STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 12th day of August, 2008.

Guy Thomas,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. WC-2008-0248**
	)	
Evergreen Lakes Water Supply,	)	
	)	
Respondent.	)	

ORDER GRANTING RELIEF BY DEFAULT

Issue Date: August 12, 2008 Effective Date: August 22, 2008

Background and Procedural History

Guy Thomas filed a formal complaint against Respondent Evergreen Lake Water Company ("Evergreen") on January 29, 2008. In his complaint, Mr. Thomas alleged that although the applicable "tap-on" fee set forth in Evergreen's tariff at the time he requested the connection for his residence was $75, Evergreen later charged him $800, deliberately waiting until a revised tariff raising the fee from $75 to $800 went into effect. He also alleged that after his tap-on connection was completed by Evergreen, he had his yard graded and found that his lot already had an unused meter setting that could simply have had a meter added to it, eliminating the need to install another one. Finally, Mr. Thomas averred that although he had asked Evergreen to fix two open pipes located in his yard, which was frequented by children and dogs, Evergreen had done nothing to fix them.

On February 7, 2008, the Commission notified Evergreen of the complaint and allowed it thirty days in which to answer as provided by 4 CSR 240-2.070(7). The same day, pursuant to 4 CSR 240-2.070(10), the Commission ordered its Staff to commence an investigation of Mr. Thomas' formal complaint and to file a report concerning the results of its investigation no later than one week after Evergreen filed its answer to the complaint. Evergreen did not file an answer, even though such a pleading was due by no later than March 10, 2008.

The Commission's Order of Default

On March 27, 2008, the Commission issued an Order Directing Filing, in which Evergreen was ordered to file, by no later than April 3, 2008, a pleading showing good cause why the Commission should not deem Mr. Thomas' averments to have been admitted and enter an order granting default pursuant to Commission Rule 4 CSR 240-2.070(9). Evergreen did not file such a pleading. Accordingly, by order dated April 10, 2008, the Commission found Evergreen in default and informed the company that Mr. Thomas' averments were deemed to have been admitted by Evergreen.

The averments deemed to be admitted by Evergreen include:

1) The price of the tap-on fee at the time it was requested was $75.00.

2) The applicable tariffed rate at the time the tap-on was requested was $75.00.

3) Delay by Evergreen resulted in a tap-on being installed after the company had increased its tariffed rate for a tap-on installation to $800.00.

4) Mr. Thomas filed a timely informal complaint with the Commission and believed that he was unable to proceed to the formal complaint process based upon his understanding of what the Commission's consumer services division had represented to him.

5) Mr. Thomas was unaware of his ability to utilize the formal compliant process until his brother had succeeded with prosecuting a similar complaint with the Commission.

6) Once the tap-on was installed, Mr. Thomas discovered that he had a usable water meter pit already in place on his property that Evergreen failed to inform him about.

7) The delayed, and unnecessary, installation of Mr. Thomas's tap-on would not have occurred had Mr. Thomas been properly informed of the existing tap-on.

In the Commission's April 10 Order Granting Default, again pursuant to 4 CSR 240-2.070(9), the Commission gave Evergreen until April 28, 2008 to move the Commission to set aside the order of default, explaining that any such motion had to be supported by a showing of good cause for Evergreen's failure to timely answer. Evergreen did not file such a motion;[1] however, a letter, dated April 28, 2008, was apparently mailed by Evergreen to the General Counsel's Office requesting that the order of default be set aside.

It is unclear from Staff's recommendation when it received Evergreen's letter, and Staff apparently had the Commission's Data Center file the letter in this docket on May 9. This letter, however, does not satisfy the requirements for motion to set aside the default order for several reasons. Evergreen is a corporation and must be represented by counsel authorized to practice law in Missouri.[2] The letter mailed to Staff is signed by Eunice

[1] Evergreen was notified that failure to state good cause to set aside the default would result with the Commission proceeding to "find as facts the allegations in Mr. Thomas' complaint and . . . grant him the relief, if any, to which he is entitled on those facts under the governing law."

