

**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

**POST-HEARING BRIEF OF THE
OFFICE OF THE PUBLIC COUNSEL**

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tariff sheets Emerald Pointe was told to implement in the 2000 rate case. (Ex. 13; Tr. Pg. 229, L. 10-16) But, Emerald Pointe provided no evidence which would cause the Commission to question what occurred in SR-2000-595. The sewer tariff approved by the Commission in SR-2000-595 (Ex. 5) matches the tariff sheet contained in the filing letter signed by Mr. Snadon on behalf of Emerald Pointe. (Ex. 6) So, it is clear that Emerald Pointe asked the Commission to open the 2000 rate case using the exact tariff sheets that the Commission ultimately approved.

The argument that Emerald Pointe only charged the sewer commodity rate because one was included in what it thought was the “correct” tariff might be somewhat compelling if Emerald Pointe had actually followed those tariff sheets in what it charged. But as it turns out, Emerald Pointe didn’t follow those included in Mr. Snadon’s rebuttal testimony either. The sewer commodity charge was not the only unapproved charge Emerald Pointe subjected its customers to. Emerald Pointe also over charged for late fees and reconnection fees from what is listed in the tariff sheets attached to Mr. Snadon’s rebuttal testimony. (Tr. Pg. 228, L. 3 to Pg. 229, L. 9) So really it doesn't matter whether you're looking at the tariffs that were approved (Ex. 4; Ex. 5) or the tariff sheets that Mr. Snadon claims Emerald Pointe was told to follow (Ex. 13), Emerald Pointe didn't follow any of them. (Tr. Pg. 230, L. 5-10 & 19-23)

Emerald Pointe’s arguments are merely a red herring to try to cover the blatant truth that Emerald Pointe charged customers whatever it liked, no matter what the Commission approved. The Commission should not be led astray by Emerald Pointe’s attempt to argue that they just followed the tariff they were given and so they should not be held responsible for overcharging customers for sewer service for nearly 12 years. Tariffs approved by the Missouri Public Service Commission are binding on both the utility and the customers with the force of law.¹ Missouri Statute 393.130.1 states that "...[e]very unjust or unreasonable charge made or demanded for gas,

¹ *Missouri P. R. Co. v. Terrell*, 410 S.W.2d 356, 360 (Mo. Ct. App. 1966)

electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited." Even if Emerald Pointe was confused or unaware of what its approved rates were, the Supreme Court of Missouri confirms that ignorance of the law is no excuse.² The evidence shows that Emerald Pointe collected a sewer commodity charge even though one was not included in its approved tariff. Therefore, the Commission should find that Emerald Pointe was not authorized to collect a sewer commodity charge in Case No. SR-2000-595.

b. If not, what action should the Commission take?

The evidence shows that Emerald Pointe overcharged customers for sewer service from May 10, 2000, until March 31, 2012, by an amount that exceeds \$346,000. (Ex. 5; Ex. 11; Ex. 12; Tr. Pg. 95, L. 3-7) For almost 12 years, Emerald Pointe had free use of the customer's money. (Tr. Pg. 139, L. 23 through Pg. 140, L. 2) This money could have been used by the customers and a return on that money could have increased the value for them. (Tr. Pg. 140, L. 3-7) And now these same customers are facing an increase that exceeds 300% from the rates they currently pay. (Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Pg. 140, L. 13-16) However, Emerald Pointe disagrees that a refund of these amounts is appropriate. It is safe to say that Emerald Pointe would argue that it should be awarded everything it deserves in this case. Customers deserve the same protection.

Customers at the local public hearing stated to the Commission that they were very concerned about the overcharges and about the amount of money that would be repaid. (Tr. Vol. 2; Tr. Pg. 96, L. 20 through Pg. 97, L. 20) Allowing Emerald Pointe to keep the overcharged money would result in unjust enrichment for Emerald Pointe at the customers' expense. The Commission has the discretion to order that the money related to the sewer commodity charge

² *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 445, 495 (Mo. 1923)

should be returned to the customers. Customers were inappropriately deprived of their hard earned money. The Commission has the opportunity to make a definitive statement that customers are not to be treated that way. For the protection of the customers, the Commission should order that the amount collected through the sewer commodity charge be returned to customers.

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

i. What is the appropriate time period over which the amounts due to customers should be calculated?

