BEFORE THE PUBLIC SERVICE C OMMISSION
OF THE STATE OF MISSOURI

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

THE OFFICE OF THE PUBLIC COUNSEL'S APPLICATION FOR REHEARING AND REQUEST FOR STAY ORDER PENDING APPEAL, OR IN THE ALTERNATIVE, ORDER FOR A SEPARATE FUND FOR RATE INCREASE SUBJECT TO REFUND

COMES NOW the Office of the Public Counsel and for its Application for Rehearing and Request for Stay Order Pending Appeal, or in the Alternative, Order for a Separate Fund for Rate Increase, and states that rehearing is warranted and the Revised Report and Order should be reheard because the decision is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, constitutes retroactive ratemaking, is in violation of constitutional provisions of Due Process, is unauthorized by law and constitutes an abuse of discretion, all as more specifically and particularly described in this motion and as follows:

I. Application for Rehearing

The Office of the Public Counsel (Public Counsel), pursuant to Section 386.500[1] and 4 CSR 240-2.160, specifically sets forth the reasons warranting a rehearing and moves the Missouri Public Service Commission (Commission) for rehearing of its Revised Report and Order of September 24, 2013, effective October 24, 2013 which: (1) authorizes the company to file a tariff sufficient to recover revenues as determined by the Commission in the order as a resolution to the rate increase request initiated by Emerald Pointe pursuant to the Commission's

[1] All statutory citations are to the Revised Statutes of Missouri 2000, unless otherwise noted.

Small Utility Rate Making Process.; and (2) concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of $3.50 per 1,000 gallons.[2]

Sewer Commodity Charge

A. Introduction

The Commission's decision must be based on competent and substantial evidence:

> The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" ***and whether the action is "supported by competent and substantial evidence upon the whole record."*** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law."[3]

The evidence that the Commission admits and makes the basis of its decision must have probative value:

> The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. ***But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.***[4]

---

[2] Revised Report and Order, pg. 3.
[3] *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).
[4] *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

The evidence shows that from May 10, 2000, until March 31, 2012, approximately the time when Emerald Pointe knew it was going to have to face the Commission in this rate case and a companion financing case, Emerald Pointe charged a sewer commodity charge for a total amount that exceeds $346,000.[5] However, the evidence shows that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[6]

B. The Revised Report and Order is Unlawful, Unjust and Unreasonable Because Public Counsel Met its Burden to Prove that Emerald Pointe Was Not Authorized to Collect a Sewer Commodity Charge as a Result of Case No. SR-2000-595

The question before the Commission was: Was the Company authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595?[7] Given the clear evidence that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595,[8] the answer to that question is no. Therefore, Public Counsel met it burden to prove that Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595. As a result, the Revised Report and Order is unlawful, unjust and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence.

As a complaining party, Public Counsel has the burden to prove that charges made by a regulated utility are improper. Missouri Statute 393.130.l 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**

[5] Exhibit 2; Exhibit 11; Exhibit 12; Tr. Pg. 95, L. 3-21.
[6] Exhibit 5.
[7] Revised Report and Order, pg. 23.
[8] Exhibit 5.

commission is prohibited." (Emphasis added.) Therefore, the ability to meet this burden hinges on the production of evidence that the charging of a sewer commodity charge of $3.50 per 1000 gallons is in excess of that allowed by law or by order or decision of the Commission.

It is clear that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[9] But, in the Revised Report and Order, the Commission concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of $3.50 per 1,000 gallons.[10] The Commission also states:

> In this case, the Commission is faced with two tariff documents that the opposing parties claim to be Emerald's Pointe's lawful sewer tariff. If Emerald Pointe's lawful sewer tariff allows it to collect a usage charge of $3.50 per 1,000 gallons, then the company's collection of that charge from its customers cannot be a violation of its tariff. The tariff that Emerald Pointe contends is its lawful tariff contains such a usage charge. The tariff that Staff and Public Counsel contend is lawful does not.[11]

So, the Commission, deciding between two documents - the approved tariff without a sewer commodity charge and another, unapproved document provided by Emerald Pointe with a sewer commodity charge - chose the unapproved document provided by Emerald Pointe as Emerald Pointe's lawful sewer tariff.

However, only an approved tariff sets out the lawful rates for a public utility. 4 CSR 240-3.010 (28) states specifically:

> Tariff means a document published by a public utility, ***and approved by the commission***, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services. (Emphasis added.)

Therefore, an existing approved tariff is *prima facie* evidence of what rates may be lawfully charged by the utility.

---

[9] Exhibit 5.
[10] Revised Report and Order, pg. 3.
[11] Revised Report and Order, pg. 32.

The evidence shows the only document that was **approved** by the Commission in Case No. SR-2000-595, thereby making it the only tariff setting out lawful rates as defined by 4 CSR 240-3.010 (28), did not include a sewer commodity charge.[12] As an existing approved tariff this is *prima facie* evidence that Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595. Therefore, Public Counsel met its burden.

Public Counsel met its burden to prove that the Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595. The tariff approved in Case No. SR-2000-595 is *prima facie* evidence that Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595. Charging a sewer commodity charge was in excess of that allowed by law or by order or decision of the Commission and was prohibited under 393.130.1. Therefore, the Revised Report and Order is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence.

C. <u>The Revised Report and Order is Unlawful, Unjust and Unreasonable Because it Improperly Assigns a Burden of Proof to Public Counsel it Was Never Required to Meet and Improperly Applies a Presumption That the Approved Tariff Was Unlawful</u>

In the Revised Report and Order, the Commission finds that Public Counsel did not meet its burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff.[13] This misstates the question before the Commission and improperly assigns a burden of proof to Public Counsel which it never had. This also improperly applies a presumption that approved tariffs are unlawful. Therefore, the Commission's Revised

[12] Exhibit 5.
[13] Revised Report and Order, pg. 35.

Report and Order is unlawful, unjust and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence.

The question before the Commission was: Was the Company authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595?[14] As a complaining party, Public Counsel had the burden to prove that Emerald Pointe was not authorized to collect a commodity charge as a result of Case No. SR-2000-595. As discussed above, the evidence shows Public Counsel met that burden of proof. However, in the discussion of its Decision on the issue, the Commission assigned an entirely different burden of proof to Public Counsel and used that to improperly determine that the approved tariff in SR-2000-595 was not Emerald Pointe's lawful tariff:

> In sum, the Commission finds that Staff and Public Counsel have **failed to meet their burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff**. Hence, Staff and Public Counsel have failed to prove that Emerald Pointe violated its tariff by collecting a sewer commodity charge from its customers.[15] (Emphasis added.)

Instead of finding that Public Counsel did not meet its burden to prove that Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595, the Commission finds that Public Counsel did not meet the burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff. That goes well beyond the actual question presented to the Commission and well beyond the burden Public Counsel was required to meet in this case.

The decision of the Commission also imposes an improper presumption that approved tariff in SR-2000-595 was unlawful. Apparently, Public Counsel did not prove that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff. So,

[14] Revised Report and Order, pg. 23.
[15] Revised Report and Order, pg. 35.

the Commission of 2013 found that the tariff approved in 2000 could not be a lawful tariff and replaced it with another document. Basically, because Public Counsel did not prove that the approved tariff, which did not contain a sewer commodity charge, was lawful, the Commission found that the approved tariff was unlawful and replaced it with another document that did contain a sewer commodity charge. In effect, the Commission presumed the approved tariff was unlawful and placed the burden on Public Counsel to prove that it was lawful. This flies in the face of the well established fact that orders of the Commission are presumed lawful.[16] While this may be a way to invoke a favorable outcome in this particular case, the implications for the myriad of orders that could now arguably be automatically presumed unlawful is staggering. Public Counsel is sure this is not what the Commission intended.

The question before the Commission in this case was not: Was the tariff presented to the Commission for approval in 2000 Emerald Pointe's lawful tariff? But, that is the one the Commission went to great pains to answer. Basically, the Commission found that because Public Counsel did not prove that the approved tariff is lawful the approved tariff should be replaced with another document. The finding by the Commission misstates the question before it and erroneously finds that Public Counsel did not meet a burden that it was never required to meet. It also imposes an improper presumption that the approved tariff in SR-2000-595 was unlawful. Therefore, the Revised Report and Order is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence.

D. Revised Report and Order is Unlawful, Unjust and Unreasonable Because Emerald Pointe Did Not Meet its Burden of Proof That the Approved Tariff Should be Set Aside

[16] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41 (Mo. 1979).

It is clear that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[17] An existing approved tariff is *prima facie* evidence of what rates may be lawfully charged by the utility. Once a *prima facie* case is made through the existence an approved tariff, the burden shifts the utility to prove by clear and convincing evidence that the approved tariff was defective and should be set aside by the Commission. The burden is on those attacking an order of the Commission to prove its invalidity. Emerald Pointe did not meet this burden. Therefore, the Commission's Revised Report and Order is unlawful, unjust and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence.

