



FILED²

NOV 7 2013

Missouri Public Service Commission

Missouri Public Service Commission (File Stamp)

Judge or Division:	Appellate Number:	3:21 pm KTB
Appellant: The Office of the Public Counsel	Missouri Public Service Commission File Number: SR-2013-0016	

vs.

Respondent:
Public Service Commission of the State of Missouri

Notice of Appeal

Notice is given that The Office of the Public Counsel appeals to the Missouri Court of Appeals Western Eastern Southern District.

11/7/2013
Date Notice of Appeal
(to be filled in by Secretary of Commission)

Christina L. Baker
Filed Signature of Attorney or Appellant

The notice of appeal shall include the appellant's application for rehearing, a copy of the reconciliation required by subsection 4 of section 386.420, a concise statement of the issues being appealed, a full and complete list of the parties to the commission proceeding, and any other information specified by the rules of the court. The appellant(s) must file the original and (2) two copies and pay the docket fee required by court rule to the Secretary of the Commission within the time specified by law. **Please make checks or money orders payable to the Missouri Court of Appeals.** At the same time, Appellant must serve a copy of the Notice of Appeal on attorneys of record of all parties other than appellant(s), and on all parties not represented by an attorney.

CASE INFORMATION

Appellant Attorney / Bar Number: Christina L. Baker, MO Bar #58303	Respondent's Attorney / Bar Number: Shelley Brueggemann, MO Bar #52173	
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Date of Commission Decision: 9/24/2014	Date of Application for Rehearing Filed: 10/23/2014	Date Application for Rehearing Ruled On: 10/30/2014

DIRECTIONS TO COMMISSION

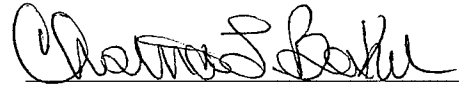
A copy of the notice of appeal and the docket fee shall be mailed to the clerk of the appellate court. Unless otherwise ordered by the court of appeals, the commission shall, within thirty days of the filing of the notice of appeal, certify its record in the case to the court of appeals.

Certificate of Service

I certify that on 11-7-2013 (date), I served a copy of the notice of appeal on the following parties, at the following address(es), by the method of service indicated.

Missouri Public Service Commission – Hand delivered
Kevin Thompson MO Bar #36288
PO Box 360
Jefferson City, MO 65102

Emerald Pointe Utility Company – U.S. Mail Service
Dean L. Cooper MO Bar #36592
Brydon, Swearngen & England
P.O. Box 456
Jefferson City MO 65102



Appellant or Attorney for Appellant

FORM 1. CIVIL CASE INFORMATION FORM SUPPLEMENT

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD _____

Office of the Public Counsel
(Appellant)

Christina L. Baker, MO Bar #58303
200 Madison Street, Suite 650
PO Box 2230
Jefferson City, MO 65102-2230

Missouri Public Service Commission
(Respondent)

Shelly Brueggemann, MO Bar #52173
200 Madison Street
PO Box 360
Jefferson City, MO 65102-0360

Date Notice filed with the Public Service Commission November 7, 2013

The Record on Appeal will consist of a Legal File Only. (This will include records filed pursuant to Rules 81.13 and 81.16)

FACTUAL BACKGROUND: (Events Giving Rise to Cause of Action)

Judicial Review of the Missouri Public Service Commission's September 24, 2013 *Revised Report and Order* issued in Case Number SR-2013-0016, In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company.

ISSUE(S):

(Anticipated to be Presented by the Appeal; Appellant is Not Bound by this Designation)

The Office of the Public Counsel challenges the lawfulness of the Commission's decision which improperly decided an issue not before the Commission, constituted prohibited retroactive rate making and improperly presumed a Commission approved tariff was unlawful.

LIST OF PARTIES TO THE COMMISSION PROCEEDING

(As required by § 386.510 RSMo)

The following parties participated in Public Service Commission Case Number SR-2013-0016:

Emerald Pointe Utility Company: Dean L. Cooper, MO Bar #36592 Brydon, Swearingen & England P.O. Box 456 Jefferson City MO 65102 (573) 635-7166 (573) 635-3847 FAX dcooper@brydonlaw.com	Office of the Public Counsel: Christina L. Baker, MO Bar #58303 Deputy Public Counsel P. O. Box 2230 Jefferson City MO 65102 (573) 751-5565 (573) 751-5562 FAX christina.baker@ded.mo.gov
Public Service Commission Staff: Kevin Thompson MO Bar #36288 Chief Staff Counsel Missouri Public Service Commission P.O. Box 360 Jefferson City, MO 65102 573-751-6514 573-526-6969 FAX kevin.thompson@psc.mo.gov	

STATEMENT OF THE ISSUES

(As required by § 386.510 RSMo)

Appellant Public Counsel will raise the following issues on appeal:

1. The lawfulness of the Missouri Public Service Commission's September 24, 2013 *Revised Report and Order* issued in Case Number SR-2013-0016, In the Matter of the Request for an Increase in Sewer Operating Revenues of Emerald Pointe Utility Company.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office in
St. Louis on the 30th day of
October, 2013.

In the Matter of the Request for an)
Increase in Sewer Operating Revenues of)
Emerald Pointe Utility Company)

File No. SR-2013-0016, et al.

**ORDER DENYING APPLICATION FOR REHEARING AND REQUEST
FOR STAY OR SEPARATE FUND**

Issue Date: October 30, 2013

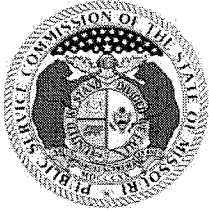
Effective Date: October 30, 2013

On September 24, 2013, the Commission issued a revised report and order regarding Emerald Pointe Utility Company's request for an increase in sewer and water operating revenues. That revised report and order became effective on October 24. On October 23, the Office of the Public Counsel filed a timely application for rehearing and request for stay order pending appeal, or in the alternative, order for a separate fund for rate increase subject to refund.

Section 386.500.1, RSMo (2000), indicates the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." In the judgment of the Commission, Public Counsel has not shown sufficient reason to rehear the revised report and order. The Commission will deny the application for rehearing. Public Counsel also requests a stay order pending appeal, or in the alternative, an order for a separate fund for rate increase subject to refund. The Commission will also deny that request.

THE COMMISSION ORDERS THAT:

1. The Office of the Public Counsel's Application for Rehearing is denied.
2. The Office of the Public Counsel's Request for a stay order pending appeal, or in the alternative, an order for a separate fund for rate increase subject to refund is denied.
3. This order shall become effective upon issuance.



BY THE COMMISSION

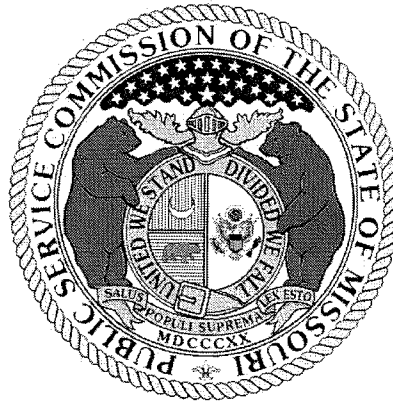
A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, and
W. Kenney, CC., concur;
Hall, C., abstains.

Woodruff, Chief Regulatory Law Judge

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



In the Matter of the Request for an)
Increase in Sewer Operating Revenues of) File No. SR-2013-0016 et. al,
Emerald Pointe Utility Company)

REVISED REPORT AND ORDER

Issue Date: September 24, 2013

Effective Date: October 24, 2013

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

In the Matter of the Request for an)
Increase in Sewer Operating Revenues of)
Emerald Pointe Utility Company) File No. SR-2013-0016 et. al.

