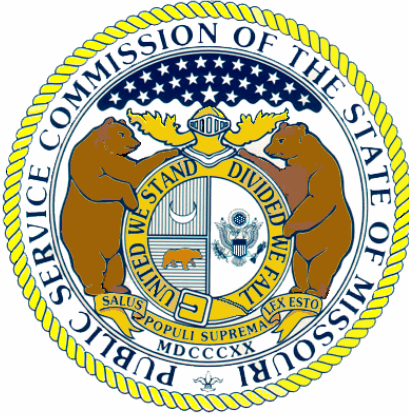


**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



In the Matter of the Joint Application of Stoddard )  
County Sewer Company, Inc., R.D. Sewer Co., L.L.C. )  
and the Staff of the Missouri Public Service )  
Commission for an Order Authorizing Stoddard )  
County Sewer Co., Inc. to Transfer its Assets to R.D. )  
Sewer Co., L.L.C., and for an Interim Rate Increase )

**Case No. SO-2008-0289**

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**REPORT AND ORDER**

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**Issue Date:** October 23, 2008

**Effective Date:** November 2, 2008

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**REPORT AND ORDER**

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## **APPEARANCES**

**Stephen W. Holden**, 718 West Business Highway 60, Dexter, Missouri 63841-0633, and **Terry C. Allen**, 314 Monroe, P. O. Box 1702, Jefferson City, Missouri 65102, for: **Stoddard County Sewer Company, Inc. and R.D. Sewer Company, L.L.C.**

**Steven Reed**, Chief Litigation Attorney, **Keith R. Krueger**, Deputy General Counsel, General Counsel, and **Shelly E. Syler-Brueggemann**, Senior Counsel, Governor Office Building, 200 Madison Street, P.O. Box 360, Jefferson City, Missouri 65102, for: **Stoddard County Sewer Company, Inc. and R.D. Sewer Company, L.L.C.**

**Michael Dandino**, Deputy Public Counsel and **Christine Baker**, Assistant Public Counsel, Office of the Public Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102, for: **Office of the Public Counsel and the Public.**

**REGULATORY LAW JUDGE:** Harold Stearley

## **REPORT AND ORDER**

**Syllabus:** The order: (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.

### **I. Procedural History**

On March 4, 2008,<sup>1</sup> pursuant to Sections 351.476, 393.190 and Commission Rules 4 CSR 240-2.060, 3.305 and 3.310, Stoddard County Sewer Company, Inc. ("Stoddard County"), R. D. Sewer Co., L.L.C. ("R. D. Sewer") and the Staff of the Missouri Public Service Commission ("Staff") (together, the "Applicants") filed a Joint Application for an order authorizing Stoddard County to transfer its assets to R. D. Sewer and to approve an interim rate increase. Applicants also seek to have the certificates of convenience and necessity ("CCN") issued to Stoddard County in Case Nos. SA-79-11 and SA-86-115 canceled and to have a new CCN issued to R. D. Sewer authorizing it to provide sewer service to the areas heretofore served by Stoddard County. Applicants further request the Commission to issue an order declaring void any and all transfers of a security interest in the assets of Stoddard County that lack Commission approval.

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<sup>1</sup> All dates throughout this order refer to the year 2008 unless otherwise noted.

## **A. Notice and Interventions**

On March 5, the Commission issued notice and set an intervention deadline for March 25. No other person, group or entity intervened. The Commission's Staff, unique to this situation, joined the sewer companies' application.

Also on March 5, the Commission directed the Missouri Department of Natural Resources ("DNR") to file a compliance report indicating whether Stoddard County was in compliance with DNR's requirements regarding the provision of sewer service. The Commission further directed DNR to inform the Commission what steps Stoddard County had taken to remedy any noncompliance with DNR regulations. DNR filed its report on April 21.

## **B. DNR's Compliance Report**

The DNR reports that Stoddard County Sewer is significantly out of compliance of the Missouri Clean Water Law, its implementing regulations and its Missouri State Operating Permit ("MSOP" No. MO-0096881) based upon the following:<sup>2</sup>

### **Notice of Violation #17390 SE - July 30, 1998**

- Failed to submit timely discharge monitoring reports as required in part "A" of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo, and 10 CSR 20-7.015(9)(A)1.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1 (3) and 644.076.1, RSMo.
- Discharged water contaminants into waters of the state which reduced the quality of such waters below the Water Quality Standards established by the Missouri Clean Water Commission in violation of Sections 644.051.1(2) and 644.076.1, RSMo, and 10 CSR 20-7.031 or applicable subsection of 10 CSR 20-7.031.

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<sup>2</sup> See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

- Failed to submit annual sludge reports as required by the standard conditions of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.

**Notice of Violation #17514 SE - May 17, 1999**

- Failed to submit timely discharge monitoring reports as required in part "A" of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo, and 10 CSR 207.015(9)(A)l.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Discharged water contaminants into waters of the state which reduced the quality of such waters below the Water Quality Standards established by the Missouri Clean Water Commission in violation of Sections 644.051.1(2) and 644.076.1, RSMo, and 10 CSR 20-7.031 or applicable subsection of 10 CSR 20-7.031.
- Failed to submit annual sludge reports as required by the standard conditions of MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to retain a certified operator to supervise the operation and maintenance of the waste water treatment facility in violation of Section 644.076.1, RSMo, and 10 CSR 20-9.020(2)(B) and (D).
- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881 in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(1) and 644.076.1, RSMo.
- On April 26, 1999, operated, used or maintained a water contaminant source (a bypass from a collection pipe) which discharged to waters of the state, without a MSOP in violation of Sections 644.051.2 and 644.076.1, RSMo, and 10 CSR 20-6.010(1)(A) and (5)(A).

**Notice of Violation #17819 SE - February 19, 2003**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-00968841, during the month of December 2002, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #17602 SE - June 9, 2003**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of January, February, and March 2003, in violation of Sections 644.051.1 (3) and 644.076.1, RSMo.

**Notice of Violation #17945 SE - August 26, 2003**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the month of April 2003, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18112 SE - June 8, 2004**

- Failed to prevent a bypass as required by the Standard Conditions Part I MSOP No. MO 0096881 in violation of Section 644.076.1, RSMo.
- Failed to notify the department of a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(l) and 644.076.1, RSMo.

**Notice of Violation #18151 SE - January 27, 2005**

- Failed to prevent a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to notify the department of a bypass as required by the Standard Conditions Part I MSOP No. MO-0096881 in violation of Section 644.076.1, RSMo.
- Failed to operate and maintain facilities to comply with the Missouri Clean Water Law and applicable permit conditions in violation of Sections 644.051.1(3) and 644.076.1, RSMo.
- Placed or caused or permitted to be placed water contaminant in a location where it is reasonably certain to cause pollution of waters of the state in violation of Sections 644.051.1(1) and 644.076.1, RSMo.

**Notice of Violation #18172 SE - March 8, 2005**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO 0096881, during the months of January, March, April, May, June, July, September,



October, November, and December 2004, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18199 SE - June 15, 2005**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of January, February, and March 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18210 SE - September 6, 2005**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of April, May and June 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18361 SE - November 23, 2005**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of July, August and September 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18385 SE - January 30, 2006**

- Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of October, November and December 2005, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

**Notice of Violation #18399 SE - September 28, 2007**

- **Failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of December 2006, January, February, March, April, May and June 2007, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.**

Finally, DNR reports that Monthly Discharge Monitoring Reports submitted to the Department pursuant to MSOP No. MO-0096881 document that Stoddard County Sewer Co., Inc. has failed to comply with the effluent limits contained in Part "A" of MSOP No. MO-0096881, during the months of December 2007 and January and February 2008, in violation of Sections 644.051.1(3) and 644.076.1, RSMo.

Stoddard County did not file a response to the DNR's Compliance Report; however, Staff, in response to the Commission's order directing a report be filed,<sup>3</sup> confirmed a number of these violations including violation numbers: 17819 SE, 17602 SE, 17945 SE, 18151 SE, 18172 SE, 18199 SE, 18210 SE, 18361 SE, and 18399 SE.<sup>4</sup>

On August 4, 2008, Stoddard County and R. D. Sewer filed their statement of positions on the issues in this matter.<sup>5</sup> In that pleading, Stoddard County and R. D. Sewer represented that any existing DNR compliance issues would be addressed by a compliance schedule negotiated with DNR and the Missouri Office of the Attorney General without penalty ("AG"). Consequently, the Commission directed the Applicants to file: (1) status reports regarding these negotiations; (2) the compliance schedule once it was formalized with the DNR and AG; and (3) status reports regarding the implementation of the compliance schedule.<sup>6</sup> In its most recent status report, Stoddard County and R. D. Sewer indicated that the DNR was waiting until this case was resolved before completing its negotiation of the compliance schedule with the companies.<sup>7</sup>

### **C. Commission's Retention of Neutral Subject Matter Experts**

On April 8, because the Commission's Staff joined the companies as one of the applicants in this matter, the Commission appointed a Special Master to assist the Commission with retaining outside experts to provide a neutral analysis of Stoddard

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<sup>3</sup> See EFIS Docket No. 3, *Order Directing Staff to File a Report*, issued March 26, 2008.

<sup>4</sup> EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008.

<sup>5</sup> EFIS Docket Number 33, *Statement of Positions on Issues of Stoddard County Sewer Company, Inc., and R.D. Sewer Co, LLC Private Joint Applicants*, filed August 4, 2008.

<sup>6</sup> EFIS Docket Number 37, *Order Directing Stoddard County Sewer Company, Inc. and R.D. Sewer Co., L.L.C. to Provide Status Reports*, issued August 5, 2008.

<sup>7</sup> EFIS Docket Number 50, *Quarterly Status Report of Private Joint Applicants*, filed August 29, 2008.

County's financial condition and the physical condition of its sewer facilities.<sup>8</sup> The Commission requires this information in order to render a decision regarding the Applicants' requests for approval of the transfer of assets and approval of the interim rate increase. The analyses were to include not only the findings and analyses from the experts, but also any recommendations concerning conditions the Commission should impose to ensure that granting the relief sought by the Applicants would be in the public interest.

On June 4, the Special Master issued notice of the retention of the experts utilizing the "Requests for Proposals" process. The accounting analysis was contracted to be performed by business and accounting professionals with The Bonadio Group, 171 Sully's Trail, Ste. 201, Pittsford, NY 14534.<sup>9</sup> The engineering assessment was contracted to be performed by civil engineering professionals with S.H. Smith & Co., Inc., 901 Vine St., P.O. Box 72, Poplar Bluff, MO 63902.<sup>10</sup>

A deadline for June 30 was set for the reports to be completed and filed with the Commission. However, due to slight delays with the completion and filing of the reports, the reports were not formally filed in the Commission's Electronic Filing and Information System ("EFIS") until July 9.<sup>11</sup>

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<sup>8</sup> EFIS Docket Number 6, *Order Appointing Special Master for Retaining Outside Experts*, issued April 8, 2008; EFIS Docket Number 13, *Order Adopting Procedural Schedule*, issued April 25, 2008; EFIS Docket Number 18, *Notice Regarding Retention of Neutral Outside Experts*, issued June 4, 2008; EFIS Docket Number 20, *Order Modifying Procedural Schedule*, issued June 5, 2008; EFIS Docket Number 24, *Notice Regarding Outside Experts' Reports and Order Directing Filing*, issued July 2, 2008; EFIS Docket Number 25, *Report on Joint Application of Stoddard County Sewer Company, Inc. R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service*, filed July 9, 2008; EFIS Docket Number 26, *Preliminary Engineering Report*, filed July 9, 2008; EFIS Docket Number 29, *Order Modifying Procedural Schedule*, issued July 10, 2008; EFIS Docket Number 31, *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination, and Notice Advising Parties and Witnesses Regarding How to Participate in the Evidentiary Hearing by Phone*, issued August 1, 2008; Transcript, pp. 33-106.

<sup>9</sup> The principals involved with the project were Monisha Nabar and Randy Shepard.

<sup>10</sup> The engineers involved with the project were Rodger Williams and Steve Hicks.

<sup>11</sup> See Footnote 8.

## D. Local Public Hearing

The Commission held a local public hearing in this matter on June 4. At the public hearing, the Commission heard the sworn testimony of four witnesses. Of particular note to the Commission was the testimony of Mr. Matt Mills.<sup>12</sup> Mr. Mills testified that he represented the Maco Company (“Maco”), a company that owns and manages commercial and residential properties.<sup>13</sup> Mr. Mills stated that 51 of Stoddard County’s customers are people who reside in apartments his company rents.<sup>14</sup> Maco pays the residents’ sewer bills directly to Stoddard County, but passes that cost through to the residents on their rent.<sup>15</sup>

Mr. Mills testified that Maco, over a period of two to three years, lent approximately \$15,000 to Stoddard County for repair, overhauling, and replacement of grinder pumps necessary for the sewer system’s proper functioning.<sup>16</sup> Mr. Mills testified that he held this loan in the form of an unsecured note.<sup>17</sup> Mr. Mills supported the approval of transfer of assets and supported the approval of a rate increase for Stoddard County.<sup>18</sup>

Of the four witnesses testifying,<sup>19</sup> none expressed any dissatisfaction with the service they receive or with how the company bills its customers.<sup>20</sup> All four witnesses supported a rate increase for Stoddard County, but two of the four witnesses objected to the company being allowed to double its rates.<sup>21</sup>

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<sup>12</sup> Transcript, Volume 2, pp. 15-20.

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* In addition to Mr. Mills, Don Gard, Wayne Worthington, and Marvin Wheeler provided testimony at the Local Public Hearing.

<sup>20</sup> *Id.*

## **E. Procedural Schedule, Hearing Dates and Issues List**

On April 25, 2008, the Commission adopted a procedural schedule in this matter culminating with an evidentiary hearing to be held on July 1-2. In that same order the Commission stated that it recognized that the schedule for the hearing dates was dependent on the provision of the reports of the outside experts that the Commission retained. Because the Commission's retained experts' reports were not formally filed until July 9, the Commission ultimately reset the date for the evidentiary hearing until August 13-14.

On July 31, the parties unanimously filed and agreed to the following proposed issues list. The parties asserted that these issues needed to be resolved in order for the Commission to make its decision in this case. That proposed list was as follows:

1. Is the proposed transfer of assets detrimental to the public?
2. Did Stoddard County or any other entity, at any time since Stoddard County acquired the real and personal assets described in Paragraphs 42 and 43 of the Application, secure from the Commission an order authorizing it to sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber any of the assets that are described in Paragraphs 42 and 43 of the Application?
3. Are any and all purported transfers of any security interest in the assets described in Paragraphs 42 and 43 of the Application in this case therefore void?
4. Should the Commission approve an interim rate increase for the customers who are now served by Stoddard County?
5. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, how much should the rate increase be?
6. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, should the Commission make the increased revenues subject to refund?

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<sup>21</sup> *Id.*

The Commission adopted this proposed issues list with the caveat that the parties' framing of the issues may not accurately reflect the material issues to this matter under the applicable statutes and rules, and it may not include all issues that the Commission finds material to its final decision.<sup>22</sup> The Commission also adopted one additional issue, the provision of safe and adequate service. The parties were put on notice that should the Commission find that evidence exists of unsafe or inadequate service, it may elect to authorize its General Counsel to pursue a complaint action or to seek penalties for any established violations of State statutes, Commission rules or the company's tariffs.

#### **F. Pre-Hearing Motions**

On August 6, Public Counsel filed a motion in limine asserting that the testimony and reports of the neutral subject matter experts retained by the Commission should be excluded from this proceeding.<sup>23</sup> The Commission notes, that despite its advance notice to all of the parties in this proceeding regarding the retention of these experts (the first notice was issued April 8), no objections were filed by any of the parties regarding their retention, or to the filing of their reports during the months of April, May, June and July. Public Counsel waited until seven days before the scheduled evidentiary hearing was set to begin, or 120 days (3 months and 29 days), after the Commission issued its first of multiple notices (at least nine notices were given)<sup>24</sup> regarding the retention of these experts, and 28 days after the filing of the experts' reports, to file its motion in limine.

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<sup>22</sup> EFIS Docket Number 31, *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination, and Notice Advising Parties and Witnesses Regarding How to Participate in the Evidentiary Hearing by Phone*, issued August 1, 2008.

<sup>23</sup> EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

<sup>24</sup> See Footnote Number 8.

In its motion in limine, Public Counsel strenuously and ironically argued, despite its acknowledgment that the Commission had a statutory duty to ensure public utilities provide safe and adequate service, that the Commission lacked authority to fulfill that statutory duty and consider the issue of whether Stoddard County was providing safe and adequate service to its customers.<sup>25</sup>

On August 11, Stoddard County and R.D. Sewer filed its own motion in limine arguing that consideration of the issue of safe and adequate service was not proper in this proceeding and could be addressed in a subsequent proceeding.<sup>26</sup> The Commission denied Public Counsel's motion in limine and Stoddard County's and R. D. Sewer's motion in limine, finding both motions devoid of merit.<sup>27</sup>

Also on August 11, just two days prior to hearing, Public Counsel filed a motion to dismiss alleging lack of jurisdiction.<sup>28</sup> The Commission took that motion with the case to give the parties an opportunity to brief the jurisdictional issue raised, and the Commission shall address that issue in the conclusions of law section of this order.

## **G. Case Submission and Unanimous Stipulation of Facts**

Pursuant to the procedural schedule adopted by the Commission, the evidentiary hearing commenced on August 13 and concluded on the same date, at the Commission's offices in Jefferson City, Missouri. In total, the Commission admitted the testimony of six witnesses and received thirteen exhibits into evidence. One of those exhibits, Exhibit 5,

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<sup>25</sup> EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

<sup>26</sup> EFIS Docket Number 42, *Motion in Limine of Stoddard County Sewer Company and R. D. Sewer Co., L.L.C. Private Joint Applicants with Suggestions*, filed August 11, 2008.

<sup>27</sup> EFIS Docket Number 45, *Order Denying Stoddard County Sewer Company, Inc. and R. D. Sewer Co., L.L.C.'s Motion in Limine*, issued August 12, 2008; EFIS Docket Number 46, *Order Denying Motion in Limine*, issued August 12, 2008.

<sup>28</sup> EFIS Docket Number 44, *Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction*, filed August 11, 2008.

was an Unanimous Stipulation of Facts. If appropriate and relevant, the Commission will adopt these agreed to facts, on a fact by fact basis, throughout the Findings of Fact Sections in this order.

Post-hearing briefs and proposed findings of fact and conclusions of law were filed according to the post-hearing procedural schedule. The post-hearing briefs were filed on September 18, and the case was deemed submitted for the Commission's decision on that date.<sup>29</sup>

## **II. Findings of Fact**

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. In making its findings of fact, the Commission is mindful that it is required, pursuant to Section 386.420.2, after a hearing, to "make a report in writing in respect thereto, which shall state the conclusion of the commission, together with its decision, order or requirement in the premises." Because Section 386.420 does not explain what constitutes adequate findings of fact to support the agency's decision, Missouri courts have turned to Section 536.090, which applies to "every decision and order in a contested case," to fill in the gaps of Section 386.420.<sup>30</sup> Section 536.090 provides, in pertinent part:

Every decision and order in a contested case shall be in writing, and . . . the decision . . . shall include or be accompanied by findings of fact and conclusions of law. The findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order.

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<sup>29</sup> "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

<sup>30</sup> *St. ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. 2003); *St. ex rel. Noranda Aluminum, Inc. v. Pub. Serv. Comm'n*, 24 S.W.3d 243, 245 (Mo. App. 2000).



Missouri courts have not adopted a bright-line standard for determining the adequacy of findings of fact.<sup>31</sup> Nonetheless, the following formulation is often cited:

The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence.<sup>32</sup>

Findings of fact are inadequate when they "leave the reviewing court to speculate as to what part of the evidence the [Commission] believed and found to be true and what part it rejected."<sup>33</sup> Findings of fact are also inadequate that "provide no insight into how controlling issues were resolved" or that are "completely conclusory."<sup>34</sup>

When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon that witness's qualifications, expertise, and credibility with regard to the attested to subject matter. Not only does the qualification of a witness as an expert rest within the fact-finder's discretion,<sup>35</sup> but witness credibility is solely a matter for the fact-finder "which is free to believe none, part, or all of the testimony."<sup>36</sup> A reviewing court lacks authority to weigh the evidence heard by the Commission because the Commission is the fact-finding agency.<sup>37</sup>

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<sup>31</sup> *Glasnapp v. State Banking Bd.*, 545 S.W.2d 382, 387 (Mo. App. 1976).

<sup>32</sup> *Id.* (quoting 2 Am.Jur.2d *Administrative Law* § 455, at 268).

<sup>33</sup> *State ex rel. Int'l. Telecharge, Inc. v. Mo. Pub. Serv. Comm'n*, 806 S.W.2d 680, 684 (Mo. App. 1991) (quoting *St. ex rel. Am. Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 701 S.W.2d 745, 754 (Mo. App. 1985)).

<sup>34</sup> *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 795 (Mo. banc 1986) (relying on *St. ex rel. Rice v. Pub. Serv. Comm'n*, 359 Mo. 109, 220 S.W.2d 61 (1949)).

<sup>35</sup> *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 186 S.W.3d 376, 382 (Mo. App. 2005); *Emerson Elec. Co. v. Crawford & Co.*, 963 S.W.2d 268, 271 (Mo. App. 1997). In determining whether a witness is an expert under Section 490.065.1, the fact-finder looks to whether he or she possesses a "peculiar knowledge, wisdom or skill regarding the subject of inquiry, acquired by study, investigation, observation, practice, or experience." *Id.* In *State Board of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 154-55 (Mo. banc 2003), the Missouri Supreme Court ruled that the standards set out in section 490.065 apply to the admission of expert testimony in contested case administrative proceedings.

<sup>36</sup> *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce*

An administrative agency as fact-finder also receives deference when choosing between conflicting evidence.<sup>38</sup> In fact, the Commission “may disregard and disbelieve evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it.”<sup>39</sup>

Appellate courts also must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.<sup>40</sup> And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.<sup>41</sup> Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.<sup>42</sup>

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*Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

<sup>37</sup> *State ex rel. Office of Public Counsel v. Public Service Com'n of Missouri*, 858 S.W.2d 806, 810-811 (Mo. App. 1993); *State ex rel. Inman Freight Sys., Inc. v. Public Serv. Comm'n*, 600 S.W.2d 650, 654 (Mo. App. 1980).

<sup>38</sup> *Klokkenga v. Carolan*, 200 S.W.3d 144, 152 (Mo. App. 2006); *Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc.*, 208 S.W.3d 922, 924 (Mo. App. 2006); *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. App. 2000); *State ex rel. Associated Natural Gas Co. v. Public Service Com'n of the State of Mo.*, 37 S.W.3d 287 (Mo. App. 2000); *State ex rel. Midwest Gas Users' Ass'n. v. Public Service Com'n of the State of Mo.*, 976 S.W.2d 485 (Mo. App. 1998); *State ex rel. Conner v. Public Service Com'n*, 703 S.W.2d 577 (Mo. App. 1986).