As stated above, the question before the Commission was: Was the Company authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595?[18] It is clear that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[19] But, in the Revised Report and Order, the Commission concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of $3.50 per 1,000 gallons.[20] The Commission also states:

> In this case, the Commission is faced with two tariff documents that the opposing parties claim to be Emerald's Pointe's lawful sewer tariff. If Emerald Pointe's lawful sewer tariff allows it to collect a usage charge of $3.50 per 1,000 gallons, then the company's collection of that charge from its customers cannot be a violation of its tariff. The tariff that Emerald Pointe contends is its lawful tariff contains such a usage charge. The tariff that Staff and Public Counsel contend is lawful does not.[21]

[17] Exhibit 5.
[18] Revised Report and Order, pg. 23.
[19] Exhibit 5.
[20] Revised Report and Order, pg. 3.
[21] Revised Report and Order, pg. 32.

So, the Commission, deciding between two documents - the approved tariff without a sewer commodity charge and another, unapproved document provided by Emerald Pointe with a sewer commodity charge - chose the unapproved document provided by Emerald Pointe as Emerald Pointe's lawful sewer tariff.

However, an existing approved tariff is *prima facie* evidence of what rates may be lawfully charged by the utility. Per 4 CSR 240-3.010 (28), only a document published by a public utility, ***and approved by the commission***, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services can legally be defined as a tariff. Orders of the Commission, including orders approving tariffs, are presumed lawful and the burden is on those attacking an order to prove its invalidity.[22] In *PSC v. Mo. Gas Energy,* 388 S.W.3d 221, 227 (Mo. Ct. App. 2012), the Court states:

> "The party seeking to set aside the Commission's order has the burden to prove by clear and satisfactory evidence that the order was unlawful or unreasonable. § 386.430." *State ex rel. BPS Tel. Co. v. Mo. Pub. Serv. Comm'n,* 285 S.W.3d 395, 401-02 (Mo. App. 2009); *State ex rel. Laclede Gas Co.*, 328 S.W.3d at 318.

So, the Court is quite clear - those who wish to set aside an approved tariff have the burden of proof to show with clear and convincing evidence that the approved tariff was unlawful or unreasonable.

Public Counsel had the burden to prove that Emerald Pointe was not authorized to collect a sewer commodity charge as a result of Case No. SR-2000-595. Public Counsel met that burden by providing evidence that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[23] Public Counsel had no desire to ask that the Commission set aside the tariff approved in SR-2000-595. Emerald Pointe alone would benefit from setting aside the approved tariff. Therefore, Emerald Pointe had

[22] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.,* 585 S.W.2d 41 (Mo. 1979).
[23] Exhibit 5.

the burden to prove with clear and satisfactory evidence that the approved tariff was unlawful or unreasonable. However, the Revised Report and Order stated:

> In nearly every circumstance, a utility's lawful tariff is the tariff that is filed by the utility and held on file with the Commission. However, that is not true in the unique circumstances under which Emerald Pointe's sewer tariff was created in 2000. …[24]

The Commission cites "unique circumstances" that apparently permitted it to set aside the approved tariff in SR-2000-595 in favor of another document containing a sewer commodity charge. The Commission makes no statement that Emerald Pointe had the burden to prove that the approved tariff was unlawful or unreasonable. Even if the Commission had made such a statement, the evidence in the case does not support a determination that Emerald Pointe met its burden of proof to show with clear and convincing evidence that the approved tariff was unlawful or unreasonable such that it should be set aside.

a. The evidence shows the approved tariff in Case No. SR-2000-595 is lawful

An existing approved tariff is *prima facie* evidence of what rates may be lawfully charged by the utility. The burden is on the party challenging that approved tariff to prove by clear and convincing evidence that the approved tariff was defective and should be set aside by the Commission. The Commission's Revised Report and Order is unlawful, unjust and unreasonable because Emerald Pointe did not meet its burden to prove by clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside by the Commission.

It is a well established fact that orders of the Commission are presumed lawful.[25] Only an approved tariff sets out the lawful rates for a public utility. 4 CSR 240-3.010 (28) states specifically:

[24] Revised Report and Order, pg. 33.
[25] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41 (Mo. 1979).

> Tariff means a document published by a public utility, ***and approved by the commission***, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services. (Emphasis added.)

Therefore, a lawful tariff must be both published by the public utility and approved by the commission. Approval of a proposed tariff requires an affirmative act by the Commission. In the Revised Report and Order for this case, the Commission cites the exact order where the Commission approved the tariff in Case No. SR-2000-595.[26] It is this order which provides evidence that the approved tariff in Case No. SR-2000-595 is lawful.

The tariff that Emerald Pointe contends is its lawful tariff contains a sewer commodity charge, but the approved tariff for Emerald Pointe does not. It is clear that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[27] Emerald Pointe argues it thought it was filing a proposed tariff with a commodity charge, so that is the tariff which should have been approved. However, the Supreme Court has stated that the mere filing of a tariff is not an approval of that tariff by the Commission.[28] Until it is approved, any "tariff" filing is merely a proposed tariff, not an approved tariff. In *PSC v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012), the Court stated quite clearly:

> A tariff is a document which lists a public utility services and the rates for those services.'" *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App. 2006) (quoting *Bauer v. Sw. Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997)). Any validly adopted tariff "has the same force and effect as a statute, and it becomes state law." *State ex rel. Mo. Gas Energy*, 210 S.W.3d at 337.

[26] *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.
[27] Exhibit 5.
[28] *Marty v. Kansas City Light & Power Co.*, 303 Mo. 233 (Mo. 1924) (Citing *Ind. Brewing Co. v. Railway Co.*, 4 Mo. P. S. C. 623).

Tariffs approved by the Commission are binding on both the utility and the customers with the force of law.[29] Emerald Pointe offers no evidence of any other tariff approved by the Commission in Case No. SR-2000-595 and offered no evidence that the approved tariff is unlawful in any way.

A tariff cannot be lawful unless it is approved. Once a proposed tariff is approved by the Commission, it takes on the force and effect of law. It is the act of approval by the Commission which transforms mere words into a lawful tariff. It is unlawful and unreasonable for the Commission to now say that some other document is the lawful tariff of Emerald Pointe for sewer service instead of the tariff approved by the Commission in SR-2000-595. Emerald Pointe did not meet its burden to prove by clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside by the Commission.

b. Emerald Pointe offered no clear and convincing evidence that the sewer tariff that was filed as part of Case No. SR-2000-595 was not the same as the Emerald Pointe's new proposed sewer tariff that Gary Snadon returned to Staff to be filed

The Revised Report and Order includes a Finding of Fact that the sewer tariff that was filed as part of Case No. SR-2000-595 was not the same as the Emerald Pointe's new proposed sewer tariff that Gary Snadon returned to Staff to be filed.[30] Apparently building on this, the Commission makes an unsubstantiated claim that Staff had no authority to file a tariff for Emerald Pointe and its presentation to the Commission of a tariff that was not issued by Emerald Pointe constituted a fraud against Emerald Pointe and the Commission.[31] The Commission provides no reference to the evidence in the case to substantiate this as a fact and makes no

[29] *Missouri P. R. Co. v. Terrell*, 410 S.W.2d 356, 360 (Mo. Ct. App. 1966)
[30] Revised Report and Order, pg. 26.
[31] Revised Report and Order, pg. 34.

mention of the fact that SR-2000-595 was processed under the effective small company rate case procedure approved by the Commission at the time.

Emerald Pointe's arguments seem to be that it was somehow bamboozled into charging the wrong amount. As proof, Mr. Snadon attached to his rebuttal testimony what he claims are the tariff sheets Emerald Pointe was told to implement in the 2000 rate case.[32] But, Emerald Pointe provided no clear and convincing evidence which would cause the Commission to question what occurred in Case No. SR-2000-595. The sewer tariff approved by the Commission in Case No. SR-2000-595[33] matches the tariff sheet contained in the filing letter for that case which was signed by Mr. Snadon on behalf of Emerald Pointe.[34] Emerald Pointe provides no witness testimony beyond the biased testimony of the owner of Emerald Pointe who is facing having to return approximately $350,000 of sewer commodity charges. Emerald Pointe focuses on the actions of Mr. Hubbs to corroborate its story, but does not call Mr. Hubbs as a witness. Any statements about what Mr. Hubbs did or did not do are mere hearsay and not competent and substantial evidence on which the Commission can base its decision in this case.

The only witness who was actually involved in the 2000 case was Mr. Johansen and even he could not provide clear and satisfactory evidence that the approved tariff was unlawful or unreasonable. In fact, Mr. Johansen provided testimony that indicated that the small rate case procedure in place at the time involved several documents and a give-and-take procedure before a final document was actually filed with the Commission.[35]

Therefore, Emerald Pointe did not meet its burden to provide clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

[32] Exhibit 13; Tr. Pg. 229, L. 10-16.
[33] Exhibit 5.
[34] Exhibit 6.
[35] Tr. Pg. 189-193.

c. The evidence shows Emerald Pointe did not even follow what it claims it thought was the lawful tariff

Emerald Pointe seems to argue that it reasonably relied on what it thought was the lawful tariff and therefore the approved tariff should be set aside. However, the evidence shows that not even the document Emerald Pointe claims it believed was the lawful tariff was followed. Emerald Pointe violated even that document by charging incorrect reconnection fees and late fees. Therefore, Emerald Pointe provides no clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

Again, Emerald Pointe's arguments seem to be that it was somehow bamboozled into charging the wrong amount. As proof, Mr. Snadon attached to his rebuttal testimony what he claims are the tariff sheets Emerald Pointe was told to implement in the 2000 rate case.[36] The tariff that Emerald Pointe contends is the lawful tariff contains a sewer commodity charge, but the approved tariff for Emerald Pointe does not. The argument that Emerald Pointe only charged the sewer commodity rate because one was included in what it thought was the lawful tariff might be somewhat compelling - if Emerald Pointe had actually followed it in what it charged the customers.

