

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

In The Matter of Ridge Creek Water Company, LLC's)
Application to Implement a General Rate Increase in)
Water Service)

Case No. WR-2017-0042

RESPONSE TO OPC'S MOTION TO COMPEL DISCOVERY

COMES NOW Staff of the Missouri Public Service Commission ("Staff"), and for its *Response to OPC's Motion to Compel Discovery*, states as follows:

1. On December 28, 2016, the Office of Public Counsel ("OPC") filed a *Motion for Waiver & to Compel Discovery or, in the alternative, Motion to Stay Proceedings* ("Motion to Compel").
2. The same day, the Commission issued an order directing the parties to file their responses to the motion by Friday, January 6, 2017.
3. OPC's Motion to Compel raises a number of items to which Staff will respond below.

Background

4. Ridge Creek Water Company, LLC ("Ridge Creek" or "Company") was granted a Certificate of Convenience and Necessity ("CCN") to provide water service in Case No. WA-2015-0182. One of the terms in the *Order Approving the Nonunanimous Stipulation and Agreement* ("Order")¹ issued in that case was for Ridge Creek to file a general rate case.
5. Ridge Creek filed a small utility rate case letter on November 14, 2016 to comply with that requirement. Ridge Creek is a small water utility as defined by Commission rule.

¹ Case No. WA-2015-0182, EFIS Item 39.

6. Ridge Creek's functional management operations currently include: one day-to-day managing member, one part-time billing employee, and one part-time maintenance employee.

OPC's Discovery Requests

7. OPC requested that the Commission waive the "proscribed discovery resolution methods outlined in the Commission regulations."² Staff believes the applicable regulation to be 4 CSR 240-2.090(8). That regulation requires that counsel contact the party that is the source of the discovery concern by telephone or in person prior to filing a discovery motion with the Commission.³ If that is unsuccessful, the regulation further requires counsel to arrange a conference with the presiding officer and opposing counsel.⁴

8. While Staff has no objection to a Commission order compelling Ridge Creek Water to respond to any outstanding OPC data requests, Staff objects to the Commission issuing any discovery sanctions authorized by Missouri Rule 61 until the requirements of 4 CSR 240-2.090(8) have been met.

9. Staff proposes that, alternatively, the Commission schedule a conference call with the parties, pursuant to 2.090(8)(B). If the proprietor of the Company fails to appear at the conference, and follow through on production of the needed discovery, the Commission should only then consider discovery sanctions, and only against the proprietor, and not the Company itself so as to ensure the Company's continuing viability.

² EFIS Item 7, Motion to Compel, ¶ 10, and Wherefore Clause.

³ 4 CSR 240-2.090(8)(A)

⁴ 4 CSR 240-2.090(8)(B)

10. Staff has been able to obtain some documents with the Company's cooperation that may be responsive in part to Staff's data requests. Staff is currently reviewing these documents to determine if Staff needs more information.

11. Staff made the documents available to OPC for review, and OPC has made copies of those documents. These documents may be responsive to some of OPC's outstanding data requests as well.

12. The first key deadline in the regulation concerning a small company rate request is February 14, 2017, when Staff should provide a preliminary report of its findings to the Company and OPC at Day 90.

13. As of today, a little more than thirty days remain before the Day 90 deadline. While not ideal, there is still time prior to that initial deadline to attempt both formal and informal discovery methods.

14. Therefore, for the foregoing reasons, Staff objects to waiving the Discovery rule 4 CSR 240-2.090(8).

Request for Sanction to Void Stipulation and Agreement

15. OPC requests the Commission order the Company to answer the propounded data requests and issue sanctions that include "voiding and nullification of the Stipulation and Agreement."⁵

16. Commission practice regulation 4 CSR 240-2.090(1) provides that "Discovery may be obtained by the same means and under the same conditions as in civil actions in the circuit court. Sanctions for abuse of the discovery process or failure to

⁵ EFIS Item 7, Motion to Compel, ¶ 11, and Wherefore Clause. The "Stipulation and Agreement" referenced by OPC is the *Nonunanimous Stipulation and Agreement* filed in case number WA-2015-0182, to which OPC filed a non-objection. See, Case No. WA-2015-0182, EFIS Items 37, 38. For continuity, Staff will refer to the document as the "Stipulation and Agreement."

comply with commission orders regarding discovery shall be the same as those provided for in the rules of civil procedure.”

