

IN THE CIRCUIT COURT FOR THE COUNTY OF COLE
STATE OF MISSOURI

STATE OF MISSOURI ex rel. CITY OF JOPLIN, MISSOURI,)
)

Relator,)

v.)

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,)
)

Respondent.)

Case No. 00CV325217

STATE OF MISSOURI ex rel. AG PROCESSING, et al.)
)

Relators,)

v.)

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,)
)

Respondent.)

Case No. 00CV325222

STATE OF MISSOURI ex rel. GILSTER MARY-LEE CORPORATION,)
)

Relator,)

v.)

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,)
)

Respondent.)

Case No. 00CV325220

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

These matters are before the Court on writs of review brought under Section 386.510, RSMo 2000 to review the lawfulness and reasonableness of certain portions of the Report and Order that was issued by Respondent Public Service Commission on August 31, 2000 in Commission Case No. WR-2000-281. These matters were originally consolidated, but were later severed and remain as separate cases. For the convenience of the Court and the parties, these Findings of Fact, Conclusions of Law and Judgment will to be filed in each of the separate cases.

The Court, having reviewed the record and the briefs presented and having heard the arguments of counsel, makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

1. Respondent Commission is a state administrative agency established by the General Assembly to regulate public utilities in the State of Missouri pursuant to Chapters 386, 392 and 393 RSMo 2000. The Commission's principal office is located at 200 Madison Street, Jefferson City, Cole County, Missouri 65101.

2. Intervenor Missouri-American Water Company ("MAWC" or "the Company") is a Missouri corporation performing the business of a public utility supplying water service. Its principal office is at 535 N. New Ballas Road, St. Louis, Missouri 63141. MAWC provides utility service in seven physically separate and unconnected districts in Missouri. Joplin, St. Joseph and Platte County are three of those districts.

3. Relator City of Joplin ("Joplin") is a political subdivision and a home-rule charter city under Missouri law. It is a customer of MAWC and is also acting in this matter in a

representative capacity for all MAWC customers receiving service within the boundaries of Joplin.

4. Relator Gilster Mary-Lee Corporation ("Gilster") is a corporation duly authorized to do business in Missouri. It is a large commercial or industrial customer of MAWC in Joplin, and receives water service from MAWC's Joplin District.

5. Relators Ag Processing Inc. ("Ag Processing"), Friskies Petcare Division of Nestle' Inc. ("Friskies"), and Wire Rope Corporation of America, Inc. ("Wire Rope") are corporations duly authorized to do business in Missouri. They are industrial customers and receive water service from MAWC's St. Joseph District. Relator City of Riverside, Missouri ("Riverside") is a municipal corporation under Missouri law and is a customer of MAWC's Platte County District and acts herein both as a customer and as a representative of its citizens. Collectively these three corporations and Riverside are referred to as "St. Joseph Industrials."

6. In addition to MAWC, the Court granted status as intervenors to: the Office of the Public Counsel; a group of entities known as the St. Joseph Area Water Districts; the City of St. Joseph, Missouri; the cities of Warrensburg, St. Peters, O'Fallon, and Weldon Spring; Central Missouri State University; Hawker Energy Products; Harmon Industries, Inc.; Stahl Specialty Company; and Swisher Mower and Machine Company.

7. The subject matters were initiated by the filing of the following:

<u>Case</u>	<u>Date</u>	<u>Case No.</u>
Joplin's Petition for Writ of Review	10/17/2000	00CV325217
Gilster's Petition for Writ of Review	10/18/2000	00CV325220
St. Joseph Industrials' Petition for Writ of Review	10/18/2000	00CV325222

8. On January 2, 2001, these three matters and four other petitions for review of the same Report and Order were consolidated, for purposes of briefing and oral argument, with Case No. 00CV325014 designated as the lead case. These three matters were subsequently severed from the other four petitions for review on April 26, 2001 and the Court heard oral argument on these three cases on June 29, 2001.

St. Joseph Industrials' Plant-Related Issues

9. In these proceedings, one of the issues for which review was specifically sought by St. Joseph Industrials concerned the prudence of the construction of a new St. Joseph water treatment plant and related facilities (i.e. well field and pipeline) near St. Joseph, Missouri for a cost of approximately \$70 million. The Court will initially review that issue.