But as it turns out, the evidence shows that Emerald Pointe didn't follow what it contends is the lawful tariff 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 sheet attached to Mr. Snadon's rebuttal testimony.[37] So really it doesn't matter whether you're looking at the tariffs that were approved[38]

[36] Exhibit 13; Tr. Pg. 229, L. 10-16.
[37] Tr. Pg. 228, L. 3 to Pg. 229, L. 9.
[38] Exhibit 4; Exhibit 5.

or the tariff sheets that Mr. Snadon claims Emerald Pointe was told to follow,[39] Emerald Pointe didn't follow any of them.[40] The evidence shows Emerald Pointe charged customers whatever it liked, no matter what the Commission approved.

Tariffs approved by the Missouri Public Service Commission are binding on both the utility and the customers with the force of law.[41] Emerald Pointe did not provide evidence of reasonable reliance on what it thought was the lawful tariff when the evidence showed it subjected customers to charges above and beyond even that document. 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.[42] Therefore, Emerald Pointe did not meet its burden to provide clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside by the Commission.

d. The evidence shows the approved tariff produced the agreed-upon increase in sewer revenues

The approved tariff in Case No. SR-2000-595 produced exactly the amount of revenue increase that Emerald Pointe requested and agreed to in that case. Emerald Pointe failed to offer any evidence to show that it was harmed in any way by the approved tariff in Case No. SR-2000-595 such that it would be unlawful or unreasonable.

The sewer tariff approved by the Commission in Case No. SR-2000-595[43] matches the tariff sheet contained in the filing letter for that case which was signed by Mr. Snadon on behalf of Emerald Pointe.[44] Attached to that filing letter is an agreement between Emerald Pointe and

[39] Exhibit 13.
[40] Tr. Pg. 230, L. 5-10 & 19-23.
[41] *Missouri P. R. Co. v. Terrell,* 410 S.W.2d 356, 360 (Mo. Ct. App. 1966)
[42] *State ex rel. Barrett v. Boeckeler Lumber Co.*, 301 Mo. 445, 495 (Mo. 1923)
[43] Exhibit 5.
[44] Exhibit 6.

Staff for an increase of $2,500 in sewer rates as the resolution in that case. The resolution of a $2,500 increase in sewer rates is exactly what Emerald Pointe requested. The evidence shows that the approved tariff in Case No. SR-2000-595 was tailored to produce exactly the $2,500 increase Emerald Pointe requested and agreed upon.

This evidence is specifically cited by the Commission in its Revised Report and Order. The Revised Report and Order states that the work papers preserved in Staff's file show that Staff agreed Emerald Pointe should receive an increase in sewer revenues in the amount of $2,500, which is the ten percent increase the company requested.[45] The Revised Report and Order goes on to say that the monthly customer charges incorporated in the approved tariff produced that amount of revenue without including any additional revenue from a sewer commodity charge.[46] An approved tariff that produces exactly the amount of increase that a utility requests and agrees upon is hardly unreasonable.

Emerald Pointe offered no evidence to show that it was somehow harmed by the approved tariff in Case No. SR-2000-595. Emerald Pointe asked for and received approval for an increase of $2,500 in its sewer revenues in Case No. SR-2000-595. The evidence shows that the approved tariff in Case No. SR-2000-595 produced exactly that $2,500 increase in sewer revenues. Therefore, Emerald Pointe did not meet its burden to provide clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

e. The evidence shows that Emerald Pointe had actual notice that the filed, and ultimately approved, tariff did not include a sewer commodity charge

The Commission makes a Finding of Fact stating that at the conclusion of the 2000 sewer rate case, Emerald Pointe began charging its customers the $3.50 per 1,000 gallon sewer

[45] Revised Report and Order, pg. 29.
[46] Revised Report and Order, pg. 29.

commodity charge that was included in the version of the tariff that was provided to Emerald Pointe by Staff and that was signed and returned to Staff by Gary Snadon as Emerald Pointe's tariff.[47] The Commission goes to great lengths to try to find evidence to support Emerald Pointe's position that it only charged the sewer commodity because it was not aware the approved tariff did not contain such a provision. This is unjust and unreasonable because the evidence shows that Emerald Pointe was provided with actual notice that the filed, and ultimately approved, tariff did not include a sewer commodity charge.

The sewer tariff approved by the Commission in Case No. SR-2000-595[48] matches the tariff sheet contained in the filing letter for that case which was signed by Mr. Snadon on behalf of Emerald Pointe.[49] However, the Revised Report and Order makes an unsubstantiated Finding of Fact that the sewer tariff that was filed as part of Case No. SR-2000-595 was not the same as the Emerald Pointe's new proposed sewer tariff that Gary Snadon returned to Staff to be filed.[50] In order to explain why Emerald Pointe apparently did not notice this until almost twelve years later, the Commission focuses on what notice Emerald Pointe did not receive which might have brought this to Emerald Pointe's attention. The Commission does not mention the notice Emerald Pointe did receive.

The Revised Report and Order includes a Finding of Fact that consistent with Staff's practice at the time, a copy of the documents Staff submitted to the Commission's Records Department on March 20, 2000, (which initiated Case No. SR-2000-595) was not mailed to Emerald Pointe.[51] The Revised Report and Order also includes a Finding of Fact stating that there is no evidence that the Commission sent a copy of the Commission approved tariff to

[47] Revised Report and Order, pg. 28.
[48] Exhibit 5.
[49] Exhibit 6.
[50] Revised Report and Order, pg. 26.
[51] Revised Report and Order, pg. 26.

Emerald Pointe and that the evidence showed that Gary Snadon did not receive a copy of the Commission approved sewer tariff from the Commission.[52] However, the Commission does not mention that the evidence shows that Emerald Pointe was provided a copy of the filed, and ultimately approved, tariff which could have been used to verify it was not the same as the proposed sewer tariff that Gary Snadon returned to Staff to be filed.

In the Revised Report and Order, the Commission cites *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.[53] The May 4, 2000, Order Approving Tariff cites two documents on which the Commission relies for its Order:

> On May 1, 2000, Staff filed a memorandum in which it recommended that the Commission approve Emerald Pointe's tariff. Based upon its audit of Emerald Pointe's books and records, an evaluation of the company's depreciation rates and an analysis of the company's capital structure and cost of capital, the Staff concluded that Emerald Pointe could justify an increase of $2,500 (approximately 7.5%) in its annual sewer service operating revenue. On May 2, 2000, the Office of the Public Counsel filed a Statement of Position indicating that it does not oppose the agreement between Staff and Emerald Pointe.

Staff's memorandum attached to the May 1, 2000, Staff Recommendation, specifically speaks to the letter containing the Agreement Regarding Disposition of Small Company Rate Increase Request and proposed tariff filed by Emerald Pointe to initiate Case No. SR-2000-595. A copy of that filing is attached to Staff's memorandum as Schedule E. The proposed tariff shown on Schedule E-5 does not include a provision for the collection of a sewer commodity charge in the amount of $3.50 per 1,000 gallons.

The May 1, 2000, Staff Recommendation, includes a Certificate of Service signed by Keith R. Krueger as Attorney for the Staff of the Public Service Commission which certified that copies of the Staff Recommendation were mailed or hand-delivered to all counsel of record as

[52] Revised Report and Order, pg. 28.
[53] Revised Report and Order, pg. 27.

shown on the attached service list. At the end of the filing is a Service List which indicates that copies of that document were provided to both Public Counsel and Mr. Snadon on behalf of Emerald Pointe. Therefore, the evidence shows that on May 1, 2000, Emerald Pointe was provided a copy of Staff's Recommendation and the attached Schedule E containing the proposed tariff that was ultimately approved by the Commission. Emerald Pointe had the opportunity to review the filing and make an objection that the proposed tariff shown on Schedule E-5 did not include a provision for the collection of a sewer commodity charge in the amount of $3.50 per 1,000 gallons. Emerald Pointe made no such objection and the proposed tariff was approved as filed.