APPEARANCES

Dean Cooper, Attorney at Law, Brydon, Swearingen & England, P.C., 312 E. Capital Ave., Jefferson City, Missouri 65102.

And

Vincent F. O’Flaherty, Attorney at Law, Law Offices of Vincent F. O’Flaherty, 2 Cleaver II Blvd., Suite 445, Kansas City, Missouri 64112

For Emerald Pointe Utility Company.

Kevin Thompson, Chief Staff Counsel, and Amy Moore, Legal Counsel, P.O. Box 360, 200 Madison Street, Jefferson City, Missouri 65102

For the Staff of the Missouri Public Service Commission.

Christina Baker, Legal Counsel, P.O. Box 2230, 200 Madison Street, Suite 650, Jefferson City, Missouri 65102

For the Office of the Public Counsel and the Public.

CHIEF REGULATORY LAW JUDGE: Morris L. Woodruff

REVISED REPORT AND ORDER

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The Missouri Public Service Commission, having considered all the competent and substantial evidence upon the whole record, makes the following findings of fact

and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position, or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

Summary

This revised report and order authorizes the company to file a tariff sufficient to recover revenues as determined by the Commission in this order as a resolution to the rate increase request initiated by Emerald Pointe pursuant to the Commission's Small Utility Rate Making Process.

This revised report and order also concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of \$3.50 per 1,000 gallons.

Procedural History

On July 16, 2012, Emerald Pointe Utility Company, Inc., sent a letter to the Commission requesting an increase of \$186,000 in its annual sewer system operating revenues and an increase of \$13,000 in its annual water system operating revenues. By filing the letter, Emerald Pointe instituted a proceeding under the Commission's Small Utility Rate Case Procedure, which is set forth at 4 CSR 240-3.050. The Commission designated the sewer rate increase request as File No. SR-2013-0016 and the water rate increase as File No. WR-2013-0017.

As provided in the Commission's regulation, the Commission's Staff and the Office of the Public Counsel undertook an investigation and audit of Emerald Pointe's

water and sewer operations. On March 14, 2013¹, Staff and Emerald Pointe filed a partial disposition agreement that purported to resolve the issues between them. However, Staff and Emerald Pointe were unable to resolve all issues and asked the Commission to resolve all of the remaining issues through contested case procedures. Subsequently, on March 18, Public Counsel objected to certain aspects of the disposition agreement and requested that an evidentiary hearing be held on all issues.

On March 19, the Commission consolidated the water case, WR-2013-0017, into the sewer case, SR-2013-0016. Thereafter, all proceedings occurred in the consolidated case, which is designated as SR-2013-0016.

On April 17, the Commission conducted a local public hearing in Branson, Missouri, near Emerald Pointe's service area. At that hearing, the Commission heard comments from Emerald Pointe's customers and the public regarding the company's request for a rate increase. Comments were also received regarding alleged unauthorized charges by Emerald Pointe.²

In compliance with the established procedural schedule, the parties prefiled direct, rebuttal, and surrebuttal testimony. An evidentiary hearing was held on May 9. The parties filed post-hearing briefs on June 6. At no time, before, during or after the hearing did any party request additional time in which to present additional evidence or witnesses, on any issue.

The Commission issued a report and order in this case on July 10. That report and order became effective on July 30. Public Counsel filed a timely application for rehearing on July 26. In response to that application for rehearing, the Commission

¹ All dates refer to 2013 unless otherwise noted.

² Transcript, Pages 96-97.

determined that the portion of the report and order dealing with overcharge refund issues should be revised. For that purpose, the Commission has withdrawn the July 10 report and order and is issuing this revised report and order in its stead.

The Unanimous Stipulation and Agreement Regarding Rate Design Methodology

On April 22, before the evidentiary hearing, Emerald Pointe, Staff, and Public Counsel filed a unanimous stipulation and agreement regarding rate design methodology. After considering the stipulation and agreement, the Commission approved it as a resolution of the issues addressed in that agreement. The issues resolved in the stipulation and agreement will not be further addressed in this report and order, except as they may relate to any unresolved issues.

Conclusions of Law Regarding Jurisdiction

A. Emerald Pointe is a public utility as defined in Section 386.020(43), RSMo (Supp. 2012). It is also a sewer corporation as defined in Section 386.020(49), RSMo (Supp. 2012) and a water corporation as defined in Section 386.020(59), RSMo (Supp. 2012). As such, Emerald Pointe is subject to the Commission's jurisdiction pursuant to Chapters 386 and 393, RSMo 2000.

B. Section 393.140(11), RSMo 2000, gives the Commission authority to regulate the rates Emerald Pointe may charge its customers for water and sewer service.

Conclusions of Law Regarding the Determination of Just and Reasonable Rates

A. In determining the rates Emerald Pointe may charge its customers, the Commission is required to determine that the rates are just and reasonable.³ Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁴

³ Section 393.150.2, RSMo 2000.

B. In determining whether the rates proposed by Emerald Pointe are just and reasonable, the Commission must balance the interests of the investor and the consumer.⁵ In discussing the need for a regulatory body to institute just and reasonable rates, the United States Supreme Court has held:

Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the services are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment.⁶

In the same case, the Supreme Court provided the following guidance on what is a just and reasonable rate:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.⁷

⁴ Section 393.150.2, RSMo 2000.

⁵ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603, (1944).

⁶ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 690 (1923).

⁷ *Bluefield*, at 692-93.

The Supreme Court has further indicated:

'[R]egulation does not insure that the business shall produce net revenues.' But such considerations aside, the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.⁸

C. In undertaking the balancing required by the Constitution, the Commission is not bound to apply any particular formula or combination of formulas. Instead, the Supreme Court has said:

Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.⁹

D. Furthermore, in quoting the United States Supreme Court in *Hope Natural Gas*, the Missouri Court of Appeals said:

[T]he Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' ... Under the statutory standard of 'just and reasonable' it is the result reached, not the method employed which is controlling. It is not theory but the impact of the rate order which counts.¹⁰

⁸ *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (citations omitted).

⁹ *Federal Power Commission v. Natural Gas Pipeline Co.* 315 U.S. 575, 586 (1942).

¹⁰ *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 706 S.W. 2d 870, 873 (Mo. App. W.D. 1985).

Conclusions of Law Regarding the Small Utility Rate Making Process

A. This small company rate increase case under the provisions of Commission rule 4 CSR 240-3.050 was initiated by Emerald Pointe. Staff and Emerald Pointe filed a partial agreement on March 14, but indicated they were unable to resolve the remaining issues and requested that those issues be resolved through contested case procedures. Public Counsel identified additional issues upon which it did not agree and also requested resolution through a contested case procedure. Unlike in a large company rate case, Emerald Pointe was not required to file a tariff, to initiate the process. Therefore no operation of law date and no tariff for the Commission to approve, reject, or suspend existed at the time the Commission issued its July 10 report and order. Subsequently, Emerald Pointe filed a tariff to comply with the Commission's July 10 report and order. The Commission took no action regarding that tariff and it went into effect by its terms on August 23.

B. Commission Rule 4 CSR 240-3.050(21) allows the company or Staff to request resolution of unresolved issues through contested case procedures. Both Staff and Emerald Pointe made such a request in this case, as did Public Counsel. The Commission rule for Small Utility Rate Making does give the parties the opportunity to proceed on all issues in one proceeding, which by full agreement of all parties to the matter is what occurred here. All parties were given every opportunity to fully and completely present all of their issues to the Commission. Since all the parties agreed to present the issues to the Commission in this manner, it is appropriate to issue a report and order that resolves the identified issues and directs Emerald Pointe to file a tariff consistent with the Commission's decisions.