[2] Commission Rule 4 CSR 240.2.010(13) includes in its definition of a pleading "any . . ., complaint, . . ., which is not a tariff or correspondence, and which is filed in a case." All pleadings are governed by 4 CSR 240-2.080, and all pleadings not in substantial compliance with 4 CSR 240-2.080, applicable statutes or commission orders "shall not be accepted for filing." Pleadings filed with the Commission require the signature of an attorney authorized to practice law in Missouri, unless the entity signing the pleading is a natural person representing only that natural person, i.e. themselves. (4 CSR 240-2.080(1) and (6)). The lack of the proper signature is the equivalent of the application bearing no signature, and unsigned pleadings shall be rejected. (4 CSR 240-2.080(5)). Moreover, 4 CSR 240-2.040(5), specifically addressing practice before the Commission, states: "A natural person may represent himself or herself. Such practice is strictly limited to the appearance of a natural person on his or her own behalf and shall not be made for any other person or entity." The underlying basis for these Commission Rules can be found in RSMo sections 484.010 and

Jones, either an owner or employee of Evergreen. It is not a proper pleading filed by a proper legal representative for the company. The letter is not a sworn or verified document and it, and its contents, do not constitute evidence. Moreover, even if the Commission treated the letter as having veracity, the letter fails to state good cause to set aside the default.

Although the term "good cause" is frequently used in the law,[3] the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning.[4] Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law."[5] Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."[6]

Of course, not just *any* cause or excuse will do. To constitute *good* cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and

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484.020, RSMo 2000. Section 484.010 defines the practice of law as "the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies." Section 484.020 restricts the practice of law and engagement in law business to licensed attorneys.

[3] *State v. Davis*, 469 S.W.2d 1, 5 (Mo. 1971).

[4] *See State ex rel. Hall v. Wolf*, 710 S.W.2d 302, 303 (Mo. App. E.D. 1986) (in absence of legislative definition, court used dictionary to ascertain the ordinary meaning of the term "good cause" as used in a Missouri statute); *Davis*, 469 S.W.2d at 4-5 (same).

[5] *Black's Law Dictionary* 692 (6th ed. 1990).

[6] *Graham v. State*, 134 N.W. 249, 250 (Neb. 1912). Missouri appellate courts have also recognized and applied an objective "ordinary person" standard. *See, e.g., Cent. Mo. Paving Co. v. Labor & Indus. Relations Comm'n*, 575 S.W.2d 889, 892 (Mo. App. W.D. 1978) ("[T]he standard by which good cause is measured is one of reasonableness as applied to the average man or woman.")

reasonable not whimsical."[7] And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.[8]

Evergreen's April 28 letter provides the Commission only with conclusory statements. The letter alleges that Mr. Thomas requested the tap-on be set after a loan was approved and Evergreen was unaware of the already installed "pit." The letter also does not provide any support for the proposition that the request/application for the tap-on had not been completed prior to the change in tariffed rates. Consequently, the Commission finds that Evergreen has failed to state good cause for setting aside the order of default.

Staff's Recommendation

The Commission issued an Order Directing Filing on April 29, 2008, in which it directed Staff to file, by May 9, 2008, a pleading concerning what relief, if any, the complainant (Mr. Thomas) was entitled to under the governing law. On May 9, Staff timely filed its "Recommendation Regarding the Relief the Commission May Grant," which contained a verified report containing the results of its investigation into Mr. Thomas' complaint. In its report, Staff concluded from its investigation that:

> Mr. Thomas should pay the $75 tap fee for his residence. There are two reasons for Staff's recommendation. First, Mr. Thomas requested the tap before the $800 rate went into effect. Second, a meter setting had already been installed on the property during the time the tap fee was $75, and this setting could have been used.
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> The Company should put a lid on the valve box that is open. The box that is sticking out of the ground should be lowered to grade and it should have a lid

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[7] *Belle State Bank v. Indus. Comm'n*, 547 S.W.2d 841, 846 (Mo. App. S.D. 1977). *See also Barclay White Co. v. Unemployment Compensation Bd.*, 50 A.2d 336, 339 (Pa. 1947) (to show good cause, reason given must be real, substantial, and reasonable).

