



October 23, 2008, effective November 2, 2008, which “...(1) concludes that the Applicants have met their burden of proof of demonstrating that the proposed transfer of assets is not detrimental to the public interest; (2) approves and authorizes the requested transfer of assets, subject to certain conditions; (3) to the extent required by law, authorizes the transfer of stock along with the transfer of assets; (4) establishes a cost structure for determination of interim rates and approves those rates; (4) declares void all security interests executed on the assets of Stoddard County that lack Commission approval; and, (5) directs additional filings to be made by Stoddard County and R. D. Sewer.”<sup>2</sup>

B. Exceeded Its Jurisdiction By Failing To Join A Necessary Party

The Missouri Public Service Commission Report and Order is unlawful because the Commission exceeded its jurisdiction by failing to join a necessary party. Since Commission approval was not received for the transfer of all of the stock of Stoddard County Sewer Company, Inc. (Stoddard County) from Ms. Bien to R.D. Sewer Co., L.L.C. (R.D. Sewer), the transfer was in violation of Section 393.190.2 and is void per Section 393.190.3. Mrs. Bien was a necessary party due to the fact that Mrs. Bien is the owner of the stock in Stoddard County.

Section 393.190.2 has a requirement for Commission approval of the transfer of stock. According to Section 393.190.3, a transfer of stock in violation of any provision of that chapter shall be void and of no effect. As Mrs. Bien’s transfer of all of the stock of Stoddard County was not to a “sewer corporation,” Commission approval was required per Section 393.190.2. Even though R.D Sewer is classified as a limited liability corporation,<sup>3</sup> R.D. Sewer was formed specifically to take the stock of Stoddard County<sup>4</sup> and in fact, claims to own all of the stock of

---

<sup>2</sup> Report and Order, pg. 4

<sup>3</sup> Report and Order, pg. 19

<sup>4</sup> Tr. 154 L. 25; Tr. 155 L. 1-2

Stoddard County.<sup>5</sup> However, Commission approval was not received for the transfer of all of the stock of Stoddard County from Mrs. Bien to R.D. Sewer.<sup>6</sup> Therefore, the transfer was in violation of Section 393.190.2 and is void per Section 393.190.3.

Legally, Mrs. Bien is the owner of the stock in Stoddard County and as such, she is a necessary party in any application regarding the transfer of Stoddard County's assets. However, Mrs. Bien was not a party to this case. Therefore, the Report and Order is unlawful because the Commission exceeded its jurisdiction by issuing its Report and Order concerning the transfer of assets without joinder of the owner of the company stock, a necessary party.

C. Deprived Public Counsel Of A Fair And Unbiased Tribunal And Violated Public Counsel's Due Process Rights

The Commission's admission and consideration of the testimony, and the reports or exhibits prepared or assembled in connection with that testimony, its own fact-witnesses, Smith & Co. Engineers, Mr. Rodger Williams, P.E., The Bonadio Group and Randall R. Shepard, CPA, was unlawful, unjust and unreasonable because it deprived Public Counsel of a fair and unbiased tribunal and violated Public Counsel's due process rights under the Fourteenth Amendment, U.S. Constitution and Mo. Const. Art. I, Sec. 10, in that the Commission hired, submitted, considered and relied upon this evidence and acted as a party rather than a neutral adjudicator.

The Commission's interest in a case brought before it is two-fold: (1) the Commission is the statutory fact-finding body and the adjudicator of disputes regarding a public utility; and (2) the Commission has a statutory duty to safeguard the public interest by ensuring that public utilities provide safe and adequate service to all customers.<sup>7</sup>

---

<sup>5</sup> Report and Order, pg. 19

<sup>6</sup> Tr. 155 L. 3-6

<sup>7</sup> *Lollar v. Ameren UE*, 2004 Mo. PSC LEXIS 1264.

When the Commission determines facts from disparate evidence and applies the law to come to a decision in a particular controversy, it acts as an adjudicator and so exercises quasi-judicial power.<sup>8</sup> Officials who occupy quasi-judicial positions, such as the Commissioners, are held to the same high standards as apply to judicial officers by insisting that such officials be free of any interest in the matter to be considered by them.<sup>9</sup>

A reasonable person not connected with the case, reviewing this case file or viewing the evidentiary hearing could question whether the Commission appeared as a party litigant or was an impartial tribunal. The Commission acted like a party by hiring “expert witnesses” separate and different from the witnesses that the parties offered to testify in the case. Also, the Commission acted like a party when it called and sponsored these witnesses to testify, not on behalf of the parties, but as the Commission’s own witnesses. The Commission stated that because the Staff of the Missouri Public Service Commission (Staff) joined with Stoddard County and R.D. Sewer as an applicant, the Commission retained outside experts to provide a neutral analysis of Stoddard County’s financial condition and the physical condition of its sewer facilities.<sup>10</sup> Staff is a party to every case that comes before the Commission and is often an applicant in those cases. The Commission made no statement as to why, all of a sudden, it deviated from its long standing practice of viewing the Staff as the party it could look to in order to provide a neutral analysis as it has done numerous times before and continues to do today. The Commission also stated that it required this neutral analysis in order to render a decision regarding the Applicants’ request for approval of the transfer of assets and approval of the

---

<sup>8</sup> *State of Missouri ex rel. Gulf Transport Company v. Public Service Commission, et al.*, 658 S.W.2d 448, 465 (Mo. App. 1983).