The Commission goes to great lengths to try to find evidence to support Emerald Pointe's position that it charged the sewer commodity charge because it was not aware the approved tariff did not contain such a provision. To accomplish this, the Commission focuses on what notice Emerald Pointe did not receive which might have brought this to Emerald Pointe's attention. This is unjust and unreasonable because the evidence shows that Emerald Pointe was provided with actual notice that the filed, and ultimately approved, tariff did not include a sewer commodity charge. Therefore, Emerald Pointe did not meet its burden to provide clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

f. The evidence shows that both Staff and Public Counsel relied upon the filed, and later approved, tariff when determining their position in Case No. SR-2000-595

The evidence shows that both Staff and Public Counsel based their positions in Case No. SR-2000-595 on the review of a proposed tariff which did not include a provision for the collection of a sewer commodity charge. The Commission based its approval of the proposed

tariff in Case No. SR-2000-595 specifically on its reliance on the positions of Staff and Public Counsel. As a result, Emerald Pointe has not provided clear and convincing evidence that the approved tariff was unlawful or unreasonable.

In the Revised Report and Order, the Commission cites *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000.[54] The May 4, 2000, Order Approving Tariff cites two documents on which the Commission relies for its Order:

> On May 1, 2000, Staff filed a memorandum in which it recommended that the Commission approve Emerald Pointe's tariff. Based upon its audit of Emerald Pointe's books and records, an evaluation of the company's depreciation rates and an analysis of the company's capital structure and cost of capital, the Staff concluded that Emerald Pointe could justify an increase of $2,500 (approximately 7.5%) in its annual sewer service operating revenue. On May 2, 2000, the Office of the Public Counsel filed a Statement of Position indicating that it does not oppose the agreement between Staff and Emerald Pointe.

The May 4, 2000, Order Approving Tariff is therefore based upon both the Staff's recommendation for approval of the proposed tariff and Public Counsel's statement that it did not oppose the proposed tariff.

Staff's memorandum attached to the May 1, 2000, Staff Recommendation, specifically speaks to the letter containing the Agreement Regarding Disposition of Small Company Rate Increase Request and proposed tariff filed by Emerald Pointe to initiate Case No. SR-2000-595. A copy of that filing is attached to Staff's memorandum as Schedule E. The proposed tariff shown on Schedule E-5 does not include a provision for the collection of a sewer commodity charge in the amount of $3.50 per 1,000 gallons. As a result of Staff's review of the Agreement Regarding Disposition of Small Company Rate Increase Request and proposed tariff (Schedule

[54] Revised Report and Order, pg. 27.

E) as set out in its memorandum, Staff requested that the Commission issue an order approving the revised tariff sheet (Schedule E-5), to be effective for service on and after May 10, 2000.

As a result, the evidence shows that Staff based its recommendation on its recommendation specifically on its review of the proposed tariff that did not contain a sewer commodity charge. This provides evidence that Staff believed that the filed, and later approved, tariff as shown in Schedule E-5 was the just and reasonable tariff to be approved by the Commission.

Similarly, in its May 2, 2000, Statement of Position, Public Counsel states:

> COMES NOW the Office of the Public Counsel (Public Counsel) and states to the Commission that it does not oppose the agreement between the Staff of the Public Service Commission and Emerald Pointe Utility Company, as set forth in the Staff's recommendation filed herein, regarding the Company's request for a sewer rate increase pursuant to the Commission's small company rate increase procedure.

Public Counsel's filing specifically provides that its statement of no opposition of the agreement between Staff and Emerald Pointe is based on Staff's recommendation regarding Emerald Pointe's request. As a result, the evidence shows that Public Counsel based its statement of no opposition specifically on its review of both of the filings in the case including Staff's recommendation based on the tariff filed as Schedule E-5 which did not contain a sewer commodity charge. This provides evidence that Public Counsel had no opposition to the filed, and later approved, tariff as a just and reasonable tariff to be approved by the Commission.

Therefore, Emerald Pointe provides no clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

g. No evidence that Emerald Pointe's lack of an attorney in Case No. SR-2000-595 so biased Emerald Pointe as to make the approved tariff in that case unlawful or unreasonable

The evidence shows that Emerald Pointe's lack of an attorney in Case No. SR-2000-595 was voluntary and completely within the Commission's rules. Emerald Pointe offers no evidence to prove that it was somehow biased by a lack of attorney in Case No. SR-2000-595. As a result, Emerald Pointe has not provided clear and convincing evidence that the approved tariff was unlawful or unreasonable.

The Revised Report and Order states: "Emerald Pointe's decision to hire a second attorney to deal with that issue was not inappropriate; particularly given the company's experience in its 2000 rate case when it, in accordance with Commission rules, did not engage the services of a lawyer."[55] By referencing Emerald Pointe's experience in Case No. SR-2000-595, the Commission seems to be making a finding that the experience in 2000 was somehow an unfair and egregious experience. The Commission also seems to be using the fact that Emerald Pointe did not engage an attorney to bolster its finding that Emerald Pointe was authorized to collect a sewer commodity charge as a result of a rate increase tariff filed by the utility in 2000.

It is unjust and unreasonable for the Commission to shift the burden of a proper business decision made over thirteen years ago to the customers. Emerald Pointe offers no evidence to prove that it was somehow biased by a lack of attorney in Case No. SR-2000-595. Emerald Pointe's lack of an attorney in its previous rate case was completely voluntary and as the Commission notes, completely in accordance with Commission rules. Just as it does today, Emerald Pointe had the choice between initializing a general rate case and utilizing the small company rate case procedure. And just as it does today, Emerald Pointe certainly had the opportunity to engage legal advice even when operating under the small company rate case procedure. The current rate case shows that Emerald Pointe has no qualms about engaging multiple sources of legal representation when it deems it beneficial.

[55] Revised Report and Order, pg. 13-14.

Deciding to utilize the small company rate case procedure and accept the risk of not having legal advice is a business decision Emerald Pointe voluntary undertook. It is not fair to place the burden of bearing the cost of that choice on the customers. It is not the Commission's responsibility to protect a utility from its own decisions or to second guess the decisions made by that utility, especially thirteen years after that decision was made and to the sole detriment of the customers. Therefore, Emerald Pointe provides no clear and convincing evidence that the approved tariff was unlawful or unreasonable and should be set aside.

E. The Revised Report and Order is Unlawful, Unjust and Unreasonable Because It is Unlawful, Unjust and Unreasonable and a Violation of Due Process to Retroactively Replace the Approved Tariff in Case No. SR-2000-595 With a Document Containing a Provision for the Collection of a Sewer Commodity Charge

It is clear that Emerald Pointe was not authorized to collect a sewer commodity charge in the tariff approved by the Commission in Case No. SR-2000-595.[56] But, in the Revised Report and Order, the Commission concludes that the complaining parties have failed to meet their burden of proving that Emerald Pointe has overcharged its customers by collecting a sewer commodity charge of $3.50 per 1,000 gallons.[57] The Commission also states:

> In this case, the Commission is faced with two tariff documents that the opposing parties claim to be Emerald's Pointe's lawful sewer tariff. If Emerald Pointe's lawful sewer tariff allows it to collect a usage charge of $3.50 per 1,000 gallons, then the company's collection of that charge from its customers cannot be a violation of its tariff. The tariff that Emerald Pointe contends is its lawful tariff contains such a usage charge. The tariff that Staff and Public Counsel contend is lawful does not.[58]

So, the Commission, deciding between two documents - the approved tariff without a sewer commodity charge and another, unapproved document provided by Emerald Pointe with a

[56] Exhibit 5.
[57] Revised Report and Order, pg. 3.
[58] Revised Report and Order, pg. 32.

sewer commodity charge - chose the unapproved document provided by Emerald Pointe as Emerald Pointe's lawful sewer tariff.

The decision of the Commission is not that the approved tariff in Case No. SR-2000-595 should be replaced as the lawful tariff for rates charged from now on. What the Commission unilaterally finds, thirteen years later, is that not the approved tariff, but some other document, was apparently always the lawful tariff for Emerald Pointe per Case No. SR-2000-595. This means the Commission's decision is replacing the approved tariff in Case No. SR-2000-595 for rates charged in the past.

Even if the Commission believes Emerald Pointe has met its burden that the approved tariff in Case No. SR-2000-595 should be replaced, the Commission cannot retroactively replace an approved tariff with a document the Commission itself added, thirteen years later, to Case No. SR-2000-595. Therefore, the Commission's Revised Report and Order is unlawful, unjust and unreasonable.

a. The approved tariff in Case No. SR-2000-595 has the force of law

In the Revised Report and Order, the Commission finds that "Staff and Public Counsel have failed to meet their burden of proving that the tariff that was presented to the Commission for approval in 2000 was Emerald Pointe's lawful tariff. Hence, Staff and Public Counsel have failed to prove that Emerald Pointe violated its tariff by collecting a sewer commodity charge from its customers."[59] Therefore, the Commission has apparently determined that the tariff that was approved in Case No. SR-2000-595 was not the lawful tariff – some other unapproved document was. This finding by the Commission is unlawful and unreasonable.

[59] Revised Report and Order, pg. 23.

