

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

**In the Matter of the Small Company)
Rate Increase of Timber Creek Sewer) Case No. SR-2010-0320
Company)**

POST HEARING BRIEF OF TIMBER CREEK SEWER COMPANY

COMES NOW Timber Creek Sewer Company ("Timber Creek"), by its attorney, Jeremiah D. Finnegan, and pursuant to the Commission's Order Establishing a Procedural Schedule dated October 25, 2010 does hereby provide the following Post Hearing Brief on the unresolved issues contained in the List of Issues filed by the parties on December 29, 2010:

1. WHAT IS THE APPROPRIATE LEVEL OF SALARIES AND OVERTIME TO BE INCLUDED IN TIMBER CREEK'S REVENUE REQUIREMENT FOR SETTING TIMBER CREEK'S RATES? SHOULD TIMBER CREEK BE REQUIRED TO DOCUMENT ITS EMPLOYEES' HOURS WORKED THROUGH TIME SHEETS?

a. Salaries

Timber Creek has not given any salary increase since 2008 due to the financial losses the company has incurred.

While all parties performed some sort of study for the various positions, only Timber Creek provided documented specific examples of comparable jobs in Kansas City that are above and beyond the MERIC salary summary information. Additionally, when comparing personnel costs as a percentage of total operations and maintenance costs across Wastewater

entities, Timber Creek is more competitive (lower percentage of personnel cost) as compared to much larger entities that should benefit from economies of scale.

It is Timber Creek's position that after the performance of its salary analysis to determine market levels in the industry and comparison to local salaries for analogous positions that the current salaries are below market. The current salaries for its four employees are as follows: 1. General Manager/President \$72,450; 2. Plant and Collection System Operator \$40,980; 3. Operations Manager \$78,660; and 4. Office Manager \$40,349. (Ex. 4, Sch. DS-2.)

Staff also determined that "the salary levels paid to Timber Creek employees are conservatively priced in relationship to salaries paid for other similar positions for other entities based on its own studies. (Ex. 4, Sch DS-3, pp.4-70.) Nevertheless, Staff only proposed the following: 1. General Manager/President \$76,862^{1/}; 2. Plant and Collection System Operator \$39,000^{2/}; 3. Operations Manager \$81,020^{3/}; and 4. Office Manager \$41,559^{4/}. The total of the Staff's salary level is \$245,441 including \$7,000 in overtime for only one position, the Plant and Collection System Operator. (Ex. 3)

^{1/} The increase is a combination of two COLA increases at 3% each.

^{2/} In lieu of a 3% COLA that Staff initially proposed for a total salary of \$42,209, Staff instead finally proposed to reduce salary to \$39,000 and allow overtime of \$7,000 for a total of \$46,000 or a total of \$5,020 more than the position previously paid without overtime.

^{3/} An additional 3% COLA.

^{4/} A 3% COLA increase.

It is Timber Creek's position that the appropriate level for salaries not including overtime is \$265,742^{5/}: 1. General Manager/President \$94,529; 2. Plant and Collection System Operator \$49,290; 3. Operations Manager \$78,660; and 4. Office Manager \$43,263. (Ex. 3)

As can be seen, in addition to overtime issues which we shall discuss later, the major difference between Staff and Company is with the position of General Manager/President which at \$94,529 is \$15,667 higher than Staff's proposal of \$76,862. What can also be readily seen is that both currently and under the Staff's proposals for the future, the salary for the General Manager/President is significantly lower than that of one of his employees, the Operations Manager, even though Staff proposed to give two 3% COLA increases to the General Manager/President in an effort to try and gradually do away with this anomaly. On the other hand, Timber Creek would like to do away with it now, while it is before the Commission in a rate case rather than suffer another three years until the next rate case.

The amount proposed by Company, \$94,529, came directly from Staff's own Memorandum Report dated August 2nd 2010, in which after stating that the Timber Creek salary levels are conservatively priced in relationship to salaries paid for similar positions for other entities, Staff stated:

"General Manager was compared to Management Occupations for the Kansas City region - median annual salary \$94,529".
(Ex. 4, Sch. DS-3, p.7)

^{5/} Plus \$10,033 in overtime and additional workers' comp insurance for two positions, the Plant and Collections System Operator and the Office Manager.