The evidence shows that Emerald Pointe overcharged customers for sewer service from May 10, 2000, until March 31, 2012, by an amount that exceeds \$346,000. (Ex. 5; Ex. 11; Ex. 12; Tr. Pg. 95, L. 3-7) For almost 12 years, Emerald Pointe had free use of the customer's money. Customers were inappropriately deprived of that money and now they are facing the possibility that approximately half of that, if not every penny of it, will be lost to them forever. At the same time customers are facing an increase that exceeds 300% from the rates they currently pay, it is clear that the money they paid for an inappropriate sewer commodity charge should be returned. (Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Tr. Pg. 140, L. 13-16)

Staff argues that the Commission should utilize 4 CSR 240-13.025 to limit the time period over which Emerald Pointe is to provide refunds to customers from the sewer commodity charge. (Ex. 2) However, Staff admits that 240-13.025 does not apply to sewer services. (Tr. Pg. 96, L. 10-12) So, there is no rule which says that customers cannot be repaid for the entire timeframe of an inappropriate sewer charge. (Tr. Pg. 96, L. 13-16)

Staff tries to convince the Commission that using Commission Rule 240-13.025 is a reasonable thing to do when dealing with a sewer overcharge. (Tr. Pg. 117, L. 10-16) The result of Staff's position is that Emerald Pointe would only have to repay customers for 5 of the approximately 12 years that it collected the sewer commodity charge from customers. (Ex. 2) Under Staff's proposal, customers would lose approximately half of the \$346,000 they paid inappropriately to the Emerald Pointe. On the reverse, Emerald Pointe would be allowed to keep about \$173,000 it collected in clear violation of its approved sewer tariff. (Ex. 5) So in reality, Staff's position is only reasonable for Emerald Pointe. It is certainly not reasonable for the customers who were inappropriately charged a sewer commodity charge for approximately 12 years.

Emerald Pointe tries to use fear mongering techniques such as suggesting that Emerald Pointe is a troubled system that would be forced to go bankrupt if it had to return even a portion of the sewer commodity charge money to customers. (Ex. 13) However, the evidence shows that Emerald Pointe is far from a troubled utility. As Mr. Busch stated, it is very difficult for small systems to have the funds available to hire attorneys and that is one reason why the small company rate case rule was created. (Tr. Pg. 92, L. 15-23) Mr. Johansen and Mr. Busch both agree that small water and sewer companies, especially troubled water and sewer companies as Emerald Pointe apparently alleges it is, are normally not able to afford even one attorney let alone two attorneys and an outside expert in their rate cases as Emerald Pointe has. (Tr. Pg. 92, L. 6-14; Pg. 189, L. 14-20) In fact, the Commission recently approved Emerald Pointe's request to issue debt for the installation of a new sewer connection line to the city of Hollister. (Ex. 23; Tr. Pg. 302, L. 16-20) When comparing Emerald Pointe to other small systems Mr. Busch could not think of any other small system that has been able to go out obtain \$1 million in financing as

Emerald Pointe and its owners recently did. (Tr. Pg. 304, L. 14 to Pg. 305, L. 1) Staff recommended approving the assumption of the new debt in that case and as Mr. Marevangepo agreed, the Commission would not have authorized such a request if it or Staff believed Emerald Pointe was heading into bankruptcy. (Tr. Pg. 302, L. 16 to Pg. 303, L. 7)

The other parties' positions that some of all of the money should not be returned to customers is certainly not in the customer's interest. The Commission has the opportunity to make a definitive statement that customers are not to be treated that way. Even though 240-13.025 may apply to Emerald Pointe's water utility, it does not apply to its sewer utility. It makes no difference whether Emerald Pointe also provides water services through its water utility; the sewer commodity charge is strictly for sewer services by the sewer utility. The Commission has complete discretion to say that sewer customers deserve to be made completely whole going back to May 10, 2000. Therefore, the Commission should order that the amount due to customers should be calculated from the effective date of the current approved tariff (May 10, 2000) through the time when Emerald Pointe ceased charging a sewer commodity charge (March 31, 2012).

ii. What, if any, interest should be applied to the amounts to be returned?

The evidence shows that Emerald Pointe overcharged customers for sewer service from May 10, 2000, until March 31, 2012, by an amount that exceeds \$346,000. (Ex. 5; Ex. 11; Ex. 12; Tr. Pg. 95, L. 3-7) However, Emerald Pointe disagrees that interest should be added to these amounts.