<sup>9</sup> *Union Electric Company, et al. v. Public Service Commission of the State of Missouri and Commissioner Alberta Slavin*, 591 S.W.2d 134, 137 (Mo. App. 1983).

<sup>10</sup> Report and Order, pg. 9-10

interim rate increase.<sup>11</sup> The Commission again failed to identify the reasons and the evidence of why, in this case, the Commission took the extreme action to present its own outside experts, rationalizing that the actual parties to the case were incapable of providing a sufficient evidentiary record on which the Commission could render its decision. Rather than taking this unprecedented step, the Commission had many paths to take if it thought there was insufficient evidence in the record. The Commission has the power to continue the hearing and request the parties provide additional information or the case could be dismissed or the application rejected for a failure of proof and lack of evidence to support the application.

Testimony by these witnesses in this case is prejudicial and does not reflect to the public that the case will be decided by an impartial tribunal. The Commission cannot step down from the bench into the arena to play the role of an advocate and a party and then reassume the bench and still be seen as an impartial trier of fact and tribunal. It is unreasonable for the Commission to rely on its own fact-witnesses for a determination of reasonable rates in this case. This mixing of roles as judge and party is inconsistent with the high standard that judicial officers must clearly preserve and protect the impartiality of the tribunal and the public's view of that impartial role. When the Commission comes off the bench to offer its own fact-witnesses like the other parties, the appearance of impartiality is diminished, if not destroyed. The Commission must not only be free of any partiality or interest in the matter before it, but must avoid even the appearance of a lack of impartiality.

Therefore, the Commission's admission and consideration of the testimony the Commission adduced into the record like a party, and the reports or exhibits prepared or assembled in connection with that testimony, was unlawful because it deprived Public Counsel

---

<sup>11</sup> Report and Order, pg. 10

of a fair and unbiased tribunal and violated Public Counsel's due process rights under the Fourteenth Amendment, U.S. Constitution and Mo. Const. Art. I, Sec. 10.

D. Not Based Substantial And Competent Evidence In The Record As A Whole

The Commission's Report and Order is unlawful, unjust and unreasonable because it was not based on substantial and competent evidence in the record as a whole in that it relied on testimony, and reports or exhibits prepared or assembled in connection with that testimony, of the Commission's own fact-witnesses, Smith & Co. Engineers, Mr. Rodger Williams, P.E., The Bonadio Group and Randall R. Shepard, CPA, which is evidence lacking in probative value since the record shows that the witnesses were not qualified as experts, had no personal knowledge of any facts and, therefore could not rely on hearsay to base their testimony and nonexpert opinion.

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."<sup>12</sup>

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

---

<sup>12</sup> *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).

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.***<sup>13</sup>

The Commission itself called its own witnesses, Mr. Rodger Williams, P.E., of Smith & Co. Engineers, and Mr. Randall R. Shepard, CPA, of The Bonadio Group, to provide factual evidence in this case. These witnesses do not meet the qualification standards for experts set forth in Section 490.065, and the related case law under which only testimony from a qualified expert is admissible as probative and competent opinion evidence.

The Commission's witnesses, Mr. Rodger Williams, P.E., of Smith & Co. Engineers, and Mr. Randall R. Shepard, CPA, of The Bonadio Group, were hired by the Commission to provide an independent, neutral review of the cost structure of a Missouri regulated public utility. Section 490.065.1 states that only a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion. The evidentiary record shows that the Commission's witnesses were not qualified as experts by knowledge, skill, experience, training or education.<sup>14</sup> The Commission's fact-witnesses had no knowledge, education, or experience about regulatory ratemaking or how utilities' cost structures are determined.<sup>15</sup> In fact, Mr. Shepard testified that he did not believe his company was hired by the Commission as a regulated utility ratemaking expert.<sup>16</sup> Therefore, the Commission's fact-

---

<sup>13</sup> *State ex rel. Lake Lotawana v. Public Service Com.*, 732 S.W.2d 191, 195 (Mo. Ct. App. 1987) (Emphasis added; citations omitted).

