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**

In the Matter of the Request for an Increase in Water Operating Revenues of Emerald Pointe Utility Company	)))	**File No. WR-2013-0017**

EMERALD POINTE'S BRIEF

TABLE OF CONTENTS

I. INTRODUCTION……………………………………………………………………...1

II. COMPLAINT ISSUES…………………………………………………………………2

A. STANDARD…………………………………………………………………….2

B. FACTS……………………………………………………………………......3

1. **Background**
2. **Impact of Commodity Charge on Company**
3. **Interaction with Commission**
4. **Impact on Company If Refunds Ordered**

C. SEWER COMMODITY CHARGE…………………………………………7

1. **The Company was authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595**
2. **The Commission may not order a refund in this case**
3. **If the Company is required to return to customers amounts collected through a commodity charge:**
   - i. **The calculation of such refund may not exceed sixty (60) months, or five years**
   - ii. **No "prejudgment" interest should be applied to any amounts that may ultimately be refunded**
   - iii. **In an over collection occurred, over what period of time should those amounts be redistributed to customers**

D. LATE FEE/RECONNECT FEE OVERCHARGES……………………….15

1. **No "prejudgment" interest should be applied to the late fee/reconnect fee amounts to be refunded**

E. CUSTOMER DEPOSITS………………………………………………….16

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

III. RATE CASE ISSUES……………………………………………………………...16

A. HOLLISTER SEWAGE TREATMENT EXPENSE……………………16

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

B. LEGAL FEES………………………………………………………………...17

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

C. RATE CASE EXPENSE…………………………………………………….17

1. **What are the appropriate expenses to be included as rate expense in this case?**

D. CAPITAL STRUCTURE………………………………………………….18

1. **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?**

E. RATE OF RETURN/RETURN ON EQUITY………………………………20

1. **What is the appropriate cost of equity for the Company?**
2. **What is the appropriate methodology for estimating small water and sewer companies' rates of return?**

F. CIAC RESERVE – CUSTOMER FEES……………………………………..22

1. **What is the appropriate amount of CIAC Reserve to book for customer fees?**

G. PLANT-RELATED BALANCE UPDATE PERIOD……………………….24

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

COMES NOW Emerald Pointe Utility Company (Emerald Pointe or Company), and, as its Brief in this matter, states the following to the Missouri Public Service Commission (Commission):

I. INTRODUCTION

This case was initiated as a small company rate case in accordance with Commission Rule 4 CSR 240-3.050. The main driver for the Company's request was the recent completion of a new pipeline through which sewage is transported to the City of Hollister for treatment and the corresponding elimination of the Company's sewage treatment plant. Prior to construction, the pipeline project was the subject of Commission review and approval in File No. SA-2012-0362.

The cost of the sewer pipeline project was over $1 million. It has resulted in a significant increase in the Company's sewer system rate base and a significant new expense for the treatment of the sewage through a wholesale contract with Hollister. It was a necessary and desirable improvement as it allowed for the elimination of an older sewer treatment facility that needed to be replaced and expanded and eliminated the flow of treatment plant effluent into Table Rock Lake.

Two general subjects have developed for hearing and decision by the Commission in this case: 1) Complaint Issues – primarily the treatment of a sewer commodity rate that was charged by Emerald Pointe from the conclusion of its last rate case (SR-2000-595) until May of 2012; and, 2) Rate Case Issues – those issues related to what rates are just and reasonable for the Company to charge on a going-forward basis.

II. COMPLAINT ISSUES

As incredible as it seems, twelve years after preparing and accepting the tariff sheet that allowed this small water and sewer utility to charge a sewer commodity rate, Staff is now asking this Commission to order a refund of over $250,000 in refunds, taking the position that the tariff was not filed with the Commission. The Staff's request, and the even more illogical request of the Office of the Public Counsel, should be denied in its entirety because the facts show that Emerald Pointe did everything required of it by Staff and the Commission to file the tariff in 2000 with the commodity charge and it was never notified, or served with, any different tariff sheet without a commodity charge.

A. STANDARD

"In cases where a complainant alleges that a regulated utility is violating the law, its own tariff, or is otherwise engaging in unjust or unreasonable actions,' the Commission has determined that 'the burden of proof at hearing rests with complainant.' This court has affirmed placing the burden of proof on the complainant in such cases, because the burden of proof properly rests on the party asserting the affirmative of an issue." *Ag Processing Inc. v. KCP&L Greater Mo. Operations Co.*, 385 S.W.3d 511 (Mo.App.W.D. 2012), *quoting State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission*, 116 S.W.3d 680 (Mo. App. 2003)

While raised within the context of a small company rate case, the Complaint Issues do not relate to the prospective setting of rates. Rather, they concern allegations concerning the Company's past conduct. Accordingly, the burden of proof as to these issues rests with the parties asserting "the affirmative of the issue" – i.e. Staff and the Office of the Public Counsel - and not Emerald Pointe.