This money could have been used by the customers and a return on that money could have increased the value for those customers. Adding what the evidence shows is a reasonable 6% compound interest, the value of the overcharge money is now well over \$500,000. (Ex. 8;

Ex. 11; Ex. 12) The addition of interest protects ratepayers from the permanent loss of monies to the extent practicable. While there are no specific Missouri statutes or regulations that require the Commission to order the payment of interest on a sewer commodity overcharge it is just common sense. (Tr. Pg. 118, L. 7-12) The Commission has complete discretion to say that sewer customers deserve to be made completely whole.

While the tariff may be silent on the addition of interest to overcharges, it is generally Staff's practice to include an interest calculation when determining the amount to be refunded to customers. (Ex. 8) As Ms. Rose states, this has been done in other water and sewer cases including Case Nos. SR-2008-0303 and WR-2008-0304, Roy-L Utilities. (Ex. 8) The Commission has routinely incorporated the cost of money over time into its decisions. For example, if an emergency interim rate is approved, it is routinely set as subject to refund with interest as a protection to customers should the permanent rates be determined to be less than the emergency rates.³ Protection from the cost of money over time has also been provided to the utility in cases where the Commission has determined that a rate increase should be phased in over time or where an emergency accounting authority order is granted. In those cases, the Commission routinely approves, and the courts have upheld, the inclusion of interest in the form of carrying costs to compensate the utility for the delay in receiving its full cost of service in rates.⁴

Statute 393.130.1 states that "...[e]very unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited." When customers

³ Commission Case No. ER-86-52; Commission Case Nos. ER-78-272, ER-78-293, and ER-79-37; Commission Case No. WM-93-43

⁴ *AG Processing Inc. v. Mo. PSC (In re Determination of Carrying Costs for Phase-in Tariffs of KCP&L Greater Mo. Operations Co.)*, 2013 Mo. App. LEXIS 588 (Mo. Ct. App., May 14, 2013); *Missouri Gas Energy, a Division of Southern Union Company, v. Public Service Commission*, 978 S.W.2d 434; Mo. App (1998)

are subjected to an unjust or unreasonable charge as they were here, they should be made completely whole. Therefore the Commission should order that 6% compound interest should be applied to the amounts returned, accruing from the date of inception through the entire applicable payback period.

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

It is also imperative that the customers be made whole as soon as possible. The evidence shows the customers are facing an increase of over 300% in their rates while being owed a significant amount of money from inappropriate charges. (Tr. Pg. 92, L. 24-25 to Pg. 93, L. 1-6; Pg. 140, L. 13-16)

Staff provided testimony recommending that the Commission require Emerald Pointe to provide bill credits to existing customers who are due refunds over a 45-month period. (Ex. 2) For any customer who has left the system, Staff recommends that the Commission require Emerald Pointe to send those former customers a check for the amount of refund owed. (Ex. 2) For any customer who leaves the system prior to being refunded all amounts owed, Staff recommends that the Commission order Emerald Pointe to send that customer a check for any remaining un-refunded balance. (Ex. 2)

The Commission has the discretion to order an aggressive payback period for the sewer commodity overcharges to help alleviate the rate shock customers are facing. The evidence shows that the 24-month overall time for payback of these overcharges as proposed by Public Counsel in Ms. Roth's rebuttal testimony (Ex. 11) as opposed to the 45-month overall payback period proposed by Staff is reasonable and will reduce the interest burden on Emerald Pointe significantly. (Ex. 11; Tr. Pg. 142, L. 8-12)

Since the refunds calculated from December 30, 2004, to March 31, 2012, are customer specific, the Commission should order that bill credits for this portion of the refunds should be provided to those remaining customers over a 24-month period after the effective date of the Commission's Order in this case. Additionally the Commission should order that a check should be provided to customers who are no longer customers but are to receive a refund, no later than 90 days after the effective date of the Commission Order in this case. Also, the Commission should order that if a customer leaves the system before they are given their full refund, Emerald Pointe should provide a check to the customer no later than 90 days after termination of service.

Because the refunds calculated from May 10, 2000, through December 29, 2004, are not customer specific due to the lack of customer records, the Commission should order that this portion of the refunds should be credited to all customers on the sewer system over a 24-month period after the effective date of the Commission's Order in this case.

2. Late Fee/Reconnect Fee Overcharges

a. Should interest be applied to the refund of late fee/reconnect fee overcharges?