RATE CASE ISSUES

The first group of issues concern questions about the company's cost of service and the rates it should be allowed to charge its customers on a going forward basis. These are the issues that affect the tariffs that Emerald Pointe has filed to comply with the July 10 report and order. The resolution of the rate case issues is not changed by this revised report and order.

1. Hollister Sewage Treatment Expense:

- a. What amount of expense related to the sewage treatment performed by the City of Hollister should be recovered in rates?**

Findings of Fact:

1. Because of recent improvements to its system, Emerald Pointe pumps its sewage to the nearby City of Hollister for treatment. The company now must pay Hollister to treat its sewage. Based on information provided by the company, Staff allowed \$75,939 in rates to cover that expense.¹¹

2. The cost to cover that expense was based on an estimation of the volume of sewage used in the design of the sewer commodity charge as originally proposed by the company. However, the first bill Emerald Pointe received from the City of Hollister for wholesale sewage treatment expense in January 2013 was larger than the company had anticipated. For that reason, Emerald Pointe proposes the ongoing amount allowed for this expense be increased by \$15,188, based upon a 20 percent increase in the volume used to calculate it.¹²

3. The January 2013 bill is the first bill Emerald Pointe received from the City of Hollister and could be a one-month anomaly. When more billing history is obtained,

¹¹ Hanneken Direct, Ex. 25, Page 2, Lines 4-17.

¹² Johansen Rebuttal, Ex. 16, Page 3, Lines 10-22.

the monthly average expense may still fall within the amount previously anticipated by the company and Staff.¹³

4. The January 2013 bill falls outside the test year used to calculate rates for this case.¹⁴

5. Emerald Pointe may request another rate increase to address changes in costs outside the current test year if future bills from the City of Hollister are indeed larger than anticipated.¹⁵

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.¹⁶

Decision:

The otherwise agreed upon level of anticipated expense used to calculate Emerald Pointe's on-going rates shall not be recalculated based on a single month of expense outside the test year used to calculate rates.

2. Legal Fees:

- a. **What amount of the company's legal fees should be recovered in rates?**

Findings of Fact:

1. Emerald Pointe recently incurred legal fees in connection with two cases before the Commission. File No. SA-2012-0362 was a certificate case in which the company sought authority from the Commission to construct, own, and operate a

¹³ Transcript, Pages 249-250, Lines 17-25, 1-15.

¹⁴ Busch Surrebuttal, Ex. 2, Page 2, Line 15.

¹⁵ Busch Surrebuttal, Ex. 2, Page 2, Lines 15-17.

¹⁶ Section 393.150.2, RSMo 2000.

sewage pipeline to pump waste to the City of Hollister for treatment. File No. SF-2013-0346 was the financing case in which Emerald Pointe sought authority to borrow money to construct the sewage pipeline.

2. Staff's updated accounting schedules include \$386 for legal expenses in the annual cost of service for both water and sewer services.¹⁷ That is a combined annual total of \$772.

3. The annual legal expense amount was obtained by normalizing Emerald Pointe's legal expenses over five years.¹⁸

4. The legal expense amount is distinct from the rate case expense amount that is addressed in the next issue.

5. All parties now accept the legal expense amount utilized by Staff.¹⁹

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.²⁰

Decision:

All parties agree \$772 in legal fees should be included in the company's annual revenue requirement. The Commission finds that amount to be reasonable. A total of \$772 in legal fees shall be included in the company's annual revenue requirement.

3. Rate Case Expense:

a. **What amount of the company's legal fees should be recovered in rates?**

¹⁷ Exhibits 9 and 10.

¹⁸ Rose Surrebuttal, Ex. 8, Page 10, Lines 4-11.

¹⁹ Transcript, Pages 254-255, Lines 23-25, 1-6.

²⁰ Section 393.150.2, RSMo 2000.

Findings of Fact:

1. Staff proposed to include annualized expenses of \$3,141 in Emerald Pointe's cost of service to cover the company's cost of pursuing this rate case. However, that amount includes rate case expenses only through March 2013.²¹

2. Many of the company's rate case expenses were not incurred until the hearing and will continue to accumulate even after the Commission issues its report and order.²²

3. It is appropriate to update rate case expenses through a date closer to when new rates will go into effect.²³ However, no party specified a date to which rate case expenses should be updated.

4. At the hearing, Emerald Pointe used the services of two attorneys. Mr. Cooper handled the rate case issues while Mr. O'Flaherty handled the sewer commodity charge issue.

5. In its brief, Public Counsel challenges the necessity of Emerald Pointe's use of a second attorney, Mr. O'Flaherty, to present its case at the hearing. Public Counsel asserts that O'Flaherty's activities were completely duplicative of those of Cooper and that there was nothing done by O'Flaherty that could not have been done by Cooper.²⁴

6. Since this argument was not raised by Public Counsel until its brief, no other party has had an opportunity to respond.

²¹ Rose Surrebuttal, Ex. 8, Page 9, Lines 8-20.

²² Transcript, Page 256, Lines 7-10.

²³ Transcript, Pages 260-261, Lines 24-25, 1-4.

²⁴ Public Counsel's Brief, Page 15.

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.²⁵

Decision:

The Commission agrees that it is appropriate for Emerald Pointe to be allowed to update its rate case expenses to some point near the end of this case. Doing so will allow the company to recover its reasonably incurred expenses of presenting this case to the Commission. No party specified a cut-off date for consideration of rate case expense, so the Commission will specify June 15, 2013 as the cut-off date.

Public Counsel challenged the reasonableness and necessity of Emerald Pointe's use of two attorneys to present its case to the Commission. Since this argument was not raised until after the evidentiary hearing, there is no evidence for the Commission to consider. As a result, the Commission must decide this matter based on its own observation of the conduct of the attorneys at the hearing.

Both Mr. Cooper and Mr. O'Flaherty represented their client in a competent and professional matter. Contrary to Public Counsel's assertion, their efforts were not duplicative. Mr. O'Flaherty took the lead on the issue regarding a possible refund of \$500,000 in alleged overcharges and interest relating to the company's collection of a sewer commodity charge. Obviously, that was a substantial issue with possible profound impact on the future of the company. Emerald Pointe's decision to hire a second attorney to deal with that issue was not inappropriate; particularly given the company's experience in its 2000 rate case when it, in accordance with Commission

²⁵ Section 393.150.2, RSMo 2000.

rules, did not engage the services of a lawyer. Emerald Pointe may recover costs incurred to hire Mr. O'Flaherty along with its other reasonably incurred rate case expense.

4. Capital Structure:

a. Should the capital structure of the company for ratemaking purposes be:

- 1) A structure that treats the company as one entity; or**
- 2) A structure that considers the water and sewer operations of the company separately?**

Findings of Fact:

1. Emerald Pointe is a single corporate entity that offers both water and sewer service.²⁶

2. Emerald Pointe has recently incurred substantial debt to provide sewer service to its customers. Specifically, it borrowed \$1,000,000 from Hawthorn Bank to finance the construction of a sewage pipeline to transport waste to the City of Hollister for treatment. In addition, it borrowed \$66,860 from White River Valley Electric Cooperative in connection with that same project.²⁷

3. Emerald Pointe currently has no debt connected with its water operations.²⁸

4. Emerald Pointe's financing and credit abilities are based on Emerald Pointe's cash flows and revenues as a whole, including both water and sewer operations.²⁹

5. All of Emerald Pointe's assets - those that are used to provide water

²⁶ Marevangepo Surrebuttal, Ex. 22, Page 5, Lines 18-19.

²⁷ Marevangepo Surrebuttal, Ex. 22, Page 3, Lines 4-8.