17. The Missouri Rules of Civil Procedure Rule 61 provide all of the available sanctions when a party fails to respond to the discovery methods outlined in Rule 56.01(a). Nothing in Rule 61 allows for the setting aside or voiding of a valid, executed settlement document the contents of which have been incorporated by reference into a final order, or the setting aside of a final order.

18. OPC did not object to the Stipulation and Agreement at the time it was filed.⁶

19. Moreover, § 386.550 RSMo prohibits collateral attacks on a final Commission orders. Once the *Order* became final there are no available avenues to attack the decision.⁷

20. The Commission’s *Order* in WA-2015-0182 incorporated the terms of the Stipulation and Agreement, and also placed further conditions and requirements upon the Company.

21. The Stipulation and Agreement terms, as well as the additional conditions and requirements in the *Order* continue to be necessary requirements upon Ridge Creek.

22. The *Order* also granted Ridge Creek its CCN. Voiding the Stipulation and Agreement and or the *Order* would remove all of the necessary terms and conditions

⁶ Case No. WA-2015-0182, EFIS Item 38. By Rule 4 CSR 240- 2.115(2), not opposing a Non-unanimous Stipulation and Agreement makes it a Unanimous Stipulation and Agreement.

⁷ “If a statutory review of a PSC order is unsuccessful, the order is final and cannot be attacked in a collateral proceeding.” *State ex rel. Mid-Missouri Tel. Co. v. Pub. Serv. Comm’n*, 867 S.W.2d 561, 565 (Mo. App. W.D. 1993).

Staff and the Commission placed upon the Company, but *would not* remove the CCN, allowing the Company to operate without the Commission-ordered conditions.⁸

23. For the foregoing reasons, Staff opposes setting aside or voiding the Stipulation and Agreement or the *Order*.

Motion to Stay

24. OPC's Motion to Compel also requests a stay of the Small Rate Case Procedure.

25. As stated above, the first key deadline is the Day 90 deadline of February 14, 2017, when Staff is required to provide a preliminary report to OPC and the Company.

26. A little more than thirty days are left before the Day 90 deadline.

27. Staff argues that a stay to the case is not needed. Staff agrees that the discovery process has been slow, and Staff itself has not obtained all of its requested information. However, Staff has had some success in obtaining information.

28. Further, 4 CSR 240-3.050 (12) allows for extensions of up to sixty (60) days upon agreement of Staff and the small utility. Staff suggests that if discovery disputes remain, it will work with the parties to extend the timeline to allow for additional time to resolve the disputes before a stay of the proceeding is needed.

WHEREFORE, Staff respectfully requests that the Commission issue an order that denies OPC's request, and grants such other and further relief as the Commission deems just.

⁸ See, *State ex rel. City of Sikeston v. Pub. Serv. Comm'n of Missouri*, 336 Mo. 985, 997, 82 S.W.2d 105, 109 (Mo. 1935)(holding that the Commission did not have the statutory authority to revoke a license of a public utility to operate). See also, *Peoples Tel. Exch. v. Pub. Serv. Comm'n*, 186 S.W.2d 531, 538 (Mo. Ct. App. 1945).

Respectfully submitted,

/s/ Jacob T. Westen

Jacob T. Westen
Deputy Counsel
Missouri Bar No. 65265

Attorney for the Staff of the
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
573-751-5472 (Voice)
573-526-6969 (Fax)
jacob.westen@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered by hand, U.S. Mail, or served electronically on this 6th day of January, 2017, to the parties of record.

/s/ Jacob T. Westen