

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

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

**POST-HEARING BRIEF OF THE
OFFICE OF THE PUBLIC COUNSEL**

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COMES NOW the Office of the Public Counsel (Public Counsel) and states for its Post-Hearing Brief as follows:

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?

Salaries

Timber Creek has requested the Commission authorize a total of \$265,742 in compensation for the four positions of General Manager, Office Manager, Operations Manager and P&C System Operator. Staff has requested a total of \$245,441 for the four positions. The evidence shows that this amount of compensation is excessive given the small size of the utility and the small number of customers.

Rather than basing each employee's compensation on suitable market data for a utility of this size in the Kansas City area, the evidence shows that Staff and Timber Creek first determined how much it would like to pay the employees and then sought out random information in an attempt to justify those amounts as just and reasonable. The evidence shows that the last rate case for Timber Creek ended in a Stipulation and Agreement so that no determination was made as to whether the salaries themselves were just and reasonable. (Tr. Pg.

30, L. 10-14) However, the evidence shows that both Staff and Timber Creek tailored its evaluation of payroll around these numbers as if they were approved and set in stone. Staff did not determine what the market rate was first, it proceeded directly to use the current salaries of Timber Creek, assumed they were just and reasonable and then attempted to find justification for its position. (Tr. Pg. 75, L. 4-24) Staff took Timber Creek's word as to the level of experience and background the employees had without verifying the accuracy and how that applied to the position. (Tr. Pg. 79, L. 3-19) The evidence also shows that Staff and Timber Creek used a variety of different sources to justify the amount of payroll they wanted included in this case. But, finding that perfect number was not easy. The evidence shows that staff used surveys and websites like MERIC and The Market survey for the Bureau of Labor Statistics as well as discussions and information provided by the company as well as other material internal to the Staff such as prior cases and a salary database maintained by the auditing department. (Tr. Pg. 74, L. 16 – Pg. 75, L. 3) Timber Creek used information from not only MERIC but also various non-regulated regional sewer districts and county utilities, most of which are not comparable to Timber Creek's regulatory status or size, in its search to justify the payroll amounts. (Tr. Pg. 43 & Tr. Pg. 69) In fact, Mr. Prenger admits that the Operations Manager's salary is currently higher than the market rate. (Tr. Pg. 76, L. 16-20) But Staff still insists on recommending customers pay this unreasonable, above-market salary in their rates. (Tr. Pg. 76, L. 21 – Pg. 77, L. 13) Picking a number and then seeking to justify it is not a just and reasonable way to determine the amount of salary customers must pay for through rates.

A just and reasonable salary determination for a public utility is based on the market rate for a similarly situated position in the same area of the state. A just and reasonable salary determination does not include determining first what you want to pay someone and then

searching high and low to find justification for that amount. In his Rebuttal Testimony, Public Counsel Witness Mr. Robertson provides evidence which shows that it is just and reasonable for the Commission to base its authorization of compensation on information provided in the MERIC Occupations Wages - Kansas City Region 2009 along with verifiable additional support for the specific positions at Timber Creek. (Ex. 23, Pg. 5-12; Tr. Pg. 232 – Pg. 243) The evidence in this case shows that utilizing the MERIC data, it is just and reasonable that the Commission should authorize total annual salaries (excluding payroll taxes) of:

Position	Annual Salary
General and Operations Manager (G Mgr.)	\$52,768
Office & Admin. Support (Office Mgr.)	\$32,650
1st line Supr./Mgrs. of Prod. (Op. Mgr.)	\$59,258
W&L Waste Treat. Plt. & Sys. Op. (P&C Sys. Op.)	\$45,867
Total	\$190,543

(Ex. 23, Pg. 12)

Overtime

Timber Creek is requesting the inclusion of approximately \$10,000/year for overtime costs for the Office Manager and the P&C System Operator positions. However, the evidence shows that Timber Creek incurred no overtime expense during the test year for this rate case and therefore the amount of overtime is a pure estimation of future and unlikely expenses.