²⁸ Transcript, Page 268, Lines 12-19.

²⁹ Marevangepo Surrebuttal, Ex. 22, Page 6, Lines 21-24.

service, and those that are used to provide sewer service – are pledged to support the current debt.³⁰

6. Because Emerald Pointe is a single corporate entity, there are no restrictions on the use of sewer-generated cash flows to support water operations and vice-versa.³¹

7. Emerald Pointe has 364 sewer customers and 389 water customers, so some water customers are not also sewer customers.³²

8. Staff, supported by Emerald Pointe, would use a single actual capital structure for Emerald Pointe when determining the company's rate of return. That capital structure would include 70.21 percent debt and 29.79 percent equity.³³

9. Public Counsel would utilize a separate capital structure for sewer and water operations, reasoning that water customers should not subsidize sewer customers. Public Counsel's capital structure for sewer operations would be 19.77 percent equity and 80.23 percent debt. For water operations, that structure would be 100 percent equity and 0 percent debt.³⁴

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.³⁵

³⁰ Transcript, Page 278, Lines 19-25.

³¹ Marevangepo Surrebuttal, Ex. 22, Page 7, Lines 8-14.

³² Russo Direct, Schedules JMR 2 and JMR 3.

³³ Marevangepo Surrebuttal, Ex. 22, Page 7, Lines 19-22 and Transcript, Page 266.

³⁴ Robertson Rebuttal, Ex. 23, Page 19, Lines 1-6.

³⁵ Section 393.150.2, RSMo 2000.

Decision:

Emerald Pointe is a single corporate entity that provides both water and sewer service. As a single entity it has borrowed money to finance a pipeline used to provide sewer service. However, that debt is the debt of the single corporate entity, not the debt of a hypothetical separate sewer service providing entity. All of Emerald Pointe's water and sewer revenues support that single corporate entity and all of that company's debt has been incurred by that single corporate entity. Therefore, it is appropriate to utilize a single actual capital structure when determining the company's rate of return. The actual capital structure including 70.21 percent debt and 29.79 percent equity calculated by Staff is appropriate.

5. Rate of Return / Return on Equity:

- a. **What is the appropriate cost of equity for the company?**
- b. **What is the appropriate methodology for estimating small water and sewer companies' rates of return?**

Findings of Fact:

1. Return on equity (ROE) is an attempt to estimate the return an investor should be allowed to earn on his or her investment in the company. Staff used an ROE of 13.26% in determining Emerald Pointe's allowed rate of return.³⁶

2. Staff arrived at its ROE recommendation by adding a four percent risk premium to a three-month average yield on B+ rated 30-year public utility bonds.³⁷ The use of B+ rated bonds is consistent with Staff's estimate of the credit quality of the company.³⁸

³⁶ Marevangepo Surrebuttal, Ex. 22, Page 17, Line 9.

³⁷ Marevangepo Surrebuttal, Ex. 22, Page 11, Lines 19-21.

³⁸ Marevangepo Surrebuttal, Ex. 22, Page 14, Lines 16-22.

3. Public Counsel takes the same four percent risk premium used by Staff and adds it to what it contends is Emerald Pointe's actual cost of debt to arrive at a recommended ROE of 9.35 percent.³⁹

4. Emerald Pointe supports the ROE recommended by Staff and did not offer its own ROE recommendation.

5. Public Counsel's ROE recommendation has a surface appeal because it purports to be based on Emerald Pointe's actual cost of debt. However, the cost of debt Public Counsel uses is not a fair measure of the actual ability of Emerald Pointe to obtain debt financing.⁴⁰

6. Emerald Pointe has recently obtained debt financing from two sources. The first, and largest was a \$1 million commercial bank loan for the purpose of constructing a sewer pipeline. That loan has a five year term, amortized over twenty years with a five year balloon payment. It carries a 5.5 percent interest rate. However, that loan is personally guaranteed by Emerald Pointe's owner, Gary Snadon, and his personal assets are used as collateral for the loan. Without Snadon's personal guarantee no bank would have been willing to make a \$1 million loan to Emerald Pointe under any circumstances.⁴¹

7. The second loan obtained by Emerald Pointe was a loan of \$66,000 at 3.15 percent interest. However, that loan was obtained from White River Valley Electric Cooperative for the purchase of electric generators from White River for use on the

³⁹ Robertson Rebuttal, Ex. 23, Page 21, Lines 13-18.

⁴⁰ Murray Surrebuttal, Ex. 24, Page 5, Lines 9-16.

⁴¹ Menke Surrebuttal, Ex. 20, Pages 3-4, Lines 18-20, 1-22.

sewer pipeline. Again, that loan is not indicative of Emerald Pointe general ability to borrow money.⁴²

8. Compared to Public Counsel's use of the actual interest rates associated with the loans obtained by Emerald Pointe, Staff's attempt to use rates associated with public utility bonds is a reasonable means to determine an appropriate return on equity for Emerald Pointe.⁴³

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁴⁴

B. A public utility, such as Emerald Pointe, is:

entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.⁴⁵

Decision:

The 13.26 percent return on equity proposed by Staff is a reasonable measure of the return required to compensate Emerald Pointe's owners for their investment in the company. In contrast, the 9.35 percent return on equity proposed by Public Counsel is not credible because it is more properly a measure of the return on equity associated

⁴² Menke Surrebuttal, Ex. 20, Page 3, Lines 12-15.

⁴³ Transcript, Page 306, Lines 2-5.

⁴⁴ Section 393.150.2, RSMo 2000.

⁴⁵ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679, 692-93 (1923).

with an investment in Emerald Pointe's owner since it is almost entirely based on the owner's ability to obtain a loan for the company through his personal guarantee and pledge of his personal property as collateral. The Commission accepts the 13.26 percent return on equity proposed by Staff.

6. CIAC Reserve – Customer Fees:

a. What is the appropriate amount of CIAC reserve to book for customer fees?

Findings of Fact:

1. This issue arises because of incorrect accounting by Emerald Pointe before 2011. The company appropriately collected \$29,800 from its customers from a new water customer connection fee. For accounting purposes the connection fees should have been booked as contributions in aid of construction (CIAC), which is excluded from the company's rate base. At the same time, the actual costs of installing a connection, including labor expenses, should have been booked to Plant in Service, which is a rate base item. It is expected that the CIAC should balance against the Plant in Service, leaving no net changes in the company's rate base. However, Emerald Pointe booked only \$12,221 to Plant in Service, leaving \$17,579 unaccounted for on the company's books.⁴⁶

2. The money in question came from Emerald Pointe's collection of a \$400 fee for each new water customer collection. The fee is intended to cover materials and installation costs related to the new connection. For several years before 2011, Emerald Pointe only included the costs of meters or labor costs incurred to install

⁴⁶ Robertson Rebuttal, Ex. 23, Page 6, Lines 3-10.

meters in the plant accounts and not any of the other connection costs.⁴⁷

3. Staff testified that the company did not keep sufficient records to allow it to verify the actual costs of installation that should have been booked to Plant in Service. So rather than treating the \$17,579 as CIAC, Staff accounted for it as one-time miscellaneous revenues that were not included in the company's ongoing expenses for ratemaking purposes.⁴⁸

4. In contrast, Public Counsel would simply treat the \$17,579 as CIAC and thereby offset that amount of the company's rate base.⁴⁹

5. Emerald Pointe's customers did receive the benefit of the money they paid for the connection fee as materials and labor used to establish the connection. They should not again receive that benefit as a reduction to Emerald Pointe's rate base.⁵⁰

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁵¹

Decision:

Staff's accounting approach is correct. Public Counsel's approach would inappropriately reduce Emerald Pointe's rate base for legitimate expenses that Emerald Pointe actually incurred but did not record in the proper account.

