

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

In the Matter of the Application of Peaceful)	
Valley Service Company Request for)	<u>Case No. SR-2014-0153</u>
Increase in Sewer Operating Revenues)	

In the Matter of the Application of Peaceful)	
Valley Service Company Request for)	<u>Case No. WR-2014-0154</u>
Increase in Water Operating Revenues)	

Staff Response

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its *Response* to the *Notice of Objection to Ex Parte Communication* filed by the Office of the Public Counsel (“OPC”), states as follows:

1. On August 27, 2014, Christina Baker, an attorney employed by and acting for the Public Counsel, filed a *Notice of Objection to Ex Parte Communication* calling upon the Commission to “take any action the Commission should deem just and reasonable under the circumstances” with respect to a purported prohibited ex parte communication described in her *Notice*.

2. In her aforesaid *Notice*, Ms. Baker asserted in conclusory fashion, without analysis, “**Being substantive in nature**, the discussion between Judge Burton, Mr. Thompson and Mr. Busch without a representative of Public Counsel present was a communication outside the contested case hearing process between the presiding officer, a party and a representative of a party and therefore, meets the definition of an ex parte communication.” (Emphasis added.)

3. Rule 4 CSR 240-4.020(1)(O), a part of the rule cited by Ms. Baker in her *Notice*, includes a definition of “substantive issue”:

Substantive issue—The merits, specific facts, evidence, claims, or positions which have been or are likely to be presented or taken in a contested case. The term substantive issue does not include procedural issues, unless those procedural issues are contested or likely to materially impact the outcome of a contested case.

4. The conversation to which Ms. Baker objects consisted of Judge Burton's direction, after the Agenda on August 20, 2014, to Mr. Thompson and Mr. Busch to query the president of Peaceful Valley Service Company as to his availability on three specified dates for questioning under oath by the Commission. Judge Burton did elaborate to the extent of suggesting that perhaps the Staff or the Commission itself would issue a subpoena to ensure the attendance of the witness.

5. The conversation to which Ms. Baker objects did not concern, include or touch upon "[t]he merits, specific facts, evidence, claims, or positions which have been or are likely to be presented or taken in a contested case" or "procedural issues [which] are contested or likely to materially impact the outcome of a contested case." Therefore, the conversation was **not** substantive and was therefore not a prohibited ex parte communication within the intendments of Rule 4 CSR 240-4.020.

6. Additionally, these small company rate cases did not become "contested cases" within the intendments of Chapter 536, *The Missouri Administrative Procedures Act ("MAPA")*, until the publication of the Commission's *Order Suspending Tariffs* on August 20, 2014. The conversation to which Ms. Baker objects occurred on August 20, 2014, **prior** to the publication of the Commission's *Order Suspending Tariffs*.

7. Rule 4 CSR 240-4.020 by its terms prohibits ex parte communications concerning the merits, facts, evidence, claims, etc., in contested cases, not in non-contested cases.

8. Rule 4 CSR 240-4.020(1)(C) provides that "Contested case—Shall have

the same meaning as in section 536.010(4), RSMo.”

9. Section 536.010(4), RSMo., provides: “‘Contested case’ means a proceeding before an agency in which legal rights, duties or privileges of specific parties are required by law to be determined after hearing[.]” See **Yarber v. McHenry**, 915 S.W.2d 325, 328 (Mo. banc 1995) (a contested case is any case in which a hearing is required by substantive law outside the MAPA).

10. A hearing is not required in a rate case; thus, a rate case is not a contested case unless and until the tariffs are suspended, whereupon the statute requires a hearing. Section 393.150, RSMo.; **State ex rel. Consumers’ Council of Missouri, Inc. v. PSC**, 585 S.W.2d 41, 48 (Mo. banc 1979).

11. On August 26, 2014, after these cases had become contested cases by reason of the publication of the Commission’s *Order Suspending Tariffs* on August 20, 2014, the undersigned did transmit the below email communication to RLJ Burton without copying Ms. Baker:

From: Thompson, Kevin
Sent: Tuesday, August 26, 2014 4:29 PM
To: Burton, Kim
Cc: Busch, Jim
Subject: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-0154

Judge—

I am advised that the president of the Peaceful Valley HOA is available on either 9-22 or 9-23 to come to Jefferson City to answer Commissioner questions.

Kevin A. Thompson
Chief Staff Counsel
Missouri Public Service Commission

From: Burton, Kim

12. The above email prompted a reply from RLJ Burton to Mr. Thompson and a response from him to RLJ Burton:

Sent: Tuesday, August 26, 2014 4:30 PM
To: Thompson, Kevin
Cc: Busch, Jim
Subject: RE: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-0154

Thank you for the update. I'll check with the Commissioners' schedules to see what works best.

Sent: Tuesday, August 26, 2014 4:30 PM
To: Burton, Kim
Cc: Busch, Jim
Subject: RE: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-0154

Thank-you!

Kevin A. Thompson
Chief Staff Counsel
Missouri Public Service Commission

13. The email set out in ¶ 11, above, also prompted the following series of emails, one by Mr. Busch addressed to RLJ Burton and Mr. Thompson, and a following exchange between Mr. Busch and Mr. Thompson that were copied to RLJ Burton, to-wit:

From: Busch, Jim
Sent: Tuesday, August 26, 2014 4:31 PM
To: Thompson, Kevin; Burton, Kim
Subject: RE: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-0154

If I could, he is not the president of the HOA. I made a mistake. He is the president of the utility company which is owned by the HOA.

From: Thompson, Kevin
Sent: Tuesday, August 26, 2014 4:32 PM
To: Busch, Jim; Burton, Kim
Subject: RE: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-

0154

Thanks for the clarification, Skipper!

Kevin A. Thompson
Chief Staff Counsel
Missouri Public Service Commission

Sent: Tuesday, August 26, 2014 4:32 PM
To: Thompson, Kevin; Burton, Kim
Subject: RE: Peaceful Valley Service Co., SR-2014-0153 and WR-2014-0154

Not a problem, Little Buddy.

14. The communications set out in ¶¶ 11, 12 and 13, above, on their face are clearly not substantive within the intendments of Rule 4 CSR 240-4.020, and thus were not prohibited ex parte communications.

WHEREFORE, having fully responded, Staff prays that the Commission will determine that (1) the conversation between RLJ Burton and Mr. Thompson and Mr. Busch on August 20, 2014, and (2) the various emails sent on August 26, 2014, and set out in ¶¶ 11, 12 and 13, above, were not prohibited ex parte communications and therefore not violations of Rule 4 CSR 240-4.020.

Respectfully submitted,

/s/ Kevin A. Thompson
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Missouri Public Service Commission

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 28th day of August, 2014.**

/s/ Kevin A. Thompson