BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of WPC Sewer Company's	)	**File No. SR-2008-0388**
Small Company Rate Increase	)	Tariff No. YS-2009-0334

DISSENTING OPINION OF COMMISSIONER TERRY M. JARRETT

In this case, the majority has not only reached the wrong result, they have ignored the premise of rate regulation, which rests on the concepts of fairness and equity and avoidance of unreasonable discrimination. When this Commission adopted new rules regarding small utility rate case procedures[1] this basic and fundamental premise did not evaporate.

In *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944), the United States Supreme Court made clear that the controlling test in determining "just and reasonable" rates is the end result[2] and not the method of reaching that result. Unfortunately, here the majority has focused not on the end result being just and reasonable rates, but rather how that result was reached – by a *unanimous* stipulation and agreement of the parties. As regulators, we must not lose sight of our ultimate responsibility, which is determining just and reasonable rates that are in the public interest, while also ensuring safe and reliable service. Only the Commissioners make that final determination, which is why a *unanimous* stipulation presented to the Commission is nothing more than a "*proposed* resolution."[3] A stipulation is only a suggestion as to the disposition of some or all of the issues pertaining to the utility's revenue increase request that the Commission considers in determining whether the result is just and reasonable rates. The majority decision rests on the premise that the *unanimity* of the

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[1] 4 CSR 240-3.050(1)-(25); and 4 CSR 240-3.330, regarding Sewer Utility Small Company Rate Increase Procedures.

[2] This case established the doctrine of the "end result." The Regulation of Public Utilities, Theory and Practice, 3rd Ed. Charles F. Phillips, Jr., pg. 181, 1993.

[3] 4 CSR 240-3.050(10) (*emphasis added*).

stipulation thereby makes the result just and reasonable. While it is entirely possible that a unanimous stipulation *could* be found to produce just and reasonable rates, in this case, it did not.

At the heart of this process are the newly adopted rules set out at 4 CSR 240-3.050, Small Utility Rate Case Procedures.[4] These procedures distort the traditional framework for the determination of rates, because the rule specifically requires that the utility omit the filing of tariff revisions at the onset of the case. Instead, the utility merely provides notice as to what rate increase is sought. Accordingly, the traditional file and suspend method is altered. This process creates a delay in the effective date of new rates, and appears to have been intended to allow unsophisticated small utilities the opportunity to interact with the Commission's staff for purposes of investigating the utility's rate increase request, allow the Public Counsel an opportunity to do the same, and provide for agreement or resolution at an early stage, in what could otherwise be a lengthy process.[5]

A utility's ability to determine what rate it chooses to file is an instrumental foundation for the balance of competing interests in a monopoly environment. After a utility makes its own determination of what rate is appropriate, the staff of the Commission, the Office of the Public Counsel, as well as other interested parties, have a chance to challenge the utility's rate, thus preserving a balance in the regulatory process. The small utility rate case procedure generally

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[4] *See* fn. 1.

[5] Staff notes that the Letter provided by WPC Sewer Company requesting a rate increase was made pursuant to 4 CSR 240-3.330, and that the "Commission" notified WPC that this rule had been superseded by Rule 4 CSR 3.050, effective May 30, 2008, *Notice of Unanimous Agreement Regarding Disposition of Small Sewer Company Revenue Increase Request, by the Staff of the Missouri Public Service Commission, February 25, 2009.* This Commissioner, however, would note that this Commission never made any such notification in this matter, as is reflected in the electronic filing and information system ("EFIS"). This Commissioner also notes that rule 4 CSR 240-3.330 was not and has not been rescinded. Further, representations by the Staff of the Missouri Public Service Commission, purporting to be representations of this Commission inappropriately blur the separation of the Commission, the Commissioners and its staff in proceedings before the Commission. Such representations may also serve to confuse a small utility about the distinction between the Commission and its staff, which most certainly could lead to a diminution in the negotiating power of these parties in a rate increase matter if the utility believes that the staff's representations are those of the Commission.

maintains this instrumental foundation. However, in my opinion, delaying the utility's tariff filing until after the utility requests a rate increase causes a shift in the balance of the parties' negotiating power.[6] Generally, the size of these small utilities and the fact that they are not represented by legal counsel are two elements which further raise my concern.

Another element that alters this balance is that where the Commission staff and the utility may agree on the disposition of the matter, the Office of the Public Counsel, under 4 CSR 240-3.050(15), has the ability to leverage its authority by calling for a local public hearing, or even an evidentiary hearing, in a tactical manner which can disadvantage a small utility.[7] The Office of the Public Counsel, regardless of its size or budget, still represents a formidable party opponent for a small utility seeking a rate increase, a fact that is not unnoticed by this Commissioner.