The evidence is clear that Timber Creek has not incurred overtime expenses during the test year. When Staff performed its audit, it found no booked overtime costs. (Tr. Pg. 70, L. 11-13 7 Pg. 102, L. 17-20) In his testimony, Timber Creek Witness Mr. Sherry stated “If we're going to be required to pay -- if we're going to be required to do time sheets, I'll have to start

paying overtime.” (Tr. Pg. 50, L. 17-20) The evidence is also clear that any future overtime costs for Timber Creek are purely speculative. Even though no timesheets are kept, Mr. Sherry testified that there are times when employees do work more than 40 hours per week at times. (Tr. Pg. 139, L. 18-21) Mr. Sherry also states that Timber Creek is requesting overtime be included in this rate case because there may at some point in the future be a legal claim for overtime by an employee. (Tr. Pg. 128, L. 21-25 & Pg. 129, L. 1-8) However, the mere possibility of a claim is not a just and reasonable cause for including overtime in rates when overtime is not justified. Just because an employee may occasionally work over 40 hours per week does not mean that employee is entitled to overtime pay. The evidence shows that the reason overtime has not been booked is because the employees are exempt employees who are paid a base salary. (Tr. Pg. 128, L. 10-12) The testimony by Mr. Prenger noted that while there may be times that an employee is required to work over 40 hours a week, at Timber Creek they are salaried employees “similar to certain Staff members here at the Commission, you put in the time as needed.” (Tr. Pg. 96, L. 6-14) Additionally, Timber Creek employees have the ability to take comp time or come in late when they have worked a long day. (Tr. Pg. 135, L. 7-9) Therefore, any calculation of future overtime pay by Timber Creek is purely speculation and unlikely to occur.

There is no evidence which shows that overtime compensation is a cost Timber Creek incurred during the test year or is reasonably likely to incur in the future. Therefore, the Commission should not authorize the inclusion of any alleged (or estimated) overtime costs in the determination of the utility's annualized payroll costs.

Time Sheets

Timber Creek opposes a requirement that it keep accurate timesheets for its employees. However, the evidence shows that keeping accurate timesheets is a normal business practice which protects both the utility and its employees.

The evidence shows that time accounting is required by the Uniform System of Accounts, which the Commission has approved to be used by regulated public utilities. (Tr. Pg. 245, L. 25 – Pg. 246, L. 1) According to Staff Witness Ms. Hagemeyer, time reporting “is a fundamental managerial responsibility and supports the managerial responsibilities of planning, organizing, directing, and controlling organizational resources.” (Ex. 11 Pg. 5, L. 11-13) Ms. Hagemeyer’s testimony stated that time sheets provide a record of accountability, which supports the staffing needs as well the pay and benefits that regulated utilities receive in customer rates. (Ex. 11 Pg. 6, L. 12-23 & Pg. 7, L. 1-7) Ms. Hagemeyer confirmed that many regulated public utilities just like Timber Creek have successfully implemented a time sheet system. (Tr. Pg. 161, L. 8-16) But the evidence shows that Timber Creek is opposed to time sheets. Apparently, it is Timber Creek’s argument is that if they start using time sheets, they will be required to start paying overtime. (Tr. Pg. 100, L. 6-11) Timber Creek somehow believes that by having the employees fill out time sheets, this would automatically subject the company to legal action by those same employees. (Tr. Pg. 128, L. 21-25 & Pg. 129, L. 1-8) There is no evidence to show why this position is just and reasonable.

Timber Creek believes it is better to not implement a time sheet system and “cover up” any evidence a time sheet might produce than to be straightforward with its business practices and with its employees. In essence, Timber Creek is asking is for the Commission to approve this cover up so they can continue with business as usual with no written evidence that can be

used against the company. This is not a just and reasonable request. Therefore, the Commission should require the utility to develop and implement a time reporting system for its employees.

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?

The evidence shows that some of the rate case expenses Timber Creek has incurred are just and reasonable to be recovered in rates. However, the evidence also shows that a significant portion of the rate case expense incurred has been merely for the benefit of Timber Creek and its wish to have face-time with the Commission. Whether the utility actually wins at hearing or not doesn't really matter when the Company can get customers to pay for it.