[8] *See generally Haynes v. Williams*, 522 S.W.2d 623, 627 (Mo. App. E.D. 1975); *Havrisko v. U.S.*, 68 F.Supp. 771, 772 (E.D.N.Y. 1946); *The Kegums*, 73 F.Supp. 831, 832 (S.D.N.Y. 1947).

> installed on it. This assumes that these are, in fact, active valve locations. If they are not active valve locations, then the inactive valve boxes should be removed or buried completely.
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> I (Steve Loethen, Utility Operations Technical Specialist) also recommend that the Company dig up the unused meter setting and cap the service line at the main. A meter horn without a meter in it is a possible source of contamination and the meter setting can also be reused at another time to save the Company money.

Findings of Fact

The Commission finds as facts the seven averments deemed admitted by Evergreen already delineated in this order. Addtionally, based upon the pleadings filed by the parties, the Commission finds: (8) Mr. Thomas did not complete a written, formal application for service with Evergreen; (9) Mr. Thomas has two meter settings in his yard (one used, and the other unused), the latter of which presents a possible source of contamination; and (10) there are two open valve boxes (one at grade, the other sticking approximately eight inches out of the ground) in Mr. Thomas' yard. The Commission further notes that it is not clear from the pleadings as to whether Mr. Thomas has in fact paid the tap-on fee.

Conclusions of Law

Applicable State Statutes

Under Section 393.270, RSMo 2000, the Commission can make factual determinations as to what the applicable connection fee is at the time that a connection is made.[9] Further, "...An investigation may be instituted by the commission as to any matter of which complaint may be made as provided in sections 393.110 to 393.285, or to enable it to ascertain the facts requisite to the exercise of any power conferred upon it."[10] Pursuant to Sections 393.270.2 and 393.140(2), RSMo 2000, it can also order a company

[9] Section 393.270.1, RSMo 2000.

to make improvements to its system for the purpose of safety. There is no question of the Commission's authority to ensure that Evergreen provides safe and adequate service.[11]

Pertinent Portions of Evergreen's Tariff

SCHEDULE OF RATES:[12]

Availability:

The following rates are applicable to all customers adjacent to the company's distribution mains using standard water services:

Rate Schedule:

Residential:			
Customer Charge	5/8"	$ 7.71	+
	1"	$18.38	+
Commodity Charge		$2.054 per 1,000 gal.	+
Commercial:			+
Customer Charge	5/8"	$ 7.71	+
	1 ½"	$83.15	+
Commodity Charge		$2.054 per 1,000 gal.	+
These rates are exclusive of any gross receipts or franchise taxes.			+

Late Charges: *

Billings will be made and distributed at monthly intervals. Bills will be rendered net, bearing the last date on which payment will then be considered delinquent. The period after which payment will then be considered delinquent is 21 days after rendition of the bill. A charge of $5.00 or three percent (3%) per month times the unpaid balance, whichever is more, will be added to delinquent amounts.

Status of Rates: The rates set forth in the above rate schedules are interim and subject to reduction pending the Company's compliance with the Report and Order issued by the Public Service Commission in Case Number WR-2006-0131. *

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[10] *Id.*

[11] See Chapters 386 and 393, RSMo 2000.

[12] See Evergreen Lake Water Company Tariff P.S.C. MO. No 2, 2nd Revised Sheet No. 4 and Original Sheet No. 4A, tracking numbers JW-2002-0115 and JW-2006-0233. See also Case No. WR-2006-0131. This

Returned Check Charge *

A returned check charge of $20 per check will be paid on all checks returned from the bank for insufficient funds.

Service Charges

Turn-off/Reconnection Charge (see Rule 7)	$ 20.00	+

Tap-on Fee

Tap-on fee for meter sizes indicated below:

5/8"	$800.00	+
1"	$815.00	+
1 ½"	$825.00	+
2" single registered	$850.00	+
2" compound	$900.00	+
Over 2" Net Cost Plus	$ 20.00	

Rule 1 - DEFINITIONS:[13]

(f) A "SERVICE CONNECTION" is the pipeline connecting the main to the customer's water service line at the property line, or outdoor meter setting including all necessary appurtenances.