⁴⁷ Hanneken Surrebuttal, Ex. 26, Page 4, Lines 8-16.

⁴⁸ Hanneken Surrebuttal, Ex. 26, Page 5. Lines 1-19.

⁴⁹ Robertson Rebuttal, Ex. 23, Pages 6-7, Lines 15-19, 1-3.

⁵⁰ Transcript, Page 325, Lines 6-14.

⁵¹ Section 393.150.2, RSMo 2000.

7. Plant Related Balance Update Period:

a. Through what period should the plant-related balance be updated?

Findings of Fact:

1. Staff used February 28, 2013 as the end of the update period for this case. As of that date, Staff obtained all relevant plant-balance data related to the new pipeline project, as well as data related to other issues in the case.⁵²

2. Public Counsel argues the update should be taken to a date closer to the effective date of new rates to better measure the company's actual financial position by considering updated additions, retirements, depreciation, and other plant related balances.⁵³

3. Staff does not have the ability to review and update all other relevant factors in the rate case other than plant in service costs. Therefore, to review and update some factors without reviewing and updating all factors would violate the matching principle.⁵⁴

4. The matching principle is simply that rates should be based on a measurement of costs and revenues at a single point in time. Updating some costs or revenues at a different time than other costs and revenues risks throwing the measurements out of balance and creating a single-issue ratemaking problem. For example, updating only a falling cost in one area might miss a corresponding rising cost in another area, thereby showing a false picture of the company's overall level of

⁵² Hanneken Surrebuttal, Ex. 26, Page 7, Lines 5-11.

⁵³ Robertson Rebuttal, Ex. 23, Page 8, Lines 13-18.

⁵⁴ Hanneken Surrebuttal, Ex. 26, Page 7, Lines 14-16.

costs.⁵⁵

5. Public Counsel points to Staff's willingness to update rate case expense to a date closer to the effective date of the rates as an indicating that the matching principle should not control the proposed update of plant-related balances.⁵⁶

6. However, it is generally not a violation of the matching principle to update rate case expense to some date closer to the effective date of rates because of the nature of those expenses and because they are the result of the case itself.⁵⁷ Most rate case expenses are not incurred until late in the rate case process and failing to update those expenses would prevent the company from recovering legitimate costs of doing business as a regulated utility.

Conclusions of Law:

A. This is a rate case issue. As such, Emerald Pointe has the burden of proving its proposed rates are just and reasonable.⁵⁸

B. When setting utility rates, the Commission is obligated to consider all relevant factors.⁵⁹

Decision:

For purposes of setting rates in this case, Staff has updated Emerald Pointe's general revenues and expenses through February 28, 2013. In order to adhere to the matching principle and to avoid engaging in single-issue ratemaking, some date must

⁵⁵ Hanneken Surrebuttal, Ex. 26, Page 7, Lines 17-23.

⁵⁶ Transcript, Pages 327-328, Lines 14-25, 1-22.

⁵⁷ Transcript, Page 330, Lines 4-7.

⁵⁸ Section 393.150.2, RSMo 2000.

⁵⁹ *State ex rel. Utility Consumers' Council of Missouri, Inc. v. Pub. Serv. Com'n*, 585 S.W.2d 41 (Mo. 1979).

be chosen at which costs and revenues will be measured. Staff has utilized a reasonable date and Public Counsel's proposal to update only certain costs after that date is rejected.

COMPLAINT ISSUES

These issues concern allegations that Emerald Pointe has overcharged its customers in the past. Thus, they are in the nature of a complaint that could have been brought as a separate action by the complaining parties. By agreement of the parties, the Commission heard evidence regarding the complaint along with evidence regarding the rate case issues, but, since these are complaint issues, the burden of proof is different, as will be explained in the Commission's conclusions of law..

8. Sewer Commodity Charge:

- a. Was the company authorized to collect a sewer commodity charge as a result of File No. SR-2000-595?**

Findings of Fact:

1. Before filing for a rate increase in this case, Emerald Pointe last changed its sewer rates as a result of a small company rate increase proceeding before the Commission in File No. SR-2000-595.⁶⁰

2. Using the Commission's small utility rate case procedure as it existed at the time, Emerald Pointe initiated the rate case process by sending a letter from its President, Gary Snadon, to the Executive Secretary of the Commission on May 20, 1999, asking for a ten percent increase in its base rate and its commodity usage rate for both water and sewer service.⁶¹ At that time Emerald Pointe's tariff authorized it to

⁶⁰ Snadon Rebuttal, Ex. 13, Page 4, Lines 3-7.

⁶¹ Snadon Rebuttal, Ex. 13, Page 4, Lines 9-14. A copy of the rate increase letter is attached to Snadon's rebuttal testimony as Schedule GWS-1.

collect a sewer commodity charge for sewer service in the amount of \$5.83 per 1,000 gallons.⁶²

3. Emerald Pointe was not represented by legal counsel during the 2000 rate case, nor did it engage the assistance of an outside consultant with rate expertise during the course of that case.⁶³ At the time, Staff encouraged small utilities to proceed with a small rate case without engaging the services of an attorney.⁶⁴

4. Upon receiving the rate increase request letter from Emerald Pointe, the Commission's Staff undertook an audit of the utility's books and records to evaluate the need for a rate increase.⁶⁵

5. On March 7, 2000, Randy Hubbs, assistant manager of the Commission's water and sewer department, sent a letter to Gary Snadon, President of Emerald Pointe, in which Hubbs enclosed a draft letter and proposed tariff describing a settlement of Emerald Pointe's request for water and sewer rate increases.⁶⁶

6. Consistent with the Commission's small company rate increase procedure as it existed at that time, the March 7, 2000 letter asked Mr. Snadon to sign a letter requesting a rate increase in the agreed upon amount and to return that letter, settlement agreements, and proposed water and sewer tariffs directly to Mr. Hubbs. The letter indicated Hubbs would have the Commission's representative sign the

⁶² Snadon Rebuttal, Ex. 13, Page 4, Lines 16-18.

⁶³ Snadon Rebuttal, Ex. 13, Page 5, Lines 1-8.

⁶⁴ Transcript, Page 172, Lines 2-16.

⁶⁵ Busch Surrebuttal, Ex. 2. Page 3, Lines 19-20.

⁶⁶ Snadon Rebuttal, Ex. 13, Page 5, Lines 17-23. A copy of the letter and associated material that Staff sent to Emerald Pointe are attached to Snadon's rebuttal testimony as Schedule GWS-3.

agreement and would then file the fully executed agreement and tariff sheets with the Commission.⁶⁷

7. Included among the documents sent to Snadon by Hubbs were two Agreements Regarding Disposition of Small Company Rate Increase Request. One disposition agreement was for a water rate increase and the other was for a sewer rate increase. Those agreements indicated that Staff and Emerald Pointe had agreed the utility should receive a rate increase of \$2,500 in its total annual operating revenues for both its water and sewer services. However, the agreements did not specify the rate design by which the utility was to recover that increase from its customers.⁶⁸

8. The rate design by which Emerald Pointe was to collect its rates from customers was specified in the new proposed tariffs that were also enclosed with Hubbs' letter. Those new proposed tariffs were prepared by Hubbs and presented to the company along with the disposition agreements.⁶⁹

9. The new proposed tariff for water service and the new proposed tariff for sewer service that were sent to Emerald Pointe by Staff both contained provisions that allowed the utility to charge its customers a monthly customer charge, plus a sewer commodity charge of \$3.50 per 1,000 gallons.⁷⁰

10. As instructed by the letter from Staff, Gary Snadon, on behalf of Emerald Pointe, signed the disposition agreements for both water and sewer service and the accompanying new tariffs that were prepared by Staff. He then returned the

⁶⁷ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁶⁸ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁶⁹ Transcript, Page 197, Lines 4-6 and Snadon Rebuttal, Ex. 13, Schedule GWS-3.

