary, substantial not trifling, and reasonable not whimsical.”¹⁴ And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.¹⁵

During the discovery conference on June 21, 2007, OPC indicated that its “good cause” for the data requests related to the fact that S. K. & M. was seeking a significant increase in its rates and that it had not found its concerns, concerning potential improper

¹⁰ *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

¹¹ See *State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term “good cause” as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

¹² *Black’s Law Dictionary* 692 (6th ed. 1990).

¹³ *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective “ordinary person” standard. See, e.g., *Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm’n*, 575 S.W.2d 889, 892 (Mo. App. 1978) (“[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.”)

¹⁴ *Belle State Bank v. Indus. Comm’n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). See also *Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

¹⁵ See generally *Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

charges being made by the company, to have been sufficiently addressed by the information obtained by Staff during its investigation and audit. Indeed, S. K. & M. originally sought an increase of approximately 89% in its water rates and a 97% increase in its sewer rates. The Disposition Agreement filed by Staff indicates that S. K. & M. and Staff have agreed to an increase of approximately 29% in its water rates and 48% in its sewer rates, still substantial increases. The substantial rate increase is a substantial cause for OPC to seek discovery of additional information not discovered by Staff in its investigation and audit.

While it appears that OPC may have been timelier in submitting its data requests, Section 386.450, RSMo 2000, does not place a time restriction on such requests. To the extent that Section 386.450, RSMo 2000, conflicts with the Commission's regulations, it must prevail. Consequently, the Commission will order S. K. & M. to comply with OPC's discovery requests.

OPC is advised, however, of the Commission's displeasure with any delay with small utility companies seeking rate increases under its expedited procedure, especially if that delay can be prevented by serving data requests earlier and when it can cooperate much closer with Staff's efforts to investigate and audit these companies. Staff is completely correct with regard to the policies behind the adoption of those rules. The Commission also advises OPC that its discovery requests, and the production requirements on S. K. & M., are limited by the express language of Section 386.450, RSMo 2000. Thus, OPC may only obtain books, accounts, papers or records kept by the corporation that were already in existence at the time of its data requests. The company cannot be compelled to create new books, accounts, papers or records simply to satisfy OPC's requests.

The Commission finds that there is good cause to expedite treatment of OPC's Motion to Compel, given that the effective dates of S. K. & M.'s tariffs is rapidly approaching. The Commission will grant the motion to expedite.

IT IS ORDERED THAT:

1. The Office of the Public Counsel's Motion for Expedited Treatment of its Motion to Compel Discovery is granted.
2. The Office of the Public Counsel's Motion to Compel Discovery is granted, subject to the restrictions delineated in the body of this order.
3. No later than June 29, 2007, S. K. & M. Water and Sewer Company shall respond fully and completely to the Office of the Public Counsel's April 10, 2007 data requests.
4. This order shall become effective on June 26, 2007.

(S E A L)

BY THE COMMISSION



Colleen M. Dale
Secretary

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

Stearley, Regulatory Law Judge