B. FACTS

1. Background

Emerald Pointe provides water and sewer service to the public in accordance with certificates of public convenience and necessity. Emerald Pointe is a "water corporation," "sewer corporation" and "public utility" as those terms are defined in Section 386.020(43), (49) and (59), RSMo,

Emerald Pointe's last rate cases were small company water and sewer rate cases identified by the Commission as Cases Nos. SR-2000-595 and WR-2000-594. (Exh. 13, Snadon Reb., p. 4) Emerald Pointe undertook, and completed, these cases without the assistance of counsel or a consultant. (Exh. 13, Snadon Reb., p. 5; Tr. 171-72, Snadon)

Emerald Pointe had a sewer commodity charge prior to Case No. SR-2000-595, in the amount of $5.83 per 1,000 gallons, and proposed to increase that charge when it initiated the 2000 small company rate case. (Exh. 13, Snadon Reb., p. 4)

In fact, Emerald Pointe did not request a "dollar" amount increase, but rather sought a 10% increase in its existing sewer "base rate" and rate for each additional 1,000 gallons (the commodity rate). (Exh. 13, Snadon Reb. Sch. GWS-1) By letter dated March 7, 2000, the Commission provided proposed disposition agreements and associated rate tariff sheets for Emerald Pointe's water and sewer operations. (Exh. 13, Snadon Reb., p. 5)

The sewer rate tariff prepared by the Commission Staff and served on Emerald Pointe with the sewer disposition agreement included a sewer commodity charge in the amount of $3.50 per 1,000 gallons. (Exh. 13, Snadon Reb., p. 6) The tariff sheet containing the sewer commodity charge was prepared by the Commission Staff. (Tr. 170, Snadon) The Commission Staff files contain a copy of the March 7, 2000 letter and the sewer tariff sheet containing the sewer

commodity charge. (Exh. 16, Johansen Reb., p. 6) Gary Snadon, on behalf of Emerald Pointe, signed the disposition agreement agreeing to that tariff and filed it with the Commission when he returned it to the Commission in accordance with the Commission instructions. (Exh. 13, Snadon Reb., p. 6-7; Tr. 169, 170, Snadon)

A sewer tariff sheet without a sewer commodity charge was later found to exist in the Commission records. Mr. Snadon never received this tariff sheet and was unaware of its existence until approximately early 2012. (Exh. 13, Snadon Reb., p. 8; Tr. 169-70, 175, Snadon) It is logical to assume that the tariff containing the $3.50 sewer commodity charge would have been the only tariff sheet Emerald Pointe received. (Tr. 199, 202, Johansen)

A review of the Commission Staff files reveals no correspondence from the Staff to the Company containing the revised tariff sheet without the sewer commodity charge, nor any notes concerning any conversation between Staff and the Company concerning this revised tariff sheet. (Tr. 120, 128, Busch; Exh. 16, Johansen Reb., p. 7) There is no evidence indicating that it was ever sent to the Company by either the Staff or the Commission. (Tr. 128, Busch; Tr. 210, Johansen) Mr. Johansen, who was the head of the water and sewer department at that time, would have expected there to be copies of written correspondence in the Staff file, if contact concerning the second tariff had been made. (Tr. 187, 210, 218, Johansen)

At the conclusion of Case No. SR-2000-595, Emerald Pointe reduced its sewer commodity charge to the $3.50 per 1,000 gallons to which it agreed. (Exh. 13, Snadon Reb., p. 7-8; Exh. 14, Pittman Reb., p. 2; Tr. 168, Snadon) That $3.50 commodity charge was charged to sewer customers by Emerald Pointe until May of 2012, and was expressly identified on each monthly customer bill. (Exh. 13, Snadon Reb., p. 8-9)

2. Impact of Commodity Charge on Company

The revenues the Company received from the $3.50 sewer commodity charge did not recover the revenue requirement identified by the Staff in its calculations in Case No. SR-2000-595. (Exh. 16, Johansen Reb., p. 7-8) The Staff revenue requirement reflected a need for an annual increase of approximately $42,700. (Exh. 16, Johansen Reb., p. 8) After a $2,500 increase, the Company was still underearning by approximately $40,000. (*Id.*) To recover this much revenue, there would had to have been a sewer commodity charge of approximately $7.92 per 1,000 gallons. (Exh. 16, Johansen Reb., p. 8-9)

A review of the Company's revenues over the period the sewer commodity charge was utilized shows that there was no overearning during the period the sewer commodity charge was utilized. (Exh. 16, Johansen Reb., p. 9) In fact, in all but one year, the Emerald Pointe sewer operations had a negative net operating income (i.e. expenses exceeded revenues), even with the collection of the sewer commodity charge. (*Id.*) These figures do not take into account a return on Emerald Pointe's investment. (Exh. 16, Johansen Reb., p. 10). Thus, the loss would be even greater, if the Company's full ratemaking cost of service were also considered. (*Id.*)

The Company's funds were kept in a non-interest bearing checking account and used to pay expenses. (Tr. 173, Snadon) The owners took no dividends or salaries during that period of time and, in fact, the owners were required to infuse cash in order to continue to provide safe and adequate service. (Exh. 13, Snadon Reb., p. 9-10)

3. Interaction With Commission

Moreover, during the period the sewer commodity charge was utilized. Emerald Pointe participated in certificate cases in 2004 and 2005. (Exh. 14, Pittman Reb., p. 3) During an on-the-record presentation during the 2004 certificate case, "a witness for Staff testified that it would be appropriate for Staff to conduct a rate review of Emerald Pointe's finances and

operations within the next two years to determine whether the company's rates [were] appropriate." (*Order Approving Application for Certificate of Convenience and Necessity*, Case No WA-2004-0581 (December 2, 2004) Mr. Snadon "testified that the company agreed to the inclusion of such a rate review requirement." (*Id.*) As a result, Staff was ordered to review Emerald Pointe's rates within two years of the effective date of the order in Case No. WA-2004-0581. (*Order Approving Application for Certificate of Convenience and Necessity*, Case No WA-2004-0581 (December 2, 2004); Exh. 14, Pittman Reb., p. 5 (". . . the Staff of the Commission shall conduct a rate review of Emerald Pointe Utility Company within two years of the effective date of this order."))