Many of the issues brought to the evidentiary hearing were purely because Timber Creek wanted to wave them in front of the Commission. The evidence shows that Timber Creek has presented issues to the Commission for decision relating to plant that does not exist and costs that are not known and measureable (i.e., costs for which recovery is prohibited by law), in addition to requesting changes in Commission policy that are more appropriately discussed in a setting outside of a contested rate hearing. (Ex. 23, Pg. 24) The evidence shows that Timber Creek is well aware of the principals of ratemaking as well as the Commission's prohibition against single-issue ratemaking and retroactive ratemaking. (Tr. Pg. 55, L. 3-15) Timber Creek is also aware that the issues of the PSC assessment and a contingency/emergency repair fund were part of an on-going and unsettled discussion in the Small Water & Sewer Utilities Working Case, WW-2009-0386, which it could hardly expect to be settled in a single utility's rate case. (Tr. Pg. 149, L. 17-25) But Timber Creek still brought the issues of a PSC pass-through and a contingency/emergency repair fund to the Commission for approval, incurring significant rate case expense and expecting the customers to pick up the tab.

Timber Creek is also attempting to recover \$10,849 from ratepayers for the cost of drilling a failed exploratory gas well by saying the money is for future alternative energy exploration. No gas was found so there was no benefit to the customers. There is no reasonable plan for how much future exploration will cost or the likelihood of success for anyone but the consultants Timber Creek proposes to hire. (Tr. Pg. 58, L. 25 & Pg. 59, L. 1-12) But still Timber Creek made a business decision to bring this issue to the Commission, incurring significant rate case expense along the way; even though it is unreasonable to expect that future expenditures for alternative energy exploration will be anything but unsuccessful and unbeneficial to the sewer customers. Again, decisions like this are easy when customers pick up the tab.

Since Timber Creek made the business decision to take this small rate case to evidentiary hearing for its own benefit, it is just and reasonable that Timber Creek should bear a portion of the rate case expense. The evidence shows that it is just and reasonable for the Commission to authorize all rate case expense associated with the current case, except those attorney costs billed by the firm Finnegan, Conrad and Peterson, L.C., normalized over 3 years. (Ex. 23, Pg. 23) Further, the evidence shows that it is just and reasonable that the Commission should authorize only fifty percent (50%) of the Finnegan, Conrad and Peterson, L.C. costs (excluding certain mileage charges) to be recovered from ratepayers and that that 50% also be normalized over 3 years. (Ex. 23, Pg. 23) This 50% disallowance is just and reasonable for the ratepayers as it allows the Company to bear a portion of the costs due to its own business decisions during this rate case. Utilizing the most current information provided to Public Counsel and in Staff's most current statement of its estimation of rate case expense and applying the 50% disallowance for the attorney costs billed by

the firm Finnegan, Conrad and Peterson, L.C., normalized over 3 years, the evidence shows it is just and reasonable to include in rates an amount of \$5,667.61 per year for rate case expense.¹

Timber Creek is also requesting that the Commission allow recovery of past rate case expense. The evidence shows that the costs were not incurred to process the instant case and were not incurred during the test year or update period. In his Direct Testimony, Staff Witness Mr. Harris stated that it would be unjust and unreasonable to include rate case expense from the prior rate case because the “use of prior period expenses in this rate proceeding would violate the Matching Principle because same-period revenues and expenses would not be properly matched.” (Ex. 13, Pg. 4) Additionally, Mr. Harris stated in his Rebuttal Testimony that the inclusion of previous rate case expense, or any other expense or revenue, outside the updated test year in this case is highly improper and violates ratemaking principles. (Ex. 14, Pg. 2) “Past costs are past costs and should not be reflected in future rate structures.” (Ex. 14, Pg. 4) Therefore, Timber Creek’s request that they be allowed to recover past rate case expense is not just and reasonable.

