

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

|                                 |   |                                     |
|---------------------------------|---|-------------------------------------|
| Office of the Public Counsel,   | ) |                                     |
|                                 | ) |                                     |
| Complainant,                    | ) |                                     |
|                                 | ) |                                     |
| vs.                             | ) | <b><u>Case No. WC-2015-0290</u></b> |
|                                 | ) |                                     |
| Ridge Creek Development, L.L.C, | ) |                                     |
| Ridge Creek Water Company, LLC, | ) |                                     |
| Mike Stoner,Denise Stoner,      | ) |                                     |
|                                 | ) |                                     |
| Respondents.                    | ) |                                     |

**MOTION TO DISMISS**

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and hereby states as follows:

1. On July 14, 2014, Staff filed a Complaint against Respondents in Case No. WC-2015-0011 (“Staff’s Complaint”) for unauthorized operation of a public utility, failure to provide safe and adequate service and violations of Commission regulations, and a threat to the public health.
2. In Staff’s Complaint case, the parties met in a prehearing conference and began planning for a procedural schedule.
3. On February 4, 2015, Respondents filed an application for a Certificate of Convenience and Necessity (CCN) in Case No. WA-2015-0182 (“CCN case”), so Staff filed a motion, which was granted, to defer filing of a procedural schedule.
4. On May 5, 2015, the Office of the Public Counsel (OPC) filed its Complaint in Case No. WC-2015-0290 (“this case”) with allegations against Respondents of

charging for water services without an approved tariff. The Commission deferred the filing of a procedural schedule in this case on July 22, 2015, in order to allow for the conclusion of the CCN case.

5. On September 2, the Commission granted the Respondents' CCN, and on October 22, 2015, the Commission approved the tariff, tracking no. YW-2016-0094, which became effective that same day. The CCN case was closed on October 23, 2015.

6. Staff subsequently filed an unopposed motion to dismiss Staff's Complaint on October 27, 2015. On November 2, 2015, the Commission granted Staff's motion to dismiss and closed Staff's Complaint case.

7. Since the conclusion of the CCN case, the only filings in this case have been OPC's Notice of Withdrawal of Counsel on November 4, 2015, and the Commission's Order Granting Leave to Withdraw as Counsel on November 6, 2015.

8. The conclusion of the CCN case should have resolved all of the issues identified in OPC's Complaint in this case over which the Commission has authority to act. Therefore, the concerns no longer need to be pursued in this Complaint case.

9. Staff now moves to dismiss this Complaint against Respondents, Case No. WC-2015-0290, because the Commission lacks subject matter jurisdiction over the remedy OPC seeks, namely, the refund of all fees and charges collected by Respondents for water service prior to the grant of the CCN. It is well-established that the Commission lacks subject matter jurisdiction over a refund request. 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>

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 small sewer company, the Court commented:

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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.

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 the relief requested by OPC. For that reason, the *Complaint* must be dismissed.

**WHEREFORE**, Staff urges the Commission to dismiss OPC’s *Complaint* and to grants such other and further relief as is just in the circumstances.

Respectfully submitted,

**/s/ Marcella L. Mueth**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed or hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record on this 14<sup>th</sup> day of January, 2016.

**/s/ Marcella L. Mueth**

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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).