10. MAWC's old treatment plant was located in the flood plain, four miles north of the city, adjacent to the river. Some parts of this structure were over 100 years old. The old plant was modified and renovated numerous times after 1881. It drew its water supply from the river and was, consequently, subject to interference by both high water and low water conditions, which conditions had caused the plant to cease operations for multiple-day intervals twice since 1989.

11. The new treatment plant is located above the flood plain and draws its water from wells, rather than directly from the Missouri River. The wells, while close enough to the Missouri River that they are recharged by it, are free from certain public health dangers posed by river water. The new plant is also largely automated and designed to operate with a minimum level of employees present.

12. John Young, P.E., Vice-President of Engineering for the American Water Works Service Company, testified in support of the Company's claim that the construction of the new

treatment plant and related facilities was reasonable and necessary, and that the costs associated with the construction were prudently incurred.

13. Jim Merciel, P.E., an engineer employed by the Commission, testified that it would have been imprudent for the Company to renovate the old plant, and also testified that the costs associated with the new treatment plant and related facilities were prudently incurred.

14. The Office of the Public Counsel presented the testimony of Ted Bidy, P.E., and the St. Joseph Industrials presented the testimony of Dr. Charles D. Morris, P.E., Ph.D. Mr. Bidy and Dr. Morris both testified that it was not necessary to construct a new treatment plant, and that the old plant could have been prudently renovated. Mr. Bidy testified that this could be accomplished at a cost of \$36.3 million. Dr. Morris testified that this could be accomplished at a cost of \$40.3 million.

15. The new water treatment plant, which the Company installed in the St. Joseph District after the last previous rate case, cost about \$70 million. Other improvements that the Company installed in the other operating districts of the Company after the last previous rate case cost about \$25 million. Thus, the new water treatment plant in the St. Joseph District constituted the vast majority of the new plant that the Company installed after its last rate case.

Joplin's and Gilster's Issues Relating to DSP

16. Relators Joplin and Gilster also raise issues concerning the Commission's decision to move away from Single Tariff Pricing ("STP") and toward District Specific Pricing ("DSP").

17. Missouri-American Water Company provides water service to the Company's Joplin District, which is separate from the other six (6) water districts to which the Company

provides water service in its Missouri system. Each such district has its own water supply and distribution system. No water is transported from one district to another district.

18. Single Tariff Pricing (STP) is a rate allocation method under which the customers in each district of a multidistrict company pay for their water use according to the same rate schedule as customers of the other districts of such a system, regardless of whether there may be differences in the actual costs to provide the service to various districts.

19. District Specific Pricing (DSP) is a rate allocation method under which different rate schedules are applied to customers in each of the various districts of the system served by the Company based on separately determined specific costs of providing service in each district. Under DSP, the costs that are incurred specifically by one of the company's districts are assigned to that district. However, the common costs that the Company incurs, which are not specifically costs incurred by any one district, are allocated among the several operating districts.

20. The Public Service Commission ("Commission"), after hearing evidence, determined to move away from STP and toward the DSP rate allocation method for the Company's Missouri system in its Report and Order of August 31, 2000.

21. The undisputed evidence before the Commission showed that prior to the hearing the Joplin District and its ratepayers were being charged under the STP method approximately \$880,000 in excess of the Joplin District charges under DSP.

22. Despite moving toward a DSP rate allocation structure for the Company's Missouri system, the Commission did not reduce the Joplin District's rate to the Company's DSP cost of water service for the Joplin district. Instead, the Commission allocated the excess revenue from the Joplin district to the other districts, to reduce the six other districts' revenue requirements. In other words, despite the system wide move toward DSP, the Joplin district

continued to subsidize the other six districts. All of the other six (6) districts in the Company's Missouri system pay water rates solely based upon a DSP cost of service rate allocation method, less revenue contributions from the Joplin ratepayers.

23. On September 12, 2000, the Commission in its Order of Clarification clarified its decision to "move away from STP and toward DSP" as follows:

MAWC must calculate its revenue requirements separately for each of its seven districts, as though each were a stand-alone water company, applying the Commission's Report and Order as appropriate. The Commission stated in its Report and Order that it "will move away from STP and toward DSP" because it is clear, on the extensive record developed in this case, that the Joplin district will produce surplus revenue. Staff is correct in its suggestion that this surplus will be used to ameliorate the rate increase impact on the other six districts. A portion of the surplus, approximately \$225,000, will be allocated as Staff suggests to the Brunswick district so that rates there will not exceed the highest rates established in any other of the company's districts. The remaining \$655,000, will be allocated among the other five water districts, St. Joseph, Warrensburg, Parkville, Mexico and St. Charles, to ameliorate the increased revenue requirement in each of these districts. The allocation to each of these districts will be in proportion to the increase of the revenue requirement for each district over the amount of revenue previously generated by that district.