The Staff further worked with the Company during this time period to address revenues and expenses for purposes of the Company's annual reports. (Exh. 14, Pittman Reb., p. 4) At the conclusion of the annual report process, the Staff stated that "Having worked with the Company regarding its books and records, and the preparation of the revised Annual Report, the Staff is satisfied that the Company's records are reasonably correct, and the Annual Report accurately reflects the Company's revenues and expenses." (Exh. 14, Pittman Reb., p. 5; *Staff Supplemental Recommendation*, Case No. WA-2004-0581 (November 24, 2004). No mention is made in this report of an improper billing rate. *Id*.

4. Impact on Company If Refunds Ordered

Staff alleges that $257,250 should be refunded ($187,683 in overcharges, plus $69,567 in interest) over 45 months based on a five year look back. (Exh. 1, Busch Dir., p. 6-7) The Public Counsel alleges that $503,095 should be refunded ($346,650 in overcharges, plus $156,445 in interest) over 24 months based on a look back to 2000. (Exh. 11, Roth Reb., p. 6-8)

The detrimental impact of the proposed refunds on the Company's finances can be quickly seen. The total sewer revenues currently called for by the Staff accounting run is $322,820. (Exh. 5, Staff Accounting Run Sewer) Even if the proposed refunds were spread over time, the revenues would not be sufficient to support the over $1 million of debt associated with the new pipeline (which requires payments of principal as well as interest totaling over $83,100 per year ($6,925 * 12)), pay the Company's expenses (which, in addition to other costs of operation, will include <u>at least</u> $75,000 that must be paid to Hollister for the treatment of sewage) and still run the Company. (Exh. 22, Marevangepo Sur., p. 10; Exh. 16, Johansen Reb., p. 3-4, Schd. DWJ-1 and DWJ-2). For an example, if, as proposed by Public Counsel, the Company were required to refund $503,095 over 2 years, or roughly $251,000 per year, the $70,000 in sewer revenues left over would <u>neither</u> cover the pipeline debt payment <u>nor</u> the treatment expense, and would not cover any of the other expenses required to operate the sewer utility.

Accordingly, if ordered to make the proposed refunds, Company bankruptcy would be likely, if not required, under the circumstances. (Exh. 13, Snadon Reb., p. 10) Staff acknowledged as much, as Staff counsel, in his opening statement, reminded the Commission that this case ". . . includes an issue that could be the death of the Company." (Tr. 66-67, Thompson)

C. SEWER COMMODITY CHARGE

1. The Company was authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595

This case presents a very unique circumstance in regard to the sewer commodity rate/refund question. One that is not likely to ever be repeated.

The Company agreed to a tariff sheet containing a $3.50 per thousand gallon sewer commodity charge which was provided to it by the Staff. The Company had no reason to believe

this was not the correct charge, as it had previously had a sewer commodity charge and proposed an adjustment to that charge in its rate filing.

The Company never received from the Staff or the Commission a different sewer tariff sheet and for the entire time it charged the sewer commodity rate, the sewer commodity was reflected as a charge on the face of each and every monthly customer bill. At the time the tariff sheet went into effect, EFIS was not available and physically checking the tariff sheet maintained by the Commission required a visit to the Commission's offices in Jefferson City. (Tr. 219-20, Johansen)

Emerald Pointe had multiple contacts with the Commission Staff over the period the sewer commodity rate was charged. This included a detailed Staff review and amendment of the Company's annual report filings. Further, the Commission ordered a Staff review of the Company's rates. None of these contacts resulted in a question as to whether Emerald Pointe was charging the appropriate sewer rates. Not only is it easy to see why Emerald Pointe charged the sewer commodity charge, it is hard to see why they would have charged anything else.

As a result of the conduct of the Company and the Commission, Emerald Pointe was authorized to collect a sewer commodity charge in the amount of $3.50 per 1,000 gallons. The tariff prepared by the Commission Staff, served on Emerald Pointe and agreed to by Emerald Pointe in Case No. SR-2000-595 included a sewer commodity charge in the amount of $3.50 per 1,000 gallons. Emerald Pointe followed the instructions found in the Commission's March 7, 2000 letter and filed the tariff sheet with the Commission. No other action on the Company's part was required.

Section 393.140(11), RSMo refers to the filing of a tariff by a sewer company:

> Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating

> to any rate, charge or service, or in any general privilege or facility, *which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation* in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect.

(emphasis added)

The only relevant sewer tariff sheet that could have been, and was, "filed by" Emerald Pointe, is the one containing a sewer commodity charge. That is the sheet Emerald Pointe agreed to and filed with the Commission, as required by Section 393.140(11), RSMo.