<sup>39</sup> *Veal v. Leimkuehler*, 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

<sup>40</sup> *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA*, 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 131 (D.C.Cir.1979).

<sup>41</sup> *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness*, 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

<sup>42</sup> *Id.*

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.<sup>43</sup> When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.<sup>44</sup> Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.<sup>45</sup>

## **A. The Parties**

1. Stoddard County Sewer Company, Inc. ("Stoddard County") is a Missouri corporation that is not in good standing.<sup>46</sup>

2. Stoddard County was administratively dissolved on September 14, 1999, for its failure to file an annual registration report within 30 days after it was due, and the dissolution has not been rescinded.<sup>47</sup>

3. The Secretary of State's records show Stoddard County's registered office is at Highway 60 West, P.O. Box 325, Dexter, MO 63841.<sup>48</sup> However, Stoddard County's current mailing address is P .O. Box 302, Wappapello, MO 63966, and the street address

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<sup>43</sup> *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

<sup>44</sup> *Id.*

<sup>45</sup> *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

<sup>46</sup> EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; Exh. 5, Unanimous Stipulation of Facts.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

of Stoddard County's principal office or place of business is at the office of the entity that owns all of Stoddard County's stock, R. D. Sewer Company, L.L.C. ("R. D. Sewer"), 406 South Allen, Bernie, MO 63822.<sup>49</sup>

4. Although Stoddard County has been dissolved, it is providing sewer service, to approximately 172 customers (115 single family residences and 57 residential apartments) in the Ecology Acres and Western Heights subdivisions and in Grant Apartments (now known as Westbridge Apartments), all of which are located outside the City of Dexter, Missouri.<sup>50</sup>

5. Applicant R. D. Sewer is a Missouri limited liability corporation in good standing, with its principal place of business at 406 South Allen, Bernie, MO 63822 . Its mailing address is P.O. Box 302, Wappapello, MO 63966.<sup>51</sup>

6. R. D. Sewer was organized to transact any and all lawful business for which a limited liability company may be organized. It owns all of the stock of Stoddard County, which in turn holds a certificate of convenience and necessity issued by the Commission to provide sewer service to the public near Dexter, Missouri.<sup>52</sup>

7. The Office of the Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission; Exh. 3, Preliminary Engineering Report.

<sup>51</sup> *Id.*

<sup>52</sup> Exh. 6, Assignment of Interest in Stoddard County Sewer, Inc., executed June 12, 2002; Exh. 7, Assignment of Interest in Stoddard County Sewer, Inc. and Assignment Order and Receipt, Estate Number 35P070000096, executed June 12, 2002; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

commission.”<sup>53</sup> Public Counsel “shall have discretion to represent or refrain from representing the public in any proceeding.”<sup>54</sup>

8. The General Counsel of the Missouri Public Service Commission “represent[s] and appear[s] for the commission in all actions and proceedings involving any question under this or any other law, or under or in reference to any act, order, decision or proceeding of the commission . . .”<sup>55</sup> In this matter the General Counsel represents the position of the Staff of the Missouri Public Service Commission (“Staff”).

## **B. Witness Demeanor, Credibility and Testimony**

9. No prefiled testimony was filed with the Commission pursuant to Commission Rules.<sup>56</sup> Instead, the Commission conducted a live evidentiary hearing.<sup>57</sup>

10. The following witnesses provided live testimony and were subject to cross-examination by the parties and the Commission:<sup>58</sup>

Rodger Owens (Stoddard County/R. D. Sewer), James A. Merciel, Jr. (Staff), Steve Rackers (Staff), Ted Robertson (Public Counsel), Randall Shepard (Commission), and Rodger G. Williams (Commission).

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<sup>53</sup> Section 386.710(2); Commission Rules 4 CSR 240-2.010(16) and 2.040(2).

<sup>54</sup> Section 386.710(3); Commission Rules 4 CSR 240-2.010(16) and 2.040(2). Public Counsel “shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of his office. If the public counsel determines that there are conflicting public interests involved in a particular matter, he may choose to represent one such interest based upon the considerations of this section, to represent no interest in that matter, or to represent one interest and certify to the director of the department of economic development that there is a significant public interest which he cannot represent without creating a conflict of interest and which will not be protected by any party to the proceeding.” *Id.*

<sup>55</sup> Section 386.071; Commission Rules 4 CSR 240-2.010(8) and 2.040(1). Additionally, the General Counsel “if directed to do so by the commission, to intervene, if possible, in any action or proceeding in which any such question is involved; to commence and prosecute in the name of the state all actions and proceedings, authorized by law and directed or authorized by the commission, and to expedite in every way possible, to final determination all such actions and proceedings; to advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof, and generally to perform all duties and services as attorney and counsel to the commission which the commission may reasonably require of him.” *Id.*

<sup>56</sup> See Commission Rules 4 CSR 240-2.110, 2.130, and 2.135.

<sup>57</sup> See Transcript Volume 3.

<sup>58</sup> *Id.*

11. Because the Commission's Staff joined Stoddard County and R. D. Sewer as a joint applicant in this matter, The Bonadio Group ("Bonadio")<sup>59</sup> and S.H. Smith & Co., Inc., ("Smith & Co.")<sup>60</sup> were retained by the Commission as independent consultants versed in the areas of accounting and engineering, respectively, to provide neutral accounting and engineering analyses of Stoddard County to assist the Commission with its determinations.<sup>61</sup>

12. Mr. Randall Shepard provided testimony for Bonadio and Mr. Rodger G. Williams provided testimony for Smith & Co.

13. Although no witness prefiled testimony with the Commission, Mr. Shepard and Mr. Williams filed reports with the Commission prior to the evidentiary hearing to provide all of the parties sufficient time to review those reports prior to the hearing.<sup>62</sup>

14. The reports filed by Mr. Shepard and Mr. Williams were not offered, received or admitted into the record evidence until the day of the evidentiary hearing.<sup>63</sup>

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<sup>59</sup> The Bonadio Group is an independent CPA firm based in New York, with its principal business address being 171 Sully's Trail, Pittsford, New York, 14534-4557. It provides accounting, tax, business advisory and financial services. It has offices in Rochester, Buffalo, Syracuse, Geneva and Perry and serves commercial, small business, public, not-for-profit and individual clients. Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission, filed by Bonadio & Co., L.L.P. on July 9, 2008, EFIS Docket No. 25, formally received into evidence on August 13, 2008; Transcript pp. 36-45. See also [www.bonadio.com](http://www.bonadio.com).

<sup>60</sup> Smith & Company, founded in 1968, is based in Poplar Bluff, Missouri. Its staff includes fifteen graduate engineers, two registered land surveyors, and two graduate geologists. The company also has a branch office in Cape Girardeau, Missouri staffed with two graduate engineers, a draftsman, and a civil engineering technician. Its experience in the design and inspection of public works projects includes airports, streets/roads/drainage, bridges, water distribution and treatment systems, wastewater collection and treatment, solid waste management facilities, industrial parks, and environmental remediation projects. Exh. 3, Preliminary Engineering Report; Transcript pp. 84-106. See [http://www.shsmithco.com/html/about\\_us.html](http://www.shsmithco.com/html/about_us.html).

<sup>61</sup> Transcript pp. 38-39, 86. See Footnote 8. See also the Procedural History section of this order, specifically subsection C entitled: "Commission's Retention of Neutral Subject Matter Experts."

<sup>62</sup> EFIS Docket Number 13, *Order Adopting Procedural Schedule*, issued April 25, 2008; EFIS Docket Number 24, *Notice Regarding Outside Experts' Reports and Order Directing Filing*, issued July 2, 2008; EFIS Docket Number 25, *Report on Joint Application of Stoddard County Sewer Company, Inc. R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service*, filed July 9, 2008 (Exh. 1); EFIS Docket Number 26, *Preliminary Engineering Report*, filed July 9, 2008 (Exh. 3); EFIS Docket Number 29, *Order Modifying Procedural Schedule*, issued July 10, 2008; Transcript pp. 45-46, 92-94.

## 1. Witnesses Shepard<sup>64</sup>

15. Mr. Shepard holds a BS degree in Accounting from the State University of New York at Genesco. He is an audit principal (non-equity partner) in Bonadio and is a licensed certified public accountant in the State of New York. He is a member of the American Institute of Certified Public Accountants (“AICPA”) and completes continuing professional education in order to maintain license. This includes training on all Financial Accounting Standards Board (“FASB”) and Governmental Accounting Standards Board (“GASB”) pronouncements, as well as Auditing Standards Board regulations. He is also a Fellow in the Health Care Financial Management Association.<sup>65</sup>

16. Mr. Shepard has been employed with Bonadio in his current capacity for 11 years. Prior to working for Bonadio, he worked as a financial analyst for a local hospital in New York. He completes stringent requirements on an annual, biannual and triennial basis for AICPA as well as New York state licensure purposes. He is responsible for overseeing any type of engagement from audits to compilation reviews, consulting engagements for municipalities, public authorities, including water and sewer utilities, as well as not-for-profit or other organizations.<sup>66</sup>

17. Mr. Shepard has conducted approximately 200 to 300 audits for business and other entities such as New York towns and counties, public authorities, which include transportation authorities, water and sewer funds, not-for-profit organizations, including nursing homes, hospitals, health and human service type organizations, as well as

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<sup>63</sup> Transcript pp. 45-46, 92-94.

<sup>64</sup> Transcript pp. 33-84.

<sup>65</sup> Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

<sup>66</sup> *Id.*

commercial organizations such as regional professional organizations such as a baseball team and those types of engagements.<sup>67</sup>

18. Mr. Shepard has not received any formal utility operation or regulatory ratemaking theory and concept education. He has not provided any previous written or oral testimony in Federal or State regulated utility cases.<sup>68</sup>

19. To produce his report for the Commission, Mr. Shepard performed an onsite review. Steven Holden (one of the attorneys representing Stoddard County and R. D. Sewer) and Rodger Owens, the operator of Stoddard County, provided supporting documentation, including invoices, annual Commission reports, check registers, and customer ledger cards. Mr. Shepard interviewed both Rodger Owens and LaDawn Owens, (who assists with the company's operations) with regard to the expenses and budget information associated with operating Stoddard County.<sup>69</sup>

20. When preparing his audit (limited review),<sup>70</sup> Mr. Shepard applied and relied upon what is considered to be the generally accepted accounting methods of his profession.<sup>71</sup>

21. Mr. Shepard was aided by Monisha Nabar<sup>72</sup> and Mark Laskoski<sup>73</sup> with preparing his report, but he is the primary author of the report and takes responsibility for all of the contents of the report and verifies its accuracy and correctness.<sup>74</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 34.

<sup>69</sup> Exhs. 1, Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

<sup>70</sup> A "limited review" is not as detailed as a full audit or full investigation of a company. Transcript p. 53.

<sup>71</sup> Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

<sup>72</sup> Monisha Nabar, Principal – Ms. Nabar is a principal (non-equity partner) of Bonadio. She has an MBA, is a Chartered Accountant and a Certified Fraud Examiner. Her educational training and twenty years of experience is consistent with the consulting services she provides for the firm. She has assisted government



22. The Commission did not direct Mr. Shepard in any manner with regard to reaching any particular outcome when he prepared this report.<sup>75</sup>

23. The Commission did not, in anyway, ask Mr. Shepard to revise his report once it was submitted to the Commission.<sup>76</sup>

24. Mr. Shepard provided his testimony to the Commission by telephone.<sup>77</sup>

25. Although the Commission was unable to visualize Mr. Shepard, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of responses, and the witness's overall responsiveness to questions.

26. Mr. Shepard was calm, composed, confident, sincere, and unwavering in his testimony.<sup>78</sup>

27. When providing his testimony, Mr. Shepard was direct and articulate with his responses, and his live hearing testimony was consistent with the Report he filed with the Commission.<sup>79</sup>

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clients in setting rates for various services including sewer. She has not had any specific regulated utility operation and ratemaking education or training. There have been no Federal or State regulated utility cases wherein she has provided written or oral testimony. See Exh. 2, Public Counsel Data Request No. 1003.

<sup>73</sup> Mark Laskoski – Mr. Laskoski is a staff level consultant at Bonadio. He holds a four-year degree, but is not a certified public accountant. The training received has been provided in-house and under the direction of his immediate supervisors, based on the nature of the assignments he is given. He has not had any specific regulated utility operation and ratemaking education or training. There have been no Federal or State regulated utility cases wherein he has provided written or oral testimony. See Exh. 2, Public Counsel Data Request No. 1003.

<sup>74</sup> Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript p. 33-45.

<sup>75</sup> Transcript p. 33-45.

<sup>76</sup> *Id.*

<sup>77</sup> Transcript, p. 32.

<sup>78</sup> Exhs. 1, Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 2, Answer to OPC Drs 1002, 1003 and 1004; Transcript pp. 33-84.

<sup>79</sup> *Id.*

28. Mr. Shepard provided extensive documentary support with regard to his positions on the subject matter of his testimony, via the report he prepared for the Commission.<sup>80</sup>

29. The testimony provided by Mr. Shepard was substantial and credible.<sup>81</sup>

## **2. Witness Williams<sup>82</sup>**

30. Mr. Williams received his Bachelor of Science Degree in Civil Engineering from Arkansas State University in 2002. He is a Registered Professional Engineer in the state of Missouri and holds certification from the American Concrete Institute (“ACI”) as a Concrete Field Testing Technician, and has complete training in Nuclear Gauge Safety. He is a member of the American Society of Civil Engineers (“ASCE”), the National Society of Professional Engineers (“NSPE”) and the Missouri Society of Professional Engineers (“MSPE”). He is required to earn 30 hours of continuing education every two years.<sup>83</sup>

31. Mr. Williams is employed by Smith & Co, in the capacity of Project Manager/ Project Engineer/Construction Inspector. His six years of professional experience in civil engineering with Smith & Co. involves a broad range of project experience including: water treatment, supply, distribution, and storage design; wastewater collection, pumping, and treatment design; wastewater disinfection; site development and planning; traffic design including, streets, roads, and bridges; preliminary engineering reports for various projects; construction inspection of various projects; airport ramp, runway and taxiway and fuel facilities. He is experienced in project and construction management, contract administration, and cost control on projects with engineering and construction costs over \$1

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<sup>80</sup> *Id.*

<sup>81</sup> Transcript, pp. 33-84.

<sup>82</sup> Transcript, pp. 84-106.

<sup>83</sup> Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript, pp. 83-94.

million. He is also experienced in Missouri DNR, National Pollutant Discharge Elimination system (“NPDES”), Clean Water Act Section 404 and other permitting.<sup>84</sup>

32. Mr. Williams provided the Commission with an extensive list of projects that he has participated in involving Water Supply Treatment, Distribution and Storage, and Wastewater Collection, Pumping and Storage.<sup>85</sup>

33. Mr. Williams has not received any formal utility operation or regulatory ratemaking theory and concept education. He has not provided any previous written or oral testimony in Federal or State regulated utility cases; however he is well-versed in Missouri Statutes and Missouri Public Service Commission rules and regulations that govern the operation and ratemaking of Missouri regulated utilities.<sup>86</sup>

34. To produce his report for the Commission, Mr. Williams performed an onsite review of Stoddard County, reviewed files obtained from the DNR and reviewed all files obtainable from Stoddard County.<sup>87</sup>

35. Mr. Williams was unable to obtain detailed drawings of the existing sewer lines for his review, but he stated that he had all necessary materials to prepare his analysis.<sup>88</sup>

36. When preparing his engineering assessment, Mr. Williams applied and relied upon what is considered to be the generally accepted methods of his profession.<sup>89</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Transcript, p. 93.

<sup>87</sup> Exh. 3, Preliminary Engineering Report; Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript p. 83-94.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

37. Mr. Williams was aided by senior engineer Dan Molloy<sup>90</sup> and junior engineer Jacob Ortega<sup>91</sup> with preparing his report, but he is the primary author of the report and takes responsibility for all of the contents of the report and verifies its accuracy and correctness.<sup>92</sup>

38. The Commission did not direct Mr. Williams in any manner with regard to reaching any particular outcome when he prepared this report.<sup>93</sup>

39. The Commission did not, in any way, ask Mr. Williams to revise his report once it was submitted to the Commission.<sup>94</sup>

40. Mr. Williams provided his testimony to the Commission by telephone.<sup>95</sup>

41. Although the Commission was unable to visualize Mr. Williams, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of his responses, and the witness's overall responsiveness to questions.

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<sup>90</sup> Mr. Molloy earned a Bachelor of Science Degree in civil Engineering from the University of Missouri-Rolla in 1976. He is a member of the National Society of Professional Engineers and Missouri Society of Professional Engineers He is currently employed by Smith & Co. as a Project Engineer. Mr. Molloy has over thirty-two years of professional experience in civil engineering. His broad range of project experience includes: water treatment, distribution, and storage design; wastewater collection, pumping, and treatment design; water and wastewater disinfection, computer modeling of water systems; site planning and design; geotechnical exploration and foundation design; soil property characterization and laboratory testing; bridge design; and design and construction of gas spill remediation systems. His teaching experience includes: instructor of basic engineering courses at local community college; and director of water and wastewater related seminars. He is experienced in project management, contract writing and administration, and cost control.

<sup>91</sup> Mr. Ortega earned an Associate of Science Degree in Physical and Natural Science from San Antonio College in San Antonio, Texas. He earned a Bachelor of Science Degree in Civil Engineering from University of Texas at San Antonio in 2003. He was recognized as Engineer-In-Training (EIT) by Texas Board of Professional Engineers in 2007 and is currently employed by Smith & Co. as a Design Engineer.

<sup>92</sup> Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript p. 83-94.

<sup>93</sup> Transcript pp. 83-94.

<sup>94</sup> *Id.*

<sup>95</sup> Transcript, p. 83.

42. Mr. Williams was calm, composed, confident, sincere, and unwavering in his testimony.<sup>96</sup>

43. While providing his testimony, Mr. Williams was direct and articulate with his responses, and his live hearing testimony was consistent with the report he filed with the Commission.<sup>97</sup>

44. Mr. Williams provided extensive documentary support with regard to his positions on the subject matter of his testimony, via the report he prepared for the Commission.<sup>98</sup>

45. The testimony provided by Witness Williams was substantial and credible.<sup>99</sup>

### **3. Witness Owens<sup>100</sup>**

46. Mr. Rodger Owens holds one-hundred percent ownership of R. D. Sewer. He has either worked for, or owned and operated, water and wastewater systems since 1976. He has been a licensed operator of these types of systems since 1986. In addition to R. D. Sewer, he owns Oakbriar Water Company, Lakeland Heights Water Company, and Whispering Hills Water Company.<sup>101</sup>

47. Mr. Owens provided the Commission with extensive information regarding the operation of, and the condition of, Stoddard County.<sup>102</sup>

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<sup>96</sup> Transcript pp. 84-106.

<sup>97</sup> Exh. 3, Preliminary Engineering Report; Exh. 4, Affidavit of Rodger Williams and Resumes of Key Personnel; Transcript pp. 84-106.

<sup>98</sup> *Id.*

<sup>99</sup> Transcript, pp. 84-106.

<sup>100</sup> Transcript, pp. 106-161.

<sup>101</sup> Transcript pp. 106-108.

<sup>102</sup> Transcript, pp. 106-161.

48. When providing his testimony, Mr. Owens was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Witness Owens was substantial and credible.<sup>103</sup>

#### **4. Witness Merciel<sup>104</sup>**

49. Mr. James A. Merciel, Jr. is employed by the Missouri Public Service Commission as an Assistant Manager of Engineering in the Water and Sewer Department. He has been employed with the Commission for approximately 31 years and has held his present title for approximately 28 or 29 of those years. Mr. Merciel has extensive familiarity with Stoddard County, having dealt with the owners and operators of the company for many years and having supervised one of the Commission's field inspectors who was involved with Stoddard County's prior proceedings before the Commission. While Staff did not submit Mr. Merciel's full resume to the Commission in this matter, he has participated in numerous cases before this Commission.<sup>105</sup>

50. Mr. Merciel provided the Commission with extensive information regarding the operation and condition of Stoddard County, as well as the history surrounding a rate increase application for the company that was filed (and subsequently dismissed) in 2002.<sup>106</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> Transcript, pp. 161-194.

<sup>105</sup> Transcript, pp. 161-163. James A. Merciel, Jr. is employed by the Missouri Public Service Commission ("Commission") as a Utility Regulatory Engineering Supervisor, in the Water and Sewer Department ("W/S Department"). He graduated from the University of Missouri at Rolla in 1976 with a Bachelor of Science degree in Civil Engineering. He is a Registered Professional Engineer in the State of Missouri. He worked for a construction company in 1976 as an engineer and surveyor, and has worked for the Commission in the W/S Department since 1977. He has presented testimony in numerous cases before the Commission. See Mr. Merciel's Direct Testimony in Case No. WR-2007-0216.

<sup>106</sup> Transcript, pp. 161-194.

51. When providing his testimony, Mr. Merciel was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Witness Merciel was substantial and credible.<sup>107</sup>

#### **5. Witness Rackers<sup>108</sup>**

52. Mr. Steve Rackers is employed by the Missouri Public Service Commission as a Regulatory Auditor V. His duties include assisting the manager, and other Auditor Vs of the auditing department, with supervision the operations of the Commission's St. Louis office. He also supervises the activities of the junior auditors assigned to that office and leads supervised audits of utility companies. His duties include conducting audits of small company rate increase requests and maintaining the custody and control of records in those cases. The St. Louis office conducted an audit of Stoddard County Sewer Company in 2002, and Mr. Rackers' office maintained the records and work papers from that case. While Staff did not submit Mr. Rackers' full resume to the Commission in this matter, he has participated in numerous cases before this Commission.<sup>109</sup>

53. Mr. Rackers provided the Commission with information regarding the Stoddard County rate increase application that was filed, and subsequently dismissed, in 2002. More specifically his testimony addressed the 2002 Staff audit of the company.<sup>110</sup>

54. Mr. Rackers provided his testimony to the Commission by telephone.<sup>111</sup>

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<sup>107</sup> *Id.*

<sup>108</sup> Transcript, pp. 194-206.

<sup>109</sup> Transcript, pp. 193-202. Mr. Rackers attended the University of Missouri – Columbia, where he received a Bachelor of Science degree in Business Administration with a major in Accounting in 1978. He has passed the Uniform Certified Public Accountant examination and he is licensed to practice in the state of Missouri. His duties include conducting and assisting with the audits and examinations of the books and records of utility companies operating within the state of Missouri. He has testified numerous times before the Commission. The schedule of cases he included with this testimony in Case No. WR-2007-0216 lists 28 cases in which he provided testimony. See Direct Testimony filed in Case No. WR-2007-0216 and accompanying schedules.

<sup>110</sup> Transcript, pp. 194-206.

55. Although the Commission was unable to visualize Mr. Rackers, it was able to evaluate his speech, including such characteristics as pitch, flow, volume, accent, inflection, intonation, intensity, emotion, fluctuation, temporal breaks and pauses, the context of responses, and the witnesses overall responsiveness to questions.