Thus, Company proposed this specific amount as the appropriate salary level of the General Manager/President, which would have the two-fold effect of doing away with the disparity between the pay for that position and that of his underling, the Operations Manager, and would be paying the General Manager/President at the median level for comparable management occupations. It would also give pause to Mr. Sherry from consideration of moving on to greener pastures where the pay offers have been higher. Judging by the responses to questions on cross-examination, all the Staff and OPC witnesses agreed that Timber Creek is a well run company under Mr. Sherry, so the Company would not wish to lose his services.

Mr. Sherry, in response to questions from Commissioner Jarrett concerning salary issues (Tr. 113-114) after stating that he believed that all employees were, as Staff said "conservatively priced", except the Operations Manager whom he believed was in the upper range and did not need an increase at this time, responded to the following question from Commissioner Jarrett about Timber Creek's salary structure as compared to Staff's proposal as follows:

Q. You have studies, they have studies. We can talk about individual, which study is better, which study is not. Do you think that anything within the range between your salary structure and Staff's proposal would you think it would be reasonable for us based on the studies to find somewhere in between?

A. Certainly. You bet. I'm a reasonable businessman.

Q. And I believe Mr. Prenger testified that all the employees of Timber Creek are - he would consider to be excellent -

A. Yes.

Q. - right? And do you think that normally employees who perform above average should be paid accordingly?

A. Correct.

Consequently, the ultimate decision on the appropriate salary levels is up to the Commission to determine based on all the studies of Company and Staff to find a reasonable salary structure somewhere in the range between the two while assuring that all the employees, all of whom have been considered to be excellent and above average, are to be paid accordingly, i.e. nearer the upper range like the Operations Manager. We hope that the Commission's decision will also mean that the inverse relationship between the lower General Manager/President's salary and the higher Operations Manager's salary will be eliminated and that the General Manager/President will be approved a salary greater than the Operations Manager without any reduction in the salary of the Operations Manager remembering that these are both excellent employees as are the Office Manager and Plant and Collection System Operator. All are deserving of the upper end of the range for their positions.

b. Time Sheets/Overtime

It was Timber Creek's position that time sheets should not be required unless overtime is authorized for two positions since based on the advice of its labor attorney it is probable that the keeping of time records would likely result in irrefutable proof that the employee is working more than 40 hours a week and could bring an action to rebut the Company's classification of the employee as exempt under the FLSA. According to its labor lawyer, Jason Davey, the cost of defending such an action could easily cost in excess of

\$30,000 or more in legal fees even if the employee were not successful in proving he or she was not exempt from overtime under the FLSA. (Ex. 4, Sch DS-4)

Timber Creek's initial position was that it was only opposed to time sheets as to the potential civil liability it poses to the Company regarding overtime for two positions - Plant and Collection System Operator and Office Manager. If Timber Creek were required to adopt time records, it would also need to establish overtime for its employees. (Ex. 4, p.10). If granted the overtime requested for these positions, Timber Creek agreed that it would implement a time sheet process. However, during the course of the hearing, Mr. Sherry determined that due to the contested case and all that, that he would begin implementing time sheets and overtime as soon as he came out of this case and got a ruling regardless of the outcome of this case. (Tr. 134) Thus, the time sheets issue has been conceded by the Company and the Company has no objection to the Commission ordering time sheets be kept of all employees.

He also made his position on overtime more emphatic. Timber Creek is going to start paying time and a half overtime for overtime worked by its Plant and Collection System Operator and its Office Manager, who are and have been working overtime without receiving overtime pay, as soon as this case is decided one way or the other.

Timber Creek provided hard-copy evidence that both the Plant and Collection System Operator and Office Manager worked overtime hours in 2009. The overtime costs sought from this case are based on that evidence.