Tariffs approved by the Missouri Public Service Commission are binding on both the utility and the customers with the force of law.[60] Only an approved tariff sets out the lawful rates for a public utility. 4 CSR 240-3.010 (28) states specifically:

> Tariff means a document published by a public utility, ***and approved by the commission***, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services. (Emphasis added)

Therefore, a lawful tariff must be both published by the public utility and approved by the commission. Approval of a proposed tariff requires an affirmative act by the Commission. The Supreme Court has stated that the mere filing of a tariff is not an approval of that tariff by the Commission.[61] Until it is approved, any "tariff" filing is merely a proposed tariff, not an approved tariff. In *PSC v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012), the Court stated quite clearly:

> A tariff is a document which lists a public utility services and the rates for those services.'" *State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. App. 2006) (quoting *Bauer v. Sw. Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. 1997)). Any validly adopted tariff "has the same force and effect as a statute, and it becomes state law." *State ex rel. Mo. Gas Energy*, 210 S.W.3d at 337.

The Commission took no affirmative act to approve the tariff document that Emerald Pointe claims to be its lawful sewer tariff. The document was not presented to the Commission when the rate case was initiated. The Commission did not stamp it as approved, it has no effective date, nor is it published as the approved sewer tariff for Emerald Pointe on the Commission's Electronic Filing and Information System (EFIS). The Commission did not allow the other parties to provide comment on its approval or to even seek suspension of the tariff

[60] *Missouri P. R. Co. v. Terrell*, 410 S.W.2d 356, 360 (Mo. Ct. App. 1966)
[61] *Marty v. Kansas City Light & Power Co.*, 303 Mo. 233 (Mo. 1924) (Citing *Ind. Brewing Co. v. Railway Co.*, 4 Mo. P. S. C. 623).

pending review or appeal. So, there is no evidence that the document provided by Emerald Pointe thirteen years later is the approved and therefore lawful tariff.

A tariff cannot be lawful unless it is approved. Once a proposed tariff is approved by the Commission, it takes on the force and effect of law. It is the act of approval by the Commission which transforms mere words into a lawful tariff. It is unlawful and unreasonable for the Commission to now say that some other document is the lawful tariff of Emerald Pointe for sewer service instead of the tariff approved by the Commission.

b. The Commission's decision to add a document to thirteen year old case is unlawful, unjust, and unreasonable in that it constitutes retroactive ratemaking

As stated above, the Commission has apparently determined, thirteen years later, that the tariff that was approved in Case No. SR-2000-595 was not the lawful tariff – some other unapproved document was. This constitutes retroactive ratemaking, which is prohibited. Therefore, the decision by the Commission is unlawful and unreasonable.

By allowing Emerald Pointe to now replace an approved tariff in a rate case that occurred over thirteen years ago with some other unapproved document, the Commission has engaged in retroactive ratemaking. In *State ex rel. AG Processing*,[62] the Court described the retroactive ratemaking doctrine:

> Section 393.140(11) provides that "[n]o corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedules filed and in effect at the time." "The filed rate doctrine . . . precludes a regulated utility from collecting any rates other than those properly filed with the appropriate regulatory agency." *State ex rel. Associated Natural Gas Co.*, 954 S.W.2d at 531. **"This aspect of the filed rate doctrine constitutes a rule against retroactive ratemaking or retroactive rate alteration."** *Id.* Retroactive ratemaking is defined as "the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate-of-return with the rate

[62] *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 311 S.W.3d 361, 365 (Mo. Ct. App. 2010)

> actually established." *State ex rel. Util. Consumers' Council of Mo.*, 585 S.W.2d at 59. The filed rate doctrine's rule against retroactive ratemaking has an "underlying policy of predictability, meaning that if a utility is bound by the rates which it properly filed with the appropriate regulatory agency, then its customers will know prior to purchase what rates are being charged, and can therefore make economic or business plans or adjustments in response." *State ex rel. Associated Natural Gas Co.*, 954 S.W.2d at 531. In other words, the approved tariffs are to "provide advance notice to customers of prospective charges, allowing the customers to plan accordingly." *Id*. (Emphasis added)

The evidence shows that both Staff and Public Counsel based their positions in Case No. SR-2000-595 on the review of a proposed tariff which did not include a provision for the collection of a sewer commodity charge. The Commission based its approval of the proposed tariff in Case No. SR-2000-595 on the evidence presented at that time and its reliance on the positions of Staff and Public Counsel based on that evidence. There is no evidence that a proposed tariff containing a provision for the collection of a sewer commodity charge was provided to the parties for their review and comment in Case No. SR-2000-595. In effect, the Commission of today is attempting to rewrite the history of a case that occurred thirteen years ago by injecting evidence to the record that did not exist at the time. This action constitutes retroactive ratemaking.

The Commission's decision must be based on competent and substantial evidence. The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's expertise alone. A document containing a provision for the collection of a sewer commodity charge, which the Commission itself has now added to a thirteen year old case, is not competent and substantial evidence on which the Commission can base its decision. Therefore, the Commission decision that the approved tariff in Case No. SR-2000-595 was not the lawful tariff - and that the Emerald Pointe's interjected

document thirteen years later was - is unlawful and unreasonable in that it constitutes retroactive ratemaking.

c. The Commission's decision to add a document to thirteen year old case is unlawful, unjust, and unreasonable in that it is a violation of Due Process

By stating in the Revised Report and Order that Public Counsel failed to prove that Emerald Pointe violated its tariff by collecting a sewer commodity charge from its customers,[63] the Commission has determined that Emerald Pointe's lawful tariff contained a provision for the collection of a sewer commodity charge in the amount of $3.50 per 1,000 gallons. Therefore, the Commission has determined that the approved tariff in Case No. SR-2000-595, which was the same proposed tariff the parties reviewed and based their positions on that time, was not the lawful tariff – some other unapproved document was. This finding by the Commission is unlawful and unreasonable.

The Commission's decision must be based on competent and substantial evidence:

> The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" ***and whether the action is "supported by competent and substantial evidence upon the whole record."*** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law."[64]

The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's expertise alone:

[63] Revised Report and Order, pg. 33.
[64] *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).

> The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. ***But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.***[65]

In the Revised Report and Order for this case, the Commission cites *In the Matter of Emerald Pointe Utility Company's Tariffs Designed for Sewer Rate Increase*, Case No. SR-2000-595, Order Approving Tariff, May 4, 2000. The May 4, 2000, Order Approving Tariff cites two documents on which the Commission relies for its Order:

> On May 1, 2000, Staff filed a memorandum in which it recommended that the Commission approve Emerald Pointe's tariff. Based upon its audit of Emerald Pointe's books and records, an evaluation of the company's depreciation rates and an analysis of the company's capital structure and cost of capital, the Staff concluded that Emerald Pointe could justify an increase of $2,500 (approximately 7.5%) in its annual sewer service operating revenue. On May 2, 2000, the Office of the Public Counsel filed a Statement of Position indicating that it does not oppose the agreement between Staff and Emerald Pointe.

The May 4, 2000, Order Approving Tariff is therefore based upon both the Staff's recommendation for approval of the proposed tariff and Public Counsel's statement that it did not oppose the proposed tariff.

Staff's memorandum attached to the May 1, 2000, Staff Recommendation, specifically speaks to the letter containing the Agreement Regarding Disposition of Small Company Rate Increase Request and proposed tariff filed by Emerald Pointe to initiate Case No. SR-2000-595. A copy of that filing is attached to Staff's memorandum as Schedule E. The proposed tariff shown on Schedule E-5 does not include a provision for the collection of a sewer commodity

[65] *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

charge in the amount of $3.50 per 1,000 gallons. As a result of Staff's review of the Agreement Regarding Disposition of Small Company Rate Increase Request and proposed tariff (Schedule E) as set out in its memorandum, Staff requested that the Commission issue an order approving the revised tariff sheet (Schedule E-5), to be effective for service on and after May 10, 2000.

As a result, the evidence shows that Staff based its recommendation specifically on its review of the proposed tariff which did not contain a sewer commodity charge. This provides evidence that Staff believed that the filed, and later approved, tariff as shown in Schedule E-5 was the just and reasonable tariff to be approved by the Commission.

Similarly, in its May 2, 2000, Statement of Position, Public Counsel states:

> COMES NOW the Office of the Public Counsel (Public Counsel) and states to the Commission that it does not oppose the agreement between the Staff of the Public Service Commission and Emerald Pointe Utility Company, as set forth in the Staff's recommendation filed herein, regarding the Company's request for a sewer rate increase pursuant to the Commission's small company rate increase procedure.

Public Counsel's filing specifically provides that its statement of no opposition of the agreement between Staff and Emerald Pointe is based on Staff's recommendation regarding Emerald Pointe's request. As a result, the evidence shows that Public Counsel based its statement of no opposition specifically on its review of both of the filings in the case including Staff's recommendation based on the proposed tariff filed as Schedule E-5 which did not contain a sewer commodity charge. This provides evidence that Public Counsel had no opposition to the filed, and later approved, tariff as a just and reasonable tariff to be approved by the Commission.