24. Because Joplin's rate was not set equal to its DSP cost of service, the Joplin District alone continues to pay approximately \$880,000 in excess of its district specific cost of service.

**Gilster and St. Joseph Industrials' Issue Relating
to Larger Size Transmission Mains**

25. Gilster and the St. Joseph Industrials raised an issue concerning the proper allocation of costs among customers served by different sizes of water mains within their respective districts.

26. Once the Commission determined how to allocate costs among the districts, a remaining issue was the appropriate design of rates within each district. The mechanism that the

Commission used for developing such rates is an allocation mechanism that is called the "base extra capacity" method ("BXC").

27. Larger water users such as Gilster, public water supply districts, Ag Processing, Friskies and Wire Rope, receive their supplies through mains that are much larger than those that are used to distribute water to the general public.

28. In addition to requiring Gilster to bear a portion of the \$880,000 surplus charges to the entire Joplin District, as discussed earlier, the Commission's August 31, 2000 Report and Order also shifted costs between classes *within* the Joplin district so that Gilster and other larger customers' rates were increased even though the aggregate rate to the Joplin district was not changed.

29. In addition to being impacted by the addition of the new St. Joseph District plant, the rates of Ag Processing, Friskies and Wire Rope were also adversely affected by this shifting of costs between classes.

30. The issue of the proper use of the BXC methodology was an issue before the Commission. In the Discussion section of the Report and Order at p. 20, Issue 8d identified the following question to be resolved:

8. Rate Design

d. Allocation of Cost/Revenue Among Classes. On what basis shall the portion of revenues to be borne by MAWC's various customer rate classes be determined?

31. The Statement of Position, submitted to the Commission by Ag Processing, Friskies and Wire Rope, in advance of the hearing on these issues, stated the following:

Issue 8[d]. Allocation of Cost/Revenue Among Classes. Having once established the proper district-specific cost of service for each district, the costs *within* that district should be allocated to (and rates should be designed

to recover from) the respective classes of customers within that district using the base-excess methodology with district-specific allocators. **An approach that uses company-wide base-excess allocators misallocates costs.** The proposal of Public Counsel to further adjust base-excess allocators is mistaken and should be rejected.

Statement of Position by Ag Processing, Friskies and Wire Rope, May 30, 2000, p. 4. (L.F. 925).

32. The issue was laid before the Commission by St. Joseph Industrials' witness Ernie Harwig in his direct (Ex. 57) and rebuttal testimony (Ex. 61). Witness Harwig's rebuttal testimony, at pages 5-7 (Ex. 61), directly addressed the issue of the proper treatment of smaller distribution mains apart from larger transmission mains. The issue was also the subject of cross-examination of the Staff witness as indicated at pages 956-963 of the hearing transcript.

St. Joseph Industrials' Issue Relating to Phase-In

33. At pp. 19-21 of the Report and Order, the Commission, under the Discussion section, sets forth the contested issues that were to be resolved by the Commission. Among the issues under Rate Design, is the issue of the phase-in of the rate increase, which is set forth as follows:

b. Phase-In:

Should MAWC's rate increase be phased in over a number of years? If so, what is the appropriate phase-in amount, and what is the appropriate phase-in period?

While recognizing in the Order that phase-in was a specific contested issue, the Commission nevertheless makes no findings of fact or conclusions of law as to such contested issues. No mention is even made in the Order's Findings of Fact section; and in the Order's Conclusion of Law section, only the following is stated, at p. 58:

As the Company requested, no phase-in of rate increases shall be permitted.

CONCLUSIONS OF LAW

The Court will first address the contentions of St. Joseph Industrials that the Commission's decision approving inclusion of the value of the new St. Joseph plant in MAWC's rate base is unlawful, unjust and unreasonable.