56. When providing his testimony, Mr. Rackers was calm, direct, articulate, composed, confident, sincere, and unwavering. The testimony provided by Mr. Rackers was substantial and credible.<sup>112</sup>

## **6. Witness Robertson<sup>113</sup>**

57. Mr. Ted Robertson is employed by the Missouri Office of the Public Counsel in the capacity of Regulatory Accountant III. He has been employed by the Public Counsel since July of 1990. He holds a Bachelor of Science Degree in Accounting and is licensed as a Certified Public Accountant in Missouri. He has attended numerous seminars and training conferences in the areas of regulatory ratemaking and accounting. While Public Counsel did not submit Mr. Robertson's full resume to the Commission in this matter, he has participated in numerous cases before this Commission.<sup>114</sup>

58. Mr. Robertson provided the Commission with testimony concerning the accounting analysis provided to the Commission by Bonadio and provided his

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<sup>111</sup> Transcript, pp. 193-194.

<sup>112</sup> Transcript, pp. 194-206.

<sup>113</sup> Transcript, pp. 206-282.

<sup>114</sup> Transcript, pp. 206-207. Ted Robertson is employed by the Missouri Office of the Public Counsel as a Public Utility Accountant III. He graduated from Southwest Missouri State University in Springfield, Missouri, with a Bachelor of Science Degree in Accounting. In November, 1988, he passed the Uniform Certified Public Accountant ("CPA") Examination, and obtained CPA certification from the State of Missouri in 1989. My Missouri CPA license number is 2004012798. Under the direction of the OPC Chief Public Utility Accountant, Mr. Russell W. Trippensee, he is responsible for performing audits and examinations of the books and records of public utilities operating within the State of Missouri. See Mr. Robertson's Direct Testimony filed in Case No. ER-2006-0315. In that case Mr. Robertson provided a schedule listing approximately 56 cases before the Commission in which he participated.



recommendations regarding approval of, and the appropriate amount of, an interim rate increase for Stoddard County.<sup>115</sup>

59. Mr. Robertson based his testimony upon a review of Staff's 2002 audit, the work papers that Staff had produced, Bonadio's report and work papers, Smith & Co.'s report and work papers, but primarily Stoddard County's 2007 Annual Report.<sup>116</sup>

60. Mr. Robertson has not operated a water or sewer company, and other than reviewing documents, he evaluates these companies by on-site inspections and watching the operators perform their duties.<sup>117</sup>

61. Mr. Robertson was not involved in the Stoddard County 2002 rate case.<sup>118</sup>

62. Mr. Robertson did not perform an on-site inspection of Stoddard County Sewer Company.<sup>119</sup>

63. There is no evidence in the record that Mr. Robertson interviewed Rodger or LaDawn Owens, when preparing his accounting analysis of the company.

64. Mr. Robertson, similar to Mr. Shepard, did not perform a full audit of Stoddard County, but rather performed a limited review.<sup>120</sup>

65. While on the witness stand, Mr. Robertson was composed, confident, and sincere. Although he was articulate, at times Mr. Robertson was defensive and evasive

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<sup>115</sup> Transcript, pp. 206-282.

<sup>116</sup> Transcript, p. 207, 210-211, 227, 229, 237-238, 246, 248. Curiously, Public Counsel challenged the accuracy of the annual reports while at the same time maintaining the position that they are presumed to be true and accurate. Transcript, pp. 120-121, 160, 213, 217-218, 251, 257.

<sup>117</sup> Transcript, p. 223.

<sup>118</sup> Transcript, p. 208.

<sup>119</sup> Transcript, pp. 221-222.

<sup>120</sup> Transcript, pp. 252-254, 260-261.

and frequently would not answer questions directly or would not answer the question that was asked.<sup>121</sup>

66. Mr. Robertson's defensiveness and evasiveness did not diminish the credibility of all of his answers, but it did diminish some of his credibility with regard to specific questions.

67. Public Counsel did not proffer a witness to provide an engineering analysis of Stoddard County to the Commission.

### **C. Evidentiary Issues Raised by Public Counsel**

Public Counsel raised objections prior to and during the evidentiary hearing that were directed toward excluding the testimony and reports offered by witnesses Shepard and Williams based upon an assertion that these witnesses: (1) were not qualified experts in regulated utilities; (2) that their testimony and reports were hearsay; and (3) they were biased.<sup>122</sup> The Commission makes the following findings with regard to Public Counsel's objections.

#### **1. Subject Matter Experts**

68. Section 490.065 sets forth the standard of admissibility of expert testimony in civil cases, including contested case administrative proceedings.<sup>123</sup>

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<sup>121</sup> Transcript, pp. 206-282. Many questions directed to Mr. Robertson were yes or no questions, but he would not answer those questions and instead re-characterized the question to provide a different answer. In other instances, he simply would not answer the question at all. His testimony is replete with these types of answers and statements.

<sup>122</sup> See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with **any** scientific, technical or other specialized knowledge. (Emphasis added). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 2008 WL 2345862, 7 (Mo. App. 2008). The expert is not required to be an expert in all subject matter in order to assist the finder of fact.

<sup>123</sup> *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003).

69. Section 490.065 states:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

70. The Commission finds that the following witnesses are subject matter experts for their individual fields of expertise as identified in their live testimony and exhibits admitted into the record:<sup>124</sup>

- a. Randall Shepard is a subject matter expert in the field of auditing and accounting because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Shepard is not required to have formal training in utility operation or regulatory ratemaking

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<sup>124</sup> As with all witnesses and all subject matter expert witnesses, any proven deficiencies in any specific testimony are evaluated in terms of the weight and credibility to be given to that specific testimony. Public Counsel's frequent attempts to completely exclude the testimony and reports of witnesses Shepard and Williams on the basis that they were not qualified experts in regulated utilities were overruled. See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. Pursuant to Section 490.065 a witness qualifies as an expert if he or she is able to assist the finder of fact with **any** scientific, technical or other specialized knowledge. (Emphasis added). Specific fact or opinion testimony offered by any expert is evaluated for its weight and credibility. Lacking certain knowledge or experience is not a basis for total exclusion of an expert's testimony. An expert's competence hinges on his or her knowledge being superior to that of the factfinder, and his or her opinion must aid the factfinder in deciding an issue in the case. *Duerbusch v. Karas*, 2008 WL 2345862, 7 (Mo. App. 2008). The expert is not required to be an expert in all subject matters in order to assist the finder of fact.

theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

b. Rodger G. Williams is a subject matter expert in the field of engineering because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony and exhibits, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Williams is not required to have formal training in utility operation or regulatory ratemaking theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

c. Rodger Owens is a subject matter expert with regard to the operation and condition of Stoddard County Sewer Company, Inc. and R. D. Sewer Co., L.L.C. and is a subject matter expert on the operation and maintenance of water and sewer companies because he possesses scientific, technical and other specialized knowledge from 32 years of experience managing and operating water and wastewater systems that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Owens is not required to have formal training in utility operation or regulatory ratemaking theory and concept education, nor is he required to have prior testimonial experience in Federal or State regulated utility cases in order to assist the Commission with specific determinations in this matter.

d. James A. Merciel, Jr. is a subject matter expert with regard to operation and engineering and maintenance of water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.

e. Steve Rackers is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined in his testimony, that will assist the Commission with understanding the evidence and determining facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education.

f. Ted Robertson is a subject matter expert with regard to auditing, accounting and the regulatory ratemaking for water and wastewater systems because he possesses scientific, technical and other specialized knowledge, as is outlined

in his testimony, that will assist the Commission with understanding the evidence and determine facts in issue in this matter. He is qualified as an expert by the uncontroverted evidence of his knowledge, skill, experience, training, and education. Mr. Robertson is not a subject matter expert in the field of engineering.

71. Additionally, the Commission finds that regardless of the general witness credibility findings made in Findings of Facts Numbers 9 through 70, a given witness's qualifications and overall credibility are not necessarily dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Consequently, the Commission will make additional specific weight and credibility decisions throughout this order as to specific items of testimony as is necessary.<sup>125</sup>

## **2. Hearsay**

72. Hearsay has been defined by Missouri courts as follows:

"Hearsay is an out of court statement made by someone not before the court that is offered to prove the truth of the matter asserted. *State v. Larson*, 941 S.W.2d 847, 854 (Mo. App. 1997). Hearsay is not admissible at trial unless an exception to the hearsay rule applies;.... *Id.*" *Alberswerth v. Alberswerth*, 184 S.W.3d 81, 101 (Mo. App. 2006). Or, as explained in *State v. Mayes*, 868 S.W.2d 541, 544 (Mo. App. 1993), quoting *State v. Harris*, 620 S.W.2d 349, 355 (Mo. banc 1981), "Hearsay is defined as 'in-court testimony of an extrajudicial statement offered to prove the truth of the matters asserted therein, resting for its value upon the credibility of the out-of-court declarant.'"<sup>126</sup>

The underlying rationale for the hearsay rule is for the purpose of securing the trustworthiness of the assertions. *State v. Harris*, 620 S.W.2d 349, 355

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<sup>125</sup> As previously stated: witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony. *In re C.W.*, 211 S.W.3d 93, 99 (Mo banc 2007); *State v. Johnson*, 207 S.W.3d 24, 44 (Mo banc 2006); *Herbert v. Harl*, 757 S.W.2d 585, 587 (Mo. banc 1988); *Missouri Gas Energy*, 186 S.W.3d at 382; *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 456-57 n. 19 (Mo. App. 2004); *Centerre Bank of Branson v. Campbell*, 744 S.W.2d 490, 498 (Mo. App. 1988); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500, 501 (Mo. App. 1985); *Keller v. Friendly Ford, Inc.*, 782 S.W.2d 170, 173 (Mo. App. 1990).

<sup>126</sup> *State v. Freeman*, 212 S.W.3d 173, 175 (Mo. App. 2007).

(Mo. banc 1981). Courts generally exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. banc 1995).<sup>127</sup>

73. Although there were hearsay objections made by Public Counsel prior to and during the evidentiary hearing that were directed to excluding the testimony and reports offered by witnesses Shepard and Williams, neither Public Counsel nor any other party to this action identified any “out-of-court” statement being offered into evidence that could be construed to be hearsay.<sup>128</sup>

### **3. Bias**

74. The term “neutral” is defined as: “Indifferent, unbiased, impartial, not engaged on either side, not taking an active part with either of the contending sides.”<sup>129</sup>

75. The term “independent” is defined as: “Not dependent; not subject to control, restriction, modification, or limitation from a given outside source.”<sup>130</sup>

76. The term “bias” is defined as: “inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction.” Bias also means a preference

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<sup>127</sup> *State v. Link*, 25 S.W.3d 136, 145 (Mo. banc 2000).

<sup>128</sup> See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. The hearsay objection raised by Public Counsel during the evidentiary hearing occurred each time it renewed all of the objections contained in its Motion in Limine filed prior to the evidentiary hearing. See EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

<sup>129</sup> Black's Law Dictionary, Sixth Dictionary, West Publishing Company, p. 1042 (1990). See also The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 917 (1997).

<sup>130</sup> Black's Law Dictionary, Sixth Dictionary, West Publishing Company, p. 770 (1990). See also The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 690 (1997).

or an inclination that inhibits impartial judgment, or a statistical sampling or testing error caused by systematically favoring some outcomes over others.<sup>131</sup>

77. It is well-settled law that evidence of bias is always relevant. Bias does not serve as a basis for exclusion of evidence, but rather goes to a witness's credibility and the weight of his or her testimony.<sup>132</sup>

78. It is also well-settled Missouri law that the determination of bias is a factual determination left to the trier of fact, and that the scope of evidence allowable to show interest or bias of witness are matters within discretion of the trier of fact.<sup>133</sup>

79. Although there were objections made by Public Counsel prior to and during the evidentiary hearing that were directed to excluding the testimony and reports offered by witnesses Shepard and Williams on the basis of their testimony and reports not being neutral or independent, neither Public Counsel nor any other party to this action identified any credible evidence that the testimony and reports offered by witnesses Shepard and Williams were biased in any way.<sup>134</sup>

80. There is no evidence in the record that witnesses Shepard or Williams, or their respective employers, demonstrated a predisposition or preference or an inclination

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<sup>131</sup> Black's Law Dictionary, Sixth Dictionary, West Publishing Company, p. 162 (1990). The American Heritage College Dictionary, Third Edition, Houghton Mifflin Company, p. 132 (1997).

<sup>132</sup> *State v. J.L.S.*, 259 S.W.3d 39, 44 -45 (Mo. App. 2008); *State v. Sandlin*, 703 S.W.2d 48, 50 (Mo. App. 1985). The term "bias" includes all varieties of hostility or prejudice against the opponent personally or of favor to the proponent personally. Evidence showing bias includes circumstances of the witness's situation that make it probable that he or she has partiality of emotion for one party's cause. Such circumstances should have a clearly apparent force on the witness as tested by the experience of human nature. Common examples include those involving some intimate family relationship to one of the parties by blood or marriage ... or some such relationship to a person, other than a party, who is involved on one or the other side of the litigation, or is otherwise prejudiced for or against one of the parties. (Internal citations omitted). *State v. J.L.S.*, 259 S.W.3d 39, 44 -45 (Mo. App. 2008).

<sup>133</sup> See *Smulls v. State*, 71 S.W.3d 138, 151 (Mo. banc 2002); *State v. Butts*, 938 S.W.2d 924 (Mo. App. 1997); *State v. Kinder*, 942 S.W.2d at 334 (Mo. banc 1996); *State v. Thomas*, 596 S.W.2d 409, 413 (Mo. banc 1980).

<sup>134</sup> See Transcript, pp. 18-19, 33-35, 45-46, 92-94, 104-105, 285. See also EFIS Docket Number 39, *Office of the Public Counsel's Motion In Limine and Suggestions in Support*, filed August 6, 2008.

that inhibited their impartial judgment, or that a statistical sampling or testing error was created by them by systematically favoring some outcomes over others.

81. Public Counsel based its claim of bias on the assertion that because witness Shepard had consulted the Commission's Staff to obtain information on salaries and cost data for companies comparable to Stoddard County that he was automatically biased. Public Counsel claims that by not consulting with it with regard to this subject matter, that witness Shepard must necessarily be biased and his testimony and report must be excluded.<sup>135</sup>

82. Public Counsel's witness Mr. Robertson attempted to equate accuracy and veracity with bias; however, he stated he had no evidence that the numbers provided by Staff to Bonadio were, in fact, inaccurate or non-verifiable.<sup>136</sup>

83. Public Counsel's witness Mr. Robertson asserted that for witness Shepard to request information from the Commission's Staff rendered him non-neutral because Public Counsel had an opposing view from Staff and because Mr. Shepard accepted the numbers from Staff without independently verifying them. However, Mr. Robertson also testified that Public Counsel should not be held to the same standard and be required to verify the numbers provide by Mr. Owens in his Annual Reports to the Commission – information that he used in his analysis.<sup>137</sup>

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<sup>135</sup> Transcript pp. 80, 102, 224-226, 229-230, 239-240, 248-250.

<sup>136</sup> Transcript, pp. 249-251.

<sup>137</sup> *Id.*



84. The information provided to Bonadio from Staff, was public information from prior Commission cases and is available to any person, entity or group that might request such information.<sup>138</sup>

85. There is no evidence in the record that any of the publicly available information utilized by Bonadio was altered in any way.

86. Public Counsel utilized the same information used by Bonadio without offering any additional verification of that information, and utilized publicly available data on one additional Commission case for its analysis of operator's salary without providing any verification of that information other than its sources was a Commission case, i.e. publicly available record information.<sup>139</sup>

87. Regarding Bonadio's Report, Mr. Robertson also testified that: (1) there were only a few major categories that he had disagreement with; (2) his analysis and Bonadio's analysis were pretty close on the cost structure of the company; (3) that a limited review, and not a full audit, was appropriate for an interim rate increase evaluation; and (4) that Bonadio's calculations were reasonable or just a few dollars off with regard to 50 or 60 percent of the line items.<sup>140</sup>

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<sup>138</sup> Transcript, pp. 55-57, 177-179, 209-211, 239-240, 277-278. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461.

<sup>139</sup> *Id.* Transcript, pp. 240-244, 276. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.

<sup>140</sup> Transcript pp. 254-260. There were 25 line items listed on Public Counsel's comparative analysis exhibit. Of these 25, Public Counsel and Mr. Shepard were in total agreement on 6 items or approximately 24%. The calculations of these two witnesses differed between \$11 and \$525 on an additional 6 items, or another 24%. On three items, the witnesses differed between \$910 and \$1354 or an additional 12%. These were small variances and confirm Mr. Robert's testimony that the experts were in general or close agreement at least 50-60% of the time.

88. Mr. Robertson further testified that the future rate case to be ordered by the Commission as part of Stoddard County's requested relief would cure any problems (if any are established) with the limited review that Bonadio prepared for the Commission.<sup>141</sup>

89. There is no evidence in the record to support Public Counsel's claim that by retaining Bonadio and Smith & Company to provide neutral expert analyses of Stoddard County the Commission demonstrated a predisposition or preference or an inclination that inhibited their impartial judgment.

90. While Public Counsel is free to question the accuracy and veracity of the reports and testimony from Bonadio and Smith & Co., there has been no bias demonstrated, and any evidence of bias would require admission of that evidence into the record – bias is not a basis for excluding evidence, but goes to weight and credibility.

#### **D. Stoddard County's Current Operation**

91. Stoddard County's wastewater treatment plant ("WWTP") is located just southwest of the City of Dexter, approximately 36 miles east of Poplar Bluff.<sup>142</sup>

92. The history of the ownership and operation of Stoddard County's WWTP is as follows:

a) At the time of its inception in 1979, Stoddard County, and all of its assets, was owned and operated by Mr. Carl Bien.<sup>143</sup>

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<sup>141</sup> Transcript, pp. 252-253.

<sup>142</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3.

<sup>143</sup> EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, Filed March 4, 2008; *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri*, Report and Order, issued August 31, 1979, effective September 11, 1979; *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only*, Order Granting Certificate, issued May 7, 1986, effective May 19, 1986; Exh. 3, Preliminary Engineering Report, pp. 1-3; Exh. 5, Unanimous Stipulation of Facts; Exh. 7, *In the Estate of Carl S. Bien, Sr. Deceased*, Assignment

b) Stoddard County was owned and operated by Mr. Carl Bien until he passed away on April 11, 2000.<sup>144</sup>

c) Stoddard County failed to file annual reports with the Commission for calendar years 1996 through 2000. It also failed to pay its Commission assessments for fiscal year 2000, in the amount of \$1991.61, for fiscal year 2001, in the amount of \$1,251.64, and for fiscal year 2002, in the amount of \$1,448.56.<sup>145</sup>

d) On September 14, 1999, prior to Mr. Bien's death, Stoddard County's corporate entity was administratively dissolved for its failure to file an annual registration report within 30 days after it was due, and the dissolution has not been rescinded.<sup>146</sup>

e) According to records maintained by the Missouri Secretary of State, Stoddard County's registered agent was Carl Bien, and Stoddard County has not notified the Secretary of State of a change in its registered agent since Mr. Bien's death.<sup>147</sup>

f) Pursuant to the provisions of Section 351.486 1, Stoddard County's corporate existence continues, but the dissolved corporation may not carry on any business except that necessary to wind up and liquidate its business and affairs pursuant to Section 351.476, and to notify claimants pursuant to Sections 351.478 and 351.482.<sup>148</sup>

g) Mr. Bien died without a will or having named a personal representative for the corporation, and consequently, the assets of the corporation were initially given to Ms. Brenda Wilson, the Stoddard County Public Administrator ("Public Administrator") to manage its operation.<sup>149</sup>

h) Carl Bien's brother-in-law was the person operating the company under Ms. Wilson's management.<sup>150</sup>

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and Receipt of the Circuit Court of Stoddard County, Probate Division, Estate No. 35P070000096, and Assignment of Interested in Stoddard County Sewer, Inc. from Ruth Bien to R.D. Sewer Co. L.L.C; Transcript, pp. 108-113.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* See also EFIS Docket No. 4, *Response to Order Directing Staff to File a Report*, filed April 4, 2008.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

i) While managing Stoddard County, the Public Administrator sought a rate increase for the company; however, the Commission dismissed this action because of Stoddard County's dissolved corporate status and the failure of the company to have paid its annual Commission assessments or file its annual reports.<sup>151</sup>

j) Ultimately, on June 11, 2002, the probate court awarded the assets of the company and 100% of the shares of the company, to Mrs. Ruth Bien, wife of the decedent.<sup>152</sup>

k) Mrs. Bien did not wish to operate Stoddard County.<sup>153</sup>

l) During this time frame, Arlie Smith, a field representative for the Commission, approached Rodger Owens and was asked if he would be interested in taking over the operations of the sewer company.<sup>154</sup>

m) Mr. Owens took over running the operations of Stoddard County in January of 2002 and on or about June 7, 2002 formed R. D. Sewer Company, L.L.C. to formally take over the control and operation of Stoddard County.<sup>155</sup>

n) Mrs. Bien assigned the entire stock interest in Stoddard County to R. D. Sewer on or about June 11, 2002.

o) On August 8, 2002, R. D. Sewer accepted Mrs. Bien's assignment of all her interest in Stoddard County, designated Rodger Owens as the manager of the sewer company, and authorized Mr. Owens to act on behalf of Stoddard County to conduct the day-to-day management of Stoddard Company's facilities and business.

p) Since R. D. Sewer took over Stoddard County's operations, Stoddard County has filed with the Commission all annual reports (that became due after August 8, 2002) and has paid all Commission assessments.<sup>156</sup>

q) R. D. Sewer is not willing to rescind the dissolution of Stoddard County's corporate status, and the Joint Applicants know of no other person or entity that is willing to rescind the dissolution of Stoddard County.<sup>157</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

r) Applicant R. D. Sewer does not have any pending action or final unsatisfied judgment or decision against it from any state or federal agency or court that involves customer service or rates that has occurred within three years prior to the date of the filing of this Joint Application.<sup>158</sup>

s) Applicant R. D. Sewer does not have any overdue Commission annual reports or assessment fees.<sup>159</sup>

t) No person, group or other entity, has, at any time since Stoddard County's real and personal assets were placed into service, secured from the Commission an order authorizing Stoddard County to sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber any of the assets of the company.<sup>160</sup>

93. The history of the construction and permitting of the Stoddard County's

WWTP is as follows:

a) On December 22, 1978, the DNR issued a construction permit for Stoddard County. This permit included the installation and construction of 5,300 feet of gravity sewer line, 15 manholes, 12,000 feet of 2 inch pressure sewer line with 33 cleanouts, a duplex pump station with 1,000 feet of 4 inch force main, 20 grinder pump units, and one interim 25,000 gallon per day (gpd) extended aeration WWTP.<sup>161</sup>

b) On August 31, 1979, in Case No. SA-79-11, the Commission granted Stoddard County a Certificate of Convenience and Necessity ("CCN") to construct, install, own, operate, control, manage, and maintain a sewer system for the public to provide sewer service to Western Heights Subdivision and Ecology Acres Subdivision utilizing the system for which it had received its construction permit.<sup>162</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* Stoddard county's assets are described in Paragraphs 42 and 43 of the Joint Application – EFIS Docket No. 1.