What set this case apart from a typical small company rate case is Timber Creek’s insistence that the case go to evidentiary hearing on issues which it was fully aware were in violation of prudent ratemaking practices such as single-issue ratemaking, retroactive ratemaking, improper risk shifting and recovery of costs to which there was no customer benefit. Therefore, it is just and reasonable that Timber Creek should bear the costs for a portion of the rate case expense in this case.

¹ Staff’s Late Filed Exhibit, February 3, 2011. In this Exhibit, Staff seems to have moved to a position of including rate case expense from the current case rather than an estimate from the previous rate case as was its position earlier. Staff also seems to have only updated its own position in the attached Reconciliation to include the updated amount of rate case expense. Public Counsel’s listed position for rate case expense has not been updated from the amount shown at the evidentiary hearing in Exhibit 3 – Reconciliation.

3. Should Timber Creek be allowed to recover costs for an exploratory alternative energy source?

Timber Creek is attempting to recover \$10,849 from ratepayers for the cost of drilling a failed exploratory gas well by now saying the money is for future alternative energy exploration. The evidence shows that these costs were not prudently incurred as no gas was found and there was no benefit to the customers. The evidence also shows that it is unreasonable to expect that future expenditures for alternative energy exploration will be anything but unsuccessful and unbeneficial to the sewer customers.

Timber Creek is a sewer company, not an energy company. (Tr. Pg. 70, L. 18-21) However, the evidence shows that Timber Creek made a business decision to spend \$10,849 to research and drill a pilot gas well with the hope that it would find gas in a usable amount. (Tr. Pg. 120, L. 13-25) It did not. Now Timber Creek is asking the Commission to include that very same amount, \$10,849, in rates. (Tr. Pg. 137, L. 5-16) Timber Creek states that they are not seeking to recover the money spent on the gas well because it is not in use. (Tr. Pg. 147, L. 16-22) But, strangely they are asking for that exact amount, \$10,849, to be put into rates to fund future exploration of alternative energy sources. Timber Creek states that it uses that exact amount as a basis for an amount that might be reasonable for alternative energy exploration over a three year period. (Tr. Pg. 147, L. 23-25 & Pg. 148, L. 1) There is no evidence of the calculations behind that decision nor is there any evidence of a solid plan for what this future exploration would entail. Apparently gas is still an option, solar is an option, wind is an option, and biogas is an option. (Tr. Pg. 58, L. 7-24) So many options, but no reasonable plan for how much it will cost or the likelihood of success for anyone but the consultants Timber Creek proposes to hire. (Tr. Pg. 58, L. 25 & Pg. 59, L. 1-12)

The evidence shows that even at the beginning, Timber Creek thought the chance of hitting usable natural gas in the area was only 50/50. (Tr. Pg. 121, L. 11-24 & Pg. 122, L. 1-6) Given that the pilot well was unsuccessful, it is reasonable to assume that the odds are now much less than 50/50. As a matter of fact, the evidence shows that Timber Creek will not continue with the alternative energy exploration unless the sewer customers pay for it. (Tr. Pg. 137, L. 17-21) So it seems Timber Creek itself will not take that gamble unless it is playing with someone else's money.

It is unreasonable to expect the customers of a sewer utility to pay for that company's choice to gamble at hitting usable gas in the future. The Commission should disallow inclusion of any future costs associated with the continued drilling of a speculative natural gas well because the costs are unjust and unreasonable and based on a proven unsuccessful venture.

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?

Appropriate Assessment Level

Timber Creek is asking the Commission to include not only the current PSC assessment amount of \$62,590 but also an additional \$45,902 normalized over 3 years (\$19,391/year) recovery of costs associated with the PSC assessment since the last rate case. The evidence shows that Timber Creek is attempting to recover past expenses which are beyond the test-year and true up for this rate case and is therefore retroactive ratemaking.

Staff Witness, Mr. Busch testified that normally in a rate case, the current amount of the PSC assessment is what is built into the rates as a part of the cost of service and then passed along to the consumers. (Tr. Pg. 207, L. 7-13) The evidence shows that the Fiscal Year 2011 PSC assessment amount is \$62,590. (Ex. 7) The inclusion of the current PSC assessment amount is just and reasonable.