<sup>14</sup> Tr. 34 L. 7-25; Tr. 35 L. 1-22; Tr. 93 L. 6-25; Tr. 94 L. 1-4

<sup>15</sup> Tr. 230 L. 1-6

<sup>16</sup> Tr. 35 L. 16-21

witnesses could not offer competent opinion evidence and their proposals lacked a proper evidentiary foundation and had no probative value.

Section 490.065.3 states that the facts upon which an expert bases an opinion or inference must be of a type reasonably relied upon by experts in that field and must be otherwise reasonably reliable. The facts upon which the Commission's fact-witnesses based their opinions were not of the type reasonably relied upon by experts hired to provide an independent, neutral review of the cost structure of a Missouri regulated public utility, nor was it reasonably reliable. The Bonadio Group did not perform an audit; it performed only a limited review of the utility.<sup>17</sup> The Bonadio Group's recommendations were not independent or neutral because for many of the cost items, the only source of the numbers the Bonadio Group relied on came from Staff, the utility and even from Smith & Co. Engineers; often that data was provided only through verbal statements. Even though Public Counsel was also a party to this case, Public Counsel was not contacted regarding what it believed to be the reasonable costs to be.<sup>18</sup> The Bonadio Group made no inquiry into the reliability or accuracy of the numbers and just accepted them at face value without any independent review.<sup>19</sup> The information relied upon by the Commission's fact-witnesses was not verified for accuracy or reasonableness nor was it even compared to other utilities operating in this state.<sup>20</sup> These witnesses could not even represent to the Commission that their work product was true and accurate since they had no knowledge that the underlying data they relied on met the standard of accuracy and reliability.

---

<sup>17</sup> Tr. 52 L. 23-25; Tr. 53 L. 1-22

<sup>18</sup> Tr. 54 L. 2 through Tr. 79 L. 24; Tr. 101 L. 13-25; Tr. 102 L. 1-25; Tr. 103 L. 1-25; Tr. 104 L. 1-5; Tr. 279 L. 3-10

<sup>19</sup> Tr. 54 L. 2 through Tr. 79 L. 24; Tr. 101 L. 13-25; Tr. 102 L. 1-25; Tr. 103 L. 1-25; Tr. 104 L. 1-5; Tr. 279 L. 3-10

<sup>20</sup> Tr. 224 L. 25; Tr. 225 L. 1-5



It was unreasonable for the Commission to consider or rely on the proposals of Smith & Co. Engineers, Mr. Rodger Williams, P.E., The Bonadio Group and Randall R. Shepard, CPA, as factual evidence in this case. The evidence provided by these Missouri Public Service Commission fact-witnesses was not competent evidence and lacked probative value since the record shows that the witnesses were not qualified as experts. The witnesses cannot vouch for the accuracy of the data provided in the reports and cannot address issues and topics beyond the scope of the application and the issues contested by the parties. Since these witnesses had no personal knowledge of any facts and took no steps to verify the facts, their testimony, exhibits and reports constitute hearsay and are not subject to admission as the basis of expert testimony.

Because the Commission's decision relied on the testimony of these witnesses, and the reports and exhibits prepared in connection with that testimony, the Commission's Report and Order is not based on substantial and competent evidence in the record as a whole and is therefore, unlawful, unjust and unreasonable.

E. Interim Rates Subject To Refund Approved By The Commission Are Not Lawful, Just And Reasonable

The interim rates subject to refund approved by the Commission are not lawful, just and reasonable in that the evidence the Commission relied upon to determine the interim rate was insufficient and its use was unreasonable.

The Commission's decision as to what the interim rate should be was based primarily on a 2002 Staff audit and the testimony of the Commission's own fact-witnesses, Mr. Rodger Williams, P.E., of Smith & Co. Engineers, and Mr. Randall R. Shepard, CPA, of The Bonadio Group.

The use of the 2002 audit as a basis for the Commission's decision was unreasonable. The evidence submitted to the Commission regarding the 2002 audit consisted of an exhibit of rate design work papers. But, these documents were never submitted for verification or filed in the 2002 rate case because the rate case was ultimately withdrawn.<sup>21</sup> The employee who apparently prepared the exhibit no longer works for the Staff of the Commission.<sup>22</sup> The auditor on the 2002 case also no longer works for the Staff of the Commission.<sup>23</sup> The auditor's work, at least in part, was based on costs that were even older than 2002. The 2002 audit, as compared to today, is based on cost data that are well in excess of six years old and may be as much as eight years old.<sup>24</sup> The 2002 audit does not reflect any costs pertaining to R.D. Sewer who took over operating Stoddard County in January 2002.<sup>25</sup> Even Staff's own witness James A. Merciel, Jr. stated that the 2002 audit was not accurate due to changes such as investment, depreciation, operations and even the operator.<sup>26</sup> Therefore, the 2002 audit and workpapers lacked reliability, accuracy and probative value due to the passage of time, change in conditions over that time, and the lack of any qualified and knowledgeable witness to vouch for the audit and provide the necessary factual and evidentiary foundation. Therefore, the record is insufficient for the Commission to use as a basis for the interim rate increase and its use was unreasonable.