A. Decision to Construct the St. Joseph Treatment Plant and Related Facilities.

The Commission found that MAWC's decision to construct the new plant and facilities was prudent. It stated that the

management of MAWC did use due diligence to address all relevant factors and information known or available to it when it assessed the situation and reached the decision to build a new treatment plant and develop a new ground water source of supply in St. Joseph. Consequently, the Commission must conclude that the decision to build the new plant and related facilities was not imprudent.

Report and Order, pp. 45-46.

St. Joseph Industrials attack the lawfulness and reasonableness of the Report and Order of the Commission as it relates to the question of whether MAWC's decision to construct a new treatment plant and related facilities in the St. Joseph area was prudent.

No party challenged the Company's construction methods, or the procurement methods it used in constructing the new water treatment plant, or the reasonableness of the amounts that it actually expended in building the new treatment plant at St. Joseph. That is, no party claimed that the Company actually carried out the construction in an imprudent manner; it was only claimed that the decision to construct a new water treatment plant, instead of renovating the old plant, was imprudent.

The credibility of a witness's testimony is for the fact-finder to determine. *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo. App. W.D. 1993). The assessment of witnesses' credibility is

implicit in the fact-finding process. *Old Fortress v. Myers*, 453 S.W.2d 692, 695 (Mo. App. W.D. 1970). In this case, the fact-finder is the Commission. The evaluation of expert testimony is left to the Commission, which "may adopt or reject any or all of any witnesses' testimony." *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App. W.D. 1985).

Commissioners can make findings on the credibility of a witness, even if they were not personally present when the witness testified. *Ferrario v. Baer*, 745 S.W.2d 193, 198 (Mo. App. W.D. 1987). Commissioners are required, by Section 536.080.2 of the Administrative Procedure and Review Act, to either hear the evidence, read the full record including all the evidence, or personally consider the portions of the record cited or referred to in the arguments or briefs. *Kraus v. Director of Revenue*, 935 S.W.2d 71, 73 (1993). A commissioner who decides a case after reading the full record but without hearing the evidence does not violate due process. *Bean v. Missouri Commission on Human Rights*, 913 S.W.2d 419, 423 (Mo. App. 1996).

When a utility seeks a rate increase, the burden of proving that costs and expenses were prudently incurred is upon the Company. Section 393.150.2, RSMo 2000.

There is an initial presumption, though, that monies expended for investment in utility property were prudently incurred. *Southwestern Bell Telephone Co. v. Missouri Public Service Commission*, 262 U.S. 276, 289; 43 S.Ct. 544 (1923). *West Ohio Gas Co. v. Public Utilities Commission of Ohio*, 294 U.S. 63, 72; 55 S.Ct. 316, 321 (1935).

However, when some participant other than the utility creates a "serious doubt" as to the prudence of an expenditure, the utility has the burden of dispelling those doubts and proving the questioned expenditure to have been prudent. *Anaheim, Riverside, et al. v. Federal Energy Regulatory Commission*, 669 F.2d 799, 809 (D.C. Cir. 1981). When substantial evidence is

introduced by the party against whom a presumption operates controverting the presumed fact, then its existence or nonexistence is to be determined from the evidence, exactly as if no presumption had ever been operative in the case. *Michler v. Krey Packing Co.*, 253 S.W.2d 136, 140 (Mo. Banc 1952).

The Commission addressed St. Joseph Industrials' and Public Counsel's evidence concerning relative costs in its conclusions. St. Joseph Industrials' witness on this issue was Charles D. Morris, P.E., Ph.D. Dr. Morris is a professor of engineering at the University of Missouri - Rolla and is a specialist in hydrogeology. Public Counsel produced Mr. Ted Bidy, P.E. on this issue. Both Dr. Morris and Mr. Bidy are registered professional engineers, Dr. Morris is registered in Missouri and several other states; Mr. Bidy in Florida. The Commission found "the cost estimates of Mr. Bidy and Dr. Morris to not be credible" and further found the testimony of Bidy and Morris to "lack credibility and to be unpersuasive." Report and Order, p. 44.

The Commission stated its reasons for this conclusion as follows:

the Commission notes that Mr. Bidy was shown on cross-examination to be inexperienced in the design of surface water treatment plants. Both Mr. Bidy and Dr. Morris were shown on cross-examination to have misunderstood planning and financial documents obtained from the Company through discovery. Both Mr. Bidy and Dr. Morris relied on very rough and preliminary cost figures which they used as a basis to criticize the far more detailed estimates developed by MAWC.