(g) The "DATE OF CONNECTION" shall be the date of the permit for installation and connection issued by the Company. In the event no permit is taken and a connection is made, the date of connection may be the date of commencement of construction of the building upon the property.

(h) The "METER SETTING" includes the meter box, meter yoke, meter, and appurtenances, all of which shall be owned and maintained by the Company.

Rule 2 – GENERAL[14]

(a) Every water customer, upon signing an application for any water service rendered by the Company, or upon taking of water service, shall be considered to have expressed consent to be bound by these rates, rules and regulations.

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schedule of rates became effective October 27, 2005 and is still in effect. An "*" indicates a new rate or text and a "+" indicates a changed rate or text.

[13] Effective since May 15, 1987, without change.

[14] *Id*.

(b) The Company's rules and regulations governing rendering of service are set forth in these numbered sheets. The rates applicable to appropriate water service or rate determination areas are set forth in rate schedules and constitute a part of these rules and regulations.

(c) The Company reserves the right, subject to authority of the Public Service Commission of Missouri, to prescribe additional rates, rules or regulations or to alter existing rates, rules or regulations as it may from time to time deem necessary and proper.

(d) At the effective date of these rules and regulations, all new and existing facilities, construction contracts, and written agreements shall conform to these rules and regulations in accordance with the Statutes of the State of Missouri and authority of the Public Service
Commission of Missouri.

Rule 4 - APPLICATIONS FOR SERVICE[15]

(a) A written application for service, signed by the customer, stating the type of service required and accompanied by any other pertinent information, will be required from each customer before service is provided to any unit. Every customer, upon signing an application for any service rendered by the Company, or upon taking, of service, shall be considered to have expressed consent to the Company's rates, rules and regulations.

(b) The applicant for original introduction of water service into premises will be required to pay the tap-on fee for the connection. The tap-on fee will be deposited in full at the water company's office before the tap on and connection will be made.

Rule 11 – METERS AND METER INSTALLATIONS[16]

(a) All permanent service connections shall be metered. The Company's installed meter shall be the standard for measuring water used to determine the bill.

(b) All meters and meter installations shall be furnished, installed, maintained and removed by the Company and shall remain its property.

(c) The Company shall have the right to determine on the basis of the Customer's state flow requirements the type and size of meter to be installed and location of same. If flow requirements increase or decrease subsequent

[15] *Id*.

[16] *Id*.

to installation and a larger or smaller meter is requested by the Customer, the cost of installing such meter shall be paid by the Customer.

(d) Service to any one Customer shall be furnished through a single metering installation. Where a building is occupied by more than one tenant, the building shall be served by one meter. The Customer may rearrange piping at his own expense so as to separate the units and meter his tenants as he chooses, then divide the bill accordingly.

(e) The meters and meter installations furnished by the Company shall remain its property, and the owners of premises wherein they are located shall be held responsible for their safekeeping and carelessness of said owner, his agent, or tenant. For failure to protect same against damage, the Company may refuse to supply water until the Company is paid for such damage. The amount of the charge shall be the cost of the necessary replacement parts and the labor cost necessary to make the repair.

(f) Meters will be installed at or near the Customer's property line; it shall be placed in a meter box vault constructed by the Company in accordance with its specifications. Company shall furnish and install suitable metering equipment for each Customer except where installation in a special setting is necessary, in which case the excess cost of installation shall be paid by the Customer.

(g) The Customer shall promptly notify the Company of any defect in, or damage to, the Meter Setting.

(h) Any change in the location of any existing meter or Meter Setting at the request of the Customer shall be made at the expense of the Customer, and with the approval of the Company.

(i) If an existing basement meter location is determined inadequate or inaccessible by the Company, the Customer must provide for the installation of a meter to be located at or near the Customer's property line. The Customer shall obtain from the Company, or furnish the necessary meter installation appurtenances conforming to the Company's specifications, and said appurtenances and labor shall be paid for by the Customer.

