BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Lincoln County Sewer & Water, LLC for Approval of a Rate Increase	)))	**File No. SR-2013-0321**

LCSW'S APPLICATION FOR REHEARING

COMES NOW Lincoln County Sewer & Water, LLC (LCSW or Company), by and through the undersigned counsel, pursuant to Section 386.500, RSMo, and 4 CSR 240-2.160, and for its Application for Rehearing respectfully states as follows to the Missouri Public Service Commission (Commission):

1. On April 2, 2014, the Commission issued its Report and Order in the above-captioned case, to be effective May 2, 2014 (the "Order").

2. The Report and Order is unlawful, unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence, in material matters of fact and law, as indicated below.

EXCESS CAPACITY

3. In regard to the excess capacity adjustment issue, the Commission concluded that "DNR's permit does not speak to maximum capacity but only to the number of customers the company requests to serve and therefore has no bearing on the issue of capacity adjustment." (p. 17) As a result, the Commission based its adjustment on the "actual capacity of the facilities." (p. 16-17) The Commission ignored the fact that LCSW's Department of Natural Resources (DNR) permits speak both to maximum capacity and minimum capacity and it does so in terms of number of customers, not actual usage levels.

4. The Commission has essentially made a finding that the subject LCSW plant was not prudently constructed by utilizing a hindsight analysis (experience with actual usage, as

opposed to what was known at the time the facilities were constructed). *This is contrary the Commission historic prudence analysis, which has focused on what was known at the time construction decisions were made*:

> The Commission, in the *Union Electric* case [*Union Electric,* 27 Mo. P.S.C. (N.S.) 183, 193 (1985)], further established that the prudence standard was not based on hindsight, but upon a reasonableness standard. The Commission cited with approval a statement of the New York Public Service Commission that:
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> > ... the company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight. In effect, our responsibility is to determine how reasonable people would have performed the tasks that confronted the company. n68
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> Since its adoption, the Commission's prudence standard has been recognized by reviewing courts. n69
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> _____
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> n68 *Union Electric,* at 194, quoting *Consolidated Edison Company of New York,* Inc., 45 P.U.R. 4th 331 (1982).
> n69 See, *e.g., State ex rel. Associated Natural Gas Company v. Pub. Serv. Com'n,* 954 S.W.2d 520, 529 (Mo. App. W.D. 1997).

In the Matter of the PGA Filing for Laclede Gas Company, Case No. GR-2004-0273, 2007 Mo. PSC LEXIS 850 (June 28, 2007).

5. The Company's DNR permits for the Rockport water and sewer facilities are essentially based on number of customers, which result from specific customer usage amounts that are used in the design of the facilities. (Exh. LCSW-1, p. 13) The DNR final inspection report, dated December 27, 2007, states very clearly that "this approval is only valid for 120 lots in Phase I of the development." (Exh. Staff-4, Sch. JAM-3) There is no provision in the DNR approval made for later assessment of actual gallons used or produced or treated.

6. The approach taken by the Commission in the Report and Order may very well lead to the absurd situation where DNR requirements force LCSW to construct additional facilities at the same time the Commission is not allowing the Company to earn a return on its

existing facilities. (Exh. LCSW-1, p. 13) Staff witness Merciel described this possibility as "very likely" when he responded by stating "absolutely this situation could occur, and in fact could very likely occur as more home construction occurs in Rockport, depending on future changes . . . ." (Exh. Staff-4, p. 14)

7. Under the approach ordered by the Commission, the Company receives neither a return on nor a return of (depreciation expense) that portion of its investment deemed to be "excess capacity." (Tr. 350-351) However, even though there is no recognition of the depreciation expense in the revenue requirement, depreciation reserve related to the excess capacity plant still accumulates. (Tr. 351) The Commission's approach guarantees that the Company will never recover a return on or a return of some portion of its plant investment. (Tr. 351-352, 355)

8. The Commission's conclusions ignore the fact that both the DNR and this Commission are agencies of, and represent, the State of Missouri. The effect of the Commission's decision is a form of "bait and switch." The State of Missouri, with one hand (DNR), requires a certain level of construction and then, with the other hand (the Commission), deems that construction to not be prudent. This is a basic constitutional takings issue.

9. Accordingly, the Commission's conclusions in regard to the excess capacity adjustment are unlawful, unjust, unreasonable, and confiscatory in that they constitute a taking from LCSW of its property without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article I, §10 of the Constitution of the State of Missouri.