Report and Order, p. 44.

The Commission further noted these items from the cross-examination of Mr. Bidy and Dr. Morris:

On cross-examination, Mr. Bidy admitted that he had never designed a water treatment plant supplying public drinking water from a surface water source. He had participated in the 1960s, as one of six design engineers, in the

design and construction of a large surface water plant that produced non-potable water for industrial cooling. In 37 years of practice, this was the extent of his experience with surface water treatment. He had not studied the soil conditions at the old plant site to determine whether or not a levee could be undermined.

On cross-examination, Dr. Morris admitted that his figures represented preliminary cost estimates, based on experience rather than on detailed design and engineering analysis. He admitted that any levee or flood-proofing work at the old plant site would require detailed soil analyses, in apparent contradiction to Mr. Bidby's position.

Report and Order, pp. 42-43.

The Commission acted within its discretion in finding that the testimony of Mr. Bidby and Dr. Morris was not credible, and that the testimony of Mr. Young and Mr. Merciel was credible. See *State ex rel. Associated Natural Gas v. Public Service Commission*, 37 S.W.3d 287, 294 (Mo. App. 2000) ("Since the testimony of both experts was properly presented to the Commission, it was up to the Commission to choose between the conflicting evidence presented as to the propriety of including the cost of the storage gas in the new rate calculations. We will not second-guess that determination.") (Citations omitted).

The Commission determined that the parties who challenged the Company's decision to construct the new water treatment plant failed to create a serious doubt as to whether that decision was prudent. The Commission's decision was supported by competent and substantial evidence on the record as a whole.

Nonetheless, the Commission examined the Company's decision under the reasonable-care-requiring-due-diligence standard, based on the circumstances that existed at the time the challenged item occurred, including what the Company's management knew or should have known, and determined that the Company had affirmatively shown that the Company's decision to construct the new water treatment plant was prudent.

The Commission reasonably determined, based upon competent and substantial evidence on the whole record, that the Company's decision to construct the new water treatment plant at St. Joseph was prudent. The Commission's ruling on this issue is lawful and reasonable.

B. Application of District Specific Pricing to the Joplin District.

The Court will now consider the challenge that is raised by both Joplin and Gilster to that portion of the Commission's decision not to reduce the Joplin district revenues in a manner consistent with the Commission's decision to move toward district specific pricing or "DSP."

Three statutory and constitutional concepts control disposition of this portion of the case. First, the Respondent's decision must comply with the requirement that it be supported by competent and substantial evidence on the whole record. Article V, Section 18, Mo. Const.; Sections 386.510 and 536.140, RSMo 2000. Second, the decision may not be contrary to law or otherwise not authorized by law. Sections 386.510, 536.140 and 393.130.3, RSMo 2000. Third, the decision must comply with those requirements of law designed to facilitate meaningful judicial review, such as setting forth adequate written findings of fact. Section 536.090, RSMo 2000. *State ex rel. Noranda Aluminum v. Public Service Commission*, 24 S.W.2d 243, 246 (Mo. App. W.D. 2000). Upon review, this Court finds the decision of the Respondent Commission deficient in each of these three areas.

While the Commission enjoys broad discretion in setting rates for utilities, those rates have to be just and reasonable. *State ex rel. Utility Consumer Council v. Public Service Commission*, 585 S.W.2d 41, 49 (Mo. banc 1979). A just and reasonable rate is never one that grants undue or unreasonable preference to or imposes undue prejudice or disadvantage on persons or localities. Section 393.130.3, RSMo. It is a rate that covers the cost of service and a reasonable return on assets dedicated to public use. *State ex rel. Washington University v. Public*

Service Commission, 272 S.W. 971, 972 (Mo. banc 1927). It is the purpose of the Commission to "secure an equality of service in rates for all who need or desire their services and are similarly situated." *Reinhold v. Fee Fee Trunk Sewer*, 664 S.W.2d 599, 604 (Mo. App. E.D. 1984).