But Timber Creek's request includes not only the current PSC assessment amount but also an additional \$45,902 normalized over 3 years (\$19,391/year) for recovery of costs associated with the PSC assessment since the last rate case. In his Direct Testimony, Mr. Harris stated that the "use of prior period expenses in this rate proceeding would violate the Matching Principle because same-period revenues and expenses would not be properly matched." (Ex. 13, Pg. 4) Additionally, Mr. Harris stated in his Rebuttal Testimony that the inclusion of any expense or revenue outside the updated test year in this case is highly improper and violates ratemaking principles. (Ex. 14, Pg. 2) "Past costs are past costs and should not be reflected in future rate structures." (Ex. 14, Pg. 4) The inclusion of the costs associated with past PSC assessments is prohibited as retroactive ratemaking and is not just and reasonable. The Commission should include only cost of the current assessment period in the revenue requirement for this case and should not allow future recovery of past assessment period costs.

The Company has also recommended that the PSC assessment for sewer companies become more equitable to other utility industries with a percentage allocation of less than 2%. This request would have a wide-reaching effect far beyond Timber Creek's rate case currently at issue before the Commission. The evidence showed that the issue of the PSC assessment is currently being discussed in the Small Water & Sewer Utilities Working Case, WW-2009-0386. (Tr. Pg. 149, L. 17-25) No evidence was presented as to the reasonableness of this request or

how it would be applicable to other companies beyond this rate case. As this is an internal matter of the Commission associated with how it bills the various industries for the oversight and services it provides and is not specific to this rate case, this recommendation should be denied.

Assessment Pass-Through

Timber Creek is also requesting the Commission allow it to establish a pass through surcharge for the PSC Assessment. The evidence shows that Timber Creek is attempting to gain Commission approval to initiate single issue ratemaking in regards to the request for the pass through surcharge which is prohibited as in utility regulation.

Mr. Busch testified that the PSC Assessment pass-through proposal of Timber Creek is single issue ratemaking which is prohibited. (Tr. Pg. 202 L. 6-10) In his Direct Testimony, Mr. Busch stated:

The PSC Assessment is a charge to each entity regulated by the Commission. This charge is defined in Section 386.370 RSMo. (2000). The charge is the mechanism approved by the Missouri Legislature to fund the operations of the Commission. Thus, the PSC Assessment is a regular cost of doing business for the regulated utilities and Staff does not believe that this single expense should be treated any differently than the other expenses incurred by the regulated utilities to provide service in the state. (Ex. 19 Pg. 5, L. 9-14)

Therefore, the Commission should not authorize Timber Creek to create a pass-through on its customer's bills to reflect the annual fluctuation in the Assessment as this would constitute "single-issue ratemaking" which is prohibited in the State of Missouri.

5. Should the Commission authorize Timber Creek to establish a Contingency/Emergency Repair Fund?

The evidence shows that Timber Creek is attempting to bypass the ratemaking principal that costs must be incurred by the utility before those costs can be recovered in rates. The evidence shows that Timber Creek's estimation of future emergency repairs is just a broad statement of what-if's and what may-be's. Timber Creek offers only statements of the money they wish to receive from ratepayers with no proof of need and no set guidelines for operation, protections for ratepayers or consequences of abuse. What Timber Creek is actually attempting to do is transfer the risk of owning and operating a public utility onto the customer which is unjust and unreasonable to the ratepayers.

Emergency repairs are a normal cost of doing business as a public utility. (Tr. Pg. 65, L. 22-24) It is Timber Creek's burden to prove that a contingency/emergency fund is necessary for the provision of safe and adequate sewer service and that the details of any such fund are protective of the interests of the customers. There has been no evidence that a contingency/emergency fund is necessary for Timber Creek. Mr. Sherry himself admitted that Timber Creek has not had a repair it could not afford or find financing as needed. (Tr. Pg. 65, L. 14-20) Additionally, customers already pay for repairs through existing rates. (Tr. Pg. 70, L. 14-17) No evidence was presented as to how the amount already included in rates is insufficient. Also, there was no evidence on how rates would be modified to remove the amount collected in rates for repairs if a contingency/emergency fund were to be established.