At least one court – the Third Circuit Court of Appeals -- has found that "filing" is all that is required in order to establish the federal filed rate doctrine as it relates to anti-trust protection:

> . . . the Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review. . . . Finally, the First Circuit has held that the filed rate doctrine only requires rates to be filed, not affirmatively approved or scrutinized. *See Town of Norwood v. New Eng. Power Co.*, 202 F3d 408, 419 (1st Cir. 2000) ("It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.")

McCray v. Fid. Nat. Title Ins. Co., 682 F.3d 229, 238-39 (3d Cir. 2012) cert. denied 133 S.Ct. 1242 (U.S. 2013).

On the other hand, there is no evidence that the tariff sheet relied on by the Staff and Public Counsel for the calculation of their proposed refunds was approved by the Company and, therefore, is a lawful tariff. First, there is no evidence that Emerald Pointe ever authorized the filing of that tariff sheet on behalf of the Company. Second, the tariff sheet could never have been in effect as there is no evidence that the sheet was ever served on Emerald Pointe. Section 386.490, RSMo states as follows:

> 1. Every order of the commission shall be served upon every person or corporation to be affected thereby, either by personal delivery of a certified copy

> thereof, by electronic service, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or, in the case of a corporation, to any officer or agent thereof upon whom a summons may be served in accordance with the provisions of the code of civil procedure.
>
> 2. Every order or decision of the commission shall of its own force take effect and become operative thirty days after the service thereof, except as otherwise provided, and shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission, unless such order be unauthorized by this law or any other law or be in violation of a provision of the constitution of the state or of the United States.

(emphasis added)

Emerald Pointe never received the tariff sheet without the sewer commodity charge and there is no evidence that the subject tariff sheet and the order approving the tariff sheet was served on Emerald Pointe. In accordance with Section 386.490, the tariff sheet relied on by Staff and the Public Counsel has no import. Moreover, the imposition of a refund based upon a tariff sheet that was never served on the Company, and that was contrary to the only tariff sheet served on the Company on March 7, 2000, impermissibly violates the Company's procedural and substantive due process rights as contained in Section 1 of the 14th Amendment of the U.S. Constitution and Section 10 of Article I of the Missouri Constitution. "Rates established by the Commission must not be confiscatory**.** The utility must be able to recover its proper expenses and also a reasonable return on its prudent investment." *State ex rel. Union Electric Co. v. Public Service Com.*, 687 S.W.2d 162, 166 (Mo. 1985).

The Company's finances during the relevant period further establish the uniqueness of this case as they reveal that there was no unjust enrichment or overearning associated with the use of the sewer commodity charge. The sewer rate used by Emerald Pointe, including the $3.50 sewer commodity charge, did not recover the revenue requirement identified by the Staff EMS run in Case No. SR-2000-595. In fact, a review of the Company's revenues over the period the

sewer commodity charge was utilized shows that expenses exceeded revenues, the owners took no dividends or salaries and the owners were required to infuse cash in order to continue to provide safe and adequate service.

In the absence of these monies, the Company would clearly have been able to file for an increased rate, in order to allow it to recover its expenses. Moreover, to assume that the Company would not have sought a rate increase, absent these revenues, and that customers would have only paid the "base rate" for the entire twelve year period is highly unlikely. In addressing a electric fuel adjustment clause it found to be unlawful, the Missouri Supreme Court, in *State ex rel. Utility Consumers Council of Missouri, et al. v. Public Service Commission*, et al., 585 S.W.2d 41 (Mo. 1979), stated as follows in indicating it would not remand the case for a refund:

> This does not mean that the utilities have received a windfall profit of the amounts illegally collected. If no fuel adjustment clause or roll-in had been in effect, the utilities would have had a right to file for an increased rate, in order to allow them to recover their increased fuel costs and to maintain a just and reasonable rate. While the amounts they would have collected may not exactly match those collected under the fuel adjustment clause, to order a refund of the latter amounts would clearly be confiscatory, and to order an offset of this refund by what a "reasonable rate" would have been would be (retroactive) rate making at the order of this court, something we cannot do.

(*Id*. at 50-51)

Accordingly, the Commission should find that Emerald Pointe filed the tariff sheet containing the sewer commodity charge, that there is no evidence that any other tariff sheet was served on Emerald Pointe and, thus, no other tariff sheet in effect and, therefore, Emerald Pointe was authorized to collect a sewer commodity charge in the amount of $3.50 per 1,000 gallons during the period in question.

2. The Commission may not order a refund in this case

If the Commission decides that a refund is warranted and should be pursued, it may only authorize its General Counsel to pursue such an action in circuit court as the Commission "cannot order any monetary or pecuniary award, refund or reparation." *See LaHoma Paige v. Kansas City Power & Light Company*, Case No. EC-84-274, 27 Mo.P.S.C. (N.S.) 363 (1985), *citing B.G. DeMaranville v. Fee Fee Trunk Sewer, Inc*., 573 S.W.2d 674 (Mo.App. 1978). *See also*, *State ex rel. Laundry, Inc. v. Public Service Com.*, 34 S.W.2d 37, (Mo. 1931) ("The Public Service 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."); *State ex rel. City of Joplin v. PSC of Mo.*, 186 S.W.3d 290 (Mo.App. 2005) ("The Commission also argues, and we agree, that it lacks the authority to refund money").