As it turns out, the evidence shows the sewer commodity charge was not the only unapproved charge Emerald Pointe subjected its customers to. Emerald Pointe also overcharged for late fees and reconnection fees in violation of its approved tariffs. (Ex. 4; Ex. 5) In direct, Staff estimated \$5,803 in overcharged late fees and a total of \$280 of overcharged reconnection fees which need to be refunded. (Ex. 2) While the other parties agree with Staff's calculation of the amount of overcharges associated with late fees and reconnection fees, Emerald Pointe disagrees that interest should be added to these amounts. (Ex. 8)

Emerald Pointe had free use of the customer's money. This money could have been used by the customers and a return on that money could have increased the value for those customers.

The addition of interest protects ratepayers from the permanent loss of monies to the extent practicable. While there are no specific Missouri statutes or regulations that require the Commission to order the payment of interest on a late fee or reconnect fee, it is just common sense. (Tr. Pg. 118, L. 7-12)

Even though the tariff may be silent on the addition of interest to overcharges, it is generally Staff's practice to include an interest calculation when determining the amount to be refunded to customers. (Ex. 8) As Ms. Rose states, this has been done in other water and sewer cases including Case Nos. SR-2008-0303 and WR-2008-0304, Roy-L Utilities. (Ex. 8) The Commission has also routinely incorporated the cost of money over time into its decisions. For example, if an emergency interim rate is approved, it is routinely set as subject to refund with interest as a protection to customers should the permanent rates be determined to be less than the emergency rates.⁵ Protection from the cost of money over time has also been provided to the utility in cases where the Commission has determined that a rate increase should be phased in over time or where an emergency accounting authority order is granted. In those cases, the Commission routinely approves, and the courts have upheld, the inclusion of interest in the form of carrying costs to compensate the utility for the delay in receiving its full cost of service in rates.⁶

The Commission has complete discretion to say that customers deserve to be made completely whole from overcharges. Therefore, the Commission should order that interest should be applied to the refund of late fee and reconnect fee overcharges.

i. If so, at what rate?

⁵ Commission Case No. ER-86-52; Commission Case Nos. ER-78-272, ER-78-293, and ER-79-37; Commission Case No. WM-93-43

⁶ *AG Processing Inc. v. Mo. PSC (In re Determination of Carrying Costs for Phase-in Tariffs of KCP&L Greater Mo. Operations Co.)*, 2013 Mo. App. LEXIS 588 (Mo. Ct. App., May 14, 2013); *Missouri Gas Energy, a Division of Southern Union Company, v. Public Service Commission*, 978 S.W.2d 434; Mo. App (1998)

Statute 393.130.1 states that "...[e]very unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited." When customers are subjected to an unjust or unreasonable charge as they were here, they should be made completely whole. The evidence shows that 6% compound interest is reasonable for the refund of the late fee and reconnect fee overcharges. (Ex. 8; Ex. 11; Ex. 12) The addition of interest protects ratepayers from the permanent loss of monies to the extent practicable.

The Commission has complete discretion to say that customers deserve to be made completely whole from overcharges. Therefore the Commission should order that 6% compound interest should be applied to the amounts returned, accruing from the date of inception through the entire applicable payback period.

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

The evidence shows the customers are facing an increase of over 300% in their rates while being owed a significant amount of money from inappropriate charges. (Tr. Pg. 92, L. 24-25 to Pg. 93, L. 1-6; Pg. 140, L. 13-16) The evidence shows that it is reasonable for the Commission to order Emerald Pointe to refund all erroneously collected late fees and reconnection fees to the appropriate customers within 90 days of the effective date of the order in this proceeding. (Ex. 2)

Once again, Emerald Pointe had inappropriate use of the customer's money. The Commission has complete discretion to say that customers deserve to be made whole from overcharges as quickly as possible. Therefore, the Commission should order that a check should be provided to those customers who were erroneously charged and paid these late fees and reconnection fees within 90 days of the effective date of the order in this proceeding.