⁷⁰ Snadon Rebuttal, Ex. 13, Schedule GWS-3.

agreements and Emerald Pointe's new tariffs to Randy Hubbs at the Commission.

11. After the documents were returned to the Commission, Dale Johansen, who was the manager of the Commission's water and sewer department in 2000,⁷¹ signed the disposition agreement on behalf of Staff. Staff, specifically Randy Hubbs of the Commission's Water and Sewer Department,⁷² submitted those documents to the Commission's Record Department on March 20, 2000, thereby opening the rate case that was assigned File No. SR-2000-595.⁷³

12. Consistent with Staff's practice at the time, a copy of the documents Staff submitted to the Commission's Records Department on March 20, 2000, were not mailed to Emerald Pointe.⁷⁴

13. However, the sewer tariff that was filed as part of File No. SR-2000-595 was not the same as Emerald Pointe's new sewer tariff that Gary Snadon returned to Staff to be filed. In the sewer tariff that was filed by Staff, the provision that allowed Emerald Pointe to charge a sewer commodity charge of \$3.50 per 1,000 gallons had been removed.⁷⁵ The usage charge remained in the water tariff that Staff submitted to the Commission.⁷⁶

14. There is no documentation in Staff files that explains why the sewer tariff returned by Emerald Pointe was changed before Staff submitted it to the Commission and significantly, there is no correspondence or other indication in the file that Emerald

⁷¹ Transcript, Page 182, Lines 5-8.

⁷² Johansen Rebuttal, Ex. 16, Page 7, Lines 14-16.

⁷³ Johansen Rebuttal, Ex. 16, Page 6, Lines 9-12.

⁷⁴ Transcript, Page 183, Lines 16-25.

⁷⁵ Exhibit 6.

⁷⁶ Exhibit 4.

Pointe was ever informed that Staff planned to remove the sewer commodity charge from the company's tariff.⁷⁷

15. Dale Johansen, who was the manager of the Commission's water and sewer department in 2000, testified that he would have expected Staff to send written correspondence to the company if Staff intended to correct a mistake in a tariff before submitting the tariff to the Commission.⁷⁸

16. Randy Hubbs, who was Staff's case coordinator for Emerald Pointe's 2000 rate case, has been retired from the Commission for several years. He lives in Jefferson City but was not called as a witness to testify at the hearing.⁷⁹

17. On May 4, 2000, the Commission issued an order approving the sewer tariff that Staff submitted to the Commission.⁸⁰

18. The Commission approved Emerald Pointe's sewer rate increase without conducting an evidentiary hearing, based on the agreement between Emerald Pointe and Staff. Public Counsel did not join in that agreement, but did not object to it.⁸¹

19. The sewer tariff submitted by Staff to the Commission, excluding a commodity sewer charge, was entered into the Commission's records, specifically into a

⁷⁷ Johansen Rebuttal, Ex. 16, Page 7- Lines 6-13. Staff's witness, James Busch, confirmed the lack of evidence that Emerald Pointe was informed of the change in the tariff at Transcript, Page 116, Lines 5-14.

⁷⁸ Transcript, Page 187, Lines 7-16.

⁷⁹ Transcript, Page 197, Lines 7-13.

⁸⁰ *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.

⁸¹ *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.

tariff book, as the Staff's sewer tariff for Emerald Pointe.⁸²

20. There is no evidence that the Commission sent a copy of the Commission approved tariff to Emerald Pointe.⁸³ The evidence showed that Gary Snadon did not receive a copy of the Commission approved sewer tariff from the Commission.⁸⁴

21. At the conclusion of the 2000 sewer rate case, Emerald Pointe began charging its customers the \$3.50 per 1,000 gallon sewer commodity charge that was included in the version of the tariff that was provided to Emerald Pointe by Staff and that was signed and returned to Staff by Gary Snadon as Emerald Pointe's tariff.⁸⁵

22. Emerald Pointe continued to collect the sewer commodity charge from its customers until May 1, 2012. At that time, as it was preparing to make its current request for a sewer rate increase, Emerald Pointe's attorney noticed the discrepancy between the sewer tariff shown on the Commission's records and what Emerald Pointe believed to be its sewer tariff. Emerald Pointe informed Staff of the discrepancy and at Staff's request stopped collecting the usage charge.⁸⁶

23. Public Counsel's witness, Keri Roth, calculated that for the period between May 10, 2000, when Emerald Pointe began collecting the \$3.50 per 1,000 gallon sewer commodity charge from its customers, through March 31, 2012, Emerald Pointe collected \$346,650.34 from its customers by means of the sewer commodity charge. Public Counsel urges the Commission to require Emerald Pointe to refund that entire

⁸² Exhibit 5, and Transcript, Page 185, Lines 10-13.

⁸³ Transcript, Pages 185-186, Lines 19-25, 1-7.

⁸⁴ Transcript, Page 170, Lines 3-5.

⁸⁵ Snadon Rebuttal, Ex. 13, Page 7, Lines 18-23.

⁸⁶ Snadon Rebuttal, Ex. 13, Page 8, Lines 4-10. See also, Busch Direct, Ex. 1, Page 5, Lines 5-10.

amount to its customers along with interest to date in the amount of \$156,445.38, for a total refund of \$503,095.71.⁸⁷ Public Counsel would have the refund amount continue to accrue compound interest until Emerald Pointe refunds the money to its customers.⁸⁸

24. Staff's witness, James Busch, recommended that the Commission require Emerald Pointe to refund \$187,683 to its customers, representing the money the company collected through the sewer commodity charge in the last five years before the discovery of what Staff believes to be an overcharge.⁸⁹

25. The workpapers preserved in Staff's file show that Staff agreed Emerald Pointe should receive an increase in sewer revenues in the amount of \$2,500, which is the ten percent increase the company requested. Based on then current revenues, plus the \$2,500 increase, Staff's workpapers show Emerald Pointe should have been allowed to collect total sewer operating revenues of \$35,909. The monthly customer charges incorporated in the tariff produced that amount of revenue without including any additional revenue from a sewer commodity charge. Thus, Staff never developed a sewer commodity charge for Emerald Pointe's sewer tariff.⁹⁰

26. Staff's workpapers from the 2000 rate case show Staff's audit of the company revealed that in 2000 Emerald Pointe needed a sewer revenue increase \$40,447 per year greater than the \$2,500 per year it requested.⁹¹ Including the \$3.50

⁸⁷ Roth Rebuttal, Ex. 11, Page 8, Lines 6-10.

⁸⁸ Roth Rebuttal, Ex. 11, Page 9, Lines 1-4.

⁸⁹ Busch Direct, Ex. 1, Page 6, Lines 11-13. Staff would limit collection of the "overcharge" to five years based on application of Commission Rule 4 CSR 240-13.025. Staff would not add interest to the "overcharge".

⁹⁰ Busch Surrebuttal, Ex. 2, Pages 4-5, Lines 4-20, 1-12.