3. If the Company is required to return to customers amounts collected through a sewer commodity charge:

i. The calculation of such refund may not exceed sixty (60) months, or five years

Commission Rule 4 CSR 24-13.025 provides as follows in regard to overcharges:

> (1) For all billing errors, the utility will determine from all related and available information the probable period during which this condition existed and shall make billing adjustments for the estimated period involved as follows:
>
> (A) In the event of an overcharge, an adjustment shall be made for the entire period that the overcharge can be shown to have existed not to exceed sixty (60) consecutive monthly billing periods, or twenty (20) consecutive quarterly billing periods, calculated from the date of discovery, inquiry or actual notification of the utility, whichever comes first;

This Commission rule provides that billing adjustments for overcharges may not exceed sixty (60) months or five years. Chapter 13 rules, of which this is one, are said to apply to "residential utility service provided by all electric, gas and water public utilities. . . ."

Commission Rule 4 CSR 240-13.010(1). Emerald Pointe is a single Missouri corporate entity that provides service as both a water utility and a sewer utility. (Exh. 16, Johansen Reb., p. 5; Tr. 117, Busch) As it is a water utility, Commission Rule 4 CSR 24-13.025 applies to Emerald Pointe and any finding of overcharge and bill adjustment should be limited to sixty (60) months or five years.

Even if the Commission should find that Commission Rule 4 CSR 24-13.025 does not strictly apply in regard to the sewer commodity charge, the Commission should use Commission Rule 4 CSR 24-13.025 as a guide in determining what period of time should be used for calculation of potential refunds.

The Rule's purpose would appear to be to limit a public utility's financial exposure as the result of billing errors. Doing so benefits the public as it stabilizes a utility where, in the absence of such a limit, service disruptions and other consequences may result from the effects of liability.[1] That public purpose would seem to be equally applicable to electric, natural gas, water and sewer utilities. Consistent with this point, Staff witness Busch indicated that the Staff utilizes Chapter 13 as a reasonable guide for sewer companies. (Tr. 117, Busch)

Failure to apply Commission Rule 4 CSR 24-13.025 to a sewer utility would be a violation of the equal protection clause of the U.S. Constitution (Fourteenth Amendment) and similar provisions found in the Missouri Constitution (article I, section 2). "Both the equal protection clause [of the Fourteenth Amendment] and article I, section 2, [of the Missouri Constitution] provide 'that a law may treat different groups differently, but it cannot treat similarly situated persons differently without adequate justification.' *Comm. for Educ. Equal. v.*

[1] The Rule may also be designed to mimic the five year statute of limitations that would be applicable in a civil court setting addressing refunds.

State, 294 S.W.3d 477, 489 (Mo. banc 2009)." *Kan. City Premier Apts., Inc. v. Mo. Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. 2011).

Even where a fundamental right is not at issue, or where a person is not a member of a "suspect" classification, a person who is treated differently from others under the law is entitled to judicial scrutiny of that law to determine whether the treatment is rationally related to a legitimate governmental interest. *See Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n.*, 946 S.W.2d 199, 202 (Mo. 1997) (en banc) (internal citations omitted); *see also Artman v. State Bd. of Registration for the Healing Arts*, 918 S.W.2d 247, 252 (Mo. 1996) (*citing Gregory v. Ashcroft*, 501 U.S. 452, 470-71 (1991)).

Staff witness Busch testified that he was unaware of any characteristic of a sewer utility that suggests it should be treated different than a water utility or electric utility with respect to overcharges and refunds. (Tr. 118, Busch) Likewise, Emerald Pointe witness Dale Johansen was unaware of any characteristics that suggest sewer utilities should be treated differently from electric, natural gas or water utilities in regard to liability for overcharges (Exh. 16, Johansen Reb., p. 5)

Given this testimony, failure to limit any overcharge reimbursement to sixty (60) months would be a violation of the equal protection clause of the U.S. Constitution (Fourteenth Amendment) and similar provisions found in the Missouri Constitution (article I, section 2).

ii. No "prejudgment" interest should be applied to any amounts that may ultimately be refunded

No interest should be applied to any sewer commodity charge amounts to be refunded as there is no authority for the addition of such interest in the tariffs or statute.

Staff witness Busch testified that is any not aware of any statute or provision in Chapter 13 that provides for interest to be added to overcharges. (Tr. 118, Busch) The Company's tariff

likewise contains no provision for interest to be added to overcharges. (Exh. 19, Menke Reb., p.4)

Moreover, the amounts collected by Emerald Pointe were used for necessary and required expenses required to operate the sewer system. Emerald Pointe did not benefit from the use of the money, other than it was able to continue to operate the sewer system in a safe and adequate manner, something that was of equal advantage to the customers.

iii. If an over collection occurred, over what period of time should those amounts be redistributed to customers?

If amounts are ultimately to be returned to customers, they should be returned over the period of time proposed by the Staff. Any shorter period would clearly result in a situation where the Company's revenue would not be sufficient to cover the required refunds and the known obligations related to its debt and the treatment of sewage.