It is Timber Creek's position that overtime should be added in the amount of \$7,234.83 for the Plant and Collection System Manager and \$2,604.45 for the Office

Manager plus \$194.07 for increased workman's compensation and general liability insurance for the two positions. The total sought is \$10,033.35 or \$3,033.35 more than the Staff which only proposed overtime for the Plant and Collection System Operator in the amount of \$7,000. (Ex. 4, p.10 and Sch. DS-5.)

Timber Creek respectfully requests that the Commission authorize overtime in the amount of \$10,033.55 in its cost of service.

2. WHAT IS THE APPROPRIATE LEVEL OF RATE CASE EXPENSE TO BE INCLUDED IN TIMBER CREEK'S REVENUE REQUIREMENT FOR SETTING TIMBER CREEK'S RATES?

In Timber Creek's previous rate case (2007 rate case - SR-2008-0080), 2004 rate case expenses were used to establish rate case expenses. Prior to the current rate case being contested, the PSC Staff was using this same model where the 2007 rate case expenses were being used to develop the rate case costs in this case. However, during negotiations the PSC Staff did not allow Mr. Sherry's time in 2007 to be recovered in the rate case costs for this case, for the mistaken reason that it believed Mr. Sherry was an employee of Timber Creek at that time when he was not. (Ex. 4, pp. 11-12 & Sch. DS-6). Thus, instead of recommending that \$44,000 be amortized over 3 years at \$14,667 a year, without the \$18,175 for Mr. Sherry, the Staff erroneously recommended only that \$23,073 be amortized over 3 years at \$7,691 a year. This was one of the issues to cause this case to be contested. The Company initially requested to recover as part of the surrogate costs from 2007, the \$18,725 that was never included in rate case costs in this case.

It was Timber Creek's initial position that the appropriate level of rate case expense was \$58,173 normalized over 3 years or \$19,391 per year. The total amount included the

recovery over the 3 year period of \$18,175 for the work performed in the last rate case by Derek Sherry in 2007, who was not an employee at that time, but which amount was not included in the rate case expense authorized in that case because the Staff mistakenly believed that he was an employee. In addition to the \$18,175 Timber Creek sought an estimated \$40,000 in expenses for this case since it had become a contested case.

However, since this case has become a contested case, the Staff is now using the actual costs incurred by Timber Creek in this case, which costs are on-going. Staff testified that it will work with Timber Creek and Public Counsel to establish an on-going normalized level of rate case expense based on the actual costs the Company incurs in this case. (Ex. 15, p.2)

To date, the Staff has been supplied with the rate case expenditures through January 31, 2011, which it has included in a late-filed exhibit filed on February 3, 2011. The amount allowed to date is \$30,630, which normalized over three years would be \$10,210 a year.

Timber Creek has no objection to using actual expenses for this incurred in this case in reaching the normalized rate case expense for this case. However, the actual costs have not all been determined, only those through January 31, 2011. Additional costs are still being incurred in researching and preparing the Company Brief. After that additional costs will be incurred by Company's attorneys in reviewing other parties' briefs and any other matters that come up before the issuance of the Report and Order, which will also require more time being incurred in having to be analyzed to ascertain if a motion for rehearing is called for or if other parties file for rehearing.

Timber Creek prays that the Commission will allow **all** the actual costs the Company incurs in this case will be included in the establishment of an on-going normalized level of rate case expense as promised by Staff even if it is necessary to estimate some of those costs that are still being incurred and the final tally on which will not be known until further on down the line. Company is interested in working with Staff as Staff has indicated it would do in the furtherance of this effort. Company has already suffered the last three years by the Staff's error in excluding a legitimate expense of \$18,175 for Mr. Sherry's consulting fee, which over three years meant that its rates were \$6,058 a year lower than they should have been had the expense been recognized as legitimate. Company cannot afford a similar non-counting of legitimate rate case expenses to happen in this case and cause it to once again under recover over the next three years.