⁹¹ Johansen Rebuttal, Ex. 16, Pages 7-8, Lines 17-22, 1-16.

per 1,000 gallon sewer commodity charge would have allowed Emerald Pointe to collect only an additional \$18,000 per year.⁹²

27. Staff's prevailing practice in 2000, within the small utility rate increase procedure, was to limit a company to a rate increase no greater than what the company requested.⁹³ Staff reasoned that if the company was dissatisfied with the rate increase it had requested, it could immediately request another rate increase.⁹⁴

28. Emerald Pointe did not request another sewer rate increase until 2012 when it instituted this case. Staff did not review Emerald Pointe's sewer rates until this case despite the Commission ordering it to do so by December 12, 2006.⁹⁵

29. Even while it collected the sewer commodity charge of \$3.50 per 1,000 gallons, Emerald Pointe's annual reports to the Commission show the company sustained a net operating loss on its sewer operations in every year except 2003.⁹⁶

30. Staff's witness, James Busch, testified to his belief that Emerald Pointe's collection of the sewer usage fee was a mistake rather than a willful violation of the company's tariff.⁹⁷

⁹² Johansen Rebuttal, Ex. 16, Page 8, Lines 17-22.

⁹³ Busch Surrebuttal, Ex. 2, Pages 3-4, Lines 23, 1-2.

⁹⁴ Transcript, Pages 190-191, Lines 4-25, 1.

⁹⁵ *In the Matter of the Application of Emerald Pointe Utility Company for a Certificate of Convenience and Necessity*, File No. WA-2004-0581, et al., Order Approving Application for Certificate of Convenience and Necessity, December 2, 2004. See Also, Pittman Rebuttal, Ex. 14, Page 5, Lines 10-18.

⁹⁶ Johansen Rebuttal, Ex. 16, Page 9, Lines 11-20 and Schedule DWJ-5.

⁹⁷ Transcript, Page 126, Lines 7-12.

Conclusions of Law:

A. Section 393.140(11), RSMo 2000 gives the Commission authority to require utilities to file tariff schedules showing the rates the utility will charge its customers. The statute goes on to state, in part: "No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time ...". There is nothing in the statute that gives the Commission's Staff authority to file a tariff on behalf of a regulated utility.

B. Section 386.270, RSMo 2000 provides:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

C. Although this issue concerning possible customer refunds is raised in the context of the company's request for a rate increase, it is not a rate case issue in that it does not concern the company's cost of service and the rates that are to be established to allow the company to recover those costs going forward. Instead, this issue concerns allegations by Staff and Public Counsel that the company has violated its tariff in the past. In effect, the allegations brought under this issue are a complaint against the company, as permitted by Section 386.390, RSMo 2000.

D. That distinction is important because, while Section 393.150.2, RSMo 2000, places the burden of proof on the company to establish that the rates it will charge are just and reasonable, the burden of proof is different when an allegation is made that a utility has violated a provision of its tariff. In that circumstance, the complainant as the party asserting the affirmative of an issue, has the burden of proof.⁹⁸ Thus Staff and Public Counsel, as the complaining parties, have the burden of proving that Emerald Pointe has violated its tariff.

E. The Commission “is an administrative body only, and not a court, and hence the commission has no power to exercise or perform a judicial function, or to promulgate an order requiring a pecuniary reparation or refund.”⁹⁹ Thus, the Commission has no authority to order Emerald Pointe to make a refund to its customers. The Commission has authority, in the proper case, to determine whether Emerald Pointe has violated its tariff. But, if a party wishes to then seek a refund it would need to seek relief in the appropriate circuit court.

Decision:

In this case, the Commission is faced with two tariff documents that the opposing parties claim to be Emerald’s Pointe’s lawful sewer tariff. If Emerald Pointe’s lawful sewer tariff allows it to collect a usage charge of \$3.50 per 1,000 gallons, then the company’s collection of that charge from its customers cannot be a violation of its tariff. The tariff that Emerald Pointe contends is its lawful tariff contains such a usage charge. The tariff that Staff and Public Counsel contend is lawful does not.

⁹⁸ *State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Com’n*, 116 S.W.3d 680, 693, (Mo. App. W.D. 2003).

⁹⁹ *State ex rel. Laundry, Inc. v. Pub. Serv. Com’n*, 327 Mo. 93, 34 S.W.2d 37, 46 (Mo 1931).

In nearly every circumstance, a utility's lawful tariff is the tariff that is filed by the utility and held on file with the Commission. However, that is not true in the unique circumstances under which Emerald Pointe's sewer tariff was created in 2000. Under the Small Utility Rate Case procedures in effect in 2000, Staff presented Emerald Pointe with a disposition agreement prepared by Staff, that would allow the company to increase its sewer rates. The agreement itself simply stated that the rates would be increased by a specified amount but was silent as to how those additional rates would be collected from customers. Staff also drafted and presented Emerald Pointe with a new proposed sewer tariff that allowed the company to collect a sewer commodity charge of \$3.50 per 1,000 gallons. Since Emerald Pointe's existing tariff included a sewer commodity charge there was no reason for Emerald Pointe to question the continuation of such a sewer commodity charge in the new proposed tariff prepared by the Commission Staff.

Emerald Pointe's president signed the disposition agreement and issued the tariff that Staff had presented to him. Following Staff's explicit instructions, Emerald Pointe's president mailed the new tariff directly to Staff's case coordinator on Staff's representation that the case coordinator would in turn file that tariff with the Commission's records department. However, Staff's case coordinator filed a different version of the tariff with the Commission's records department than the one Mr. Snadon delivered to the Commission. The tariff that Staff filed, a tariff that Emerald Pointe never received or reviewed, does not contain a sewer commodity charge.

Emerald Pointe quite reasonably believed that the tariff it issued was also the tariff that had been submitted to the Commission's records department for inclusion in

the company's tariff book and that the tariff it had issued was in effect. Acting on that reasonable belief, Emerald Pointe collected the sewer commodity charge from its customers for nearly twelve years without objection from either Staff or Public Counsel. Even then, the confusion surrounding the sewer commodity charge was only identified by counsel for Emerald Pointe, who brought the discrepancy to the attention of Staff.

Emerald Pointe did not issue the tariff that was on file with the Commission and it was not notified that the tariff presented to the Commission for approval and inclusion in the Commission's records was not the tariff issued by the company. Staff had no authority to file a tariff for Emerald Pointe and its presentation to the Commission of a tariff that was not issued by Emerald Pointe constituted a fraud against Emerald Pointe and the Commission.

It is likely that Staff mistakenly presented the wrong tariff to the Commission and there is no evidence of intentional wrongdoing by anyone. But, if Emerald Pointe had been made aware that the tariff on file with the Commission did not authorize it to recover a sewer commodity charge it could have returned to the Commission for another rate increase years sooner than it did while operating on the reasonable belief that the sewer commodity charge, and the revenue it produced, was authorized by the company's sewer tariff. In these circumstances, the tariff that was filed by Staff, and presented to the Commission for approval without the knowledge or approval of Emerald Pointe, is not the company's lawful tariff. As a result, Emerald Pointe should not be required to refund money collected pursuant to the sewer commodity charge to its customers.

In sum, the Commission finds that Staff and Public Counsel have failed to meet their burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff. Hence, Staff and Public Counsel have failed to prove that Emerald Pointe violated its tariff by collecting a sewer commodity charge from its customers.

This decision is limited to a determination that the complainants have failed to prove that Emerald Pointe has violated its lawful tariff. This decision does not authorize Emerald Pointe to collect any additional sums from its customers.

If the company is required to return to customers amounts collected through a sewer commodity charge:

- i. **What is the appropriate time period over which the amounts due to customers should be calculated?**
- ii. **What, if any, interest should be applied to the amounts to be returned?**
- iii. **If an over collection occurred, over what period of time should those amounts be redistributed to customers?**

These three sub-issues are moot as the Commission has found that the complainants have not met their burden of proving that Emerald Pointe' has violated its lawful tariff.