3. Customer Deposits

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

The evidence also shows that Emerald Pointe did not follow the rules of the Commission regarding the proper use and return of customer deposits. The evidence shows that Emerald Pointe has been violating its Commission approved tariff by requiring all water customers to make a deposit of \$30 upon requesting service and instead of refunding the deposits, with interest, after successful completion of given criteria, Emerald Pointe was holding the deposits until the customer left the system. (Ex. 2) Even though Emerald Pointe's records of customer deposits is lacking, Staff estimated in direct testimony that Emerald Pointe needed to refund \$11,370 in deposits with an additional \$17,668 in interest for a total refund due to customers of \$29,038. (Ex. 2)

So, customers are owed approximately \$30,000 in inappropriately held customer deposits. The evidence shows that it is reasonable for Emerald Pointe to be ordered to return the customer deposits within 90 days of the effective date of the order in the proceeding. (Ex. 2)

Once again, Emerald Pointe had inappropriate use of the customer's money. And once again, the Commission has complete discretion to say that customers deserve to be made completely whole as soon as possible. Therefore, the Commission should order Emerald Pointe to provide a check to those affected customers within 90 days of the effective date of the order in this proceeding.

4. Hollister Sewage Treatment Expense

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

As noted by Mr. Johansen in his testimony on behalf of Emerald Pointe, this issue is solely related to the volumes used in calculating the sewage treatment expense resulting from the wholesale treatment contract between Emerald Pointe and the City of Hollister (Hollister). (Ex. 15; Ex. 16)

The basic issues of return of investment and expenses have been mainly agreed to by the parties. A rate design method has been agreed to and approved by the Commission. However, Emerald Pointe is now requesting an increase in the Hollister Sewage Treatment Expense by increasing the volumes used by Staff in its calculations by 20% based solely on the wholesale treatment bill Emerald Pointe received from Hollister for the month of January 2013. (Ex. 16; Tr. Pg. 249, L. 8-11)

The single bill for the month of January 2013 shown in Mr. Johansen's rebuttal testimony as support for his position is the very first bill Emerald Pointe has received and may not be representative of future costs. (Ex. 12; Tr. Pg. 249, L. 12-25) Additionally, the rate design mechanism as agreed to by the parties and approved by the Commission anticipates variable sewer volumes by including a volumetric charge for sewer. (Ex. 12) Ultimately, the usage could fall within the parameters on which the rate design mechanism agreed to by the parties was based. (Tr. Pg. 250, L. 12-15) If it does not, Emerald Pointe certainly has the option of filing another rate case in the future to capture any increased costs.

The evidence shows that the rate design mechanism as agreed to by the parties and approved by the Commission sufficiently anticipates variable sewer volumes by including a volumetric charge for sewer. Therefore, the Commission should deny Emerald Pointe's request for an increase in the Hollister Sewage Treatment Expense by increasing the volumes by 20% from those contemplated by Staff in its revenue requirement calculations.

5. Legal Fees

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

The Revised Staff Accounting Schedules include legal fees of \$386 each for the water system and the sewer system for a total of \$772 in legal fees. (Ex. 9; Ex. 10) Public Counsel and Emerald Pointe agree with Staff's proposal to include \$772 in revenue requirement for legal fees. Therefore, legal fees is no longer an issue and was not brought up in the evidentiary hearing. (Tr. Pg. 254, L. 21-24; Tr. Pg. 255, L. 1-8)

6. Rate Case Expense

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

There is no disagreement between the parties that the amount of rate case expense proposed by Staff in its Revised Accounting Schedules (Ex. 9; Ex. 10), based on a five-year normalization, is reasonable. There is no disagreement that an update of reasonable rate case expense may be appropriate. The issue before the Commission is how much that amount should be updated. Mr. Johansen explained that Emerald Pointe is asking to update the rate case expense to the end of the case, because Emerald Pointe feels that it is just and reasonable for all of its rate case expenses to be updated to the most current time when rates go in to effect. (Tr. Pg. 256, L. 20-25; Tr. Pg. 257, L. 1-2)

As stated above, there is no disagreement that an update of rate case expense may be appropriate. However, only just and reasonable costs should be included in this case. Mr. Johansen agreed that updated costs would be provided to the Staff for their review to see what was appropriate to be included. (Tr. Pg. 258, L. 24-25; Tr. Pg. 259, L. 1-3) But, it seems Emerald Pointe expects rate payers to pay for all the additional expenses pertaining to its outside expert, Mr. Johansen, and attorney expenses including those of Mr. Cooper and those of Emerald

Pointe's second attorney, Mr. O'Flaherty. (Tr. Pg. 257, L. 14-25; Tr. Pg. 258, L. 1-4) Costs that have been included by Staff include the costs for one attorney, Mr. Cooper. (Tr. Pg. 260, L. 11-16) But, all of a sudden Emerald Pointe determined that having one attorney was not good enough so it brought in a second attorney. (Tr. Pg. 260, L. 17-20) And, it seems that Emerald Pointe will be expecting rate payers to pay the second attorney's costs as well. (Tr. Pg. 260, L. 21-23)