<sup>161</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3. Stoddard County, however, was not built according to the DNR permit. An example of this fact is the size of the existing force main which is 3 inches in diameter rather than 4 inches. *Id.*

<sup>162</sup> EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri*, Report and Order, issued August 31, 1979, effective September 11, 1979; *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only*, Order

c) At the time the Commission issued Stoddard County its first CCN, there were 278 lots platted in the two subdivisions, 78 homes had been constructed and it was estimated that a total of 270 homes would ultimately be constructed.<sup>163</sup>

d) On January 2, 1985, Stoddard County submitted to the DNR a preliminary engineering report for extending its sewer service to the Grant Apartment complex, also located near Dexter, Missouri.<sup>164</sup>

e) On April 28, 1985, DNR informed Stoddard County that it had the capacity to take on wastewater from the Grant Apartments; a 40 unit apartment complex (currently named Westbridge Apartments) and in June 1985, DNR issued a construction permit for the Grant Apartment extension.<sup>165</sup>

f) On February 5, 1986, Stoddard County filed an application with the Commission to extend its CCN to enlarge its service area to provide sewer service to the Grant Apartments.<sup>166</sup>

g) On May 7, 1986, in Case No. SA-86-115, the Commission granted Stoddard County a Certificate of Convenience and Necessity to expand its service area to provide sewer service to Grant Apartments.<sup>167</sup>

h) An inspection conducted by the Commission on January 27, 2005 verified that there are actually 57 units at the Grant Apartment complex, not 40.<sup>168</sup>

94. A description of the WWTP, in its current state of operation, maintenance and repair is as follows:

a) Stoddard County's WWTP, in its current configuration, is known as an extended air type system. Stoddard County's original Missouri State

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Granting Certificate, issued May 7, 1986, effective May 19, 1986; Exh. 3, Preliminary Engineering Report, pp. 1-3; Exh. 5, Unanimous Stipulation of Facts.

<sup>163</sup> *In the Matter of the Approval of Stoddard County Sewer Co., Inc., for the Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri, Report and Order, issued August 31, 1979, Effective September 11, 1979.*

<sup>164</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3.

<sup>165</sup> *Id.*

<sup>166</sup> *In the Matter of the Application of Stoddard County Sewer Co., Inc., for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in an Unincorporated Area in Stoddard County, Missouri; This is to Extend Service Area Boundaries Only, Order Granting Certificate, issued May 7, 1986, effective May 19, 1986.*

<sup>167</sup> *Id.*

<sup>168</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3.

Operating Permit was for a design flow of 25,000 gpd. This was mistakenly increased in a subsequent permit issued March 3, 1995 indicating a design flow 75,000 gpd. The inaccurate permit expired on June 15, 1999. The system has not changed and only has a design capacity of 25,000 gpd.<sup>169</sup>

b) Wastewater arrives at the treatment plant by means of a gravity sewer line and is put through a pump station that delivers it into the plant's primary aeration basin at an elevation of 407.3 feet above Mean Sea Level ("MSL"). An aeration basin is a secondary (biological) stage of wastewater treatment. The only primary treatment the influent wastewater receives is from the submerged bar screen through which it passes when first entering the treatment plant. The bar screen is composed of 1/2 inch bars spaced 1 inch apart center to center.<sup>170</sup>

c) The treatment plant is equipped with two aeration basins, a primary and a secondary. The concrete basins have 1 foot thick walls. The primary aeration basin is 10 feet wide, 25 feet long, and 10 feet deep while the secondary aeration basin is 12 feet wide, 10 feet long, and 10 feet deep.<sup>171</sup>

d) The treatment plant has two 4" diameter aeration blowers, but only one is powered by a replacement motor that is being maintained by the plant's current operator. The blower system and controls are housed inside a small building only a few feet from the aeration basins. According to plant records, air filter maintenance occurs every 30 - 60 days.<sup>172</sup>

e) The inside of the building is in disarray and in need of repairs. The walls have been damaged by recent heavy rain and high wind events. Only one of two existing blowers is currently in use and there is no back up blower in case of failure. A major concern for the blower system is the fact that there is air loss occurring. Air that should be getting added to the aeration basin is being unused and released adjacent to the blower building. There is a third inlet that would allow for the installation of an additional blower, but it is not in use.<sup>173</sup>

f) The treatment plant's aeration is delivered from the 4 inch blower pipe into a set of five 1 inch ductile iron pipes that are submerged into the bottom of the primary aeration basin. After being aerated in the primary aeration basin for an amount of time determined by the flow of the wastewater, the wastewater is allowed to transfer to the second aeration basin by means of a

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<sup>169</sup> Exh. 3, Preliminary Engineering Report, pp. 4-7.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* According to the plant operator, Mr. Owens, the air release is being performed to regulate aeration in the aeration basin. *Id.*

4 inch PVC pipe. Inside the second aeration basin, wastewater is allowed additional contact time and is further aerated by two 1 inch ductile iron pipes which further reduce Biological Oxygen Demand (“BOD”), a DNR effluent parameter.<sup>174</sup>

g) Activated sludge is allowed to flow from the bottom of the system's clarifier's into the aeration basins which improves the efficiency of BOD reduction. The second aeration basin features a second inlet into the system with the same submerged bar screen as in the first basin; however this second inlet is not used. A series of pipes allow the wastewater in the second aeration basin to move to the next process in the treatment process. Around the aeration basins there is a wooden fence to prevent accidents.<sup>175</sup>

h) The piping in the WWTP is extremely old and worn. The walkway above the basins is severely rusted as is the majority of the piping in and around the system. The walkway could be scraped and painted and the aeration piping system would need to be replaced if the system is renovated.<sup>176</sup>

i) The next stage in the treatment process is accomplished with two rectangular clarifiers. Each clarifier is 5' feet wide, 10 feet long, and has a depth of 10 feet. The clarifiers are used in-series in the treatment process so that the detention time of each clarifier, which is based on the wastewater flow, is added to its adjacent clarifier for maximum Total Suspended Solids (“TSS”) and BOD reduction. The piping system inside each clarifier allows for the movement of sludge that settles at their bases. From the first clarifier, sludge moves into either the secondary aeration basin or the waste sludge basin depending on the sludge level in the secondary aeration basin. The second clarifier allows sludge to not only travel to the secondary aeration basin but also to the primary aeration basin. Each clarifier is also equipped with a skimming pipe that allows aerated wastewater to be delivered to each clarifier directly from the primary aeration basin. Weirs in both clarifiers skim off the clarified liquid as it moves toward the effluent pipe which sits at an elevation of 406 .0 feet above MSL. The valve controls and metallic weirs that allow treated water to skim off the surface of the clarifiers are in a rusted condition. The clarifiers are in deplorable condition and need to be replaced.<sup>177</sup>

j) To accommodate excess sludge build up in the WWTP the plant also employs the use of a waste sludge basin. The rectangular sludge holding tank has an inside length of 12 feet, width of 6 feet, and a depth of 10 feet. With these dimensions the sludge tank has a storage capacity of

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*



approximately 5,373 gallons. The sludge holding tank does not include a decanting system and so dewatering of the sludge is impossible. The sludge holding tank has no outlet. According to the WWTP operator, the sludge in the sludge holding tank is periodically pumped out by a contractor that most likely disposes of the sludge at a landfill. The WWTP has a secondary sludge container at its disposal in case sludge buildup in the holding basin is too great; it is a cylindrical container that can be towed. According to the last issued permit, the system produces 13.5 dry tons of sludge per year. The sludge holding basin is also in very poor condition; the piping in and out of the basin is severely worn and needs replacement.<sup>178</sup>

k) The outfall stream for the Stoddard County WWTP is an unnamed tributary to Cane Creek. The treated effluent leaves the plant through Outfall #001, a 10 inch polyvinyl chloride (PVC) pipe. The exact location of the outfall is the SE 1/4, NW 1/4, Section 32, Township 25 North, and Range 10 East in Stoddard County. Effluent travels from Cane Creek to Dudley Main Ditch and then to the Saint Francis River. The description given to the receiving stream and basin is as follows: Unnamed Tributary to Cane Creek, Otter Slough (St . Francis River Basin). The effluent leaving the WWTP is extremely cloudy and there appears to be sludge build up near the effluent pipe. The effluent pipe is missing a flap valve and there is some trash build up near the mouth of the pipe.<sup>179</sup>

l) The collection system consists of approximately 5,300 feet of gravity sewer line, 15 manholes, 12,000 feet of 2 inch pressure sewer line with 33 cleanouts, a duplex pump station with 1,000 feet of 3 inch PVC force main, and 20 grinder pump units. The system also includes 8 inch gravity sewer lines that lead to the treatment plant. Manholes and manhole access locations appear to be in good general condition, although some of the manholes have been found to be in areas that flood quite easily during rainfall. DNR inspectors have suggested that manholes in areas that flood be sealed shut or bolted down to prevent wash outs during rain events. Also of great concern is the fact that many of the clean outs throughout the collection system that have been damaged by juveniles in the area. As stated by the treatment system's operator there isn't any money to make the necessary clean out repairs.<sup>180</sup>

m) The WWTP has two lift stations. The first is a duplex 80 gallons per minute (gpm) pumping station operating at 104 feet of total dynamic head (TDH) at the southern most location of the system near the intersection of Two-Mile Road and Henry Street. The second lift station is located at the

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* The majority of the system was installed around 1980. DNR inspections indicate that the general condition of the collection system is good. The fact that PVC piping was used instead of vitrified clay pipe (VCP) means that the collection system may still have many years of serviceability ahead of it. *Id.*

Westbridge Apartments and has a history of failing. The lift station was designed to accommodate two pumps so that if one were to fail, the other would operate until repairs could be made on the primary pump. The lift station at the Westbridge Apartments has recently had repairs made as part of the efforts to correct the bypass problem that produced many local complaints. Both lift stations for this system have 4 foot diameter manholes. The pumps are 2 - 5 horsepower Hydromatic pumps. The wet well capacity of each lift station is approximately 1,366 gallons. The lift station controls are equipped with their own warning devices and cut-off switches in the event that a failure should occur. Stoddard County has no spare pumps for the two lift stations in the system. It is extremely important that the southernmost wet well have one spare pump on standby in case it should break down. The lift station at Westbridge Apartments should have two working pumps but only has one at this time. A new second pump should be installed and one more should be placed on standby should a failure occur at the lift station. The overall condition of the lift stations is good. Despite the fact that the overall condition of each lift station is good, they have problems.<sup>181</sup>

n) Flow Capacity - As evidenced in the correspondence among the several parties that have an interest in the SCSC WWTP, there has been a bit of confusion about what the actual flow capacity is for the plant. As previously stated, the design flow capacity of the plant is 25,000 gpd and has been since 1978. The plant remains very much in its original configuration. There is no evidence of any upgrades and adjustments that would have raised the maximum flow capacity of the plant. In 1985, the treatment plant was deemed by DNR to be capable of treating wastewater from a 40-unit apartment complex. This decision was due to a careful review of the effluent BOD and TSS readings from the plant which indicated at the time that the treatment plant was easily meeting its prescribed effluent limitations and would have the capacity to take on more BOD reduction responsibility. The construction of the apartment complex produced a total of 57 apartments instead of 40. According to Stoddard County's last issued permit their design population equivalent was equal to 750 people. According to the Rules of Department of Natural Resources Division 20 – Clean Water Commission Chapter 8 - Design Guides CSR 20-8 .020 Design of Small Sewage Works the most conservative estimate for the wastewater flow production per person connected to a WWTP is 100 gallons per day. This translates to the

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<sup>181</sup> *Id.* The southernmost lift station appears to have a leak where wastewater is somehow leaking into a nearby grassy area. The lift station is extremely close to a nearby agricultural operation where at the time of our inspection the crops had been freshly planted. The puddle of wastewater that seemed to have leaked from the lift station was approximately ten to fifteen feet away from the crop area; so should a large scale break in the line occur there could be a large mess for the land owner to have to worry about. This could lead to the owner of the wastewater collection system having to compensate the land owner for any damages and expenses related to a cleanup. The actual danger of such an incident is relatively low since the surrounding terrain and topography is accommodating for downhill flow in a north to south orientation which would lead any leakage away from the crops and allow it to enter a Cane Creek tributary. As part of any remediation efforts for the collection system and lift stations there should be a thorough inspection of both lift stations to ensure there is no danger of leaks or breaks in their piping systems. *Id.*

fact that for the 750 people considered to be connected to the treatment plant the total design flow would be 750 times 100 which is equal to 75,000 gallons per day. There are 109 residential homes and 67 apartments being served by the existing wastewater collection system and extended aeration treatment plant. When accounting for the design guide value of 3.7 people per residence or apartment the current population served is closer to 652 people. Using the previously mentioned calculation method for determining design flow, the WWTP must be able to accommodate the existing flow of 65,200 gallons per day in wastewater influent. The current treatment system is only capable of adequately removing BOD from a peak flow of 25,000 gallons per day but instead is consistently faced with flows reaching a maximum of 65,200 gallons per day. The estimated BOD loading from the existing population, utilizing the DNR design guide value of 0.17 pounds of BOD per person is 110.84 pounds of BOD per day. The original BOD loading value, based on the original design population of 250, was 42.50 pounds per day. This problem requires immediate attention.<sup>182</sup>

o) Infiltration and Inflow -- Another problem currently faced by the Stoddard County WWTP is infiltration and inflow which is also referred to as "I & I".<sup>183</sup> There are no flow meters installed at the treatment plant, but given the estimated population connected to the WWTP of 652, the design wastewater flow should be in the neighborhood of 65,200 gpd. Peak flows of this system can range up to 12 times higher than the design flow due to inflow. This would make the goal of BOD reduction virtually impossible for the system to accomplish. The circumstances surrounding the WWTP, i.e. topography, system age, and poor maintenance, suggests that the collection system has some infiltration problems but the majority of the extraneous flow would be from inflow. This is a good situation for the collection system in that inflow is much easier to locate and correct than infiltration.<sup>184</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* Infiltration is groundwater that enters the system through defects in the collection system such as bad pipe joints, cracked or otherwise damaged pipes, and leaking manholes. Inflow is rainwater that enters the system through illegal connections such as roof drains, area drains, and abandoned lots. Infiltration typically lasts for prolonged periods when groundwater levels are high. Inflow is usually instantaneous, occurring at the same time as major rain events. *Id.*

<sup>184</sup> *Id.* Stoddard County should begin a program to locate and correct sources of inflow. One of the best methods is smoke testing where non toxic smoke is forced into the sewer lines between adjacent manholes. The area between the manholes is observed during the test. Smoke emanating from gutters, vacant lots, or other locations are marked and recorded. After accumulating data on the entire system, Stoddard County will need to follow up by making the necessary repairs. Homeowners will need to be forced to disconnect their gutters from the system or to plug drains in their yards. Open pipes on vacant lots will need to be plugged. *Id.*

## E. Purported Encumbrances on Stoddard County

95. All of the parties to this action are in agreement that various documents exist that purport to convey security interests in Stoddard County's assets to various entities.

The said documents include the following:<sup>185</sup>

a) Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises,<sup>186</sup> dated May 24, 1996 and recorded on June 3, 1996, in Book 289 at Page 451 of the land records of Stoddard County, Missouri (this agreement included a promissory note for \$100,000;<sup>187</sup> Corporation Guaranty Agreement by and between Clinton Enterprises and Carl Bien and Ruth Bien dated May 24, 1996; Security Agreement by and between Bien Co., Inc. and Clinton Enterprises dated May 24, 1996; Uniform Commercial Code - Financing Statement from Bien Co., Inc. to Clinton Enterprises; Modification and Extension Agreement by and between Carl Bien and Ruth Bien and Clinton Enterprises, dated June 3, 1997 (extending the \$100,000, May 24, 1996 promissory note, plus \$20,000 in accumulated interest, and increasing the secured interest by an additional \$15,000 loan to the Bien's for a total note of \$135,000)<sup>188</sup>; Note dated June 3, 1997 in the amount of \$30,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises; Trust Deed by and between Carl Bien and Ruth Bien and Clinton Enterprises dated September 8, 1997, recorded September 17, 1997 in Book 298 at Page 898 of the land records of Stoddard County, Missouri.

b) Deed of Trust by and between Stoddard County Sewer Co., Inc. and Citizens Bank of Dexter, in the amount of \$550,000, dated April 20, 1980 and recorded April 30, 1980 in Book 209 at Page 635 of the land records of

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<sup>185</sup> Exh. 5, Unanimous Stipulation of Facts; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008; EFIS Docket No. 15, *Staff's Supplementary Information Regarding Security Interests in Stoddard County Sewer Company Assets*, filed May 2, 2008; EFIS Docket No. 17, *Staff's Notice Regarding Additional Security Interest in Stoddard County Sewer Company Assets*, filed May 23, 2008.

<sup>186</sup> Clinton Enterprises' last known address is P.O. Box 766, Sikeston, Missouri 63801. Notice was served at this address, but Clinton Enterprises did not intervene in this action. See EFIS Docket No. 2, *Order Directing Notice, Setting Intervention Deadline and Directing the Department of Natural Resources to File a Compliance Report*, issued March 5, 2008.

<sup>187</sup> The parties appear to have listed a typographical error with the date and amounts on the promissory note executed with Clinton Enterprises. The date of May 24, 1997, listed by the parties for the first \$100,000 loan was actually the date scheduled for payment. Payment was apparently not completed for the loan made on May 24, 1996 requiring the execution of the modification agreement on May 24, 1997. The principal on the first promissory note, being paid with an interest rate of 20% per annum, had increased from \$100,000 to \$120,000 at the time the modification agreement was executed.

<sup>188</sup> The Modification Agreement notes that as of May 24, 1997, the unpaid balance on the May 24, 1996 promissory note has increased to \$120,000. Consequently, the additional \$15,000 increased the total to \$135,000.

Stoddard County, Missouri; and note subsequently assigned to the Small Business Administration on December 14, 1983, and recorded on December 22, 1983, in Book 71 at Page 39 of the land records of Stoddard County, Missouri.

c) Second Deed of Trust executed by Stoddard County Sewer Co., Inc. in favor of Ed Maslansang, trustee for Michael Brennan, to secure payment of a promissory note, in the amount of \$40,000, from Carl Bien to Michael Brennan. The Second Deed of Trust was executed on May 1, 2000, and recorded in the office of the Recorder of Deeds for Stoddard County, Missouri, on May 3, 2000, in Book 324, at Page 136.

96. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of the security interests that were executed, as listed in Finding of Fact Number 95, as required by Section 393.190 prior to their execution.

97. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of the security interests that were executed, as listed in Finding of Fact Number 95, after their execution.

98. There is no record evidence that Carl or Ruth Bien ever sought Commission approval of any security interests without having first secured an order from the Commission authorizing the sale, assignment, lease, transfer, mortgage, or execution of any other instrument or mechanism that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner, as required by Section 393.190 prior to their execution.

99. There is no record evidence that Rodger Owens, the current operator and manger of Stoddard County, executed any type of security interest that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner, that would

have necessitated Commission approval prior to their execution as required by Section 393.190.<sup>189</sup>

100. The loan provided to Stoddard County by Maco, previously identified in this order, is an unsecured loan.<sup>190</sup>

101. There is no record evidence that the Commission ever approved or authorized any security interests that would encumber the whole or any part of Stoddard County, and/or its assets, in any manner.

## **F. Stoddard County's Cost Structure**

### **1. Analyses and Methodology**

102. The methodology utilized when performing an accounting analysis of a company such as Stoddard County is part art and part science.<sup>191</sup>

103. All of the parties agree, and all of the accounting analyses presented in this case confirm, that Stoddard County is operating with a revenue deficit.<sup>192</sup>

104. All of the parties agree that it is appropriate to approve the transfer of assets from Stoddard County to R. D. Sewer and to approve an interim rate increase for Stoddard County subject to refund.<sup>193</sup>

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<sup>189</sup> The Commission notes that Stoddard County's 2007 Annual Report lists outstanding loans/debts to Maco Construction, Ray Clinton, the Holden Law Firm, Rodger and LaDawn Owens. It also lists a labor lien and a bank lien. There is no evidence; however, that any of Stoddard County's assets were used to secure these debts. See *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. 10.

<sup>190</sup> Transcript, Volume 2, pp. 15-20; Transcript, Volume 3, pp. 132-135; Exh. 3, Preliminary Engineering Report, p. 3.

<sup>191</sup> Transcript, pp. 81 (Shepard), 254-255 (Robertson). Indeed, as the Missouri Court of Appeals has noted with regard to determining rates, which is necessarily dependent upon determining a company's cost structure: 'The cases also recognize that the fixing of rates is a matter largely of prophecy and because of this commissions in carrying out their functions necessarily deal in what are called 'zones of reasonableness' the result of which is that they have some latitude in exercising this most difficult function. . . ." *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 570 -571 (Mo. App. 1976).

<sup>192</sup> Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 49 (Bonadio-Shepard); 129 (Owens); 173 (Staff-Merciel) 199-202 (Staff-Rackers); 212, 232, 260, 266 (Robertson).

105. The parties disagree on Stoddard County's current cost structure and the specific amount of the interim rate increase Stoddard County should receive prior to completing a formal small company rate increase proceeding pursuant to Commission Rule 4 CSR 240-3.050.<sup>194</sup>

106. The record evidence includes four separate accountings or statements of position regarding Stoddard County's revenue requirement, each utilizing either a different methodology or a different set of variables, and each reaching a different result. The four accountings are summarized in the table below:<sup>195</sup>

<b>Recommendations</b>	<b>Stoddard County</b>	<b>Public Counsel</b>	<b>Bonadio</b>	<b>Staff's 2002 Audit</b>
<b>Description</b>				
<b>Postage</b>				
<b>Post office Box</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$55</b>
<b>Payroll/Services</b>				
<b>Billing Expense</b>	<b>\$9,600</b>	<b>\$0</b>	<b>\$4,160</b>	<b>\$1,200</b>
<b>Operator Expense</b>	<b>\$24,000</b>	<b>\$8,749</b>	<b>\$13,800</b>	<b>\$15,000</b>
<b>Mowing</b>	<b>\$750</b>	<b>\$750</b>	<b>\$750</b>	<b>\$400</b>
<b>Miscellaneous</b>				
<b>Misc.</b>	<b>\$100</b>	<b>\$100</b>	<b>\$100</b>	<b>\$0</b>
<b>Office Supplies</b>	<b>\$3,508</b>	<b>\$1,340</b>	<b>\$3,100</b>	<b>\$180</b>

<sup>193</sup> Transcript, pp. 125 (Owens), 226-228, 252 (Robertson), (253-254, 280-282 contrary position of Robertson on refund); EFIS Docket No. 33, Statement of Position on Issues of Stoddard County Sewer Company, Inc. and R. D. Sewer Co. L.L.C., Private Joint Applicants, filed August 4, 2008; EFIS Docket No. 34, Staff's Statement of Positions on Issues, filed August 4, 2008; EFIS Docket No. 35, Office of the Public counsel's Position Statement, filed August 4, 2008.