9. Late Fee/Reconnect Fee Overcharges:

- a. **Should interest be applied to the refund of late fee/reconnect fee overcharges?**
- b. **Over what period of time should those amounts be returned to customers?**

Findings of Fact:

1. Emerald Pointe's water and sewer tariffs allow the company to collect a late payment fee from its customers of two percent of the amount due or \$3.00,

whichever is greater.¹⁰⁰ That provision is the same in both versions of the tariff discussed previously and is not disputed by the parties.

2. During its investigation of Emerald Pointe's request for a rate increase, Staff discovered the company has been charging its customers a late payment fee of ten percent.¹⁰¹

3. Staff also discovered Emerald Pointe has charged its customers a \$40 reconnect fee rather than the \$30 reconnect fee authorized in its tariff.¹⁰² Again, the provision is the same in both versions of the tariff and is not disputed by the parties.

4. Staff calculated Emerald Pointe over collected \$4,172 in late fees and \$280 of overcharged reconnection fees.¹⁰³

5. Emerald Pointe agrees with Staff's calculation of the overcharges and agrees to refund that money to its customers.¹⁰⁴

6. Staff initially proposed Emerald Pointe be required to pay six percent interest to its customers on the overcharged late fees and reconnection charges. Such interest charges would add \$1,631 to the late fee overcharges and \$53.65 to the reconnection fee overcharges.¹⁰⁵ Staff backed away from its demand for inclusion of interest in its post-hearing brief. However, Public Counsel continues to advocate for inclusion of interest on the refunds.

¹⁰⁰ Busch Direct, Ex. 1, JAB Schedule 2.

¹⁰¹ Busch Direct, Ex. 1, Page 7, Lines 19-21.

¹⁰² Transcript, Page 230, Lines 11-18. See also Ex. 4.

¹⁰³ Busch Direct, Ex. 1, Page 8, Lines 1-4.

¹⁰⁴ Menke Rebuttal, Ex. 19, Page 4, Lines 1-9.

¹⁰⁵ Busch Direct, Ex. 1, Page 8, Lines 1-4.

7. Emerald Pointe's tariff does not specify that interest is to be included on overcharged late fees and reconnection fees. Staff applied a six percent interest rate by analogy to the six percent interest rate specified in the tariff for collection and holding of customer deposits.¹⁰⁶

8. Staff and Public Counsel ask the Commission to order Emerald Pointe to refund the overcharged late fees and reconnection fees to customers within 90 days of the effective date of this report and order.¹⁰⁷

9. Emerald Pointe does not agree that interest in any amount should be added to the overcharged late fees and reconnection fees. It would return the reconnection fee overcharges in a single payment within 90 days, but would refund the overcharged late fees as a billing credit over 24 months.¹⁰⁸

10. Public Counsel advocates for the inclusion of interest based on the idea that customers should be compensated for the time value of the use of the money Emerald Pointe improperly collected from them.

Conclusions of Law:

A. There is no provision in Emerald Pointe's tariff that would require the company to pay interest to customers in connection with refunds of overcharges for late fees and reconnection fees. Neither is there any statutory or regulatory provision that would authorize the Commission to require Emerald Pointe to pay interest to its customers in that circumstance.

¹⁰⁶ Rose Surrebuttal, Ex. 8, Page 9, Lines 1-7. See also, Transcript, Page 235, Lines 3-11.

¹⁰⁷ Busch Direct, Ex. 1, Page 8, Lines 10-12. See also, Roth Rebuttal, Ex. 11, Page 13, Lines 2-15.

¹⁰⁸ Menke Rebuttal, Ex. 19, Page 4, Lines 1-9 and Emerald Pointe's Brief, Page 16.

B. The parties asserting the affirmative of an issue, in this case that refunds plus interest must be made, have the burden of proof.

C. Emerald Pointe concedes that it must refund the overcharges to its customers, but it does not concede that interest should be added to those refunds. Therefore, Public Counsel, the party advocating for the inclusion of interest must prove that the inclusion of interest is legal and appropriate. The Commission concludes Public Counsel has failed to carry that burden.

Decision:

The Commission concludes that there is no legal basis for requiring Emerald Pointe to add interest to the amounts it is refunding to its customers for overcharges for late fees and reconnection fees. However, the customers should be made whole as soon as reasonably possible. Therefore, the Commission will require Emerald Pointe to refund to its customers within 90 days the amounts it concedes it has overcharged.

10. Customer Deposits:

- a. **Over what period of time should deposits be returned to customers?**

Findings of Fact:

1. Emerald Pointe's water service tariff establishes certain criteria for the collection and holding of security deposits from customers. Staff's investigation during the course of the rate case determined that Emerald Pointe violated its tariff by requiring all water customers to make a deposit of \$30 upon requesting service. Furthermore, rather than refunding the deposit, with interest, upon the customer's completion of

certain criteria, the company held the deposit until the customer left the system.¹⁰⁹

2. Staff recommends the Commission require the company to refund \$11,370 in deposits with an additional \$17,688 in interest to customers. Staff further recommends all customers for whom the company has existing records receive refunds of their deposits, with interest. Because the company's records are lacking for some customers, Staff recommends those customers, for whom proper records are lacking, receive a refund of their original deposit, plus interest from the time they were added to the system. Customers connected to the system within the last year and properly charged a deposit need not be given a refund, except as provided in the tariff.¹¹⁰

3. Emerald Pointe accepts Staff's recommendation regarding the refund of customer deposits with interest as calculated by Staff.¹¹¹

4. Staff, supported by Public Counsel, proposes Emerald Pointe refund all improperly collected and held customer deposits with interest within 90 days of the effective date of this report and order.¹¹²

5. Emerald Pointe proposes customer deposits and interest be returned to customers through a bill credit over a 24-month period for existing customers and through a one-time payment to former customers who have left the system.¹¹³

Conclusions of Law:

A. The parties asserting the affirmative of an issue, in this case that refunds

¹⁰⁹ Busch Direct, Ex. 1, Page 8, Lines 14-22.

¹¹⁰ Busch Direct, Ex. 1, Page 9, Lines 1-10.

¹¹¹ Menke Rebuttal, Ex. 19, Page 3, Lines 13-20.

¹¹² Busch Direct, Ex. 1, Page 9, Lines 8-10. See also Roth Rebuttal, Ex. 11, Pages 14-15.

¹¹³ Emerald Pointe's Brief, Page 16.

plus interest must be made, have the burden of proof.

B. Emerald Pointe's water service tariff establishes certain criteria for when the company can collect and hold a security deposit from its customers. That tariff specifically provides the company must pay "interest at the rate of 6% per annum compounded annually" on all deposits.

C. For this issue, the company's tariff explicitly requires the payment of interest at six percent in connection with customer deposits held by the company. Therefore, the parties advocating for a refund including interest have met their burden.

Decision:

Emerald Pointe has not complied with the provisions of its tariff with regard to its handling of security deposits collected from its customers. Those deposits, plus interest, should be returned to customers as soon as possible. Therefore, the Commission will order Emerald Pointe to refund those amounts to customers within 90 days.

THE COMMISSION ORDERS THAT:

1. Emerald Pointe Utility Company is authorized to file a tariff sufficient to recover revenues as determined by the Commission in this order.

2. Emerald Pointe Utility Company shall refund all overcharged late fees and reconnection fees to customers within 90 days of the effective date of this revised report and order.

3. Emerald Pointe Utility Company shall refund all improperly collected and held security deposits, plus interest, to its customers within 90 days of the effective date of this revised report and order.

4. This revised report and order shall become effective on October 24, 2013.

BY THE COMMISSION



A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

R. Kenney, Chm., Stoll, and W. Kenney, CC., concur;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 24th day of September, 2013.