D. **LATE FEE/RECONNECT FEE OVERCHARGES**

1. No "prejudgment" interest should be applied to the late fee/reconnect fee amounts to be refunded

Emerald Pointe has agreed to refund the alleged late fee overcharges in the amount of $4,172, as calculated by the Staff, and the alleged reconnect fee overcharges in the amount of $280, as calculated by the Staff. (Exh. 19, Menke Reb., p. 4) However, for the same reasons as those stated above, no interest should be applied to the refunded amounts as there is no authority for the addition of such interest in the statutes, rules or Company tariffs. Moreover, the amounts collected by Emerald Pointe were used for necessary and required expenses used to operate its water and sewer systems. Emerald Pointe did not benefit from the use of the money, other than it was able to continue to operate its water and sewer systems in a safe and adequate manner, something that was of equal advantage to the customers.

2. Over what period of time should those amounts be returned to customers?

Emerald Pointe suggests that it should return the late fees ($4,172) through a customer credit over no more than a twenty-four (24) month period, for those customers still on the Emerald Pointe system, and through a one-time payment to those customers that have previously left the system. Emerald Pointe is willing to return the reconnection fee amounts ($280) in a single payment/credit.

E. CUSTOMER DEPOSITS

1. Over what period of time should deposits be returned to customers?

Emerald Pointe has agreed to refund the alleged deposits ($11,730) and interest ($17,668) that has been calculated by the Staff. (Exh. 19, Menke Reb., p. 3) Emerald Pointe suggests that it should return the customer deposits and associated interest through a customer credit over no more than a twenty-four (24) month period, for those customers still on the Emerald Pointe system, and through a one-time payment to those customers that have previously left the system.

III. RATE CASE ISSUES

A. HOLLISTER SEWAGE TREATMENT EXPENSE

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

The Company is proposing an increase in this expense based upon a 20% increase in the volumes being used to calculate it. (Exh. 16, Johansen Dir., p. 5-6) This results in a total treatment expense of $91,127, or a $15,188 increase from the April 1, 2013 Staff amount. (Exh. 16, Johansen Reb., p. 3-4; Reb. Schd. DWJ-1 and DWJ-2)

B. LEGAL FEES

1. What amount of the Company's legal fees should be recovered in rates?

Emerald Pointe agrees with the legal fees reflected in the Sewer and Water Accounting Schedules (Exh. 9 and 10) and believes there is no further dispute among the parties as to this issue.

C. RATE CASE EXPENSE

1. What are the appropriate expenses to be included as rate expense in this case?

The Commission recently found as follows in regard to rate case expense:

> Rate case expense is just another cost of doing business for a regulated utility. As a regulated utility, Ameren Missouri has a legal obligation to provide safe, adequate, and reliable service to ratepayers. Because it is a regulated utility, the only way Ameren Missouri can raise its rates to charge what this Commission determines to be just and reasonable is through the rate case process. The rate case process is adversarial, just as is any other civil litigation in this country. That means all parties, including the company, must be able to present their facts and arguments so the Commission can reach a proper and fair resolution.

(Report and Order, *In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for Electric Service*, File No. ER-2012-0166 (December 12, 2012))

It is the Company's position that these expenses should be updated as contemporaneous as possible to the conclusion of this case. If rate case expenses are to be accurately reflected in rates, this is important as a good portion of the costs associated with a rate case are incurred relatively late in the process preparing for and participating in the hearing, as well as the preparation of the post hearing brief. (*See* Tr. 259, Johansen; *see also In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff* (". . . most rate case expenses are incurred in conjunction with the hearing, which, of course, occurs after the true-up date of July 31, 2012.

Indeed, the actual final cost figures will not be known until after this report and order is issued.”)) Staff’s Sewer and Water Accounting Schedules (Exh. 9 and 10) does not include these hearing related expenses.

Staff generally supports updating rate case expenses to near the end of the case. (Tr. 260, Rose) Staff witness Hanneken stated that “generally it's acceptable to make exception for rate case expense given the nature of the expense itself and the fact that the case itself is the cause of those expenses. (Tr. 330, Hanneken)

The Commission has also been generally supportive of this concept. For example, in the most recent Kansas City Power & Light Company rate case, the Commission ordered periodic rate case expense filings after the evidentiary hearing. (*See* Order Consolidating Cases for Hearing and Setting Procedural Schedule, and Amended Notice of Hearing, *In the Matter of Kansas City Power & Light Company's Request for Authority to Implement A General Rate Increase for Electric Service*, File No. ER-2012-0174 (April 26, 2012)

For these reasons, the Commission should order that rate case expenses be updated as close as practicable to the conclusion of this case.