<sup>194</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.; Exh. 3, Preliminary Engineering Report, Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1-December 31, 2007*; Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation;

<sup>195</sup> *Id.* The table was constructed primarily utilizing Exh. 13 offered by Public Counsel that summarized the proposals and contrasted them individually with their own.

<b>Effluent Testing</b>		<b>\$1,252</b>		<b>\$1,241</b>		<b>\$1,252</b>		<b>\$1,703</b>
<b>Repair &amp; Maintenance</b>		<b>\$0</b>		<b>\$1,012</b>		<b>\$2,400</b>		<b>\$743</b>
<b>Real Estate Taxes</b>		<b>\$230</b>		<b>\$230</b>		<b>\$230</b>		<b>\$163</b>
<b>Depreciation Expense</b>		<b>\$5,400</b>		<b>\$0</b>		<b>\$5,400</b>		<b>\$4,150</b>
<b>Rent</b>		<b>\$4,200</b>		<b>\$1,050</b>		<b>\$1,050</b>		<b>0</b>
<b><u>Assessments/Permits</u></b>								
<b>Annual Registration</b>		<b>\$50</b>		<b>\$50</b>		<b>\$50</b>		<b>\$50</b>
<b>DNR Ann Op Permit</b>		<b>\$3,000</b>		<b>\$2,500</b>		<b>\$3,000</b>		<b>\$3,000</b>
<b>PSC Assessment</b>		<b>\$2,219</b>		<b>\$2,219</b>		<b>\$2,219</b>		<b>\$1,449</b>
<b><u>Utility Expense</u></b>								
<b>Utilities</b>		<b>\$8,500</b>		<b>\$8,219</b>		<b>\$8,500</b>		<b>\$9,484</b>
<b>Telecommunications</b>		<b>\$3,060</b>		<b>\$309</b>		<b>\$834</b>		<b>\$860</b>
<b><u>Other Expense</u></b>								
<b>Sludge Hauling</b>		<b>\$3,800</b>		<b>\$446</b>		<b>\$1,800</b>		<b>\$0</b>
<b>Uncollectibles</b>		<b>\$500</b>		<b>\$330</b>		<b>\$500</b>		<b>\$0</b>
<b>Insurance</b>		<b>\$1,499</b>		<b>\$591</b>		<b>\$1,501</b>		<b>\$0</b>
<b>Legal &amp; Professional</b>		<b>\$3,600</b>		<b>\$584</b>		<b>\$1,000</b>		<b>\$0</b>
<b>Total Expenses</b>		<b>\$75,268</b>		<b>\$29,720</b>		<b>\$51,646</b>		<b>\$38,437</b>
<b>Return on Investment</b>		<b>\$7,021</b>		<b>\$0</b>		<b>\$7,021</b>		<b>\$9,637</b>
<b>Total Cost of Service</b>		<b>\$82,289</b>		<b>\$29,720</b>		<b>\$58,667</b>		<b>\$48,074</b>
<b>Total Revenues</b>		<b>\$21,970</b>		<b>\$21,970</b>		<b>\$21,970</b>		<b>\$22,093</b>
<b>Net Revenue Deficit</b>		<b>\$60,319</b>		<b>\$7,750</b>		<b>\$36,697</b>		<b>\$25,981</b>

107. The line items in the Table included with Finding of Fact Number 106 that represent the Stoddard County's position are a compilation made by Public Counsel utilizing, in part, the numbers the Stoddard County provided to Bonadio. Stoddard County has not formally sought to recover the net revenue deficit derived from those numbers in this action.<sup>196</sup>

<sup>196</sup> Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript p. 208.



108. Bonadio, who performed a limited review, utilized the accrual basis of accounting to determine the revenue requirement for Stoddard County.<sup>197</sup>

109. Bonadio's Report explained the methodology used as follows:

On June 19 and 20, 2008, Bonadio interviewed LaDawn and Rodger Owens, the current operators of Stoddard County. Bonadio reviewed the information provided relating to invoices and receipts for Stoddard County. Bonadio noted the Owens' also operate three other water districts. All operations are run out of one office and overhead costs are shared among all four operations resulting in efficiencies.

Currently, neither LaDawn, nor Rodger, are drawing any regular salary or dollars from their operation of Stoddard County. Each month, invoices are paid from the businesses that have enough cash to make the payment. Amounts are allocated between the Water and Sewer systems owned/operated by the Owens'. If any excess cash exists, then Rodger or LaDawn will draw a payment for services provided. At times, either Rodney Owens (Roger's son) or Natalie Spitzer (LaDawn's daughter) will provide services to the system and may be paid for those services. The services provided include, but are not limited to, maintenance, lawn mowing, monitoring phone calls, [and] plant observations.

As a result, based on our analysis, many of the actual costs reported for 2007 may not necessarily be a true representation of costs and expenses of the system. Additionally, previously reported amounts have been prepared using the cash basis of accounting, which recognizes revenues when cash is received and expenses when cash is disbursed, regardless of when the revenue is earned, or expenses are incurred. The information provided by Bonadio's analysis has been prepared utilizing the accrual basis of accounting. **The accrual basis of accounting recognizes revenues when the service is provided and expenses when the costs are incurred, regardless of when the cash is received or disbursed, and therefore presents a truer picture of actual operations.** (Emphasis added).

110. Bonadio rounded up its line item allocations subjectively, and rounding up is a common accounting practice because these types of calculations are not an exact science.<sup>198</sup>

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<sup>197</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>198</sup> Transcript, p. 81.

111. While Bonadio has extensive accounting experience with water and sewer utilities, it has limited experience with Missouri regulatory ratemaking procedures. Consequently, the Commission will give less weight to two of the line items allocations Bonadio recommended for Stoddard County's cost structure, i.e. depreciation expense and return on investment.<sup>199</sup>

112. Based upon its extensive accounting experience, the remainder of the line item allocations recommended by Bonadio are credible and substantial.

113. The accounting analysis provided by Staff is taken directly from Staff's 2002 audit of Stoddard County in the rate case that was filed, but ultimately dismissed. Staff performed a full audit as opposed to a limited review.<sup>200</sup>

114. The day-to-day expenses of Stoddard County, and the total of those expenses currently, i.e. 2008, are not less than what is reflected in the 2002 audit.<sup>201</sup>

115. Public Counsel also performed a limited review, primarily relying on the company's 2007 Annual Report and its knowledge of small rate case procedures.<sup>202</sup>

116. Annual Reports filed with the Commission are presumed to be true and accurate.<sup>203</sup>

117. Public Counsel did not independently verify any of Stoddard County's Annual Reports.<sup>204</sup>

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<sup>199</sup> See Finding of Fact Number 18 Transcript pp. 34-35.

<sup>200</sup> Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Transcript, pp. 194-202.

<sup>201</sup> Transcript, p. 188.

<sup>202</sup> Transcript, p. 211.

<sup>203</sup> Transcript, pp. 213, 217-218, 251, 257. Mr. Robertson accurately referred to Exhibits 8 (Attachment C – Balance Sheet and Income Statement – 2006) and Exhibit 9 (Balance Sheets – 2007) interchangeably with Stoddard County's Annual Reports, and these exhibits are, in fact, comprised of portions of those reports. Transcript, p. 217.

118. Public Counsel did not rely on Stoddard County's 2007 Annual Report for its analysis and recommendations on the line items of mowing, property tax, corporate registration, rent and miscellaneous expenses; its witness stating that these costs were immaterial.<sup>205</sup>

119. Public Counsel made Consumer Price Index ("CPI") adjustments to the company's 2007 Annual Report line items of sludge hauling, repairs, utilities, effluent testing, insurance and legal and professional fees to derive its recommendations for these particular line items.<sup>206</sup>

120. Public Counsel relied upon an Internet review of market information to determine what it believes should be the proper operator's expense.<sup>207</sup>

121. It is unclear from the record what information Public Counsel relied on, or how it performed its analysis, when determining its recommendations for Stoddard County's cost structure for the following line items: billing expenses, office supplies, telecommunications, and uncollectible expenses.<sup>208</sup>

122. There was little difference between Public Counsel's cost structure analysis and Bonadio's cost structure analysis, with the exception of a few categories.<sup>209</sup>

123. The differences between Public Counsel's and Bonadio's cost structure analysis are really small and maybe even immaterial.<sup>210</sup>

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<sup>204</sup> Transcript, pp. 250-251. Neither Bonadio or Public Counsel independently verified the public records on which they based their opinions. While Mr. Robertson, testifying for Public Counsel, criticized Bonadio for not independently verifying public records, he inexplicably indicated that Public Counsel should not be held to the same standard. *Id.*

<sup>205</sup> Transcript, pp. 244-245; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Findings of Fact Sections for those particular line items. See Generally Transcripts, pp. 206-282.

<sup>206</sup> Transcript, pp. 242-243.

<sup>207</sup> Transcript, pp. 268-269.

<sup>208</sup> Transcript, pp. 244-245; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Findings of Fact Sections for those particular line items. See Generally Transcripts, pp. 206-282.

<sup>209</sup> Transcript, p. 211, 243, 259-260.

124. The biggest differences between Public Counsel's analysis and Bonadio's analysis are the plant, the depreciation and most of the labor and repairs costs.<sup>211</sup>

125. The accounting services currently provided to Stoddard County are inadequate and have resulted in inaccurate reporting.<sup>212</sup>

126. Stoddard County's Annual Reports for 2006 and 2007 do not capture all of the labor and expense Mr. and Mrs. Owens have contributed to, or invested in, the WWTP. Consequently, the net losses reported in those reports are lower than the actual losses Stoddard County has experienced.<sup>213</sup>

127. For purposes of determining the proper cost structure for Stoddard County, methodology employing an extrapolation of expenses (i.e. Consumer Price Index adjustments) from potentially inaccurate annual reports, and methodology employing subjective rounding of actual cost figures of expenses, magnify any inaccuracies inherent in the respective methodologies.

128. In this instance, actual cost figures, without rounding, from Stoddard County's invoices, as determined by Bonadio, are more accurate than the expenses reported in the company's 2007 Annual Report, or expenses extrapolated from that report.

129. Actual cost figures, without rounding, from Stoddard County's invoices, as determined by Bonadio, provide the most accurate accounting of the company's expenses for purposes of determining Stoddard County's cost structure.

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<sup>210</sup> Transcript, p. 211.

<sup>211</sup> Transcript, pp. 211-212.

<sup>212</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, p. 4.

<sup>213</sup> Transcript, pp. 159-160. Mr. Owens, testifying for Stoddard County, stated that the company's 2007 Annual Report is accurate to the best of his knowledge with the exception in that they do not accurately reflect the labor contributed to the WWTP by Mr. and Mrs. Owens. Transcript, p. 122, 160. Mr. Owens was responding to questions about Exhibits 9, which includes part of the complete 2007 Annual Report.

## **2. Line Item Allocations for Stoddard County's Cost Structure**

### **a. Postage/Post Office Box**

130. Only Staff's 2002 audit reflects the existence of a post office box for Stoddard County and an expense associated with it.<sup>214</sup>

131. There was no testimony or other documentation from the parties that would confirm Stoddard County was currently incurring any expense associated with having a post office box.

### **b. Mowing, Miscellaneous, Real Estate Taxes, Annual Registration, PSC Assessment**

132. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, Stoddard County's annual mowing expense should be recognized and accepted as being \$750.<sup>215</sup>

133. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, Stoddard County's annual miscellaneous expenses should be recognized and accepted as being \$100.<sup>216</sup>

134. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, annual real estate taxes expenses for Stoddard County are \$230.<sup>217</sup>

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<sup>214</sup> Exh. 10, Rate Design Work Papers; Exh. 11, Audit Work Papers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>215</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 60-61, 243-244.

<sup>216</sup> *Id.*

<sup>217</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 74-75, 82, 244.

135. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, the annual corporate registration fee for Stoddard County is \$50.<sup>218</sup>

136. Stoddard County, R.D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining a proper interim rate increase, the annual Commission assessment expenses for Stoddard County are \$2,219.<sup>219</sup>

137. While serving as a benchmark for comparison, Staff's allocations for the line items of mowing, miscellaneous, real estate taxes, annual registration, and the Commission assessment included in its 2002 audit are now outdated and can no longer be considered to be accurate.<sup>220</sup>

138. There is no controverting evidence in the record to challenge the accounting of the line item expense allocations listed in Findings of Fact Numbers 132-137, above.

139. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure: (1) annual mowing expense is \$750; (2) annual miscellaneous expenses are \$100; (3) annual real estate taxes expenses are \$230; (4) the annual corporate registration fee is

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<sup>218</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 76, 244. The corporate registration fee has apparently not changed since Staff performed its 2002 audit – see Exh. 12, Revenue Requirement Calculation and Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>219</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 74-75, 82, 244.

<sup>220</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Transcript, p. 245.

\$50; and (5) the annual Missouri Public Service Commission Assessment expenses are \$2219.

**c. Billing Expense**

140. Stoddard County's expenses for billing for the calendar year of 2007 are listed as being \$233.86 in the Annual Report it filed with the Commission.<sup>221</sup>

141. Stoddard County collect bills monthly, quarterly, semi-annually and annually, although most bills are collected on a monthly basis. Direct monthly billing yields more consistent payments for Stoddard County, but the current company tariffs require the company to use annual payment books. As part of its request for relief, Stoddard County/R. D. Sewer would like to modify its tariffs to implement a monthly billing system and would like to have a provision added to the tariff allowing for late-payment fees.<sup>222</sup>

142. Some of Stoddard County's customers have quit paying their bills and are waiting to see what rates will result from this proceeding before resuming payment.<sup>223</sup>

143. As previously noted, Stoddard County provides service to 172 customers, 115 single family residences and 57 residential apartments.<sup>224</sup>

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<sup>221</sup> Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1. Transcript pp. 122-123.

<sup>222</sup> Transcript, pp. 131-132, 141-142. See also EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

<sup>223</sup> Transcript, pp. 129-130.

<sup>224</sup> See Finding of Fact Number 4; Transcript, p. 118; EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, Filed March 4, 2008; EFIS Docket No. 4; *Response to Order Directing Staff to File a Report*, filed April 4, 2008; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission, filed by Bonadio & Co., L.L.P. on July 9, 2008, EFIS Docket No. 25, formally received into evidence on August 13, 2008. Exh. 3, Preliminary Engineering Report, Smith & Co. Engineers.

144. The apartment complex, managed by Maco, pays the sewer bills for 51 apartment residents (customers of Stoddard County) and passes the costs of the sewer service on to those residents in their monthly bills. Consequently, if Stoddard County billed all its customers monthly it would be required to mail at least 122 monthly bills (121 individual customers and one bill to Maco to cover 51 customers) or 1462 bills annually.<sup>225</sup>

145. Stoddard County and R. D. Sewer provided Bonadio with a proposal to increase the expense for monthly billing to \$9,600.<sup>226</sup>

146. Bonadio recommended that billing expenses for the Stoddard County's cost structure should be \$4,160. Bonadio's analysis utilized the \$1.55 charge per bill/per customer/per month from Staff's calculations from the 2002 rate case and rounded that figure up to \$2.00, i.e. a total of \$4,128, based upon one monthly bill for each of the 172 customers (i.e. 2064 customer bills annually).<sup>227</sup>

147. For verification, Bonadio estimated ten hours per week or 520 hours per year would be required for billing and multiplied that by an hourly rate of \$8.00 to get another estimate of \$4,160.<sup>228</sup>

148. Bonadio's report more fully explains its recommendation for \$4,160 in billing expenses as follows.<sup>229</sup>

R. D. Sewer [Stoddard County] reported billing expenses for 2007 of \$234. An adjustment was proposed [by the company] to increase this expense to a

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<sup>225</sup> Transcript, Volume 2, p. 19.

<sup>226</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service Commission.

<sup>227</sup> Exh. 11, Audit Workpapers; Transcript, pp. 61-63. Note: the transcript references the year 2000, however, this is in error since the rate case was filed in 2002. The Commission must assume that Mr. Shepard's first calculation was based upon the issuance of 172 monthly bills or 2064 annual bills at the rate of \$2.00 per bill resulting in an annual expense of \$4128.

<sup>228</sup> Transcript, pp. 61-63.

<sup>229</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.



level of \$9,600, based on the estimated expense of \$800 per month for billing clerk and collection expense. This is based on 100 hours/month at \$8 per hour. Based on the current amount of time spent on these activities, Bonadio is of the opinion that these services could be performed in substantially fewer than 1,200 hours per year. The time required to service 172 customers can be reasonably expected to be 40 hours/month or 480 hours/year. At \$8/hour, the expense is estimated at \$4,160. Accordingly, Bonadio recommends an increase of \$3,926 be allowed for rate-making purposes.

149. Bonadio used the \$8.00 per hour figure based upon its knowledge of what rates are charged for billing services, on the size of the WWTP and what it felt would be required to perform the billing and associated bookkeeping.<sup>230</sup>

150. The cost figure of \$1.55 per bill/per customer/per month is a reasonable amount for billing expense.<sup>231</sup>

151. Staff's work papers from the 2002 audit list a total amount of \$3200 for "Contracted-Billing Expense;" however, Staff listed \$1,200 for this expense in Exhibit 12, where it compares the audit to the company's and Bonadio's proposals.<sup>232</sup>

152. Staff shifted \$2,000 of the \$3,200 Contracted Billing Expense to operator expense. Presumably, the \$2,000 quantified shift represents the time/personnel requirement for billing that was rolled into operator expense.<sup>233</sup>

153. Staff's work papers from 2002 reflect that the number of total bills would be 2064 annually, relying on one bill being generated for every customer.<sup>234</sup>

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<sup>230</sup> Transcript, pp, 62-63.

<sup>231</sup> Transcript, pp. 180-181.

<sup>232</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See also Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>233</sup> *Id.* Staff's calculations indicate that it initially determined that \$13,000 was an appropriate salary for a licensed operator of the WWTP; however, its summary table indicates that the amount for billing was decreased from \$3,200 to \$1,200 and operator expense was increased from \$13,000 to \$15,000. *Id.*

<sup>234</sup> Exh. 10, Rate Design Workpapers.

154. Public Counsel, without quantifying a value or providing supporting evidence, recommended billing expenses be considered part of operator's expense and that \$0 be included in the company's cost structure for this line item expense.<sup>235</sup>

155. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure billing expense shall remain a separate line item and is \$1,891.

#### **d. Operator's Expense**

156. Stoddard County's mechanical system and its size are not easily comparable to other similar sized regulated utilities operating in southeast Missouri for purposes of comparing operator salary costs.<sup>236</sup>

157. Stoddard County is a very mechanical system requiring more labor and intensive personnel to keep it operating.<sup>237</sup>

158. Given the current condition of the WWTP, Stoddard County requires more labor and more operator time to keep it running than other similar systems.<sup>238</sup>

159. Stoddard County's operation requires more work and more time than operating a water company.<sup>239</sup> Operating a water system requires between 1.5 and 2 hours

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<sup>235</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, p. 209.

<sup>236</sup> Transcript, p. 54.

<sup>237</sup> Transcript, pp. 56-57.

<sup>238</sup> Transcript, pp. 185-186.

<sup>239</sup> Transcript, p. 117-118. The water companies Mr. Owens operates are Oak Briar Estates, Lakeland Heights Water Company and Whispering Hills Water Company. Transcript, pp. 154, 176. Mr. Robertson, testifying for Public Counsel, stated that he believed water testing requirements were more complicated or conducted with greater frequency than for sewer companies, and believed that any comparison of Stoddard County to combined water and sewer companies was unfair. Transcript, p. 210. While any given water and or sewer systems' testing requirements may factor into the time required to operate the system, the individual testing requirements does not indicate or correlate to the total amount of labor required for testing or for operation of that given the system.

per week, while operating Stoddard County's sewer system requires between 14 and 21 hours per week.<sup>240</sup>

160. Mr. Owens works at least two to three hours each day, seven days a week, on average, to operate and maintain Stoddard County's WWTP.<sup>241</sup>

161. Mr. Owens is "on-call" to (and frequently does) make repairs to Stoddard County's WWTP twenty-four hours a day, seven days a week.<sup>242</sup>

162. Mr. Owens barter his time and labor with different skilled laborers in order to obtain their labor in exchange to assist with maintaining the WWTP.<sup>243</sup>

163. Mr. Owens has been operating Stoddard County "pretty well without pay" since he took over operating the system.<sup>244</sup>

164. Based upon the company's Annual Reports, Stoddard County's operator's expense for the calendar year of 2006 was \$225, and for the calendar year of 2007 was \$1162.69.<sup>245</sup>

165. Given that Mr. Owens expends no less than 728 to 1092 hours annually to operate Stoddard County, Mr. Owens earned between 20 cents per hour and \$1.60 per hour operating Stoddard County for the years of 2006-2007.

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<sup>240</sup> *Id.*

<sup>241</sup> Transcript, pp 117-118.

<sup>242</sup> Transcript, p. 118.

<sup>243</sup> Transcript, pp. 136-137.

<sup>244</sup> Transcript, p. 124. Mr. Owens testified that if there is a little money left over from the company's revenues that he or his wife may be able to take that small amount to pay for gas or other items. Transcript, pp. 139-140.

<sup>245</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1-December 31, 2007*, p. S-1. Transcript pp. 139-140.

166. Stoddard County and R.D. Sewer provided Bonadio with a proposal to increase the operator's expense to \$24,000.<sup>246</sup>

167. Bonadio, recommended the operator's fee be set at \$13,800.<sup>247</sup> Bonadio's report explains:

The primary purpose of the operator fee is to compensate the management for duties performed for the utility. Bonadio finds that the current operators of Stoddard County also operate 3 other water and sewer districts. If the system is upgraded as necessary, only a limited amount of time would be required by the owner/manager to take care of breakdowns, leaks and other operations of R.D. Sewer as it is a relatively small utility. Accordingly, Bonadio finds that \$13,800 is a reasonable fee for the owner/manager of this utility and has increased 2007 expense by \$12,172 to a level of \$13,800. To the extent necessary capital improvements are not provided for, or completed, these operator fees may be insufficient to cover the costs.<sup>248</sup>

168. When determining its recommendation for operator's expense for inclusion in Stoddard County's cost structure, Bonadio compared Stoddard County to four other companies operating similar systems. Those companies were, S. K. & M. Water and Sewer Company; Mill Creek Sewers, Inc.; LW Sewer Corporation; and Foxfire Utility Company.<sup>249</sup> These companies are similar to Stoddard County in that they have

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<sup>246</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>247</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Transcript, pp. 47,

<sup>248</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Transcript, pp. 47-48. Mr. Shepard testified that if all necessary improvements and repairs were made to the WWTP, that he estimated it would still take a few days per week to operate the system. Transcript, p. 48.