After hearing extensive evidence, the Commission decided that it would not use the STP method in setting the Company's Missouri system rates. Instead, the Commission decided that it would use the DSP method to set the Company's Missouri system rates. The Commission also, however, stated that it will "adhere to the principle that no district [in the system] will receive a rate decrease as a result of rate design." (Report and Order, p. 58). This statement is supported by no findings of fact, nor is it explained or elaborated upon in conclusions of law. Although the Commission later attempted to clarify this statement in its Order of Clarification of September 12, 2000 (explaining what the Company should do with the excess payments made by Joplin District ratepayers), there are no findings of fact or conclusions of law anywhere in the Report and Order that would justify or support such a decision not to reduce the Joplin District rates according to the DSP rate allocation method applicable to all other districts.

It must also be concluded that the Commission has identified no "principle" to support this decision not to set the Joplin District rates by the same method as the rest of the Company's Missouri system. While the result is undisputed that the Joplin District pays \$880,000 in excess of its DSP cost of service in order to subsidize the other water districts, there is no factual or legal explanation for this unequal treatment of the Joplin District in the Commission's Order. The Commission cited no source for such principle in its briefs to this Court. Such a result, without explanation, violates the prohibition against granting undue or unreasonable preference or advantage to some ratepayers and locales and against subjecting any ratepayer or locale to any

undue or unreasonable prejudice or disadvantage in any respect whatsoever. Section 393.130.3, RSMo 2000.

Respondent's argument in support of its decision, that it adopted in this case a "modified DSP" rate design for the Joplin District, is rejected. There are no findings of fact or conclusions of law which support the argument that the Commission endorsed a "modified DSP," as now contended by the Commission. The concept of a "modified" cost allocation method does not appear anywhere in the Commission's Report and Order and the Respondent cites the Court to no evidence supporting such a "modified" DSP concept.

Even if the Commission intended to adopt such a "modified DSP" rate design the decision would have to be reversed because there are still no findings of fact or conclusions of law that justify requiring a different and higher rate for Joplin alone. *State ex rel. City of Grain Valley v. Public Service Commission*, 778 S.W.2d 287, 290-291 (Mo. App. W.D. 1989). The Commission's refusal to permit use of the same system-wide DSP cost allocation method granted to all other districts in the MAWC system, in the absence of justification, violates Section 393.130.3, RSMo, because the Joplin District locale pays in excess of its district specific cost of service, subsidizes the other water districts which pay less than cost of service, and, therefore, suffers undue and unreasonable prejudice and disadvantage. Similarly, the Commission's conscious decision to treat differently the ratepayers in the Joplin District from those outside that district by requiring those customers to pay part of the cost of serving all other customers outside the Joplin District clearly requires justification in the evidence and in the decision. *State ex rel. City of Grain Valley, supra*; Section 393.130.3, RSMo. Because the Respondent's decision states no such justification, and because Respondent cites no such evidence in the record, the Commission decision is unauthorized by law.

Finally, the Commission's decision not to reduce the Joplin District revenues to its DSP cost of service does so without any specific findings of fact or conclusions of law to support such decision.

[With]out specific findings of fact..., it is impossible to determine whether the action of the [agency] was supported by substantial evidence.

Noranda Aluminum, supra at 246, citing *Webb v. Board of Police Commissioners of Kansas City*, 694 S.W.2d 927, 929 (Mo. App. W.D. 1985).

The Commission is required by law to set forth specific findings of fact to permit effective judicial review by the reviewing Court in order to determine whether the Commission's decision was supported by substantial and competent evidence. Section 536.090, RSMo 2000. The lack of findings of fact and conclusions of law concerning the Joplin District rate design precludes any meaningful review of the Commission's decision by this Court. *Noranda Aluminum, supra* at 246-247. Accordingly, the decision in this regard will be reversed.

C. The Proper Treatment of Costs Associated With Large Transmission Mains.

It is clear on this record that the issue of the proper application of the BXC class cost allocation method was a litigated issue before the Commission. While the Commission appeared to have directed a shift in costs between classes of customers, it provided no decision on this issue and provided this Court with no findings of fact on which the basis of that decision may be examined and reviewed.

Moreover, litigants before the Commission are entitled to decisions on the issues that they bring before the Commission. Gilster and the St. Joseph Industrials argue that the only hearing venue under Missouri law for these issues is that provided by the General Assembly through the

Commission and that a meaningful hearing is not possible if the Commission may simply ignore evidence or issues that do not square with the result it desires to achieve.