The evidence shows that both Staff and Public Counsel based their positions in Case No. SR-2000-595 on the review of a proposed tariff which did not include a provision for the collection of a sewer commodity charge. The Commission based its approval of the proposed tariff in Case No. SR-2000-595 on the evidence it was presented and its reliance on the positions

of Staff and Public Counsel based on that evidence. There is no evidence that a proposed tariff containing a provision for the collection of a sewer commodity charge was provided to the parties for their review and comment in Case No. SR-2000-595. In effect, the Commission of today is attempting to rewrite the procedural history of a case that occurred thirteen years ago by injecting evidence into the record which did not exist at the time. This action violates Public Counsel's due process rights under the Fourteenth Amendment, U.S. Constitution and Mo. Const. Art. I, Sec. 10.

The Commission's decision must be based on competent and substantial evidence. The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's expertise alone. A document containing a provision for the collection of a sewer commodity charge, which the Commission itself has now added to a thirteen year old case, is not competent and substantial evidence on which the Commission can base its decision. Therefore, the Commission decision that the approved tariff in Case No. SR-2000-595 was not the lawful tariff, and that the Commission's own interjected document was, is unlawful and unreasonable in that it violated Public Counsel's Due Process rights.

d. Revised Report and Order is discriminatory and as such is unlawful, unjust and unreasonable

The U.S. Supreme Court has also mandated that the Commission must balance the interests of the utility and the consumer in the decisions it makes.[66] Therefore, a Report and Order which is blatantly decided to favor the utility's interest over the consumer's interest is unlawful, unjust and unreasonable. A part of that balancing act is to ensure that the decisions of the Commission are not discriminatory and that all regulated utilities and their customers are

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

provided with equal protection. As a result, customers of small water and sewer utilities must be provided with the same protections as customers of large water and sewer utilities.

The Revised Report and Order goes to great lengths to try to state that the reason for the decision of the Commission in this case is the "unique circumstances" involving the rate case thirteen years ago.[67] But, the result of the Revised Report and Order is that customers of Emerald Pointe will not enjoy the same protection that other utility customers in Missouri enjoy.

In its haste to protect Emerald Pointe from an unsubstantiated harm, the Commission has instead dealt an actual harm to Emerald Pointe's customers. An existing approved tariff is *prima facie* evidence to the customers of what rates may be lawfully charged by the utility – except for the customers of Emerald Pointe. Per 4 CSR 240-3.010 (28), only a document published by a public utility, ***and approved by the commission***, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services can legally be defined as a tariff – except for Emerald Pointe. Orders of the Commission, including orders approving tariffs, are presumed lawful and the burden is on those attacking an order to prove its invalidity – except for Emerald Pointe.

There is no evidence that Emerald Pointe's customers do not deserve the same treatment and protection as the customers of other utilities. It is unreasonable for the Commission to state that in this particular case, the utility should be propped up at the expense of the rights all other customers enjoy. The fact that a utility has a small number of customers does not transform those customers into some sub-class where the right to just and reasonable charges is abrogated. Neither is the mere unsubstantiated threat of bankruptcy.

Customers of Emerald Pointe should not have to pick up the tab for the utility's inability to verify what tariff has been approved by the Commission. It is the utility's responsibility to be

[67] Revised Report and Order, pg. 33.

aware of what tariff has been approved for use by the utility and to act according to that approved tariff. Small utilities like Emerald Pointe already have a special rate case procedure which provides a quicker and cheaper mechanism for rate review while still providing protection for both the utility and the customers. It is unjust and unreasonable to single out the actions of Emerald Pointe as needing special protection by the Commission at the expense of the customers.

All decisions of the Commission must balance the needs of the utility and the needs of the customer. Customers of small water and sewer utilities must be provided with the same protections as customers of large water and sewer utilities. A process that provides only protection for the utility at the expense to the customer of the rights offered to other utility customers is discriminatory and unreasonable. Therefore the Revised Report and Order is unlawful, unjust and unreasonable.

e. Revised Report and Order is harmful to all Missouri utility customers and as such is unlawful, unjust and unreasonable

There is no doubt that the Revised Report and Order benefits Emerald Pointe. However, this benefit comes at a very high price to all Missouri regulated utility consumers. It is unlawful, unjust and unreasonable for the Commission to put all Missouri regulated utility consumers at risk.

Decisions by the Commission may not have the force of *stare decisis*, but the precedential force of these decisions is undeniable. While the Commission may try to say that its decision is for this case alone, the precedent set by the Commission is a slippery slope upon which the lawful effect of all tariffs approved by the Commission may be questioned. This Revised Report and Order means that approved tariffs will no longer be the final proof of what

rules a regulated utility must follow or what rates a regulated utility must charge. A tariff cannot have the force and effect of law if even once the Commission undermines the effect of an approved tariff.

Customers rely on the approved tariffs as protection against unapproved charges by the utility. If there is some precedent that an approved tariff has been ignored by the Commission in favor of some other charges, the customer has no protection whatsoever through an approved tariff. Once the Commission has abridged the sanctity of an approved tariff even in one single case, the tariffs approved by the Commission can no longer be reasonably relied upon as a legal requirement. Tariffs would no longer hold the force of law but would be mere guidelines subject to future interpretation of validity. Actions by the Commission could no longer be considered final, thus potentially eliminating the appeal process.

Basically, because Public Counsel did not prove that the approved tariff, which did not contain a sewer commodity charge, was lawful, the Commission found that the approved tariff was unlawful and replaced it with another document that did contain a sewer commodity charge. In effect, the Commission presumed the approved tariff was unlawful and placed the burden on Public Counsel to prove that it was lawful. This flies in the face of the well established fact that orders of the Commission are presumed lawful.[68] While this may be a way to invoke a favorable outcome in this particular case, the implications for the myriad of orders that could now arguably be automatically presumed unlawful is staggering.

The decision in this case puts into question several other tariffs that were approved under the small company rate case procedures in place during the 2000 rate case. The Commission makes an unsubstantiated claim that Staff had no authority to file a tariff for Emerald Pointe and its presentation to the Commission of a tariff that was not issued by Emerald Pointe constituted a

[68] *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41 (Mo. 1979).

fraud against Emerald Pointe and the Commission.[69] The Commission makes no mention of the fact that SR-2000-595 was processed under the effective small company rate case procedure approved by the Commission at the time. The very same procedure was used in several small company rate cases, many of which have tariffs approved under this procedure still in effect today. If the actions of Staff constituted a fraud against Emerald Pointe, then several other existing tariffs are equally as suspect. It is unreasonable for the Commission to think that it can choose a single tariff to invalidate on procedural grounds without calling into question all tariffs approved under that same procedure.

While there is much in this Revised Report and Order to the benefit of all regulated utilities in Missouri, there is little to the benefit of the consumers. Customers can no longer rely on the approved tariffs as protection against unapproved charges by the utility. If the filings can be second guessed by a future commission, there is no order or approval that customers can rely on as final. Under the current case law finding that an approved tariff has the force and effect of law, a regulated utility has a strong incentive to ensure that it is aware of the contents of the approved tariff and that it is acting according to that approved tariff. This Revised Report and Order would all but eliminate that incentive because now the utility would be able to point to other unapproved documents and argue that this is what it believed it should follow instead of the approved tariff.

It is harmful to all Missouri utility customers for the Commission to think that it can pick and choose which tariffs are to be followed to the letter and which may be subject to a future finding that other undocumented charges may actually be lawful instead. Decisions by the Commission on specific cases do not occur in a vacuum. The effects of these decisions are routinely felt throughout other cases which come before the Commission. Fundamental fairness

[69] Revised Report and Order, pg. 34.

dictates that how one utility is treated by the Commission affects how all other utilities expect to be treated. If one utility is allowed to not follow its approved tariff, you can be sure that other utilities will expect the same treatment.

The effect of this Revised Report and Order is to weaken Public Service Commission oversight of what rates are deemed to be just and reasonable. This will certainly cause great harm to the customers of regulated utilities in Missouri. Because the actual harm to all Missouri regulated utility customers outweighs the unsubstantiated harm to Emerald Pointe, the Revised Report and Order is unjust and unreasonable.

F. The Revised Report and Order is Unlawful, Unjust and Unreasonable Because Determination that Sewer Commodity Charge Sub-issues were Irrelevant is Unlawful, Unjust, Arbitrary and Capricious

Other sub-issues related to the sewer commodity charge issue were brought before the Commission for decision. The issues were: If the company is required to return to customers amounts collected through a sewer commodity charge: (1) What is the appropriate time period over which the amounts due to customers should be calculated?; (2) What, if any, interest should be applied to the amounts to be returned?; and (3) If an over collection occurred, over what period of time should those amounts be redistributed to customers?

The Commission determined Emerald Pointe should not be required to refund money collected through a sewer commodity charge to its customers.[70] Relying on this determination by the Commission the Revised Report and Order went on to say:

> These three sub-issues are moot as the Commission has found that the complainants have not met their burden of proving that Emerald Pointe' has violated its lawful tariff.[71]

[70] Revised Report and Order, pg. 34.
[71] Revised Report and Order, pg. 35.

These sub-issues were not taken up by the Commission and no findings of fact or conclusions of law were provided in the Revised Report and Order.