BEGINNING BALANCE RATE BASE

10. In regard to the beginning rate base issue, the Commission made a factual finding that the "company argued that the value of the items that should be included range from $75,000 to $100,000." (p. 12) This finding is unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence.

11. The Company argued that the absence of these items ignored "at least" another $75,000 to $100,000 in rate base. (LCSW Brief, p. 17) However, LCSW pointed out that Mr. Johansen testified that he would have to review documentation that was not available at the hearing in order to be accurate. (LCSW Brief, p. 17; Tr. 160-161)

12. The actual difference between the parties in regard to the starting rate base is not as exact as was found by the Commission. As the Commission concluded that the company has not carried its burden in regard to this issue, it may be an issue in future cases supported by more specific information.

WATER TESTING

13. The Commission found that $360 was the appropriate amount to include in rates in regard to a management fee for water testing. (p. 32). This finding is unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence.

14. The figure chosen by the Commission equates to $180 per system, per year ($360 ÷ 2 water systems). The evidence before the Commission was that Tests must be conducted a minimum of once a month, and usually more tests are required. This means that the Staff figure is, *at most*, $15 per test. For comparison, when Mr. Kallash used a third party to perform the water testing, he was charged $150, per month, per subdivision. (Tr. 173)

15. The Company's calculation considers the fact that there 20 testing trips required, and that the per trips costs are as follows: incremental mileage of 5 miles/trip above the mileage accounted for elsewhere; incremental time of 2 hours/trip above the work hours accounted for elsewhere; and miscellaneous supplies at $5/trip. (Exh. LCSW-1, p. 17)

16. LCSW asserted that Staff's water testing expense should be increased by $1,504 on an annual basis in order to address the expenses specifically associated with the water testing required by the Department of Natural Resources and performed by LCSW. (Tr. 173) This would result in approximately half the cost Mr. Kallash was charged by the third party tester.

17. LCSW's evidence was sponsored by Mr. Johansen, who is personally familiar with what is involved in water testing. (Tr. 206) He utilized that experience in coming up with the time and expenses he identifies as support for his adjustment. (Tr. 207) Mr. Johansen took into account the time it takes to prepare the site, to take the sample, to prepare the paperwork associated with the sample, and then to deliver the sample to either a lab or to a health department office. (Tr. 207-208)

18. In contrast, neither the Staff nor the Public Counsel witness identified any experience with water testing that would be helpful in determining a reasonable amount of time or supplies associated with this function.

19. It is unclear what evidence the Commission used to support the finding that $360 per year was appropriate for this testimony expense. That finding is not supported by competent and substantial evidence

SLUDGE HAULING

20. The Commission found that based on a three year average for sludge-hauling, that an appropriate amount of expense to include in rates for sludge hauling was $2,958. (p. 33). This

finding is unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence.

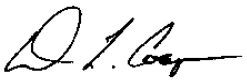
30. The Commission determined that additional amounts should not be added for additional maintenance because "during its 16 years of operation, the company has not been cited for any violations from the Department of Natural Resources." (p. 33)

31. The Commission did not address, however, the inconsistency between the average used and its utilization of the Staff's excess capacity adjustment. The evidence showed that for the Rockport system, Staff's average includes one year for which the Company had no hauling expense. There was no hauling expense for that year because the Company was able to use a part of its sewage treatment plant for sludge holding. (Exh. LCSW-1, p. 11-12; Tr. 210) The treatment storage used to avoid this cost is a part of the treatment plant for which LCSW is to receive no return on, or of, its investment as a result of the excess capacity adjustment.

32. The Commission's decision to both follow the Staff's excess capacity adjustment as to this plant and then to utilize the benefits of that "excess plant" in the calculation of sludge hauling expense represents an inconsistency that is unjust, unreasonable, arbitrary, and not supported by competent and substantial evidence

WHEREFORE, Lincoln County Sewer & Water, LLC, respectfully requests that the Missouri Public Service Commission grant rehearing with respect to its Report and Order issued in the above-captioned case on April 2, 2014, as requested herein, and upon rehearing and reconsideration of the issues raised herein issue a new Report and Order consistent with this pleading. LCSW requests such other and further relief as the Commission deems just and proper under the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 1st day of May, 2014, to:

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