The Commission must be mindful that regulated utilities exchange a competitive marketplace in favor of a monopolistic existence in the market. As such, the Commission is not merely a spectator in the marketplace, but rather is a substitute for the marketplace. This exchange from competition to regulation does not dispose of this Commission's fundamental obligation in serving the public interest, and that the end result of the regulatory process includes just and reasonable rates.[8] The Small Utility Rate Case Procedure[9] should not eliminate this

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[6] By making a request for an increase, and then allowing the Commission's staff to essentially act in a role more akin to an assistant to the utility, runs the risk that the utility will not view a recommendation by the Commission's staff as an adversarial position, and further, that the utility may misunderstand that the recommendation of the Commission's staff, is not necessarily the recommendation of the Commission. All are risks which impact on negotiating power in this process.

[7] The reasons for considering tools of "due process" as a tactical tool are the knowledge that there is added cost and expense associated with both the local public hearing as well as the evidentiary hearing. For these reasons I support modification, or even the overall elimination of the small utility rate case procedure. Additionally, this Commissioner has concerns that the rule as currently written, under 4 CSR 240-3.050(21) unwittingly appears to remove the public interest obligations of the Commissioners when exercising their regulatory responsibilities, by limiting the considerations for evidentiary hearings to "due process, the fairness to the participants in the matter and the utility's ratepayers."

[8] *See* Section 393.130.1 RSMo Supp. 2008. "Every ... sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such ... sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. [...]" *See also*

Commission's obligation; instead, it should preserve it. Additionally, this Commission must ensure that the utilities it regulates perform at levels that are in the public interest, regardless of their size.

In this particular case, the Commission's staff auditor indicated to the Commission that at least one number in the cost of service calculation was wrong and should be increased. This small, $100.00 change, while appearing to be small is nearly a 10% difference in the overall revenue requirement for this utility. The majority glossed over this difference by instead pointing to the *unanimous* agreement as the rationale for the result. But clearly, a 10% difference demonstrates that the *unanimously* agreed rate may, after hearing, be found not just and reasonable. When a difference this significant exists, the public interest suggests that an evidentiary hearing is proper to explore, not only this issue, but any other differences that may exist.

Beyond the $100.00 change, there is the matter of the compliance issue with Department of Natural Resources ("DNR") requirements. In 2007, DNR gave WPR until December 31, 2013, to take steps to become compliant with DNR standards. This compliance effort may include a need for capital improvements in WPR's sewer system, which the Commission's staff has indicated could exceed $10,000, including engineering studies, as well as construction. The majority's answer to these DNR requirements is to have WPR come back for another rate case. Instead, the focus should be on the present situation and consideration of the financial damage that the approved rate may have on WPR's ability to receive financing for these improvements or to undertake them at all. Additionally, this Commission has within its power the ability to order reimbursement for construction work in progress in anticipation of the improvements that would

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Section 386.310.1 RSMo (2000).

[9] 4 CSR 240-3.050(1) – (25).

be required by DNR. The Commission's Staff even acknowledged that a surcharge to pay for this type of required improvements would be appropriate, an issue that could have been developed at an evidentiary hearing.

Unfortunately, the majority ignored both the change in expenses, which are nearly 10%, as well as allowing construction work in progress ("CWIP") for funding the DNR required improvements. While the statements of the staff at a Commission Agenda session are not evidence, they are at least an indicator of facts that could be elicited at an evidentiary hearing. That is why I supported an evidentiary hearing in this case, rather than the majority's approval of the proposed disposition agreement. What is most troubling here is that the staff indicated to the Commission not only that the rate was in error, but that a surcharge for the DNR project was appropriate – two key elements which will have a substantial effect on this small utility. This begs the question – since these two elements are important, why were they not included in the settlement agreement? Safe and adequate service rests on financial stability as well as meeting DNR health and safety requirements.

Settlement is not a substitute for regulation, even when it is a part of the overall regulatory process. This Commission must remain mindful that where a regulated entity enters into a settlement, it is not a disposition of the matter, but rather a proposal to the Commission for disposition. When a civil litigation mindset is wrapped around this Commission's settlement processes, and that framework is used to further the disposition of a matter, the result flies squarely in the face of the balance that this Commission is entrusted to administer in furtherance of its statutory duties. That is why I find it necessary to bring to the attention of the majority in this case that this Commission is not a court, because by viewing this Commission as a court would ultimately serve to undermine the Commission's regulatory effectiveness. Reaching a

result based solely upon the desire of the parties is fundamentally flawed in a regulated environment. For the foregoing reasons, I must respectfully dissent.

Respectfully,

Terry M. Jarrett, Commissioner

Dated in Jefferson City, Missouri,
on this 30th day of March, 2009.