While there is merit to the argument for the necessity of an outside expert and an attorney in an evidentiary hearing, there is absolutely no reason why a second attorney was necessary for this case. Emerald Pointe is a small water and sewer system and the rate increase request was filed under the small company rate case rule. Mr. Johansen and Mr. Busch both agree that small water and sewer companies, especially troubled water and sewer companies as Emerald Pointe apparently alleges it is, are normally not able to afford even one attorney let alone two attorneys and an outside expert in their rate cases. (Tr. Pg. 92, L. 6-14; Pg. 189, L. 14-20) As Mr. Busch stated, it is very difficult for small systems to have the funds available to hire attorneys and that is one reason why the small company rate case rule was created. (Tr. Pg. 92, L. 15-23)

It is unknown why a second attorney was brought in by Emerald Pointe. Apparently Emerald Pointe saw some benefit from Mr. O'Flaherty being present in this case, but the customers certainly received no benefit. Mr. O'Flaherty's activities were completely duplicative of those provided by Mr. Cooper. Both attorneys sat side by side in the court room - both charging for their services. There was nothing done by Mr. O'Flaherty that could not have been done by Mr. Cooper, especially given the fact that Mr. Cooper routinely appears in similar cases before the Commission while Mr. O'Flaherty does not. Mr. O'Flaherty was not active in the filing of testimony; Mr. Cooper was. Not even Staff was aware that Emerald Pointe had retained

the services of a second attorney until the evidentiary hearing. (Tr. Pg. 260, L. 17-20) As duplicative services, the costs of Mr. O’Flaherty are not just and reasonable to be included as rate case expense.

The Commission should order that only reasonable rate case expense should be included in this case. The costs of Mr. O’Flaherty are not just and reasonable. Therefore, the Commission should not include those costs in the rates paid by customers.

7. Capital Structure

- a. Should the capital structure of the Company for ratemaking purposes be: 1) a structure that treats the Company as one entity or 2) a structure that considers the water and sewer operations of the Company separately?**

The actual capital structure of Emerald Pointe’s regulated utilities is known. If the capital structure is known, it is reasonable that is what rates should be based on. There is no need to tinker with what is known to transform it into something else.

Emerald Pointe is both a regulated water utility and a regulated sewer utility. Each utility is required to have its own Certificate of Convenience and Necessity from the Commission and each was required to file a separate rate case. Each utility has separately developed rates in separately approved tariffs. (Ex. 4; Ex. 5) Each of these utilities provides unique services, has separate expenses and revenues as well as differing customer bases. (Ex. 23; Tr. Pg. 269, L. 3-12; Tr. Pg. 275, L. 1-7) The evidence shows the sewer operation has all the debt, \$1,000,066,000, while the water utility has none. (Tr. Pg. 268, L. 12-23; Tr. Pg. 276, L. 14-15) A combined capital structure does not provide just and reasonable rates for all of Emerald Pointe’s customers. Customers that are not sewer customers, no matter how many there are, gain

no benefit from subsidizing the debt of sewer customers. The only entity that benefits from this tinkering is Emerald Pointe.

The Commission must ensure that rates are just and reasonable and are based on the actual situation of each utility it regulates. To avoid subsidization between the water and sewer systems by a non-uniform customer base, each utility's actual capital structure should be utilized in the determination of its weighted rate of return. Therefore the Commission should order that the capital structure of Emerald Pointe for ratemaking purposes should be a structure that considers the water and sewer operations of the company separately.

8. Rate of Return/Return on Equity

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

The Commission's charge is to set just and reasonable rates. Part of that determination is to set affordable rates that are not detrimental to the utility or the customers. The US Supreme Court in the *Bluefield* and *Hope*⁷ cases has determined that a reasonable return on equity is: (1) adequate to attract capital at reasonable terms, thereby enabling the utility to provide safe and reliable service; (2) sufficient to ensure the utility's financial integrity; and (3) commensurate with returns on investments in enterprises having corresponding risks. While small water and sewer systems are not publicly traded and have unique characteristics compared to larger systems (Ex. 24), the Commission must still ensure that these factors are taken into account when deciding a reasonable return on equity.