The use of the testimony of the Commission's witnesses, Mr. Rodger Williams, P.E., of Smith & Co. Engineers, and Mr. Randall R. Shepard, CPA, of The Bonadio Group, as a basis for the Commission's decision was also unreasonable because this was not the testimony of proper, qualified experts in Missouri public utility ratemaking. In addition, the evidence shows that

---

<sup>21</sup> Tr. 170 L. 20-25; Tr. 171 L. 1 & 14-21

<sup>22</sup> Tr. 170 L. 23-25; Tr. 171 L. 1-10; Tr. 172 L. 6-11

<sup>23</sup> Tr. 185 L. 2-8

<sup>24</sup> Tr. 184 L. 9-24

<sup>25</sup> Tr. 110 L. 1-2; Tr. 185 L. 9-15

<sup>26</sup> Tr. 186 L. 9-19

these fact-witnesses could not, and did not, offer an unbiased, third-party determination of reasonable public utility rates in Missouri. These witnesses were hired by the Commission to provide an independent, neutral review of the cost structure of the utility. That did not occur. The Bonadio Group did not perform an audit; it performed only a limited review of the utility.<sup>27</sup> The Bonadio Group's recommendations were not independent or neutral because for many of the cost items, the numbers came from Staff, the utility and even from Smith & Co. Engineers through verbal statements and were just accepted at face value without any independent review.<sup>28</sup> Even though Public Counsel is also a party to this case, Public Counsel was not contacted regarding what it believed to be the reasonable costs to be.<sup>29</sup> The information relied upon by the Commission's fact-witnesses was not verified for accuracy or reasonableness nor was it even compared to other utilities operating in this state.<sup>30</sup> For these reasons, the testimony of the Commission's witnesses, Mr. Rodger Williams, P.E., of Smith & Co. Engineers, and Mr. Randall R. Shepard, CPA, of The Bonadio Group audit was also insufficient as competent and substantial evidence for the Commission to use as a basis for the interim rate increase and its use was unreasonable.

Therefore, the determination of the interim rates subject to refund approved by the Commission in the Report and Order are not lawful, just and reasonable in that the evidence the Commission relied upon to determine the interim rate was insufficient and its use unreasonable.

#### F. Conclusion

---

<sup>27</sup> Tr. 52 L. 23-25; Tr. 53 L. 1-22

<sup>28</sup> Tr. 54 L. 2 through Tr. 79 L. 24; Tr. 101 L. 13-25; Tr. 102 L. 1-25; Tr. 103 L. 1-25; Tr. 104 L. 1-5; Tr. 279 L. 3-10

<sup>29</sup> Tr. 54 L. 2 through Tr. 79 L. 24; Tr. 101 L. 13-25; Tr. 102 L. 1-25; Tr. 103 L. 1-25; Tr. 104 L. 1-5; Tr. 279 L. 3-10

<sup>30</sup> Tr. 224 L. 25; Tr. 225 L. 1-5

Public Counsel's Application for Rehearing should be granted due to the fact that the Commission exceeded its jurisdiction, the Commission deprived Public Counsel of a fair and unbiased tribunal and violated Public Counsel's due process rights, the Report and Order was not based on substantial and competent evidence in the record as a whole, and the interim rate subject to refund approved by the Commission are not just and reasonable.

**Request for Stay Order Pending Appeal, or in the Alternative, Order for Company to Record Interim 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 Report and Order during the appeal process.

In the alternative, Public Counsel asks the Commission to issue an Order to the Company directing it to record the interim increase in a separate fund and make any interim increase 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 the Company to record the interim increase in a separate fund subject to refund.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By:     /s/Christina L. Baker    

Christina L. Baker (#58303)

Senior 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 31<sup>st</sup> day of October 2008:

General Counsel Office  
Missouri Public Service Commission  
GenCounsel@psc.mo.gov

Syler Shelley  
Missouri Public Service Commission  
shelley.syler@psc.mo.gov

Miller Marty  
Missouri Department of Natural Resources  
marty.miller@dnr.mo.gov

Allen C Terry  
R. D. Sewer Co., L.L.C.  
terry@tcallenlawoffices.com

Holden Steven  
R. D. Sewer Co., L.L.C.  
steve@holdenlawoffices.com

Allen C Terry  
Stoddard County Sewer Co., Inc.  
terry@tcallenlawoffices.com

Holden Steven  
Stoddard County Sewer Co., Inc.  
steve@holdenlawoffices.com

**/s/ Christina L. Baker**