

On May 5, 2015, the Office of the Public Counsel (“OPC”) filed its *Complaint*, charging that Respondents Ridge Creek Development, LLC, Ridge Creek Water Company, LLC, and Mike and Denise Stoner, were charging unjust and unreasonable rates for water sold to the public, on the theory that without an approved tariff, any charge was unjust and unreasonable as a matter of law. OPC prayed that the Commission would, after notice and a hearing, declare the rates in question to be unjust, unreasonable and unlawful; order the refund of all unlawful charges collected; and authorize its General Counsel to seek penalties from the Respondents in circuit court.

Thereafter, on May 7, 2015, the Commission ordered Staff to investigate the circumstances and to file a report thereof not later than July 8, 2015.

On July 8, 2015, Staff moved for an extension of time, up to and including August 10, 2015, within which to complete its investigation.

Staff herewith tenders its *Investigation Report*.

***Staff's Investigation Report:***

Staff filed its own *Complaint* against Ridge Creek Development, LLC, and Mike and Denise Stoner on July 14, 2014, almost one year ago. That *Complaint* charged that the Respondents (Count I) were engaged in the business of providing water to the public for gain without authorization from the Commission and (Count II) that the water so provided was not safe for human consumption. For remedies, Staff prayed that, after notice and a hearing, the Commission would sustain Staff's *Complaint*; direct its General Counsel to seek penalties against the Respondents in circuit court; and require the Respondents to submit to inspection by the Missouri Department of Natural Resources ("DNR") and to make any required improvements to their system.

On September 2, 2014, Ridge Creek Development, LLC, and Mike and Denise Stoner answered Staff's *Complaint*, denying the violations charged therein.

Staff based its *Complaint* upon conversations by Staff investigators with the Stoners and several of their customers, upon the results of site visits by Staff members, upon review of documents generated by the Respondents, including a New Customer Application, invoices for water service rendered and informational notices and letters, and upon review of records maintained by the Missouri Secretary of State and of

records maintained by the Missouri Public Service Commission. Staff states that the material facts are as follows:

1. Mike and Denise Stoner are a married couple residing in Dixon, Missouri, whose several business ventures include a residential real estate development in Pulaski County, Missouri, known as Ridge Creek. There are 136 inhabited residences in the Ridge Creek development.

2. Mike and Denise Stoner own and operate Ridge Creek Development, LLC, a Missouri limited liability corporation through which they carry on activities associated with the Ridge Creek residential real estate development.

3. On January 15, 2015, Mike and Denise Stoner created a second Missouri limited liability corporation, Ridge Creek Water Company, LLC.

4. Mike and Denise Stoner, Ridge Creek Development, LLC, and/or Ridge Creek Water Company, LLC, provide water service to the residents of the Ridge Creek development. The Respondents charge for the water they provide, at a rate of either \$28.00 or \$33.00 per residence per month, and realize about \$50,000 annually from this activity.

5. The water sold by Respondents is obtained from some 22 wells at the Ridge Creek development. The wells are equipped with pumps and distribution infrastructure connected to the residences served. On information and belief, the number of residences served per well was limited by the Respondents in order to evade regulation by the Department of Natural Resources (DNR).

6. The Commission's records show that none of the Respondents has a Certificate of Convenience and Necessity ("CCN") from the Commission authorizing any

of them to provide water to the public for gain. The Commission's records also show that none of the Respondents has a Commission-approved tariff containing a schedule of rates and charges for the sale of water to the public.

7. On February 6, 2014, the Commission granted Respondent's *Motion to Defer Filing of Procedural Schedule* based on Respondents' representation that they were seeking a CCN in Case No. WA-2015-0182.

8. Case No. WA-2015-0182 is set for hearing on September 16, 2015, because of thus far unreconciled differences as to the appropriate revenue requirement to be collected through rates.

9. Staff's policy is to use complaints in many situations as encouragement tools. The complaint that Staff filed against the Stoners and Ridge Creek Development, LLC, is an example of a tool used to encourage a reluctant un-certificated utility owner to seek a CCN. Unless the facts are egregious or the operator obdurate, Staff will likely dismiss its complaint upon the granting of a CCN by the Commission. In Staff's view, it is rarely in the public interest to exact monetary penalties from a small water or sewer utility. Staff intends to dismiss the complaint it brought against the Stoners and Ridge Creek Development, LLC, upon the granting of a CCN in Case No. WA-2014-0182 and resolution of the un-certificated utility issue.

#### ***Discussion:***

The facts found by Staff support the allegations of OPC's *Complaint*. However, Staff does not agree that OPC is entitled to the relief it seeks or that the relief is in the public interest.