(j) Approved meter installation locations in dry basements, sufficiently heated to keep the meter from freezing, may remain provided the meter is readily accessible, at the Company's and Customer's convenience as determined by the Company for servicing and reading and the meter space provided is located where the service line enters the building . The Company may, at its discretion, require the Customer to install a remote reading device at an approved location, for the purpose of reading the meter. It is the responsibility of the Customer and/or the owner of the premises to provide a

> location for the water meter which, in the event of water discharge as a result of leakage from the meter or couplings, will not result in damage. The Water Company s liability for damages to any and all property caused by such leakage shall in no event exceed the price of water service to the affected premises for one average billing period in the preceding year. Where damage is not caused by the negligence of Company personnel at the premises, this limitation will not apply. If a customer refuses to provide an accessible location for a meter as determined by the Company, the Company will notify the Secretary of the Public Service Commission before ultimately refusing service or proceeding to discontinue service.

Filed Tariff Doctrine

A tariff is a document which lists a public utility's services and the rates for those services.[17] A tariff that has been approved by the Public Service Commission becomes Missouri law and has the same force and effect as a statute enacted by the legislature.[18]

The filed tariff, or filed rate, doctrine governs a utility's relationship with its customers and provides that any rate filed with the appropriate regulatory agency is sanctioned by the government and cannot be the subject of legal action.[19] The filed tariff doctrine conclusively presumes that both a utility and its customers know the contents and effect of the published tariffs.[20] "[N]either the customer's ignorance nor the utility's misquotation of the applicable tariff provides refuge from the terms of the tariff."[21]

Further, "a customer of a utility has no cause of action against a utility for alleged negligent or intentional misquotation of a tariffed service."[22] Courts that have considered the fraud issue almost unanimously have rejected the notion that there is a fraud exception

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[17] *Bauer v. Southwestern Bell Telephone Co*., 958 S.W.2d 568, 570 (Mo. App. 1997).

[18] *Id*. See also *Allstates Transworld Vanlines, Inc. v. Southwestern Bell Telephone Co.,* 937 S.W.2d 314, 317 (Mo. App. 1996). When analyzing a tariff, if the tariff is clear and unambiguous, the court cannot give it another meaning. *Id.*

[19] *Id*. See also *Metro-Link Telecom,* 919 S.W.2d at 692.

[20] *Id*.

[21] *Id*.

to the filed rate doctrine.[23] The rationale behind applying the filed tariff doctrine when there are allegations of fraud is to prevent "discrimination in rates paid by consumers because victorious plaintiffs would wind up paying less than non-suing ratepayers."[24]

There is no rate/service distinction under the filed tariff doctrine. *Id.* The filed tariff doctrine prohibits discrimination based on service as well as price.[25] Once a filed tariff is approved, it becomes law and is an absolute defense.[26]

Decision

Evergreen's tariff provisions make clear that once a customer completes an application and pays the applicable tap-on fee, and once the date of connection is established when either Evergreen issues a permit or begins construction, that the tariffed rate for installation of the tap-on becomes fixed upon that date of connection.[27] As best as the Commission can determine, Mr. Thomas intended to apply for service and the tap-on installation at the time the tariff fee was $75. However, there is no evidence that a permit was issued by Evergreen and the actual date of connection must have been established on the date in which construction began; i.e. some time after the tariffed rate increased to $800.[28] Consequently, it would appear that the filed tariff doctrine would determine the

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[22] *Id.*

[23] *Id*. See also *Wegoland Ltd. v. NYNEX Corp.,* 27 F.3d 17, 20 (2d Cir.1994).

[24] *Id*.

[25] *Id.*

[26] *Snelling v. Southwestern Bell Telephone Co*., 996 S.W.2d 601, 604 (Mo. App. 1999).

[27] See also Order Granting Relief and Denying Motion to Set Aside Default, *Erik M. Thomas v. Evergreen Lake Water Company*, Case No. WC-2006-0423 (Aug. 31, 2006), at 2. At first blush, the complaint in Case No. WC-2006-0423, involving the complainant's brother, appears very similar to this one. However, the two cases are factually distinguishable.

[28] The Commission could derive an inference from this case and Case No. WC-2006-0423 that Evergreen has been waiving its formal application requirements; however, that inference does not add to the legal analysis in this instance.

applicable tap-on fee to be $800 at the time Evergreen installed the unnecessary tap-on. However, the fact that the second tap-on installed by Evergreen was unnecessary is the crux of this case, and the filed tariff doctrine is not implicated or relevant to the Commission's decision.