However, as argued above, the evidence shows that the decision by the Commission that Emerald Pointe's lawful tariff contained a provision for the collection of a sewer commodity charge in the amount of $3.50 per 1,000 gallons is unlawful, unjust, arbitrary and capricious because it constitutes retroactive ratemaking and violates due process. Therefore, the Commission's decision that the three sub-issues were irrelevant and moot due was also unlawful, unjust, arbitrary and capricious.

Late Fee/Reconnect Fee Overcharges

A. Introduction

The Commission's Revised Report and Order is unlawful, unjust and unreasonable because it was not based on substantial and competent evidence in the record as a whole and does not balance the interests of Emerald Pointe and the customer.

The Commission's decision must be based on competent and substantial evidence:

> The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" ***and whether the action is "supported by competent and substantial evidence upon the whole record."*** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law."[72]

[72] *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).

The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's own witnesses or expertise:

> The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. ***But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.***[73]

The U.S. Supreme Court has also mandated that the Commission must balance the interests of the utility and the consumer in the decisions it makes.[74] Therefore, a Report and Order which is blatantly decided to favor the utility's interest over the consumer's interest is unlawful, unjust and unreasonable.

B. The Revised Report and Order is Unlawful, Unjust and Unreasonable Because it is Not Based Substantial And Competent Evidence in the Record as a Whole and does not Balance the Interests of Emerald Pointe and the Customer

The issue before the Commission was should interest be applied to the refund of late fee and reconnect fee overcharges. The evidence showed that Emerald Pointe overcharged for late fees and reconnection fees in violation of its approved tariffs.[75] In direct, Staff estimated $5,803 in overcharged late fees and a total of $280 of overcharged reconnection fees which need to be refunded.[76]

In the Revised Report and Order, the Commission stated:

---

[73] *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).
[74] *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944).
[75] Exhibit 4; Exhibit 5.
[76] Exhibit 2.

> There is no provision in Emerald Pointe's tariff that would require the company to pay interest to customers in connection with refunds of overcharges for late fees and reconnection fees. Neither is there any statutory or regulatory provision that would authorize the Commission to require Emerald Pointe to pay interest to its customers in that circumstance.[77]

However, the Revised Report and Order is incorrect that the Commission has no authorization to require Emerald Pointe to pay interest to its customers in this circumstance. While there may be no specific rule that requires the payment of interest due to a violation of an approved tariff, the Commission certainly has the discretion to do so in order to balance the interests of the utility and the customer.

The evidence shows that 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 evidence also shows that even though the approved 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.[78] The evidence shows that 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.[79] The evidence shows that 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

[77] Revised Report and Order, pg. 37.
[78] Exhibit 8.
[79] 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

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.[80]

It is just and reasonable for the Commission to determine, in order to balance Emerald Pointe's violation of an approved tariff that the customers should be made completely whole from overcharges. It is certainly within the discretion of the Commission to order that a reasonable amount of interest be added to the refund of late fee and reconnect fee overcharges collected in violation of an approved tariff. The Commission's failure to do so violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

Rate Increase Request

A. Introduction

Customers are facing an increase that exceeds 300% from the rates they currently pay.[81] So, it is important that customers get every reasonable benefit to minimize the necessary rate increase. The Commission's Revised Report and Order is unlawful, unjust and unreasonable because it was not based on substantial and competent evidence in the record as a whole and does not balance the interests of Emerald Pointe and the customer.

B. The Revised Report and Order is Unlawful, Unjust and Unreasonable Because it is Not Based Substantial And Competent Evidence in the Record As A Whole and does not Balance the Interests of Emerald Pointe and the Customer

The Commission's decision must be based on competent and substantial evidence:

[80] *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).
[81] Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Pg. 140, L. 13-16.

> The provision for circuit court review of orders of the Public Service Commission is found in section 386.510 (all references are to RSMo 1959 unless otherwise noted) which provides that such review shall be for the "purpose of having the reasonableness or lawfulness" of the administrative action determined. This statutory provision is broadened by the application of the provisions of the V.A.M.S., Missouri Constitution, Article 5, Section 22, setting forth the scope of review of administrative action pursuant to a hearing required by law. This constitutional provision provides for review both as to whether such action is "authorized by law" ***and whether the action is "supported by competent and substantial evidence upon the whole record."*** Thus, the duty incumbent upon the reviewing circuit court is dual in nature, at least to the extent that a determination of competent and substantial evidence is a determination of a separate question as contrasted with the phrase "authorized by law."[82]

The evidence that the Commission admits and makes the basis of its decision must have probative value and cannot be based on the Commission's own witnesses or expertise:

> The reviewing court is often faced with the question what lack of evidence can be supplied by the expertise of the Commission. No clear line can be drawn from the cases. We go to considerable lengths to give deference to the expertise of the Commission. Furthermore, we acknowledge the restrictive scope of judicial review, which accords to the Commission's orders every presumption of correctness and places a heavy onus upon its challengers to demonstrate its error. ***But if judicial review is to have any meaning, it is a minimum requirement that the evidence, along with the explanation thereof by the witnesses and by the Commission itself, make sense to the reviewing court. We may not approve an order on faith in the Commission's expertise.***[83]

The U.S. Supreme Court has also mandated that when determining whether proposed rates are just and reasonable, the Commission must balance the interests of the utility and the consumer.[84] Therefore, a Report and Order which is not based on competent and substantial evidence or which is blatantly decided to favor the utility's interest over the consumer's interest is unlawful, unjust and unreasonable.

a. Rate Case Expense is not Just and Reasonable

---

[82] *State ex rel. Centropolis Transfer Co. v. Public Service Com.*, 472 S.W.2d 24, 25-26 (Mo. Ct. App. 1971) (Emphasis added; citations omitted).
[83] *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).
[84] *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944).

The issue before the Commission was to determine the appropriate expenses to be included as rate expense in this case. The evidence shows there was no disagreement between the parties that the amount of rate case expense proposed by Staff in its Revised Accounting Schedules,[85] based on a five-year normalization, is reasonable. Also, there was no disagreement that an update of reasonable rate case expense may be appropriate. The issue before the Commission was how much that amount should be updated.

In the Revised Report and Order, the Commission determined June 15, 2013 as the cut-off date for the inclusion of rate case expense in this case.[86] In the Revised Report and Order, the Commission also determined that the entire cost for two attorneys was just and reasonable to be added to rates:

> Public Counsel challenged the reasonableness and necessity of Emerald Pointe's use of two attorneys to present its case to the Commission. Since this argument was not raised until after the evidentiary hearing, there is no evidence for the Commission to consider. As a result, the Commission must decide this matter based on its own observation of the conduct of the attorneys at the hearing.
>
> Both Mr. Cooper and Mr. O'Flaherty represented their client in a competent and professional matter. Contrary to Public Counsel's assertion, their efforts were not duplicative. Mr. O'Flaherty took the lead on the issue regarding a possible refund of $500,000 in alleged overcharges and interest relating to the company's collection of a sewer commodity charge. Obviously, that was a substantial issue with possible profound impact on the future of the company. Emerald Pointe's decision to hire a second attorney to deal with that issue was not inappropriate; particularly given the company's experience in its 2000 rate case when it, in accordance with Commission rules, did not engage the services of a lawyer. Emerald Pointe may recover costs incurred to hire Mr. O'Flaherty along with its other reasonably incurred rate case expense.[87]

As the Revised Report and Order stated, many of Emerald Pointe's rate case expenses were not incurred until the hearing.[88] On the day of the hearing, Emerald Pointe determined that

[85] Exhibit 9; Exhibit 10.
[86] Revised Report and Order, pg. 13.
[87] Revised Report and Order, pg. 13-14.
[88] Revised Report and Order, pg. 12.

having one attorney was not good enough so it brought in a second attorney.[89] As a result, each issue cost the rate payers significantly more just so Emerald Pointe could have two attorneys in the evidentiary hearing. Emerald Pointe benefitted from this but the customers did not.

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. Both attorneys sat side by side in the court room - both charging for their services even when not addressing the particular issue at hand. It wasn't like one went off the clock when their specific issue was not being litigated. As a result, two (well paid) attorneys were charging the rate payers by the hour for each and every issue no matter whether they were actively engaging in the evidentiary hearing or merely sitting idly by. But, 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 for all the issues taken to hearing; Mr. Cooper was. As duplicative services, the costs of Mr. O'Flaherty are not just and reasonable to be included as rate case expense.

Only reasonable rate case expense should be included in this case. However, the costs of Mr. O'Flaherty are not just and reasonable and unfairly benefit Emerald Pointe at the expense of customers. As a result, the Commission's decision is not just and reasonable and violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

b. Capital Structure is not Just and Reasonable

[89] Tr. Pg. 260, L. 17-20.

The issue before the Commission was should the capital structure of Emerald Pointe 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 evidence showed that the actual capital structure of Emerald Pointe's regulated utilities is known. The evidence shows the sewer operation has all the debt, $1,000,066,000, while the water utility has none.[90] As the Revised Report and Order states, some water customers are not sewer customers.[91] Customers that are not sewer customers gain no benefit from subsidizing the debt of sewer customers. Therefore, a combined capital structure does not provide just and reasonable rates for all of Emerald Pointe's customers.