<sup>249</sup> Transcript, pp. 55-57, 177-180, 209-211, 239-244, 277-278. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389. This information was provided to Bonadio by Mr. Merciel from the Commission's staff. It is publicly available information. Transcript, p. 179. The rate cases had been filed and completed within the past ten years. *Id.* Mr. Merciel testified that he believed he provided Mr. Shepard with information about five companies, but could not remember the fifth company. Transcript, p. 177.

mechanical treatment plants and approximately the same number of customers.<sup>250</sup> These companies have completed rate cases with the Commission within the past ten years.<sup>251</sup> Bonadio did not independently verify the public information it obtained from the Commission's staff on these rate cases.<sup>252</sup>

169. Bonadio examined the company information from the recent rate cases, identified in Finding of Fact Number 168, developed a range based upon the average cost per customer, and accepted the higher end of that range for its recommendation for an operator expense of \$13,800.<sup>253</sup>

170. Given the condition of Stoddard County's WWTP and the extensive hours required to operate it, the Commission finds Bonadio's methodology and results to be reasonable.

171. Staff's 2002 audit recommended an operator expense of \$15,000. Staff's Workpapers reveal that this recommendation is comprised of the combination of \$13,000 for a contracted operator plus a \$2,000 labor/personnel expense for contracted billing services.<sup>254</sup> Staff's audit serves to verify Bonadio's methodology and results.

172. Public Counsel based its recommendation for operator expense by comparing Stoddard County to the same four companies Bonadio used for comparison. Public counsel also considered one other company for comparison – Roy-L Utilities.<sup>255</sup>

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<sup>250</sup> Transcript, pp. 178-179.

<sup>251</sup> *Id.*

<sup>252</sup> Transcript, p. 55.

<sup>253</sup> Transcript, p. 239-240.

<sup>254</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. See Finding of Fact Numbers 151-152

<sup>255</sup> Transcript, p. 209-211, 239-240. See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate*

173. Public Counsel focused on the costs and payroll associated with the two, sewer only companies, i.e. Mill Creek Sewers, Inc.(operator salary \$4,356); LW Sewer Corporation (operator salary \$8,749), compared those to Roy-L Utilities (operator salary \$8,700), and used the higher payroll of \$8,749 for his recommendation.<sup>256</sup> Public Counsel's analysis determined that an operator's salary in the \$8,000 to \$10,000 range would be reasonable to include in Stoddard County's cost structure.<sup>257</sup>

174. Public Counsel did not independently verify the public information it utilized from the Commission's prior rate cases for its recommendation for operator's expense; part of the same information that Public Counsel faults Bonadio for utilizing without independent verification.<sup>258</sup>

175. Public Counsel was unaware if the companies it compared to Stoddard County were mechanical or lagoon systems.<sup>259</sup>

176. Public Counsel was unaware if the operator's cost for the companies that included both water and sewer operations (S. K. & M. Water and Sewer Company and Foxfire Utility Company), that it excluded from its analysis, were based upon the operation of both systems or not.<sup>260</sup>

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*Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.

<sup>256</sup> Transcript, pp. 211-214, 230, 239-240.

<sup>257</sup> Transcript, p. 214.

<sup>258</sup> Transcript, pp. 224-225, 229-230, 239-240, 248-251.

<sup>259</sup> Transcript, p. 276-277.

<sup>260</sup> Transcript, p. 277-278.

177. Public Counsel was unaware of what the sampling requirements are for sewer companies, although it was aware that testing time could vary from fifteen minutes to two hours depending on the company.<sup>261</sup>

178. Public Counsel was unaware of the level of disrepair Stoddard County was experiencing, although its witness agreed that it is reasonable to assume that more labor is required to maintain and operate a system that is in decline and disrepair.<sup>262</sup>

179. Public Counsel found it difficult to determine an hourly wage or salary for the operator of a sewer company, and relied upon market information it found on the Internet.<sup>263</sup>

180. Public Counsel did not provide the Commission with any salary or market comparisons from its Internet searches, nor did it provide any explanation or evidence of how such market information could be verified or authenticated.

181. Given the defects in Public Counsel's analysis, the Commission finds it has less credibility than Bonadio's current analysis or Staff's 2002 analysis, and the Commission will give less weight to Public Counsel's analysis.

182. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, operator expense is \$12,799.

#### **e. Office Supplies**

183. Stoddard County's 2006 Annual Report reflects an amount of \$3,843.10 in the category of "Supplies and Expenses, and its 2007 Annual Report lists \$3,508 in that same category.<sup>264</sup>

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<sup>261</sup> Transcript, p. 216-217.

<sup>262</sup> Transcript, pp. 222, 269-270.

<sup>263</sup> Transcript pp. 241-242, 268-269.

184. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for office supplies in the amount of \$3,508.<sup>265</sup>

185. Bonadio's recommendation for expenses for office supplies was based upon Stoddard County's records and the oral interviews conducted with Mr. and Mrs. Owens.<sup>266</sup>

186. Bonadio's Report indicates that it reviewed an itemized list of the supplies included in R. D. Sewer's [Stoddard County's] operations and factored out costs for supplies that would be used by Mr. Owens' other business.<sup>267</sup>

187. Bonadio calculated an actual cost of \$3,065, which it verified by reviewing the company's invoices. Bonadio then rounded that amount up to \$3,100 when developing its recommended cost structure for the company.<sup>268</sup>

188. Staff's 2002 audit reflects an expense for office supplies in the amount of \$180.<sup>269</sup> Staff's audit for this expense is outdated and has limited value for comparison.

189. Public Counsel recommends that \$1,340 be allowed for office supplies.<sup>270</sup>

190. Public Counsel provided no explanation of how it derived its recommendation.<sup>271</sup>

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<sup>264</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

<sup>265</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>266</sup> Transcript, pp. 64-65

<sup>267</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>268</sup> *Id.*; Transcript, pp. 64-65

<sup>269</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>270</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.



191. Given that Bonadio determined that actual costs for office expenses were \$3,065 and that the Commission has already determined that this method, without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation to be reasonable.

192. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

193. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, office supply expense is \$3,065.

#### **f. Effluent Testing**

194. Stoddard County's 2006 Annual Report reflects an amount of \$938.30 in the category of "Effluent Testing Expenses," and its 2007 Annual Report lists \$1,113.60 in that same category.<sup>272</sup>

195. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for Effluent Testing in the amount of \$1,252.<sup>273</sup>

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<sup>271</sup> Mr. Robertson did provide the following general statement during the proceeding: "In connection with this case, at the current -- based on the current cost structure for this time frame. So essentially what I did is I went in and looked at each cost, looked at Bonadio's work papers. Based on my knowledge of small rate case procedures and the recent cases and the 2007 annual report, I then developed the cost structure." Transcript, p. 210-211, 250-251, Mr. Robertson also testified that he reviewed Staff's 2002 Audit, and the Reports from Bonadio and Smith and Company and their associated Workpapers; Transcript, p. 207. However, no relation between what Mr. Robertson calculated for office supplies and Stoddard County's 2007 Annual Report is evident from the evidence Public Counsel offered into the record. Public Counsel adjusted some of the amounts listed in the 2007 annual report to reflect the change in the Consumer Price Index ("CPI") from December 2007 to June of 2008; however, it did not make such an adjustment for office supplies. Transcript, p. 238, 242-243. Public Counsel made the CPI adjustment for the categories of repairs, sludge hauling, utilities, testing, insurance and legal and professional fees. *Id.*

<sup>272</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3.

196. Bonadio's calculated expense for Stoddard County's effluent testing was taken directly from a notice from the effluent testing provider.<sup>274</sup>

197. Bonadio's report explains:

For 2007 R. D. Sewer [Stoddard County] reported effluent testing expense of \$1,114. An adjustment was proposed to increase this expense to a level of \$1,252, based on a notice received from the supplier. Bonadio has reviewed the notice and has adjusted 2007 effluent testing expense by an increase of \$132.<sup>275</sup>

198. Staff's 2002 audit reflects a combined expense for Stoddard County in the category of "Testing Supplies and Testing" of \$1,703.<sup>276</sup>

199. Public Counsel' analysis yielded a recommended expense for effluent testing totaling \$1,241.<sup>277</sup>

200. Public Counsel relied upon Stoddard County's 2007 Annual Report coupled with a Consumer Price Index ("CPI") adjustment in order to reach its conclusions.<sup>278</sup>

201. Given that Bonadio determined that actual costs for effluent testing are \$1,252 and that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

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<sup>273</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>274</sup> Transcript, p. 60.

<sup>275</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>276</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>277</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>278</sup> Transcript, p. 243.

202. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, effluent testing expense is \$1,252.

**g. Repairs and Maintenance**

203. From the time Mr. Owens took over the operation of Stoddard County he has had to implement significant and on-going repairs to the WWTP.<sup>279</sup>

204. Stoddard County's 2006 Annual Report reflects an amount of \$3,024.39 for repairs to the sewer plant and its 2007 Annual Report lists \$975.00 for that same category.<sup>280</sup>

205. Stoddard County and R. D. Sewer provided Bonadio no proposal for a specific amount to be allocated for repairs and maintenance.<sup>281</sup>

206. Bonadio based its recommendation that \$2,400 be allocated for repairs and maintenance upon the estimated repair and materials costs in the analysis performed by the engineering firm S. H. Smith & Co., Inc.<sup>282</sup>

207. S. H. Smith & Co. relied on information provided by Mr. Owens to estimate the annual costs for repairs and maintenance, and while this information was not

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<sup>279</sup> Transcript, pp. 113-116, 129, 133-136

<sup>280</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3. Stoddard County's 2006 Annual Report specifically reflects repairs made to motors in the amounts of \$989.84 and \$442.84 and a repair made to a pump in the amount of \$300. *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. 3.

<sup>281</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>282</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 3, Preliminary Engineering Report; Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 47-48, 101-103.

independently verified, S. H. Smith & Co. performed an extensive engineering analysis documenting the current condition of the WWTP and the extensive needs for repair, maintenance and upgrading of the facility.<sup>283</sup>

208. Given the current condition of the equipment in the WWTP, it is reasonable to expect that with four pumps and two blowers, one of these devices would fail and require repair at least once every year and a half.<sup>284</sup>

209. An immediate problem that needs to be addressed is that being an aerated plant, it should have two blowers, but it only has one; and it has two lift stations, each should have two pumps in them, but each one only has one. If the single devices fail, the plant becomes non-operational.<sup>285</sup>

210. Staff's 2002 audit allocated \$743 for repair and maintenance costs.<sup>286</sup> Staff's audit for this expense is outdated and has limited value for comparison.

211. Public Counsel recommends an allocation of \$1012 dollars for repairs and maintenance, based upon adjusting the \$975 from Stoddard County's 2007 Annual Report by the change in CPIs from December 2007 to June 2008.<sup>287</sup>

212. Public Counsel's witness, Mr. Robertson, would not acknowledge or accept Mr. Owens' sworn testimony regarding the condition of the assets of Stoddard County or with regard to any problems the company was facing with the company's operation and maintenance and repair of equipment.<sup>288</sup>

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<sup>283</sup> Transcript, pp. 101-103; Exh. 3, Preliminary Engineering Report.

<sup>284</sup> Transcript, pp. 185-186.

<sup>285</sup> Transcript, pp. 166-167; Exh. 3, Preliminary Engineering Report.

<sup>286</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>287</sup> Transcript pp. 237-238

<sup>288</sup> Transcript, p. 222.

213. Mr. Robertson is not an engineer, has never operated a WWTP, and he did not perform an on-site inspection of Stoddard County.<sup>289</sup>

214. Because Public Counsel would not consider the actual physical condition of Stoddard County's WWTP, described by the other witnesses in this matter and in detail in Smith & Co.'s engineering report, Public Counsel's recommendation shall receive less weight in the Commission's decision.

215. Smith & Co. Engineering, an expert in this field, provided the Commission with an extensive report, including a cost analysis for various alternatives to repair, maintain and upgrade Stoddard County's WWTP.<sup>290</sup>

216. Smith & Co., while relying on Mr. Owens for some information, has demonstrated extensive knowledge of the costs associated with repairing, maintaining and upgrading WWTP.<sup>291</sup>

217. There is no evidence in this record to suggest that Mr. Owens' descriptions of the repairs and maintenance required for Stoddard County's WWTP that was provided to Smith & Co. was in any way inaccurate.<sup>292</sup>

218. It was reasonable for Bonadio to rely upon the calculations that Smith & Co. provide to it when performing its analysis of the expenses required for repair and maintenance of Stoddard County's WWTP.

219. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, repair and maintenance expense is \$2,400.

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<sup>289</sup> See Findings of Fact Numbers 57-67.

<sup>290</sup> Exh. 3, Preliminary Engineering Report.

<sup>291</sup> *Id.*

<sup>292</sup> Mr. Owens was found to be a credible witness and testified as to the condition of the WWTP. Transcript pp. 106-161.

## **h. Rent**

220. Stoddard County's 2006 Annual Report reflects an amount of \$1958.05 for rent and its 2007 Annual Report lists \$2,694.05 for that same category.<sup>293</sup>

221. Stoddard County and R.D. Sewer provided Bonadio with a proposal to recognize an expense for Rent in the amount of \$4,200.<sup>294</sup>

222. Bonadio recommended that \$1,050 be allocated for office rental. Bonadio based its recommendation on the shared use of the facilities by Mr. Owens for all of his water companies and for Stoddard County.<sup>295</sup> Bonadio's report explains:

For 2007 R.D. Sewer reported rent expense of \$2,694. R. D. Sewer proposed these expenses be increased to \$4,200 at \$350 per month. Bonadio is of the opinion these costs should be shared by the three water companies and the sewer company. Bonadio estimated the sewer company's share of these costs to be \$1,050. Bonadio recommends that a decrease of \$1,644 be made to 2007 expense for rent.

223. Mr. Owens testified that he believed that Bonadio's estimate was low because Bonadio did not include another small office that he utilizes for Stoddard County when preparing its analysis.<sup>296</sup>

224. Staff's allocation of \$0 for rent in its 2002 audit is now outdated and can no longer be considered to be accurate for purposes of comparison.<sup>297</sup>

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<sup>293</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

<sup>294</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>295</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Transcript, pp. 68-69.

<sup>296</sup> Transcript, p. 150.

<sup>297</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

225. Although Public Counsel provided no explanation on how it made its determination on rent expense, it is in agreement with Bonadio's recommended allocation of \$1,050 for rental expense.<sup>298</sup>

226. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, repair and maintenance expense is \$2,400.

#### **i. DNR Annual Operating Permit Fee**

227. DNR operating permits are based upon the plant capacity.<sup>299</sup>

228. Stoddard County's 2007 annual report does not reflect a specific line item for the expense of a DNR operating permit; however, their expense report to Bonadio included a proposed allocation for \$3,000 for this permit.<sup>300</sup>

229. Bonadio recommended an allocation of \$3,000 for Stoddard County's DNR operating permit.<sup>301</sup>

230. Smith and Co. reports that there was an error in Stoddard County's DNR permit that listed the plant as being a 75,000 gallon per day plant and that there was no indication that Stoddard County had attempted to correct the permit.<sup>302</sup> This error had occurred in relation to a planned expansion for the WWTP that did not occur.<sup>303</sup>

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<sup>298</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, p. 244.

<sup>299</sup> Transcript, p. 272.

<sup>300</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 9, Balance Sheet, Sewer Operating Revenues, Expenses and Statistics, p. S-1.

<sup>301</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>302</sup> Transcript, p. 104; Exh. 3, Preliminary Engineering Report. See also Finding of Fact Numbers 94(b) and (n), 356-357.

<sup>303</sup> *Id.*

231. Bonadio's recommendation for an allocation of \$3,000 for the DNR permit fee was made without knowledge of the error in permitted design capacity for Stoddard County.<sup>304</sup>

232. Staff's 2002 audit lists an allocation for the DNR permit of \$3,000.<sup>305</sup>

233. The design capacity of Stoddard County is 25,000 gallons per day and this is currently in line with the company's DNR permit.<sup>306</sup>

234. The actual gallon flow per day of Stoddard County's WWTP is uncertain, but based upon water usage, the estimated actual flow is near at least 33,000 gallons per day.<sup>307</sup>

235. Smith and Co.'s Preliminary Engineering Report documents that, based upon the WWTP's current design capacity, the population the WWTP serves and DNR regulations, the current treatment system is only capable of adequately removing BOD from a peak flow of 25,000 gallons per day but instead is consistently faced with flows reaching a maximum of 65,200 gallons per day.<sup>308</sup>

236. Stoddard County's DNR permit is currently correct for a 25,000 gallon per day WWTP, and that the correct fee for a plant this size is \$2,500, even if the plant is actually receiving and treating between 25,000 and 65,200 gallons per day.<sup>309</sup>

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<sup>304</sup> Transcript, pp. 73-74.

<sup>305</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>306</sup> Transcript, p. 166

<sup>307</sup> Transcript, p. 165-166.

<sup>308</sup> Exh. 3, Preliminary Engineering Report, pp. 8-9.

<sup>309</sup> Transcript, pp. 243, 272-273.



237. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the DNR permit expense is \$2,500.

**j. Utilities**

238. Exemplifying Stoddard County's revenue deficit, Stoddard County's electric bill for the month of July exceeded the company's revenue for that same month.<sup>310</sup>

239. Stoddard County's 2006 Annual Report reflects an amount of \$7,456.04 for its purchased power expense and \$127.92 for purchased water expense, for a total of \$7,583.96.<sup>311</sup>

240. Stoddard County's 2007 Annual Report reflects an amount of \$7,372.84 for its purchased power expense and \$118.82 for purchased water expense, for a total of \$7,491.66.<sup>312</sup>

241. Stoddard County and R. D. Sewer provided Bonadio with a proposal to recognize an allocation for utility expenses of \$8,500.<sup>313</sup>

242. Bonadio determined that \$8,500 should be allocated for utility costs.<sup>314</sup>

Bonadio's Report explains:

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<sup>310</sup> Transcript, p. 129. Mr. Owens testified that he collected a little over \$700.00 in revenue in July and his electric bill was \$963.00. *Id.*

<sup>311</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1, S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1, S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1, S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1, S-3.

<sup>312</sup> *Id.*

<sup>313</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>314</sup> Transcript, pp. 47, 58-59; Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

During 2007 R. D. Sewer [Stoddard County] incurred purchased power expense of \$7,372 and purchased water expense of \$119 for a total of \$7,491. An adjustment was proposed to increase this expense by \$1,009 to \$8,500 based on a projected increase for the year as a result of higher fuel costs. The engineering firm, S. H. Smith & Co., Inc. estimates the utility costs to be \$9,600. Accordingly, Bonadio finds that the proposed increase is reasonable and has increased 2007 expense by \$1,009 to a level of \$8,500.<sup>315</sup>

243. Bonadio's calculations were based upon a review of Stoddard County's invoices and the actual utility cost was \$8,236, which it then rounded up to \$8,500.<sup>316</sup>

244. Staff, in its 2002 audit determined that \$9,484 was Stoddard County's expense for utilities.<sup>317</sup> While Staff's audit is outdated, it does serve as a basis of comparison in this instance, because, as was already determined by the Commission, the day-to-day costs of the WWTP are not expected to have decreased since 2002.

245. Public Counsel used the expense documented for utilities from Stoddard County's 2007 annual report (i.e. \$7,372) and performed a CPI adjustment to derive his recommendation that \$8,219 be allocated for utility expenses.<sup>318</sup>

246. Given that Bonadio determined that actual costs for utility expenses are \$8,236 and that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

247. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, utility expense is \$8,236.

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<sup>315</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>316</sup> Transcript, pp. 58-59.

<sup>317</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>318</sup> Transcript, p. 242; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

## **k. Telecommunications**

248. Stoddard County's annual reports from 2006 and 2007 do not have a separate line item listed for telecommunications expense.<sup>319</sup>

249. Stoddard County and R. D. Sewer provided Bonadio with a proposed cost structure reflecting an allocation of \$3,060 for telecommunications expenses.<sup>320</sup>

250. Bonadio based its recommendation for telecommunications cost upon a review of specific invoices provided by Stoddard County. These were actual costs based upon 12 months of expenditures.<sup>321</sup>

251. Bonadio's analysis included charges for cable and Internet service. Bonadio determined that Internet service was essential for the company and there was no way to separate out cable charges from the package received by Stoddard County.<sup>322</sup> Bonadio found that separating such charges would have been negligible to its analysis.<sup>323</sup>

252. Bonadio further explained in its report that:

For 2007 R. D. Sewer [Stoddard County] reported no telecommunications expense. These costs were paid through some other company. R. D. Sewer [Stoddard County] proposed these expenses be increased to \$3,060. A review of actual 2007 telephone and internet bills indicated the total annual costs of these services was \$3,333. Bonadio is of the opinion these costs should be shared by the three water companies and the sewer company. Bonadio estimated the sewer company's share of these costs to be \$834. Bonadio recommends that an increase of \$834 be made to 2007 expense for telecommunications expenses.<sup>324</sup>

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<sup>319</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheet.

<sup>320</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Transcript, pp. 65-69.

<sup>321</sup> Transcript, pp. 65-69.

<sup>322</sup> *Id.*

<sup>323</sup> Transcript, p. 66.

<sup>324</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

253. Bonadio did not separate out any telecommunications that were for personal use as opposed to being in connection with Stoddard County's business operations.<sup>325</sup>

254. Bonadio found the fees for telecommunications services to be fixed fees and not minute by minute purchases.<sup>326</sup>

255. At the time of Staff's 2002 audit, Stoddard County was claiming \$1,175 in telecommunications expenses and Staff determined that \$860 was the appropriate amount for these expenses.<sup>327</sup> While Staff's audit is outdated, it does serve as a basis of comparison in this instance, because, as was already determined by the Commission, the day-to-day costs of the WWTP are not expected to have decreased since 2002.

256. Public Counsel recommended the allocation for phone expenses should be set at \$309.<sup>328</sup>

257. Public Counsel provided no explanation of the method it employed to determine the phone expenses it built into its recommended cost structure for Stoddard County's telecommunication services.<sup>329</sup>

258. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

259. Given that Bonadio determined what Stoddard County's actual costs were for its share of telecommunications expenses, and that the Commission has already determined that this method, actual costs without rounding up the values, is the most

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<sup>325</sup> Transcript, pp. 65-69.

<sup>326</sup> Transcript, p. 67.

<sup>327</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>328</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>329</sup> See Transcript, pp. 206-282.

accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

260. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, telecommunications expense is \$834.

### **I. Sludge Hauling**

261. Smith and Co. prepared a very precise calculation of the sludge hauling requirements of Stoddard County, relying, in part, on information concerning sludge hauling that was provided to them by Stoddard County.<sup>330</sup>

262. To verify the information it received from Stoddard County, Smith and Co. compared it to other projects it completed and with other Missouri regulated utilities and found the information to be "right in line" with those projects and utilities.<sup>331</sup>

263. Smith and Co. also performed specific calculations regarding the WWTP's sludge holding basin, and determined that the system produces 13.5 dry tons of sludge per year.<sup>332</sup>

264. Smith and Co. reported that the effluent from the WWTP is extremely cloudy and there is sludge buildup near the mouth of the effluent pipe.<sup>333</sup>

265. DNR violations Numbers 17390, 17514, from 1998 and 1999 respectively, cited Stoddard County for failure to file its annual sludge reports and all of the DNR

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<sup>330</sup> Transcript, p. 101-102.

<sup>331</sup> *Id.*

<sup>332</sup> Exh. 3, Preliminary Engineering Report, p. 5.