D. CAPITAL STRUCTURE

1. **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?**

Staff proposes to utilize the actual capital structure of Emerald Pointe in setting both its water and sewer rates. (Exh. 22, Marevangepo Sur., p. 2, 5-7) Staff views this to be a “company-specific capital structure” and emphasizes that Emerald Pointe is “one utility company that provides two services – water and sewer.” (Exh. 22, Marevangepo Sur., p. 5; *see also* Tr. 274, Robertson)

Public Counsel witness Robertson instead opposes the use of what he calls a "consolidated" capital structure for the water and sewer operations. (Exh. 23, Robertson Reb., p. 14-16) Mr. Robertson believes that because the existing Emerald Pointe debt was primarily incurred for the sewer operation, the Commission should compute a sewer capital structure and a water capital structure. (*Id.*)

Emerald Pointe's water and sewer customers are largely the same. There are 364 sewer customers and 389 water customers. (Tr. 280-81, Russo Dir., Sch. JMR-1 and JMR-2) Public Counsel witness Robertson seemed to wrongly assume that the difference was greater – perhaps as much as a 94 customer difference. (Tr. 274, Robertson)

Public Counsel's approach to this issue would ignore several known relevant factors in favor of a complete fabrication. The single corporate entity, Emerald Pointe, is liable for all of its debt. (Tr. 274, Robertson) Because there is only one corporate entity, there is only one set of shareholders. (Tr. 277, Robertson) Moreover, the debt is secured by both water and sewer assets –i.e. all of the water and sewer plant is encumbered by the bank loan. (Tr. 278, 293, Robertson)

Additionally, calculating separate capital structures would be contrary to how the Commission has addressed other utilities providing more than one utility service. For example, a single corporate capital structure is utilized for both Ameren Missouri's electric and gas operations. (Exh. 22, Marevangepo Sur., p. 6) This approach is followed even though Ameren Missouri has far less overlap between its electric and gas customers than Emerald Pointe has between its water and sewer customers.

Similarly, the Court of Appeals stated as follows in finding the Commission's use of an actual capital structure for Southern Union Company to be appropriate:

> Southern Union's argument completely overlooks the legal and practical effect of the fact that MGE is an operating division of Southern Union and has no capital

> structure or legal existence independent of Southern Union. Southern Union *is* MGE and, as the PSC concluded in this and MGE's last two rate cases, MGE must operate with the results of Southern Union's management decisions, including Southern Union's capital structure. In both legal and practical terms, "enterprises having corresponding risks" are enterprises similar to Southern Union within the meaning of *Hope* and *Bluefield*.

State ex rel. Office of the Pub. Counsel v. PSC, 367 S.W.3d 91, 108 (Mo.App. 2012) (footnote omitted).

Similarly, neither Emerald Pointe's water nor sewer operations have a capital structure or legal existence independent of the other. The Commission should utilize the single, actual corporate capital structure for Emerald Pointe in setting its water and sewer rates in this case.

E. RATE OF RETURN/RETURN ON EQUITY

1. What is the appropriate cost of equity for the Company?

Staff recommended a 13.26% return on equity (ROE) for Emerald Pointe. (Exh. 22, Marevangepo Sur., p. 2) Staff arrived at this recommended ROE by adding "a 4 percent risk premium to a 3-month average of the yields on 'B+' rated 30-year public utility bonds." (Exh. 22, Marevangepo Sur., p. 11) Staff suggests that this ROE is "reasonable considering the risks faced by Emerald Pointe." (Exh. 22, Marevangepo Sur., p. 16)

Public Counsel witness Robertson took a different approach. He took Emerald Pointe's actual consolidated cost of debt of 5.35% and added a 4% risk premium to arrive at a recommended ROE of 9.35%. (Exh. 23, Robertson Reb., p. 21-22)

There is no difference between Staff and Public Counsel in terms of the risk premium they believe should be added to arrive at the recommended ROE. (Tr. 295, Robertson) The difference between the two is the appropriate estimate of the utility's cost of debt. (*Id.*)

Without any detailed analysis, the Commission should believe Public Counsel's ROE recommendation to be highly suspicious. This 9.35% is much lower than the 9.8 % ROE recently authorized for Ameren Missouri and the 9.7% ROE authorized for Kansas City Power & Light Company (KCPL). (Exh. 20, Menke Sur., p. 5) By any measure and by any method, an investment in Emerald Pointe is more risky than an investment in Ameren Missouri or KCPL. Emerald Pointe's financial risk (i.e. debt to equity ratio) is far greater than Ameren Missouri or KCPL and its business risks (i.e. size and diversity) are also far greater. (*Id.*) Public Counsel's recommended ROE fails even the most basic test of reasonableness.

The recommendation is also flawed in regard to its most basic assumption. Public Counsel witness Robertson assumes that Emerald Pointe's actual cost of debt is 5.35%. (Exh. 23, Robertson Reb., p. 18) He arrives at that conclusion by calculating a weighted average of a bank loan in the amount of $1,000,000, at 5.5%, and a loan from White River Valley Electric Cooperative (White River) in the amount of $66,000, at 3.15%. (Exh. 20, Menke Sur., p. 3; Exh. 23, Robertson Reb., p. 18) For various reasons, this weighted average is not the cost of debt for Emerald Pointe.