The Commission must ensure that rates are just and reasonable and are based on the actual situation of each utility it regulates. A combined capital structure benefits Emerald Pointe but does not provide just and reasonable rates for all of Emerald Pointe's customers. As a result, the Commission's decision is not just and reasonable and violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

c. Rate of Return/Return on Equity is not Just and Reasonable

The decision before the Commission was what is the appropriate cost of equity for the Company and what is the appropriate methodology for estimating small water and sewer companies' rates of return? In the Revised Report and Order the Commission stated:

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

[90] Tr. Pg. 268, L. 12-23; Tr. Pg. 276, L. 14-15.
[91] Revised Report and Order, pg. 15.

> equity associated with an investment in Emerald Pointe's owner since it is almost entirely based on the owner's ability to obtain a loan for the company through his personal guarantee and pledge of his personal property as collateral. The Commission accepts the 13.26 percent return on equity proposed by Staff.[92]

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 U.S. Supreme Court in the *Bluefield* and *Hope*[93] 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,[94] the Commission must still ensure that these factors are taken into account when deciding a reasonable return on equity.

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.[95] The evidence also 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.[96] Therefore, the evidence shows that a reasonable cost of equity for each utility is 9.35% based on

[92] Revised Report and Order, pg. 18-19.
[93] *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).
[94] Exhibit 24.
[95] Exhibit 23.
[96] Exhibit 22; Exhibit 23; Exhibit 24.

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. Since the actual cost of equity can be calculated, it is reasonable to utilize that in setting rates.

In the Revised Report and Order, the Commission states that compared to using **actual interest rates associated with loans obtained by Emerald Pointe**, Staff's use of rates associated with public utility bonds is a reasonable means to determine the appropriate return on equity for Emerald Pointe.[97] This is unreasonable because actual data is far more reasonable than the convoluted methodology Staff uses to estimate a small company's cost of equity based on a non-existent market valuation.[98] Staff's belief that since the Emerald Pointe does not have actively traded debt, Staff must develop an estimate of its credit rating and then apply an appropriate bond yield for debt based on that estimated credit rating is not reasonable.[99] Whether or not the debt is actively traded has no bearing on the ultimate cost of the debt to the utility.[100] The evidence shows Staff's methodology is not even tested for prudence. Mr. Marevangepo testified that Staff utilizes that methodology for small systems and whatever number comes out is Staff's recommendation.[101] 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.[102] That is hardly a reasonable methodology for setting just and reasonable rates.

[97] Revised Report and Order, pg. 18.
[98] Exhibit 24.
[99] Exhibit 23; Exhibit 24.
[100] Exhibit 23.
[101] Tr. Pg. 309, L. 13-16.
[102] Tr. Pg. 309, L. 17 through Pg. 311, L. 3.

The Commission must ensure that rates are just and reasonable and are based on the actual situation of each utility it regulates. The evidence shows that the 13.26 percent return on equity proposed by Staff is not as reasonable as the 9.35 percent return on equity proposed by Public Counsel. An excessive return on equity benefits Emerald Pointe to the detriment of the customers. As a result, the Commission's decision is not just and reasonable and violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

d. CIAC Reserve – Customer Fees is not Just and Reasonable

The Commission was asked to determine the appropriate amount of contribution in aid of construction (CIAC) reserve to book for customer fees.

As the Revised Report and Order stated:

> The money in question came from Emerald Pointe's collection of a $400 fee for each new water customer collection. The fee is intended to cover materials and installation costs related to the new connection. For several years before 2011, Emerald Pointe only included the costs of meters or labor costs incurred to install meters in the plant accounts and not any of the other connection costs.[103]

The evidence showed that ratepayers paid $17,579 of miscellaneous revenue CIAC based on this $400 new water customer fee charged to the utility's customers.[104] The 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.[105]

The Revised Report and Order stated that rather than treating the $17,579 as CIAC, Staff accounted for it as one-time miscellaneous revenues that were not included in the company's

[103] Revised Report and Order, pg. 19-20.
[104] Exhibit 23; Exhibit 26; Tr. Pg. 323, L. 15-21.
[105] Tr. Pg. 322, L. 17-24.

ongoing expenses for ratemaking purposes.[106] But, the evidence shows that this did not actually occur. Staff's work papers do not reflect that any of the $17,579 was included as miscellaneous revenue.[107] 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.[108] 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.[109] As a result, none of the $17,579 paid by customers was actually included in Staff's calculation of miscellaneous revenues.[110]

The Commission must ensure that rates are just and reasonable and are based on the actual situation of each utility it regulates. 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. Not including the $17,579 of miscellaneous revenue CIAC based on the $400 new water customer fee charged to the utility's customers benefits Emerald Pointe to the detriment of the customers. As a result, the Commission's decision is not just and reasonable and violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

e. Plant-Related Balance Update Period is not Just and Reasonable

The Commission was asked to determine the period through which plant-related balance should be updated. The Revised Report and Order states:

[106] Revised Report and Order, pg. 20.
[107] Exhibit 10; Exhibit 23.
[108] Exhibit 26.
[109] Exhibit 26.
[110] Exhibit 10; Exhibit 23; Exhibit 26; Tr. Pg. 319, L. 19 through Pg. 320, L. 7.

> For purposes of setting rates in this case, Staff has updated Emerald Pointe's general revenues and expenses through February 28, 2013. In order to adhere to the matching principle and to avoid engaging in single-issue ratemaking, some date must be chosen at which costs and revenues will be measured. Staff has utilized a reasonable date and Public Counsel's proposal to update only certain costs after that date is rejected.[111]

The Commission must balance the interests of the utility and the consumer. Customers are facing an increase that exceeds 300% from the rates they currently pay.[112] 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. In the Revised Report and Order, the Commission determined June 15, 2013 as the cut-off date for the inclusion of rate case expense in this case and determined that the cost of two attorneys should be included in rates.[113] There is no doubt that including an updated rate case expense is to the benefit of Emerald Pointe. However, the Commission's decision does not include a similar update that might benefit the customers.

Plant additions, plant requirements and plant depreciation affect rates.[114] Updates in plant depreciation to the end of the case would certainly provide a benefit to customers.[115] However, the evidence shows that the 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.[116] In addition, the evidence shows 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

[111] Revised Report and Order, pg. 22-23.
[112] Tr. Pg. 92, L. 24 through Pg. 93, L. 6; Pg. 140, L. 13-16.
[113] Revised Report and Order, pg. 13-14.
[114] Tr. Pg. 328, L. 10-13.
[115] Tr. Pg. 238, L. 18 through Pg. 239, L. 10.
[116] Exhibit 23.

because of the utility's unapproved billing practices and extremely poor accounting and records maintenance.[117] 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.[118] Since Staff revised its Accounting Schedules[119] 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.[120]

The customers should get the benefit of updated plant-related balances. The Commission's decision to update rate case expense to near the end of the case is beneficial to Emerald Pointe. However, the Commission's decision refused to include a similar update that might benefit the customers. As a result, the Commission's decision is not just and reasonable and violates the U.S. Supreme Court's mandate that the Commission must balance the interests of the utility and the consumer in the decisions that it makes. Therefore, the Revised Report and Order is unlawful, unjust and unreasonable.

Conclusion

Public Counsel's Application for Rehearing should be granted because the decision is unlawful, unjust, and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record, is retroactive ratemaking, is in violation of constitutional provisions of Due Process, is unauthorized by law and constitutes an abuse of discretion.

II. Request for Stay Order Pending Appeal, or in the Alternative, Order for

[117] Exhibit 23; Exhibit 25; Exhibit 26; Tr. Pg. 323, L. 22 through Pg. 325, L. 2.
[118] Exhibit 23.
[119] Exhibit 9; Exhibit 10.
[120] Exhibit 23.

Company to Record Rate Increase in Separate Fund Subject to Refund

Public Counsel further requests that the Commission issue a Stay Order while the Commission is considering the application for rehearing and extend that stay of the effectiveness of its Revised Report and Order during the appeal process.

In the alternative, Public Counsel asks the Commission to issue an Order to Emerald Pointe directing it to record the rate increase as a result of this Revised Report and Order in a separate fund and make any monies collected and any interest earned on those monies subject to refund.

WHEREFORE, Public Counsel respectfully requests that the Commission grant its application for rehearing and issue a stay order pending a ruling on the rehearing application and during the appeal, or in the alternative, issue an order for Emerald Pointe to record the rate increase and/or any back-billing of a sewer commodity charge in a separate fund subject to refund.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Christina L. Baker

By:_____

Christina L. Baker (#58303)
Deputy Public Counsel
P O Box 2230
Jefferson City, MO 65102
(573) 751-5565
(573) 751-5562 FAX
christina.baker@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the following this 23rd day of October 2013:

General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounselservice@psc.mo.gov

Kevin Thompson
General Counsel Office
Missouri Public Service Commission
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Kevin.Thompson@psc.mo.gov

Dean Cooper
Emerald Pointe Utility Company
P.O. Box 456
312 East Capitol
Jefferson City MO 65102
dcooper@brydonlaw.com

/s/ Christina L. Baker