<sup>333</sup> *Id.*

violations issued for Stoddard County indicate problems with the effluent from the WWTP.<sup>334</sup>

266. The prior operator of Stoddard County's WWTP (Mr. Bien) used a poor settling agent for sludge that impaired the system's proper operation. Despite current attempts to rectify this situation, the system is still not working correctly with this regard.<sup>335</sup>

267. Sludge hauling expenses will not change based upon whether a utility is regulated or unregulated.<sup>336</sup>

268. Stoddard County's 2006 Annual Report reflects an amount of \$725 for rent and its 2007 Annual Report lists \$400 for that same category.<sup>337</sup>

269. Stoddard County provided Bonadio with a proposed cost structure reflecting an allocation of \$3,800 for sludge hauling expenses.<sup>338</sup>

270. Bonadio based its determination of sludge hauling expenses on the information provided to it by Smith and Co.<sup>339</sup>

271. Bonadio's report concerning its recommendation for sludge hauling expense stated:

During 2007 R.D. Sewer incurred sludge hauling expenses of \$400. An adjustment was proposed to increase this expense by \$3,400 based on a

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<sup>334</sup> See also EFIS Docket No. 9, *Missouri Department of natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008. See also Findings of Fact 364 and 367.

<sup>335</sup> Transcript, p. 115.

<sup>336</sup> Transcript, p. 105.

<sup>337</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-3; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-3; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-3.

<sup>338</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation; Transcript, pp. 65-69.

<sup>339</sup> Transcript, pp. 59-60.

projected hauling cost of \$600 per haul done 4 times a year and projected cost of hauling at \$175 per haul done 4 times a year at each of the two lift stations. The engineering firm, S. H. Smith & Co., Inc. estimates the sludge hauling costs to be \$1,800. Based on actual 2007 and 2006 costs incurred by R.D. Sewer and the engineering projection, Bonadio finds an estimated cost of \$1,800 to be more reasonable and has increased the 2007 expenses by \$1,400.<sup>340</sup>

272. Bonadio, when making its recommendation on sludge hauling expenses had no reason to independently verify the figures Smith and Co. had provided to him regarding Stoddard County's sludge hauling expenses.<sup>341</sup>

273. Staff's 2002 audit included no allocation for sludge hauling.<sup>342</sup> Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

274. Public Counsel recommended a sludge hauling expense allocation of \$446.<sup>343</sup>

275. Public Counsel, based his recommended allocation for sludge hauling on Stoddard County's 2007 Annual Report, adjusted for CPI.<sup>344</sup>

276. Because Public Counsel did not factor the actual physical condition of Stoddard County's WWTP, described by the other witnesses in this matter and in detail in Smith & Co.'s engineering report and the DNR notices of violations, Public Counsel overlooked the fact that Stoddard County is significantly behind on its sludge hauling requirements and the 2007 Annual Report does not accurately reflect the required expense

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<sup>340</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>341</sup> Transcript, p. 59.

<sup>342</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>343</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>344</sup> Transcript, pp. 242-243.

for this line item. Consequently, Public Counsel's recommendation shall receive less weight in the Commission's decision.

277. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, sludge hauling expense is \$1,800.

**m. Uncollectibles**

278. Stoddard County has a history of difficulty with collecting payments from customers.<sup>345</sup>

279. Stoddard County's annual reports for 2006 and 2007 list uncollectible expenses as being \$2,676.90 and \$2,980.30 respectively.<sup>346</sup>

280. Bonadio's report concerning its recommendation for uncollectible expenses stated:

R. D. Sewer reported uncollectible accounts expense for 2007 in the amount of \$2,980. Adjustments were proposed to decrease this expense to \$500 for rate-making purposes. This is a reasonable estimate of future bad debts based on past history. Prior annual reports provided to the Public Service Commission had reported overstated expenses for uncollectible accounts. The amounts reported represented the cumulative uncollected balances for the reported customers and did not change in 2005, 2006, or 2007. Therefore, Bonadio recommends that uncollectible accounts be decreased by \$2,480.

281. Bonadio's calculation for uncollectible expenses was based upon Bonadio's and Stoddard County's experience, and no additional verification was required because

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<sup>345</sup> Transcript, pp. 131-132.

<sup>346</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, pp. 6, S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, pp. 6, S-1.



comparison of this company's uncollectible expenses with other Missouri utilities would not be indicative of Stoddard County's experience.<sup>347</sup>

282. Staff's 2002 audit included no allocation for uncollectible expenses.<sup>348</sup> Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

283. Public Counsel recommended an uncollectible expenses allocation of \$303.<sup>349</sup>

284. Public Counsel provided no explanation of how it derived its recommendation.<sup>350</sup>

285. Because Public Counsel has not substantiated any methodology for its recommendation, the Commission finds that it is deserving of little weight and lacks credibility.

286. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, uncollectible expense is \$500.

#### **n. Insurance**

287. Stoddard County's annual reports for 2006 and 2007 list \$427.49 and \$529.82 for the company's insurance expenses respectively.<sup>351</sup>

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<sup>347</sup> Transcript, p. 79.

<sup>348</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>349</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>350</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement; Exh. 9, Balance Sheet. While Public counsel provided no explanation, the Commission notes that the difference between Stoddard County's reported uncollectible expenses for the years 2006 and 2007 is \$303.40.

<sup>351</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water*

288. Bonadio's report concerning its recommendation for the allocation of insurance expenses stated:

R.D. Sewer's [Stoddard County] 2007 operations reflect insurance expense of \$530. R. D. Sewer [Stoddard County] proposed these expenses be increased to \$1,499. Documentation was provided to support liability insurance for the plant in the amount of \$1,011 and auto insurance in the amount of \$490 for a total of \$1,501. Therefore; for rate-making purposes, Bonadio has increased 2007 insurance expense by \$971 to \$1,501.

289. Bonadio examined Stoddard County's invoices for insurance, which historically totaled \$1,350, and examined the insurance policies of the company and determined that insurance for one company vehicle should be \$415. Bonadio, according to its workpapers rounded this figure up to \$500.<sup>352</sup>

290. Bonadio's analysis also determined that \$1,011 was appropriate for the company's liability insurance premiums to cover the WWTP.<sup>353</sup>

291. Staff's 2002 audit included no allocation for insurance expenses.<sup>354</sup> Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

292. Public Counsel recommended an insurance expense allocation of \$591.<sup>355</sup>

293. Public Counsel, based his recommended allocation for insurance expenses on Stoddard County's 2007 Annual Report, adjusted for CPI.<sup>356</sup>

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*and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007, p. S-1.*

<sup>352</sup> Transcript, p. 69-71.

<sup>353</sup> Exh. 1. During the evidentiary hearing Mr. Shepard, testifying for Bonadio was only questioned about the company's automobile insurance premiums. See generally Transcript, pp. 33-84.

<sup>354</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>355</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>356</sup> Transcript, pp. 242-243. Mr. Robertson, testifying for Public Counsel, stated that he believed Stoddard County's automobile insurance policy had personal vehicles on it in addition to company vehicles and did not believe Bonadio properly separated out individual costs for the vehicles. Mr. Robertson did not address the

294. Given that Bonadio determined that the actual costs for insurance for one company vehicle should be \$415, and given that the Commission has already determined that this method, actual costs without rounding up the values, is the most accurate methodology, the Commission finds Bonadio's recommendation is more accurate than Public Counsel's.

295. There was no controverting evidence presented to substantiate that \$1,011 was not a reasonable amount of expense for liability insurance premiums to cover the WWTP.

296. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, insurance expense, including automobile and liability insurance, is \$1,416.

**o. Legal and Professional**

297. Stoddard County's Annual Reports for 2006 and 2007 list a line item for "outside services" (legal and accounting) of \$705 and \$592 respectively.<sup>357</sup>

298. Stoddard County's Annual Reports for 2006 and 2007 list a debt owed to the Holden Law Firm in the amount of \$2,617.83.<sup>358</sup>

299. Steven Holden, from the Holden Law Firm, is one of the attorneys representing Stoddard County in this matter.<sup>359</sup>

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fact that Bonadio's auto insurance calculation was lower than his and Mr. Robertson not address the subject of liability insurance at all for the WWTP. Transcript, p. 243.

<sup>357</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

<sup>358</sup> *Id.*

300. Bonadio's report concerning its recommendation for the allocation of legal and professional expenses stated:

R. D. Sewer [Stoddard County] reported legal and professional fees of \$592 in its 2007 operations. An adjustment was proposed to increase this expense to \$3,600. These fees were for accounting services and attorney fees. The average costs of these services for the last three years were \$650. The accounting services currently provided are inadequate and has resulted in inaccurate reporting and will need to be increased to ensure quality of service. Bonadio is of the opinion that the legal and professional fee should be increased by \$408 to \$1,000.

301. Staff's 2002 audit included no allocation for legal and professional expenses.<sup>360</sup> Staff's audit, having no amount allocated for this expense, cannot serve as a basis of comparison or verification.

302. Legal expenses have increased for Stoddard County since the time Staff conducted its 2002 audit.<sup>361</sup>

303. Public Counsel recommended an allocation for legal and professional expenses of \$584.<sup>362</sup>

304. Public Counsel arrived at this figure by performing a CPI adjustment on the \$552 reported for the cost of having H&R Block prepare Stoddard County's taxes in 2007.<sup>363</sup>

305. Public Counsel did not recommend any expense amount be considered for legal fees, stating that any reasonable and prudent legal expenses could be recovered in a subsequent rate case.<sup>364</sup>

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<sup>359</sup> See EFIS Docket No. 1, *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R.D. Sewer Co. and Establishing New Rate for R.D. Sewer Co., Subject to Review*, filed March 4, 2008.

<sup>360</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>361</sup> Transcript, p. 188.

<sup>362</sup> Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>363</sup> Transcript, pp. 218-219, 242-243, 255-259.

306. Public Counsel did not believe that legal expenses could be very high for a small sewer company and its witness, Mr. Robertson, stated that he believed the company could represent itself, through its operator, in DNR negotiations.<sup>365</sup>

307. Stoddard County is facing many legal problems, problems that prolonged these proceedings.<sup>366</sup>

308. Any legal expenses incurred by Stoddard County would need to be normalized to determine a proper annual allocation.<sup>367</sup>

309. Stoddard County was represented by legal counsel at the local public hearing held in this matter on June 4. That hearing's duration was approximately 45 minutes in length.<sup>368</sup>

310. Stoddard County was represented by legal counsel at the evidentiary hearing held in this matter on August 13. That hearing's duration was approximately five and a half hours in length.<sup>369</sup>

311. Stoddard County's legal counsel filed 10 pleadings with the Commission during the course of this proceeding and will be filing status reports regarding the company's progress with negotiating and executing a compliance agreement with DNR.<sup>370</sup>

312. Stoddard County will require legal representation in any subsequent rate case before this Commission, and has agreed to initiate such a case within 30 days of this order becoming effective.<sup>371</sup>

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<sup>364</sup> Transcript, pp. 218-219, 242-243, 255-259, 280.

<sup>365</sup> Transcript, pp. 218-219, 242-243, 255-259, 273-275.

<sup>366</sup> Transcript, pp. 227, 236, 273-275.

<sup>367</sup> Transcript, p. 274.

<sup>368</sup> Transcript, Volume 2.

<sup>369</sup> Transcript, Volume 3.

<sup>370</sup> See EFIS Docket Numbers 1, 10, 11, 14, 33, 42, 43, 50, 66, and 67.

313. Stoddard County faces potential other legal fees associated with purported encumbrances on the assets of the WWTP.

314. Section 536.085(4) provides definition for reasonable attorney's fees in contested administrative cases where a party prevails against the state pursuant to Section 536.087. Those attorney's fees are capped at \$75.00 per hour, unless the court determines that a special factor justifies a higher fee.

315. Missouri courts have found attorney's fees ranging from \$75.00 per hour to \$200.00 to be reasonable.<sup>372</sup>

316. Public Counsel's recommendation, having not factored in any expense for legal fees, is artificially low and diminished in its credibility.

317. Bonadio's recommendation, while acknowledging the need for improved and more expensive accounting service, also did not factor in expenses for legal services and while it is credible with regard to accounting expenses, its recommendation will be given less weight with regard to legal expenses.

318. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, legal and professional expenses are \$2,000.

## **p. Depreciation Expense and Return on Investment**

### **i. Depreciation**

319. Stoddard County's Annual Reports for 2006 and 2007 list a line item for depreciation expenses of \$3,675.70 and \$5,406.72 respectively.<sup>373</sup>

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<sup>371</sup> Transcript, p. 137.

<sup>372</sup> *In re C.W.*, 257 S.W.3d 155, 158 (Mo. App.2008); *Wallace v. Wallace*, 2008 WL 4402435, 9 (Mo. App. 2008) ); *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App.2006); *Washington v. Jones*, 154 S.W.3d 346, 352 (Mo. App. 2004); *H.S.H. ex rel. R.A.H. v. C.M.M.*, 60 S.W.3d 656, 659 (Mo. App. 2001); *McIntosh v. McIntosh*, 41 S.W.3d 60, 73 (Mo. App. 2001); *Dildine v. Frichtel*, 890 S.W.2d 683, 687 (Mo. App.1994); *American Bank of Princeton v. Stiles*, 731 S.W.2d 332 (Mo. App. 1987).

320. Bonadio recommended an allocation of \$5,400 for depreciation expense.<sup>374</sup>

321. Bonadio made its recommendation based the information contained in Stoddard County's Annual Reports, its inventory and its fixed assets.<sup>375</sup> Bonadio's Report stated:

R.D. Sewer reported depreciation expense of \$5,407 for 2007 which it proposed to decrease by \$7, to the projected 2008 level of \$5,400. Bonadio concurs with the depreciation expense estimate and therefore recommends a decrease of \$7 be included for rate-making purposes.

322. Staff's 2002 audit allocates \$4,150 for depreciation expenses.<sup>376</sup>

323. The 2002 audit is not completely accurate because there has been more investment in plant and depreciation.<sup>377</sup>

324. It is unclear from the record if depreciation that has been collected since 2002 has exceeded the amount invested in plant since that time; however, to the extent that Mr. Owens contributed more to the WWTP than has been depreciated in the past six years, rate base would increase.<sup>378</sup>

325. The Commission does not allow a return on plant if a company has no investment in that plant.<sup>379</sup>

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<sup>373</sup> Exh. 8, Attachment C, Balance Sheet and Income Statement, p. S-1; Exh. 9, Balance Sheets, Water and Sewer Operations, Sewer Operating Revenues, Expenses and Statistics, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Year Ending December 31, 2006*, p. S-1; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. S-1.

<sup>374</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>375</sup> Transcript, pp. 75-76.

<sup>376</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>377</sup> Transcript, pp. 186-187, 192-193. Mr. Merciel, testifying for Staff, stated that he still believes Staff's audit is the best information that Commission has available in terms of a full accounting for these expenses. *Id.*

<sup>378</sup> Transcript, pp. 192-193.

<sup>379</sup> Transcript, pp. 204.

326. Public Counsel recommends that no amount be allocated for depreciation because it believes that Mr. Owens has no investment in the Stoddard County and should not earn a return on the plant or for depreciation.<sup>380</sup>

327. In prior Commission cases involving rate increase requests for small water and sewer companies, the Commission has approved the following depreciation rates:<sup>381</sup>

<b>Account Number</b>	<b>Account Description</b>	<b>Depreciation Rate</b>	<b>Average Service Like (Years)</b>
<b>311 (351)</b>	<b>Structures &amp; Improvements</b>	<b>2.5%</b>	<b>40</b>
<b>352.1</b>	<b>Collection Sewers(Force)</b>	<b>2.5%</b>	<b>40</b>
<b>352.2</b>	<b>Collection Sewers(Gravity)</b>	<b>2.0%</b>	<b>50</b>
<b>353</b>	<b>Other Collection Plant</b>	<b>4.0%</b>	<b>--</b>
<b>354</b>	<b>Services to Customers</b>	<b>2.0%</b>	<b>50</b>
<b>355</b>	<b>Flow measurement Devices</b>	<b>3.3%</b>	<b>30</b>
<b>362</b>	<b>Receiving Wells and Pump Pits</b>	<b>4.0%</b>	<b>25</b>
<b>363</b>	<b>Electric Pumping Equipment</b>	<b>10.0%</b>	<b>10</b>
<b>372</b>	<b>Oxidation Lagoons</b>	<b>4.0%</b>	<b>--</b>
<b>373</b>	<b>Treatment &amp; Disposal Facilities</b>	<b>4.5% - 5.0%</b>	<b>20</b>
<b>375</b>	<b>Outfall Sewers</b>	<b>2.0%</b>	<b>--</b>
<b>391</b>	<b>Office Furniture &amp; Equipment</b>	<b>5.0%</b>	<b>20</b>
<b>391.1</b>	<b>Office Computer Equipment</b>	<b>14.3%</b>	<b>7</b>
<b>392</b>	<b>Transportation Equipment</b>	<b>12.5%</b>	<b>8</b>

<sup>380</sup> Transcript, pp 219-220, 235, 238-239; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

<sup>381</sup> See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461; *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389.



<b>395</b>	<b>Laboratory Equipment</b>	<b>5.0%</b>	<b>20</b>
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328. For reasons that will be more fully articulated in the Commission’s conclusions of law, the Commission finds that for Stoddard County’s current cost structure, the appropriate allocation for depreciation is \$0.

**ii. Return on Investment**

329. Mr. Owens has not paid any costs for acquiring the assets of the WWTP.<sup>382</sup>

330. Mr. Owens currently has an oral agreement to acquire the assets of the WWTP, the terms of which do not require any payment for the assets.<sup>383</sup>

331. No WWTP assets have been taken out of service since the time Mr. Owens has taken over operation of the WWTP.<sup>384</sup>

332. Mr. Owens has placed approximately \$17,000 worth of new or refurbished equipment into service in the past three years, including two-blowers, two grinder pumps, and an electric motor – all with the assistance of loans from Maco.<sup>385</sup>

333. Stoddard County’s 2007 Annual Report reflects the exact amount owed to Maco that was provided to Stoddard County for these investments is \$17,388.88.<sup>386</sup>

334. Stoddard County’s 2007 Annual Report reflects the addition of a new grinder pump at the cost of \$2,078.00.<sup>387</sup>

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<sup>382</sup> Transcript, p. 133.

<sup>383</sup> Transcript, p. 138.

<sup>384</sup> Transcript, p. 136.

<sup>385</sup> Transcript, pp. 133-136.

<sup>386</sup> Exh. 9 Exh. 9, Balance Sheet; *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. 10.

<sup>387</sup> *Stoddard County Sewer Company, Inc., Water and/or Sewer Annual Report, Small Company, To the Missouri Public Service Commission, For the Calendar Year of January 1- December 31, 2007*, p. 3.

335. The new or refurbished equipment Mr. Owens contributed to plant is being used and is useful to the provision of sewer service to Stoddard County's customers.<sup>388</sup>

336. Stoddard County and R. D. Sewer provided a proposal to Bonadio to recover \$7,021 for a return on its investment.<sup>389</sup>

337. Bonadio recommended an allocation of \$7,021 for a return on plant. Bonadio's report concerning its recommendation for the allocation for return on investment stated:

R. D. Sewer [Stoddard County] did not include any amount for return on plant for 2007. An adjustment was proposed to include return on plant expense at an estimated level of \$7,021. Bonadio calculated a return amount based on an 11% rate of return on the assets in service as of December 31, 2007. Net assets in service were \$63,826 as reported on the 2007 Public Service Commission Annual Report. Accordingly, Bonadio has included return on plant expense of \$7,021 for ratemaking purposes.

338. Bonadio obtained the information regarding the 11% rate of return from Mr. Merciel and did not compare that rate with other Commission cases.<sup>390</sup>

339. In the five prior Commission rate cases involving small water and sewer companies (the ones reviewed by Bonadio and Public Counsel) the rate of return approved by the Commission has ranged from 8.88% to 10.09%.<sup>391</sup>

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Stoddard County has also incurred other expenses for repairs on some of the motors: "like \$3- or \$400 at different times." Transcript, p. 135.

<sup>388</sup> Transcript, pp. 126-128.

<sup>389</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D.

<sup>390</sup> Transcript, p. 77.

<sup>391</sup> See the following Commission Cases: *In the Matter of the Small Company Rate Increase Request of Mill Creek Sewers, Inc.*, Case No. SR-2005-0016; *In the Matter of the Request of LW Sewer Corporation for a Rate Increase Pursuant to the Commission's Small company Rate Increase Procedure*, Case No. SR-2005-0338; *In the Matter of the Small Company Rate Increase Request of Foxfire Utility Company*, Case No. SR-2002-1163; *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Case No. SR-2007-0461. See also *In the Matter of Roy-L Utilities, Inc. Small Company Rate Increase*, SR-2008-0389. The rate of return allowed in Foxfire was 9.92%; in S. K. & M. was 10.09%; in Roy-L Utilities was 8.88%; in L.W. Sewer a return on Equity of 7.00% was allowed and in Mill Creek no rate of return was allowed.

340. Public Counsel recommends that no amount be allocated for return on plant because it believes that Mr. Owens has no investment in the Stoddard County.<sup>392</sup>

341. Once an owner/operator contributes equipment to the utility, as long as it is a reasonable and prudent expense, then it is appropriate to allow the owner/operator to earn a return and recovery of it.<sup>393</sup>

342. When asked by Commissioner Murray how Mr. Owens' investment in plant equipment should be categorized, where Mr. Owens acquired new equipment and refurbished old equipment, Mr. Robertson, testifying for Public Counsel, replied that depending on the amount of the expense it would be classified as being an operating expense or being capital. Mr. Robertson further stated that the difference in these classifications was based upon the dollar amount invested and that once the investment exceeded the threshold of \$1000 it would be classified as being capital as opposed to being an expense. According to Mr. Robertson, an expense would be factored into repairs and maintenance and updated for CPI and contributions to plant are allowed to earn a return and recovery of depreciation.<sup>394</sup>

343. Applying Mr. Robertson's definition of expenses and plant to Mr. Owens' investment of \$17,388.88 into replacing or refurbishing blowers, grinders and electric motors, the Commission finds Mr. Owens' investments to be contribution to plant.

344. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the appropriate allocation for return on investment is \$1,721.

#### **q. Total Revenues**

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<sup>392</sup> Transcript, pp. 219-220, 231-232, 276

<sup>393</sup> Transcript, p. 234.

<sup>394</sup> Transcript, pp. 235-236.

345. Stoddard County, R. D. Sewer, Public Counsel and Bonadio all agree that, for purposes of determining Stoddard County's current cost structure the company's normalized operating revenues are \$21,970.<sup>395</sup>

346. While serving as a benchmark for comparison, Staff's allocation of \$20,093 for operating revenues in its 2002 audit is now outdated and can no longer be considered to be accurate.<sup>396</sup>

347. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds that for Stoddard County's current cost structure, the total revenue is \$21,970.