#### **1. The Public Service Commission cannot order refunds.**

The Public Service Commission “is purely a creature of statute” and its “powers are limited to those conferred by the [Missouri] statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted.”<sup>1</sup> While the Commission properly exercises “quasi judicial powers” that are “incidental and necessary to the proper discharge” of its administrative functions, its adjudicative authority is not plenary.<sup>2</sup> “Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise.”<sup>3</sup> While the Public Service Commission Law is a remedial statute and thus subject to liberal construction, “neither convenience, expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by the statute.”<sup>4</sup>

It is well-established that the Commission is without authority to award money damages or to order refunds.<sup>5</sup> Even in the ***State ex rel. Utility Consumers’ Council of Missouri, Inc. v. Public Service Commission (“UCCM”)*** case,<sup>6</sup> where a refund of an unlawfully-collected surcharge was ordered, it was not the Commission that did so, but the Missouri Supreme Court in an exercise of its “inherent power to afford redress.”<sup>7</sup> In a recent appellate case discussing another attempt by OPC to extract refund from a

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<sup>1</sup> ***State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission***, 585 S.W.2d 41, 47 (Mo. banc 1979); ***State ex rel. City of West Plains v. Public Service Commission***, 310 S.W.2d 925, 928 (Mo. banc 1958).

<sup>2</sup> ***State Tax Commission v. Administrative Hearing Commission***, 641 S.W.2d 69, 75 (Mo. 1982), quoting ***Liechty v. Kansas City Bridge Co.***, 162 S.W.2d 275, 279 (Mo. 1942).

<sup>3</sup> ***State Tax Commission***, *supra*.

<sup>4</sup> *Id.*, quoting ***State ex rel. Kansas City v. Public Service Commission***, 301 Mo. 179, 257 S.W. 462 (banc 1923).

<sup>5</sup> ***American Petroleum Exchange v. Public Service Commission***, 172 S.W.2d 952, 955 (Mo. 1943).

<sup>6</sup> 585 S.W.2d 41 (Mo. banc 1979).

<sup>7</sup> *Id.*, pp. 59-60.

small sewer company, the Court commented:

We note that, even if the Office of Public Counsel had met its burden of proof in the complaint case, it would have been unlawful for the Commission to have authorized a refund of the sewer commodity charge into the new tariff. “The Commission ... does not have the authority to retroactively correct rates or to order refunds. ‘Nor can the Commission take into account overpayments when fashioning prospective rates.’” ***State ex rel. Pub. Counsel v. Pub. Serv. Comm'n of State of Mo.***, 259 S.W.3d 23, 31 (Mo. App.2008) (citations omitted). Indeed, in its *Revised Report and Order*, the Commission recognized that it had no authority to order Emerald Pointe to make a refund to its customers and that it merely had the authority to determine whether Emerald Pointe violated its tariff. The Commission further noted that, if a party wanted to seek a refund, it would have to seek relief in the appropriate circuit court.<sup>8</sup>

The Commission is unable to grant this aspect of the relief requested by OPC.

## **2. The Commission should not seek penalties in this case.**

Section 386.600, RSMo., sets out the procedure by which an action for penalties may be pursued:

An action to recover a penalty or a forfeiture under this chapter or to enforce the powers of the commission under this or any other law may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. No filing or docket fee shall be required of the general counsel. In any such action all penalties and forfeitures incurred up to the time of commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be, a waiver of the right to recover any other penalty or forfeiture; if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this chapter, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding. All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order.

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<sup>8</sup> ***In re Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Co.***, 438 S.W.3d 482, 490 n. 8 (Mo. App., W.D. 2014).

As is clear from the language of § 386.600, RSMo., an action to seek penalties is within the Commission's discretion. Such an action is by no means required. Because the Respondents are now seeking a CCN and cooperating with Staff, Staff considers penalties to be unnecessary in this case. As soon as the CCN is granted, approved tariffs are in place and Staff is satisfied that the company is operating within the law and in compliance with its tariff and with the Commission's rules and orders, Staff will dismiss its complaint and Staff would expect OPC to do the same.

It is Staff's position that the public interest would not be served by litigating these complaint cases to a conclusion or by seeking penalties against the Respondent small companies and operators. Small companies are typically under-capitalized and monetary penalties often have negative results for customers in terms of reduced service quality, deferred maintenance, and the like. Indeed, it is possible that penalties might cause this small company to stop functioning altogether. Loss of water service would be a disaster for Ridge Creek's residents.

***Conclusion and Recommendation:***

Although the facts discovered by Staff in the course of its investigation support the allegations of OPC's *Complaint*, the relief sought by OPC is nonetheless either unavailable (refunds) or inadvisable (penalties). For that reason, and in view of the pending CCN case, Staff recommends that this case be held in abeyance pending the conclusion of Case No. WA-2015-0182.

**WHEREFORE,** Staff prays that the Commission will accept its *Investigation Report*.

Respectfully submitted,

**/s/ Kevin A. Thompson**

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, on this 9<sup>th</sup> day of July, 2015.

**/s/ Kevin A. Thompson**