Whether or not the debt is actively traded has no bearing on the ultimate cost of the debt to the utility. (Ex 23) However, Staff's apparent belief is that since the Emerald Pointe does not have actively traded debt, Staff must develop an estimate of its credit rating and then apply an

⁷ *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923); *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591 (1944).

appropriate bond yield for debt based on that estimated credit rating is not reasonable. (Ex. 23; Ex. 24) Mr. Murray described the convoluted methodology Staff uses to estimate a small company's cost of equity based on a non-existent market valuation. (Ex. 24) Mr. Marevangepo testified that Staff utilizes that methodology for small systems and whatever number comes out is Staff's recommendation. (Tr. Pg. 309, L. 13-16) He also admitted that there is no standard protocol to check that the number Staff's methodology produces is reasonable – whatever number comes out he would use as Staff's recommendation. (Tr. Pg. 309, L. 17 through Pg. 311, L. 3) That is hardly a reasonable methodology for setting just and reasonable rates.

The actual cost of equity of Emerald Pointe's regulated utilities can be calculated. The evidence shows that Emerald Pointe has sewer operation debt and that debt has a cost (or yield to holder of the debt) and as such is the real-world actual cost to Emerald Pointe as determined by the utility and the parties that issued the loans to it. (Ex. 23) If the actual cost of equity can be calculated, it is reasonable that is what rates should be based on. There is no need to tinker with what is known to transform it into something else. The evidence shows that that the appropriate cost of equity for each utility is 9.35% based on actual debt of 5.5% secured indebtedness associated with the construction of a sewer line and to eliminate the existing wastewater treatment facility and to convert it to a lift station, and the 3.15% loan from White River Valley Electric Cooperative, Inc., plus the 4% risk premium which Staff proposed. (Ex. 22; Ex. 23; Ex. 24)

Since the actual cost of equity can be calculated, it is reasonable to utilize that in setting rates. Therefore, the Commission should order that the appropriate cost of equity for each utility is 9.35% based on actual debt of 5.5% secured indebtedness associated with the construction of a sewer line and to eliminate the existing wastewater treatment facility and to convert it to a lift

station, and the 3.15% loan from White River Valley Electric Cooperative, Inc. plus a 4% risk premium.

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

The evidence shows that that the appropriate cost of equity for each utility is 9.35% based on actual debt of 5.5% secured indebtedness associated with the construction of a sewer line and to eliminate the existing wastewater treatment facility and to convert it to a lift station, and the 3.15% loan from White River Valley Electric Cooperative, Inc. plus the 4% risk premium which Staff proposed. (Ex. 22; Ex. 23; Ex. 24) The evidence also shows the sewer operation has all the debt, \$1,000,066,000, while the water utility has none. (Tr. Pg. 268, L. 12-23; Tr. Pg. 276, L. 14-15) To avoid subsidization between the water and sewer systems by a non-uniform customer base, is it reasonable that each utility's actual capital structure should be utilized in the determination of its weighted rate of return. As a result, the evidence shows that including a 9.35% return on equity in the weighted rate of return analysis with Emerald Pointe's actual capital structure yields a reasonable weighted rate of return before income tax of 6.14% for the sewer operation and 9.35% for the water operation. (Ex. 23)

The Commission must ensure that rates are just and reasonable and are based on the actual situation of each utility it regulates. Since the actual cost of equity can be calculated, it is reasonable to utilize that in setting rates. It is also reasonable that each utility's actual capital structure should be utilized in the determination of its weighted rate of return. Therefore, the Commission should order a weighted rate of return before income tax of 6.14% for the sewer operation and 9.35% for the water operation.

9. CIAC Reserve – Customer Fees

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

Customers are facing an increase that exceeds 300% from the rates they currently pay. (Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Pg. 140, L. 13-16) So, it is important that customers get the benefit of everything they pay for.