Since Timber Creek has not experienced an emergency repair it could not actually pay for, it had to resort to providing an estimate of what may happen in the future and what it believed it would be appropriate for customers' money to pay for. Timber Creek's proposal includes collecting

a fund with a cap of \$177,604. (Ex. 4, Schedule DS-7; Tr. Pg. 123, L. 8-12) According to Mr. Sherry, money would be collected by customers by charging an additional \$0.50 per month per customer such that it would take over 19 years before this cap would be reached if no funds were used during this timeframe. (Ex. 5, Pg. 6) But, Timber Creek provides no evidence of how the proposed contingency/emergency fund would be protective of the interests of the customers. The proposal by the Company lacks oversight provisions, lacks conditions on use and contains potential legal issues which are not addressed. (Tr. Pg. 122, L. 18-25 & Pg. 123, L. 1-7) Mr. Sherry admits that no specific customer protections or safeguards are proposed, but states that Timber Creek “would work with Staff to establish how the parameters of the fund would work to come up with a satisfactory mechanism to assure that the consumers are protected with the proper safeguards and restrictions.” (Ex. 5, Pg. 6) Strangely, there was no offer by Timber Creek to work with the customers’ statutory representative, the Office of the Public Counsel.

Mr. Sherry states “It is intended that the funds be used to repair existing infrastructure that is part of the core utility processes.” (Ex 5, pg. 6). However, in his Direct Testimony Mr. Sherry provides Schedule DS-7 Emergency Repair Fund which includes a list of unplanned events he used to calculate the proposed cap of \$177,604. (Ex. 4, Schedule DS-7) While the list does contain some plant failure estimations, the list also includes normal business operations such as if the General Manager or other personnel decide to leave the company. (Tr. Pg. 66, L. 8-16) No evidence was presented on how this could possibly be considered such an emergency for the utility that customers must pay for this possibility in advance. Additionally, one other item that Timber Creek listed as appropriate for customers to pay for with this emergency fund is \$60,000 for Environmental Impacts (clean-up, restoration and Department of Natural Resources (DNR) fines). (Ex. 4, Schedule DS-7; Tr. Pg. 136, L. 2-7) So basically, Timber Creek is proposing that

money be collected from customers to pay for future environmental wrongdoing on the part of the Company. No evidence was presented on how this could possibly be considered an emergency or why the utility should reasonably expect that customers must pay for this at all let alone in advance. Therefore, the evidence shows that the Company's proposal is not in the customers' best interest and not even tailored to actual emergencies.

The evidence shows that Timber Creek's proposal for a contingency/emergency repair fund could have a wide-reaching effect on all public utilities in Missouri and would take more time than is allotted for Timber Creek's rate case currently at issue before the Commission. (Tr. Pg. 210, L. 22 – Pg. 218, L. 14 & Tr. Pg. 248, L. 1 – Pg. 249, L. 1) The evidence showed that the issue of a contingency/emergency repair fund is currently being discussed in the Small Water & Sewer Utilities Working Case, WW-2009-0386. (Tr. Pg. 149, L. 17-25) As this is a wide-reaching matter associated with how the Commission applies approved ratemaking principals and is not specific to this rate case, Timber Creek's proposal should be denied.

The Commission should not authorize Timber Creek to establish a contingency/emergency repair fund. The Commission should not approve a scheme that would force ratepayers to pay more than the cost of service determined under the traditional regulatory ratemaking process. It is the owners of the regulated utility who bear the responsibility for funding the capital investments associated with the operation of their company - not ratepayers. Mitigation of the owner's risk by forcing ratepayers to pay rates that exceed the actual cost of service is inappropriate, unjust and unreasonable.

Respectfully submitted,

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By:_____

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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 4th day of February 2011:

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