3. SHOULD TIMBER CREEK BE ALLOWED TO RECOVER COSTS FOR AN EXPLORATORY ALTERNATIVE ENERGY SOURCE?

Timber Creek's electric utility costs have increased substantially year after year. In fact, it is one of the causes for bringing this rate case. In 2007, electrical costs were approximately \$43,000. In 2008 it was \$56,000 and \$64,000 in 2009. While the costs have increased over this 3-year period approximately 49%, the usage has only increased 5% for this same period. This area of increasing costs with more increases on the horizon caused Timber Creek to evaluate potential alternative energy options in late 2008 in an effort to reduce on-going operational costs. After analyzing the alternatives of solar, wind and natural gas, Timber Creek chose an exploratory gas well on its property as the most financially attractive proposition due to its short payback period. Unfortunately, despite its best efforts

and intentions, it expended \$10,849 on a pilot gas well and ceased after drilling 900 feet without any natural gas being found. (Ex. 4, pp. 12-15)

Because it did not succeed in obtaining gas, Timber Creek is not seeking to recover its costs of exploration for the natural gas well in this case. (Tr. 147) However, as a forward-thinking company with the best interests of its ratepayers in mind, the Company is desirous of moving forward in seeking new affordable alternative energy sources to replace its increasing electricity costs with a lower cost source of energy.

It is Timber Creek's position that it should be allowed to recover \$10,849, normalized over 3 years at \$3,616 per year for it to continue to explore alternative energy options to the constantly increasing electricity costs that it has been experiencing and will continue to experience. The funding would be used for studies to explore possible sources and develop potential business cases for investment. The amount was determined by the fact that \$10,849 was the amount that Timber Creek expended in drilling a natural gas well in an effort to locate natural gas as an alternative fuel that would offset the constantly increasing electric costs that it has been absorbing to the best of its ability, despite its adverse impact on cash flow, since the last rate case and which increased costs are to be passed on to its ratepayers in this case.^{6/} The \$3,616 requested is a small amount to its ratepayers, about \$2.37 per year per customer. While it is a small cost, it could pay them big dividends should Timber Creek be able to wean itself from the constantly rising electricity costs, costs that the

^{6/} Unfortunately, shortly after this case is decided with electric costs at current levels, an increase in electricity costs is less than six months away and once again it will be Timber Creek that absorbs the increase and not the ratepayers, who will not see any increase due to increased electric bills paid by Timber Creek until its next rate case.

customers bear in rates. This type of activity by a small sewer utility on behalf of its ratepayers should be encouraged by the Commission.

4. WHAT IS THE APPROPRIATE LEVEL OF THE PUBLIC SERVICE COMMISSION ASSESSMENT TO BE INCLUDED IN TIMBER CREEK'S REVENUE REQUIREMENT FOR SETTING TIMBER CREEK'S RATES? SHOULD THE COMMISSION AUTHORIZE TIMBER CREEK TO CREATE A PASS-THROUGH ON ITS CUSTOMER'S BILL TO REFLECT THE ANNUAL FLUCTUATION IN THE PUBLIC SERVICE COMMISSION ASSESSMENT?

The PSC Assessment has been inequitable for sewer companies, ranging from 6% plus to over 11% the past four years, while all other utility groups have had PSC assessments less than 1%. In addition to the large amount of the assessment, the volatility of the percentage fluctuations have caused cash flow issues with Timber Creek and other sewer utilities. Sewer companies and their ratepayers have been paying 700% to 1100% more in PSC assessments than other regulated utilities in Missouri. (Ex. 4, p.15)

It is Timber Creek's position that the Company paid an additional \$45,902 from FY2009-2011 and since there was no rate case during that period, none of such amount was passed on to its customers. (Ex. 4, p.16) Due to the inequitable and overly financially burdensome increases in the PSC Assessment for sewer utilities which was authorized in the last rate case at 6.94% but which increased to 8.47% in FY2009, 11.22% in FY2010 and for FY2011 is 9.34%. During this period, no other utility industry in Missouri had an assessment above 1%. Timber Creek is seeking to recover the \$45,902 normalized over 3 years at \$15,000 per year.