White River is an electric cooperative not in the common business of loaning money. (Tr. 291-92, Robertson) The White River loan was specifically associated with the purchase from, and installation by, White River of electric generators. (Exh. 20, Menke Sur., p. 3; Tr. 292, Robertson) This is not money that would be available to Emerald Pointe in any other context. (*Id.*)

The use of the 5.5% bank loan is also inappropriate as this is not a true cost of debt for Emerald Pointe. (Exh. 20, Menke Sur., p. 3) Banks were not willing to loan money to Emerald Pointe. (Exh. 20, Menke Sur., p. 4) Emerald Pointe witness Menke, who spent approximately

twenty-nine (29) years working in the banking industry, much of that time in commercial lending, personally investigated this possibility with several banks. (Exh. 20, Menke Sur., p. 4, 6) Mr. Menke contacted conventional banks and the Small Business Administration. (Tr. 298, Menke) The Company looked into neighborhood improvement districts (NIDs), community improvement districts (CIDs), tax increment financing (TIFs) and other avenues and could not find a financing option that would allow Emerald Pointe to borrow based on its on assets. (*Id.*)

Mr. Menke does not believe that Emerald Pointe would have been able to obtain a loan at any interest rate based on its financial condition and its assets. (Exh. 20, Menke Sur., p. 3; Tr. 298, Menke) If a bank had been willing to make a loan, it would have been at an interest rate well above that of the larger water and sewer companies Staff analyzed as a part of its rate of return recommendation. (Exh. 20, Menke Sur., p. 5)

In order to obtain the bank loan, Mr. Snadon and his wife were required to personally guarantee the loan and pledge additional collateral. (Exh. 20, Menke Sur., p. 4) Even then, the loan obtained was only for a five (5) year term, required interest and principal payments based on a twenty (20) year amortization and a balloon payment at the end of the term. (*Id.*)

Public Counsel's assumption that the debt examined in this case is the actual debt cost for Emerald Pointe is incorrect. Any attempt to then add a risk premium to that debt does not provide an accurate estimate of the appropriate ROE for Emerald Pointe. Staff's ROE estimate is the best estimate available based upon the evidence before the Commission.

2. What is the appropriate methodology for estimating small water and sewer companies' rates of return?

Emerald Pointe supports the methodology used by the Staff.

F. CIAC RESERVE – CUSTOMER FEES

1. What is the appropriate amount of CIAC Reserve to book for customer fees?

Emerald Pointe is authorized through its tariffs to collect $400 for each new water customer connection. (Exh. 26, Hanneken Sur., p. 4) This is meant to cover the materials and installation (labor, equipment, etc.) costs related to the new connection. (*Id.*) Based on a review of the Company's records, Staff concluded that for many years prior to 2011, Emerald Pointe included only the costs of meters in its plant records, and not the cost of other materials (to include the pit and connections) and labor incurred to install meters. (*Id.*; Tr. 320, 322, Hanneken) This situation caused the CIAC charge to appear to be larger than the amount of associated plant. (*Id.*)

Customers would have received the correct at the time of installation. (Tr. 325, Hanneken) The mismatch would occur if all of the CIAC were put into the plant accounts at this time without the corresponding plant. (*Id.*)

As a result, Staff concluded it would be inappropriate to include the full amount of CIAC and instead treated the excess as miscellaneous revenue. (Exh. 26, Hanneken Sur., p. 5) In the alternative, it would have been necessary to determine an accurate amount of plant costs incurred to offset the CIAC. (*Id.*) Both approaches – treating the excess as miscellaneous, one-time revenue, or adjusted plant to equal CIAC – will result in the same rate base. (Exh. 26, Hanneken Sur., p. 5-6)

Public Counsel's proposal, to increase CIAC without an offsetting entry to plant to recognize the additional costs associated with meter installation – would understate Emerald Pointe's rate base. (Exh. 26, Hanneken Sur., p. 6) The Commission should find in favor of Staff's approach to the CIA reserve issue.

G. **PLANT-RELATED BALANCE UPDATE PERIOD**

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

In any rate case, there is interplay between attempting to bring plant information forward as close as possible to the effective date of rates and the practical need to have sufficient time to analyze those plant updates in a way that will allow for audit of the figures, assessment in regard to in-service dates and opportunity to litigate differences of opinion.

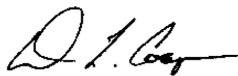
In this case, an update of February 28, 2013, was used by the Staff. This date is approximately four and one-half months prior to the eleven month deadline in the case (July 16, 2013). That update period compares favorably to the true-up dates used in several other recent rate cases. For example, in the most recent Ameren Missouri rate case, Case No. ER-2012-0166, there was an operation of law date of January 2, 2013 (the equivalent of the eleven month date in a small company rate case). The case was updated through July 31, 2012. Accordingly, there was a gap of five and one half months in that case.

Plant additions are different from the Commission's treatment of rate case expense. Updating these two items would violate the matching principle. (Tr. 328-29, Henneken) Staff witness Hanneken stated that "generally it's acceptable to make exception for rate case expense given the nature of the expense itself and the fact that the case itself is the cause of those expenses. (Tr. 330, Hanneken)

The Commission should use the plant balances developed by the Staff as of February 28, 2013, to set rates in this case.

WHEREFORE, Emerald Pointe respectfully requests that the Commission consider this Brief and thereafter issue such order as it finds to be just and reasonable.

Respectfully submitted,



Dean L. Cooper MBE# 36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Telephone: (573) 635-7166
Facsimile: (573) 635-0427
dcooper@brydonlaw.com

ATTORNEYS FOR EMERALD POINTE UTILITY COMPANY

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been sent by electronic mail this 6th day of June, 2013, to:

Amy Moore
Office of the General Counsel
Missouri Public Service Commission
Governor State Office Building
Jefferson City, Missouri 65101
amy.moore@psc.mo.gov

Christina Baker
Office of the Public Counsel
Governor State Office Building
Jefferson City, Missouri 65101
christina.baker@ded.mo.gov