Ratepayers paid \$17,579 of miscellaneous revenue CIAC based on the \$400 new water customer fee charged to the utility's customers. (Ex. 23; Ex. 26; Tr. Pg. 323, L. 15-21) The evidence shows that, on a going forward basis, because it believed these fees should exactly equal plant costs, Staff did not include either the contributions or the plant in its recommended plant or CIAC balances. (Ex. 10; Ex. 23) Ms. Hanneken explains that since it would be inappropriate to include the full amount of CIAC fees in rate base without also including the correct plant costs, Staff listed this difference as "miscellaneous revenues." (Ex. 26) However, Staff's workpapers do not reflect that any of the \$17,579 was included as miscellaneous revenue. (Ex. 10; Ex. 23) Ms. Hanneken agrees that Staff's approach to annualizing miscellaneous revenues in this case did not reflect the amount of additional CIAC in Staff's ongoing cost of service. (Ex. 26) Ms. Hanneken argues that since the differences between the CIAC charges and the underlying plant costs no longer exist, Staff believes it could not include these non-ongoing items in its cost of service calculation. (Ex. 26) As a result, none of the \$17,579 paid by customers was actually included in Staff's calculation of miscellaneous revenues. (Ex. 10; Ex. 23; Ex. 26; Tr. Pg. 319, L. 19 through Pg. 320, L. 7)

Staff asserts that including the \$17,579 miscellaneous revenue CIAC would understate Emerald Pointe's rate base. (Ex. 26) However, the CIAC dollars at issue consist of monies collected from ratepayers which though not capitalized properly represent labor costs which the utility could have recovered in their current rates. (Tr. Pg. 322, L. 17-24) Ratepayers paid the

\$17,579 and deserve to have this payment reflected whether or not cost of the associated plant was equal to or less than the contributions obtained from ratepayers. Since the ratepayers paid the \$17,579 of miscellaneous revenue CIAC based on the \$400 new water customer fee charged to the utility's customers, the Commission should order that those funds should be accounted for in the utility's plant as such.

10. Plant-Related Balance Update Period

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

Customers are facing an increase that exceeds 300% from the rates they currently pay. (Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Pg. 140, L. 13-16) So, it is important that customers get every reasonable benefit to minimize the necessary rate increase.

Emerald Pointe has no qualms about asking the Commission to include every reasonable benefit to the utility in this case. Mr. Johansen stated that Emerald Pointe is asking to update the rate case expense to the end of the case, because Emerald Pointe feels that it is just and reasonable for all of its rate case expenses to be updated to the most current time when rates go in to effect. (Tr. Pg. 256, L. 20-25; Tr. Pg. 257, L. 1-2) Ms. Hanneken admits that Staff will consider updating Emerald Pointe's rate case expense to the most current time when rates go in to effect. (Tr. Pg. 327, L. 20 through Pg. 328, L. 4) She also agrees that updating rate case expense to the end of the case is beneficial to Emerald Pointe. (Tr. Pg. 328, L. 14-17)

Plant additions, plant requirements and plant depreciation affect rates. (Tr. Pg. 328, L. 10-13) Updates in plant depreciation to the end of the case would certainly provide a benefit to customers. (Tr. Pg. 238, L. 18 through Pg. 239, L. 10) But, Staff refuses to do saying it is not been its policy and it does not wish to violate the matching principle. (Tr. Pg. 329, L. 4-8) However, the evidence shows that Staffs concern that the matching principle would be violated

is not reasonable given that the main driver, and reason for two time extensions, in the case was to achieve the inclusion of the new construction undertaken to eliminate the sewer treatment plant. (Ex. 23) In addition, many of the remaining costs and revenues associated with the Staffs recommended cost of service were actually developed by Staff to represent the cost structure of a similar sized utility and not based on Emerald Pointe's actual booked costs because of the utility's unapproved billing practices and extremely poor accounting and records maintenance. (Ex. 23; Ex. 25; Ex. 26; Tr. Pg. 323, L. 22 through Pg. 325, L. 2) Excluding plant and possibly revenues, material cost changes are unlikely to occur given that Staff itself developed many of the costs in its recommended cost of services. (Ex. 23) Since Staff revised its Accounting Schedules (Ex. 9; Ex. 10) to correct known errors in its analysis, it would have been a simple task to extend those changes to account for plant changes such as updated additions, retirements, depreciation, etc., in order to match a truer cost of service at the date closest to the actual date of the rate change. (Ex. 23)

The customers should get the benefit of updated plant-related balances. Updating rate case expense to near the end of the case is beneficial to Emerald Pointe. (Tr. Pg. 261, L. 5-8) If it is reasonable that Company expenses such as rate case expense be updated to the end of this rate case, it is certainly reasonable that plant changes such as additions, retirements, depreciation, etc. should be also be updated as close to the effective date of the rate change as possible. Therefore, the Commission should order that plant-related balances should be updated as close as possible to the end of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 6th day of June 2013:

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