In this case and on this issue, the Court is simply unable to review the Commission's decision under the applicable constitutional and judicial standards because the Report and Order is wholly devoid of any findings of fact, conclusions of law or even mention of the resolution of this clearly disputed issue. Findings of fact on disputed issues are a legal requirement for the Commission to reach its ultimate determinations. Section 386.420.2 and 536.090, RSMo 1994; *Noranda Aluminum, supra*; *Century State Bank v. State Banking Board of Mo.*, 523 S.W.2d 856, 859 (Mo. App. 1975); *Deaconess Manor Association v. Public Service Commission, et al.*, 994 S.W. 2d 602, 612 (Mo. App. 1999); *Glasnapp v. State Banking Board*, 545 S.W.2d 382, 387 (Mo. App. 1976). The Commission may not assume the facts necessary for its findings. *Webb, supra*, at 928-29; *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 126 (Mo. App. 1982). The parties are entitled to a decision that indicates the basis of that decision. By failing or refusing to decide the issue, the Commission denies the parties opposing the decision constitutionally guaranteed due process and effective judicial review as to the basis of the Commission's decision. Deference to Commission "expertise" has been rejected as a substitute for competent and substantial evidence. *State ex rel. Marco Sales v. Public Service Commission*, 685 S.W.2d 216, 222 (Mo. App. 1984) ("Unbridled bureaucracy is the subtle destroyer of people's rights and Mo. Const. Art. V, § 18 is their response.").

More recently, in *Noranda Aluminum, supra*, the Court of Appeals remanded a case to the Commission with instructions that it prepare proper findings of fact and conclusions of law. Section 536.090 was held applicable and required the Commission to provide "a concise

statement of the findings on which the agency bases its order." See, *Deaconess Manor, supra*, at 612. The *Noranda Aluminum* court also stated:

"The only means by which we could review the commission's conclusion would be to comb through the record looking for evidence that supported it and presuppose that the commission accepted this evidence as true. This is unacceptable."

Noranda Aluminum, supra, at 246 (emphasis added).

Because there are no findings of fact that this Court may evaluate against the recognized standards for judicial review, the Commission's decision in this respect is not lawful. As noted by the *Noranda Aluminum* court, the reviewing court is not required to comb the record and indulge in presuppositions about what the Commission accepted as true or found as fact. Accordingly the Report and Order will be reversed, for failure to provide findings of fact regarding this issue, and remanded.

D. The Issue of the Phase-In.

The Commission's decision concerning the issue of whether or not to "phase-in" the authorized rate increase is not supported by adequate findings of facts and conclusions of law and, therefore, does not comply with the requirements of Sections 386.420 and 536.090 RSMo 2000. *Noranda Aluminum, supra* at 246. It will be reversed and remanded on that basis.

JUDGMENT

By reason of the foregoing, it is hereby **ORDERED, ADJUDGED AND DECREED:**

1. that the decision of Respondent Public Service Commission in these matters as to the utility's decision to build a new plant to provide service in the St. Joseph, Missouri district and its decision to allow the value of that plant to be included in rate base and collected through rates is affirmed;

2. that the decision of Respondent Public Service Commission in this matter is reversed as to the Respondent's refusal to reduce the Joplin District rate to its DSP cost of service, such decision being unsupported by competent and substantial evidence upon the whole record, and is lacking in findings of fact in violation of Section 536.090 and Section 386.420.2, RSMo. 2000, and this issue is remanded to the Commission;

3. that the decision of Respondent Public Service Commission in this matter is reversed as to the Respondent's failure to provide any findings of fact from which the Court may review the administrative decision as regards the issue of the proper treatment of the costs associated with smaller distribution mains as distinguished from larger transmission mains, and this issue is remanded to the Commission; and

4. that the decision of Respondent Public Service Commission in this matter is reversed as to the "phase-in" issue and remanded to the Public Service Commission with instructions that the Commission make findings of fact and conclusions of law sufficient to support a resolution of the phase-in issue in Case No. WR-2000-281 and to permit the Court to determine whether such resolution is based upon and supported by the competent and substantial evidence on the whole record in that case and is otherwise reasonable and lawful.

5. Accordingly, the decision is therefore remanded to the Public Service Commission for further proceedings consistent with this order.

IT IS SO ORDERED.

Dated: September 19th, 2001

(KW4541.WPD;1)


Thomas J. Brown III, Circuit Judge