Further, until the assessment for sewer utilities becomes more equitable, Timber Creek is asking that the Commission authorize Timber Creek to segregate the annual PSC Assessment from its operating costs and instead allow Timber Creek to pass it on directly to its customers as a separately stated surcharge on the customers' monthly bills identified as "PSC Assessment Charge". (Ex. 4, p.17) Instead of booking the assessment charge as an operating expense or the money paid by ratepayers for their share of the assessment as operating revenues, the entire transaction would be a pass-through item pursuant to a rule providing for such treatment.

What Timber Creek is seeking is to collect such charge in the same manner as gross receipts tax and franchise fees are treated on utility bills because they are similar charges. Like gross receipts taxes and franchise fees, which are calculated as a percentage of a utility's gross revenue, so too is the PSC Assessment calculated on gross utility revenues and it is equally suitable as a pass-thru item on the utility bill as are gross receipts taxes and franchise fees.

Under Chapter 393, RSMo. and the case law of Missouri, particularly *State ex rel. Hotel Continental, et al. v. Burton, et al.*, 334 S.W. 2d 75 (Mo. 1960), the Supreme Court affirmed the Commission's approval of a tariff provision known as a so-called tax adjustment clause as a part of KCPL's tariffs which allowed KCPL to charge customers a separate item to be added to their monthly bills a surcharge equal to the proportionate part of a gross receipts tax which is imposed upon the Company on the basis of the gross receipts of the Company from steam sales. In calculating the operating income which would accrue to the Company under the proposed rates, the Commission eliminated from the Company's

operating expense the amount of the gross receipts tax and also excluded that same item from operating income. *Id.* at 81. So it was a true pass-thru. As the Court stated *Id.* at 80:

Thus, as we see it, the tax clause in operation would have two effects: one, it would permit the company to bill in a form that would disclose that a stated part ... of the total charge is the customer's proportionate share of the money the company must collect with which to pay the gross receipts tax to the city; and two, it would result in the automatic and immediate adjustment of the customer's total charge in the exact proportionate amount by which any such tax was increased or decreased.

That is exactly what we are asking here as the proper and reasonable treatment of the PSC assessment. Or to paraphrase the Court:

Thus, as we see it, the PSC Assessment clause in operation would have two effects: one, it would permit the company to bill in a form that would disclose that a stated part ... of the total charge is the customer's proportionate share of the money the company must collect with which to pay the PSC Assessment to the Commission; and two, it would result in the automatic and immediate adjustment of the customer's total charge in the exact proportionate amount by which any such assessment was increased or decreased.

Under such proposal, the Commission would receive the amount it billed Timber Creek and the customer would pay exactly what he or she had been paying. The only difference is that when the assessment changed the next year, the customer would be charged proportionately more or less depending upon whether the assessment change was upward or downward but Timber Creek would not be receiving a revenue windfall or loss as it does now because under the proposal, it would be a pass-thru.

5. SHOULD THE COMMISSION AUTHORIZE TIMBER CREEK TO ESTABLISH A CONTINGENCY/EMERGENCY REPAIR FUND?

It is Timber Creek's position that while its current rate structure supports routine operations and maintenance type items, it does not support emergency, unplanned events that would substantially impact utility operations and would adversely impact Timber Creek's ability to provide uninterrupted, dependable utility service that is environmentally responsible. To support uninterrupted service and implement a financially prudent business practice, the Company is seeking to establish and maintain a contingency fund for emergency and extraordinary unplanned events. An additional benefit to utilities in maintaining a contingency fund can be a more favorable interest rate since many financial institutions evaluate cash reserves as a parameter in determining risk and establishing interest rates and/or bond ratings. (Ex.4, pp. 17-18)

The Company has identified critical areas for the on-going, uninterrupted operations and management of the Company in Ex. 4, Sch. DS-7. The amount sought to be funded is based on the estimated cost of potential unplanned events that would have significant financial and operational impact and which have been assigned a probability for occurrence of each event. The Company proposes the establishment of a cash reserve fund cap based on such calculations subject to needed consumer protections to ensure that the Fund would be used appropriately.