The only service that Mr. Thomas should have initially received at the time he made his request for service from Evergreen was the installation of the water meter with a connection made to his service line. The Commission's rules are clear that bills for residential utility services may only include charges authorized in the company's Commission-approved tariff.[29] Charges for unnecessary services are not authorized by the Commission in Evergreen's Commission-approved tariff.

Mr. Thomas should not be required to pay for Evergreen's failure to acknowledge the existence of and utilize its own infrastructure; i.e. the tap-on already installed on Mr. Thomas's property.[30] Evergreen's tariff provides for no connection fee for attaching the meter to a customer's service line and the tariff also provides for no fee for the installation of the meter itself. Consequently, Mr. Thomas should not have received any charges whatsoever in relation to the installation of a tap-on when his water service was first connected.

It is irrelevant that the appropriate fee at the time the unnecessary tap-on was installed was $800 pursuant to the filed tariff doctrine, what is relevant is that Mr. Thomas should not have been charged any fee for an unnecessary service. The only fees applicable to Mr. Thomas under Evergreen's tariff are included the in schedule of rates for monthly water.

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[29] See Chapter 13 of the Commission's rules.

If Evergreen levied an unnecessary charge upon Mr. Thomas it would be a violation of its tariff. While it is not clear from the pleadings before the Commission if Evergreen has collected a fee for installation of the unnecessary tap-on, it is clear that to do so would subject Evergreen to the Commission's authority to seek penalties against the company. Section 386.570, RSMo 2000, authorizes the Commission to seek penalties "not less than one hundred dollars nor more than two thousand dollars for each offense," and each day a company is in violation of its tariff constitutes a separate and distinct offense. Penalties could be avoided, however, if correct billing adjustments were made pursuant to the Commission's rules on billing.[31]

The Commission notes that Evergreen is responsible for maintaining accurate books and records of its business pursuant to Chapter 10 of the Commission's Rules. It is Evergreen's burden to know the location of, and all elements of, its infrastructure and all locations and conditions of the tap-ons installed for its customers.

Additionally, Evergreen elected to become a corporation and avail itself of the privileges and protections of such designation under the laws of this state. With those privileges and protections attaches the responsibility for obtaining proper legal representation when actions are filed against it, should it desire to challenge or defend itself in those actions. If Evergreen chooses, as it has done in this case, not to respond to a complainant or the Commission's orders through proper representation, then it must accept the consequences of a default judgment. Based upon the facts of this case, Mr. Thomas is entitled to a default judgment against Evergreen.

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[30] It makes no difference if Evergreen's failure was the result of negligence or if it was intentional.

IT IS ORDERED THAT:

1. Default judgment is hereby entered in favor of Complainant Guy Thomas against Respondent Evergreen Lakes Water Supply.

2. If Evergreen has, or does, collect any tap-on fee from Complainant Guy Thomas for the installation of the unnecessary tap-on, it shall be in violation of its tariffs for charging a customer for an unecessary service.

3. Evergreen Lakes Water Supply shall, without charge, dig up the unused meter setting in Mr. Thomas' yard and cap the service line at the main by no later than September 15, 2008.

4. Evergreen Lakes Water Supply shall, without charge, level to grade and install lids on both valve boxes in Mr. Thomas' yard by no later than September 15, 2008, unless they are not active valve locations, in which case the company is ordered to remove the inactive valve boxes or bury them completely by no later than Sepetember 15, 2008.

5. The Staff of the Missouri Public Service Commission shall investigate Evergreen Lakes Water Supply to determine if it is in complinace with this order and file a report of its investigation no later than September 23, 2008.

6. This order shall become effective on August 22, 2008.

BY THE COMMISSION

(S E A L)

Colleen M. Dale
Secretary

Davis, Chm, Murray, Clayton, Jarrett,
and Gunn, CC., concur.
Stearley, Senior Regulatory Law Judge

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[31] See Chapter 13 of the Commission's rules.