The Company has estimated the total cost at \$177,604 which is to be normalized over 19 years at \$9,347 per year. The Company proposes that this amount be collected as a surcharge of \$0.50 per month on each of the customers' monthly bills during such period.

The PSC Staff and the Company generally agree that a fund should be established. The PSC Staff, however, would like consumer safeguards put into place and the Company is

agreeable. While the Company has provided several suggestions and ideas for mechanics of managing the fund and safeguards for ratepayers, the PSC staff has not provided any suggestions. The PSC staff prefers to work the issue through Case No. WW-2009-0386. The Company cites the extreme lack of progress on WW-2009-0386 to solve any issues that have been prioritized by this working case. The Company prefers to be and is requesting that it be made an immediate 'pilot program' by Commission order in this case, with the PSC Staff, OPC and Company being ordered to work through details of the fund and the reasonable consumer safeguards within a few months of the issuance of the Report and Order, so that this case can be used as a foundation for a future broader scale and implementation for all sewer utilities.

As Mr. Sherry advised Commissioner Gunn in response to Questioning from the bench on the contingency fund that he is on board with conditions on the fund, as follows at TR. 122-123:

Q. ... Because this is - this is one of those things that seems a little bit - we'll just call it creative. And obviously what Staff's major concern other than some of the legal potential issues -

A. Right.

Q. - was the lack of oversight and lack of conditions. And this is another one is that - did - would you or are you willing to accept conditions on any contingency fund that is set up?

A. Absolutely. I mean the - you know, when we've had discussions on the working case at very high level, haven't gotten down into the details, but I absolutely believe that it's a contingency reserve fund available for these repairs. So I think the - you know, oversight and reviews and even approvals, you know, a separate account, all those kinds of concepts we're completely in agreement with.

Any question as to the Commission's authority to establish a contingency fund is answered by Section 393.270, RSMo. in which such authority is specifically provided in subsection 5, which reads as follows:

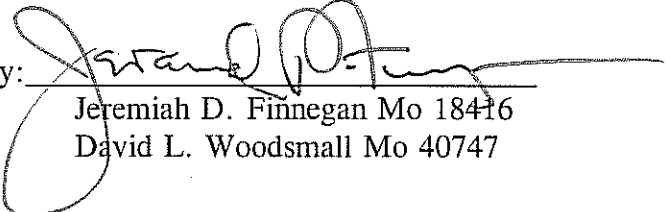
5. In determining the price to be charged for sewer service the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, **with due regard, among other things, to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservations out of income for surplus and contingencies.** [Emphasis added.]

Inasmuch as the Commission has the statutory authority to do so and the Company is willing to accept conditions on the contingency fund, the Commission should go ahead and order Timber Creek to establish a fund and begin charging its customers fifty cents a month to begin building up such fund while the Staff, Company and OPC work out the details over the next few months and to implement such details once agreed to and approved by the Commission.

Wherefore, Timber Creek respectfully requests that the Commission give full consideration to Timber Creek's requests in this contested portion of the case and grant it the relief it has sought that it determines is meet and just in the premises.

Respectfully submitted,

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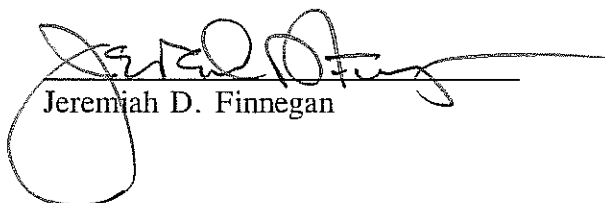
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ATTORNEYS FOR TIMBER CREEK
SEWER COMPANY

February 4, 2011

Certificate of Service

I hereby certify that on this date I electronically filed the foregoing document with the Commission and further caused a copy of the same to be sent to Staff Counsel Jaime N. Ott at jaime.ott@psc.mo.gov and Christina L. Baker of the Office of Public Counsel at christina.baker@ded.mo.gov by electronic transmission.



Jeremiah D. Finnegan