**r. Net Revenue Requirement**

348. As previously noted, the parties analyses/proposals result in the following recommendations for Stoddard County's net revenue requirement:<sup>397</sup>

<b>Analyses/Proposals</b>	<b>Stoddard County</b>	<b>Public Counsel</b>	<b>Bonadio</b>	<b>Staff's 2002 Audit</b>
<b>Total Cost of Service (Total Revenue Requirement)</b>	<b>\$82,289</b>	<b>\$29,720</b>	<b>\$58,667</b>	<b>\$48,074</b>
<b>Total Revenues</b>	<b>\$21,970</b>	<b>\$21,970</b>	<b>\$21,970</b>	<b>\$22,093</b>
<b>Net Revenue Deficit</b>	<b>\$60,319</b>	<b>\$7,750</b>	<b>\$36,697</b>	<b>\$25,981</b>

<sup>395</sup> Exh. 1, Report on Joint Application of Stoddard County Sewer Company, Inc., R.D. Sewer Co., L.L.C. and Staff of the Missouri Public Service, pp. 1-5 and Attachments A-D. Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation. Bonadio explained in detail: "R.D. Sewer reported in its annual report operating revenue in the amount of \$24,119 for 2007. Based on R.D. Sewer's current tariff rate of \$11.40 per month for houses/duplexes and \$9.12 per month for apartments and a customer level of 115 and 57 for houses/duplexes and apartments, respectively, Bonadio has calculated normalized operating revenues to be \$21,970. The customer base is expected to stay the same. This results in a decrease over 2007 reported revenues of \$2,149." Exh. 1, p. 2. Transcript, p. 212.

<sup>396</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation.

<sup>397</sup> Exh. 10, Rate Design Workpapers; Exh. 11, Audit Workpapers; Exh. 12, Revenue Requirement Calculation; Exh. 13, Stoddard County Sewer Co., Inc. Revenue Requirement Calculation.

349. Mr. Owens has the technical, managerial and financial experience required to operate Stoddard County and continue to operate it if the transfer of assets is approved.<sup>398</sup>

350. Mr. Owens testified that based upon his technical, managerial and financial experience he needs a 100% increase in Stoddard County's rates to provide safe and adequate sewer service to WWTP's customers.<sup>399</sup>

351. For reasons that will be more fully articulated in the Commission's conclusions of law, the Commission finds Stoddard County's total cost of service is \$44,830; its total revenue is \$21,970; and its net revenue deficit is \$22,860.

### **G. The Provision of Safe and Adequate Service**

352. Since January of 1987, Stoddard County has experienced problems with the quality of its effluent.<sup>400</sup>

353. DNR inspectors have documented that the aeration units of the WWTP were inoperable at times causing dangerous septic conditions in the outflow channel for the effluent. The effluent flows into an unnamed tributary and then into Cane Creek. The effluent then travels from Cane Creek to Dudley Main Ditch and then into the Saint Francis River.<sup>401</sup>

354. Stoddard County, while under Mr. Bien's operation, failed to meet the requirements for filing its discharge monitoring reports. This was a violation of Stoddard

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<sup>398</sup> Transcript, p. 128. Mr. Owens has demonstrated his abilities over the six years he has operated the WWTP and his many years of experience operating his water companies.

<sup>399</sup> Transcript, p. 129.

<sup>400</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

<sup>401</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

County's National Pollution Discharge Elimination System ("NPDES") permit number MO-0096881 which expired November 20, 1985.<sup>402</sup>

355. In October of 1987, DNR conducted a "stream survey" of the outflow channel for Stoddard County's effluent. According to DNR, extensive algae mats on the stream substrate indicated that the Stoddard County effluent was a likely nutrient source which is harmful for aquatic life in the stream.<sup>403</sup>

356. In June of 1988, DNR denied Stoddard County's Missouri State Operation Permit renewal request and issued an abatement order.<sup>404</sup>

357. In response to DNR's abatement order, Mr. Bien obtained the services of a certified operator and an engineer to re-evaluate the WWTP and design necessary upgrades. Subsequent to this re-evaluation, Mr. Bien applied to the DNR for a construction permit to expand the WWTP to 75,000 gpd by August of 1990. DNR completed the engineering review, but the construction permit was never issued.<sup>405</sup>

358. When DNR renewed Stoddard County's Missouri State Operating Permit, it mistakenly modified the permit by increasing the design capacity of the old WWTP to 75,000 gpd, the design flow of the proposed WWTP.<sup>406</sup>

359. The WWTP upgrade was never constructed, and violations related to effluent Biological Oxygen Demand (BOD) and Total Suspended Solids (TSS) continued to be a problem.<sup>407</sup>

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<sup>402</sup> *Id.*

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10; Transcript, pp. 104,164-167.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

360. Chronic poor performance and non-submittal of monitoring reports resulted in Stoddard County being placed on the annual noncompliance list in 1997.<sup>408</sup>

361. In June of 1998, septic conditions in the plant were again documented by DNR. An inspection in late July of 1998 revealed that the plant was again without a certified operator, was poorly operated, and was over its design capabilities. Monitoring reports were not being submitted and operational control testing was not being performed.<sup>409</sup>

362. Because of the continued DNR compliance issues, Stoddard County was referred to DNR's enforcement section in May of 1999. DNR enforcement section personnel found Mr. Bien uncooperative concerning compliance issues and by October of 1999, the enforcement section referred Stoddard County to the Attorney General's Office (AGO) for formal legal action to compel compliance.<sup>410</sup>

363. On May 17, 2000, DNR received documentation of Mr. Bien's death; however, due to continued poor operation and water quality issues, the AGO decided to proceed with litigation.<sup>411</sup>

364. On May 27, 2004, the DNR Southeast Regional Office (SERO) received a complaint of sewage bypassing from a lift station near Westbridge Apartments, formerly known as Grant Apartments, and flowing into a nearby-unnamed tributary. The single pump that served the station failed and a back-up pump was not available. SERO confirmed that the bypass was eventually stopped on July 6, 2004, but the repairs that were made were only temporary. During the time it took to stop the bypass, untreated

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<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

wastewater flowed from a manhole and into the unnamed tributary at an approximate rate of 10,000 gallons per day.<sup>412</sup>

365. In addition to the documented history of environmental violations delineated in Findings of Fact Numbers 351 through 364, the Commission adopts, as findings of fact, the issuance of all of the DNR violation notices that are listed DNR's compliance report filed in this case and that are listed in the procedural history section of this order.<sup>413</sup>

366. The plant has failed to meet the parameters related to the levels of BOD and TSS in the plant's effluent discharged into Cane Creek on a consistent basis.<sup>414</sup>

367. According to the testing documentation, during the 33 month period between May of 2005 and January of 2008, the WWTP was above maximum allowable BOD and TSS levels for 22 months, or 67% of the time. This indicates that the system is drastically overloaded and undersized.<sup>415</sup>

368. The visible results of the lack of BOD and TSS reduction include but aren't limited to sludge accumulation in the creek, excessive algae growth near the treatment plant's effluent pipe and in the creek bed, and severe discoloration of the creek water. The BOD that is being released into Cane Creek is harmful to not only the immediate discharge area but also the area downstream of the WWTP.<sup>416</sup>

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<sup>412</sup> *Id.* Part of the loans provided by Maco were used to replace a pump at the lift station near the Westbridge apartments to stop the major sewage bypass which had been occurring. *Id.*

<sup>413</sup> See also EFIS Docket No. 9, *Missouri Department of Natural Resources' Statement of Compliance for Stoddard County Sewer Co., Inc.*, filed on April 21, 2008.

<sup>414</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10.

<sup>415</sup> Exh. 3, Preliminary Engineering Report, pp. 1-3, 5, 8-10. According to the treatment plant's last operating permit issued March 3, 1995 and expired June 15, 1999, the maximum permitted BOD levels were 45 mg/L as a weekly average and 30 mg/L as a monthly average. There was no daily maximum on the permit but the effluent BOD reading cannot be very much higher than the weekly average. The observed maximum level during the 2005 to 2008 time period for BOD was 203 mg/L and 272 mg/L for TSS. *Id.*

<sup>416</sup> *Id.* Since the harmful organic material that is meant to be neutralized through the system's aeration process is being released into Cane Creek, dissolved oxygen in the creek is being depleted. The reduction in



369. A review of testing results from the independent lab that provides Stoddard County's testing data supports the idea that some outside source, i.e. the dumping of waste from surrounding septic systems into the collection system, could possibly be forcing an extremely high peak BOD loading on the system.<sup>417</sup>

370. Stoddard County, under the operation of Mr. Owens, is currently engaged in negotiations with the DNR to arrange and execute a settlement agreement with a compliance schedule to bring the company back into compliance with all environmental regulations.<sup>418</sup>

371. Because of the history of, and the continued violations of, Missouri DNR regulations, Missouri Clean Water Act Violations and NPDES requirements, Stoddard County is not providing safe and adequate service.

### **III. Conclusions of Law**

The Missouri Public Service Commission has arrived at the following conclusions of law.

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dissolved oxygen removal creates a very harmful situation for any aquatic life in Cane Creek. Without the normal levels of oxygen in the creek there undoubtedly has been a severe stunting in the growth of plant and aquatic life in the creek. Not only do the microorganisms consume oxygen but they also cause life threatening diseases in humans. Unsuspecting children that play near Cane Creek downstream of the WWTP are in danger due to the existing treatment system. *Id.*

<sup>417</sup> *Id.* According to the plant operator, the local police have made it a priority to keep a watch out for any activity that would be a contributing factor of this concern. In the past there were also concerns over whether or not the high BOD and TSS readings obtained in the WWTP were the results of contamination from nearby methamphetamine laboratories dumping waste products into the collection system. A thorough investigation was completed around the year 2000 and no evidence was found to support the idea that a "meth lab" was responsible for the effluent conditions at the WWTP. Factors related to the collection system aren't responsible for the high BOD and TSS levels experienced in the WWTP. The high levels in the plant are due to the fact that the plant size is too small for the number of people it currently serves. *Id.* at pp. 6-9.

<sup>418</sup> EFIS Docket Number 42, *Motion in Limine of Stoddard County Sewer Company and R.D. Sewer Co., L.L.C. Private Joint Applicants with Suggestions*, filed August 11, 2008. See also EFIS Docket No. 50, *Quarterly Status Report of Stoddard County Sewer Company, Inc., and R.D. Sewer Co., L.L.C., Private Joint Applicants*, filed August 29, 2008.

**A. Jurisdiction, Application of Section 393.190, Standard for Evaluating the Transfer Application, Burden of Proof, Public Interest Defined and Standard for Granting Interim Relief<sup>419</sup>**

**1. Commission Jurisdiction and Authority**

Section 386.020(42) defines "public utility" as including "every . . . sewer corporation . . . as [this term is] defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."

Section 386.020(48), RSMo, defines "sewer corporation" as including:

every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets.

Stoddard County and R. D. Sewer are "sewer corporations" and a "public utilities," as defined in Sections 386.020(48) and (42), and are subject to the jurisdiction, supervision, and control of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

**2. Application of Section 393.190**

**a. The Statute's General Application**

Section 393.190.1 provides in pertinent part:

**No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other**

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<sup>419</sup> See Procedural History; Findings of Fact 1-8, 91-94; and Exhs. 6 and 7 as they relate to this section.

corporation, person or public utility, **without having first** secured from the commission an order authorizing it so to do. . . .<sup>420</sup>

Section 393.190.2 provides:

No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality; neither shall any street railroad corporation acquire the stock or bonds of any electrical corporation, unless, in either case, authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, **no stock corporation of any description, domestic or foreign, other than a** gas corporation, electrical corporation, water corporation, **sewer corporation** or street railroad corporation, ***shall, without the consent of the commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by*** any gas corporation, electrical corporation, water corporation or ***sewer corporation*** organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any gas corporation, electrical corporation, water corporation or sewer corporation may, with the consent of the commission, acquire and hold the remainder of the capital stock of such gas corporation, electrical corporation, water corporation or sewer corporation, or any portion thereof.<sup>421</sup>

The Applicants seek Commission approval of the transfer of the following assets, as identified in paragraphs 42 and 43 of their Application, from Stoddard County to R. D.

Sewer:

42. Stoddard County's assets include the following real estate:  
Legal Description:

All of Lot 1 and the North 35 feet of Lot 2 in Block 1 of Ecology Acres Subdivision, as recorded in Plat Book 8 at Page 4 in the Recorder of Deeds Office of Stoddard County, Missouri. Date of Acquisition: December 28, 1979.

43. Stoddard County's assets include the following personal property:  
Description of Property

Sewer Plant Facility and Equipment  
(One 15 h.p. Electric Motor, one 5 h .p . Blower Motor)

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<sup>420</sup> Emphasis added.

<sup>421</sup> Emphasis added.

3-ABS 5 h .p. Grinder Pump, Rebuilt  
8300 ft. of 3" PVC Sewer Main  
11865 ft . of 8" PVC Sewer Main  
One 1000 gallon three-axle Fiberglass Sewage Tank Trailer  
One 16 ft., two-axle Flat Bed Trailer with Hydraulic Winch  
One 20" x 30" Aluminum Extension Ladder  
One Lot Rubber Air Up Test Plugs  
Two 18 x 25 x 52 Four-Drawer File Cabinets  
One Stand Light

The proposed transfer of assets involves Stoddard County selling, transferring, or otherwise disposing or encumbering the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, and as such, the transfer of Stoddard County's assets requires that the companies involved secure Commission authorization.<sup>422</sup> No party contests the facts that, to-date, no transfer of Stoddard County's assets has taken place and the transaction proposed requires Commission approval pursuant to Section 393.190. However, the record is clear that Stoddard County's corporate stock has already been assigned to R. D. Sewer.<sup>423</sup>

**b. Section 393.190.2 – Not Applicable**

Two days prior to the evidentiary hearing, Public Counsel filed a motion to dismiss this matter alleging the Commission lacked jurisdiction pursuant to Section 393.190.2, because it believed Mrs. Bien's assignment of Stoddard County's stock to R. D. Sewer was void. Because of the timing of this filing, the Commission took the motion with the case to

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<sup>422</sup> Section 393.190.1 (emphasis added).

<sup>423</sup> Exh. 6, Assignment of Interest in Stoddard County Sewer, Inc., executed June 12, 2002; Exh. 7, Assignment of Interest in Stoddard County Sewer, Inc. and Assignment Order and Receipt, Estate Number 35P070000096, executed June 12, 2002.

allow the other parties an opportunity to fully respond. The Commission directed the parties to include their responses in their post-hearing briefs.

The gravamen of Public Counsel's claim is: (1) at the time the transfer of stock occurred from Stoddard County to R. D. Sewer, R. D. Sewer was not a "sewer corporation" as defined in Section 386.020; (2) at the time the transfer of stock R. D. Sewer was a "stock corporation" as referred to in Section 393.190.2; (3) R. D. Sewer received the transfer or assignment of Stoddard County's stock without Commission approval as required by Section 393.190.2 for stock corporations and; consequently, that transfer or assignment is void pursuant to Section 393.190.3; (4) because the transfer of stock is void, Mrs. Bien is still the legal owner of the stock; (5) the Commission cannot approve the transfer of Stoddard County's assets without the presence of the owner of Stoddard County's stock (i.e. Mrs. Bien is a necessary party), and (6) therefore, the Commission lacks jurisdiction to hear this case or approve the requested transfer of assets.<sup>424</sup>

Public Counsel's motion shall be denied for multiple reasons. The Commission has personal jurisdiction over Stoddard County and R. D. Sewer in this matter because, as previously noted, they are both presently sewer corporations and public utilities. Moreover, both companies acquiesced to the Commission's jurisdiction when they filed their application and entered their appearance, through counsel.

With regard to subject matter jurisdiction, as an initial matter, Section 393.190.2 does not apply to R. D. Sewer. It did not apply at the time of the purported transfer of Stoddard County's stock, and it does not apply now. Public Counsel is correct that at the time the assignment of stock agreement was executed, i.e. on or about June 11, 2002,

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<sup>424</sup> EFIS Docket 44, Office of the Public Counsel's Motion to Dismiss for Lack of Jurisdiction, filed August 11, 2008. See also Transcript, pp. 17-18, 283-284

R. D. Sewer was not a sewer corporation – it clearly became a sewer corporation before the ink dried on Mrs. Bien’s signature on the assignment, but in the seconds prior to the assignment, R. D. Sewer was only a Limited Liability Company (L.L.C.) and not a sewer corporation. R. D. Sewer remains an L.L.C. (although now it is also a sewer corporation), and L.L.C.s are not “stock corporations” subject to the requirements of Section 393.190.2. An L.L.C. has membership interests, not stock.<sup>425</sup> Indeed, an L.L.C. is not even allowed to use the words “corporation” or “incorporated” in its company name.<sup>426</sup>

The Commission is required, by Section 393.190.1, to approve any transfer of Stoddard County’s assets and the Commission has an appropriate application before it seeking that approval. Even assuming, *arguendo*, that Section 393.190.2 was applicable and that the stock assignment was void, it is irrelevant who owns Stoddard County’s stock for purposes of making a determination on the requested approval for the transfer of assets. Mr. Owens testified that he has an oral agreement with Mrs. Bien regarding the proposed transfer. The Commission has the jurisdiction and authority to approve the requested transfer in the absence of Mrs. Bien subject to any conditions the Commission may impose on such a transfer. One condition the Commission would require is for Stoddard County to file a fully executed transfer of assets agreement between the appropriate parties.<sup>427</sup> If it approves the transfer, the Commission may also place other conditions on the transfer, and any of the parties to the proposed transfer, including Mrs.

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<sup>425</sup> Sections 347.015(12), 347.081 and 347.097.

<sup>426</sup> Section 347.020(2).

<sup>427</sup> The Commission’s filing requirements recognize that the authority to transfer assets of a sewer company require the filing of contract or agreement of sale; consequently, the may grant conditional authority, requiring these requirements be met prior to fully authorizing the transfer. See Commission Rule 4 CSR 240-3.310. Moreover, the Commission’s rule only requires filing a contract for sale and in this instance Mrs. Bien has promised to transfer the assets without charge.

Bien, may elect not to proceed with the approved transfer if they do not wish to comply with the Commission's conditions.<sup>428</sup>

Even assuming, *arguendo* again, that Mrs. Bien was a necessary party because she still owned Stoddard County's stock, the absence of a necessary party is not fatal to jurisdiction.<sup>429</sup> Rather, "[i]f it is claimed that necessary parties who are subject to the processes of the court are not present, the remedy is not by a motion to dismiss but rather by motion to add the parties deemed to be necessary."<sup>430</sup> Dismissal is appropriate only if the court finds the absent party both "necessary" and "indispensable."<sup>431</sup> However, a person, group or entity can only be considered "indispensable" if that person, group or entity cannot be made a party and if the court determines that it cannot "in equity and good conscience" allow the action to proceed without him.<sup>432</sup> To determine whether in equity and good conscience the action should proceed among the parties before it, there are four factors to be considered: (1) prejudice to the absent party or to those already parties, (2) the lessening or avoiding of prejudice by protective provisions in the judgment, by shaping relief, or by other measures, (3) the adequacy of the judgment which might be entered in

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<sup>428</sup> See Case No. SO-2007-0071 (transfer of assets) and Case No. EM-2007-0374 (merger). It is common practice for the Commission to grant conditional authority for this type of requested relief.

<sup>429</sup> *Bracey v. Monsanto, Co.*, 823 S.W.2d 946, 947 (Mo. banc 1992); *Edmunds v. Sigma Chapter of Alpha Kappa*, 87 S.W.3d 21, 27 (Mo. App. 2002); *Iowa Steel & Wire Co., Inc. v. Sheffield Steel Corp.*, 227 S.W.3d 549, 556 (Mo. App. 2007); *In the Matter of Sweeney*, 899 S.W.2d 886, 889 (Mo. App. 1995). "Failure to join a necessary party, however, is not ground for dismissal. *Rule 52.06*. There is a recognized distinction between an 'indispensable party,' without whose presence a case may not be maintained, and a 'necessary party,' who should be made a party in order that there may be a complete determination of the controversy at hand, but whose presence is not essential to a determination of the issues between the parties. If it is claimed that necessary parties who are subject to the processes of the court are not present, the remedy is not by a motion to dismiss but rather by motion to add the parties deemed to be necessary. *Rules 52.06* and *55.27(a)(7)*." *Bracey v. Monsanto Co., Inc.*, 823 S.W.2d 946, 947 (Mo. banc 1992).

<sup>430</sup> *Bracey*, 823 S.W.2d at 947; *Edmunds*, 87 S.W.3d at 27 (Mo. App. 2002); *Iowa Steel*, 227 S.W.3d at 556.

<sup>431</sup> *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo. banc 1976).

<sup>432</sup> *Id.*; *State ex rel. Webster County v. Hutcherson*, 199 S.W.3d 866, 874 (Mo. App. 2006); *Rule 52.04*.

the person's absence, and (4) the adequacy of a remedy if the action is dismissed for nonjoinder.<sup>433</sup>

Public Counsel did not request the appropriate relief for its claimed deficiency because Mrs. Bien was not an indispensable party and Public Counsel did not seek her joinder. But even if Mrs. Bien was considered a necessary party, the Commission still has jurisdiction to proceed because any relief ordered will not prejudice Ms. Bien or any of the parties in any way. The Commission would not approve the transfer without a condition that Stoddard County file a properly executed transfer of assets agreement. This would require Mrs. Bien to be a party to the agreement, and that is the only “presence” of Mrs. Bien that would be required in this matter.

Public Counsel has requested the Commission dismiss this case on the basis of inapplicable statute, which even if applicable would be irrelevant, and that even if applicable and relevant (which Section 393.190.2 is not) the appropriate relief would not be dismissal. The Commission declines Public Counsel’s invitation to act contrary to the applicable law.

### **3. Transfer of Assets Approval Standard – “Not Detrimental to the Public Interest”**

Section 393.190 does not set forth a standard or test for the Commission's approval of the proposed transfer of assets. However, when reviewing Section 393.190's predecessor, i.e. Section 5195, RSMo 1929, the Missouri Supreme Court determined that

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<sup>433</sup> *Burack*, 536 S.W.2d 7 at 11.



the standard for Commission's approval of transactions pursuant to this statute is the "not detrimental to the public interest" standard.<sup>434</sup> As the court explained:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"<sup>435</sup>

No Missouri court has deviated from this ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190, and this standard is further cemented by the Commission's own rules, which require an applicant for such authority to state in its application "[t]he reason the proposed sale [or transfer] of the assets is not detrimental to the public interest."<sup>436</sup>

No party contests that the appropriate standard the Commission must apply to evaluate the proposed transaction, pursuant to the application of Section 393.190, is the "not detrimental to the public interest" standard, and "[t]he Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest."<sup>437</sup>

The Missouri Court of Appeals has stated of Section 393.190: "The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by

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<sup>434</sup> *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934). See also *State of Missouri ex rel. Ag Processing, Inc., v Public Service Commission of the State of Missouri and Aquila, Inc., f/k/a Utilicorp United, Inc.*, 2003 WL 1906385\*6 (Mo. App. 2003) (overruled on other grounds).

<sup>435</sup> *City of St. Louis*, 73 S.W.2d at 400.

<sup>436</sup> Commission Rule 4 CSR 240-3.310(1)(D).

<sup>437</sup> *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

the utility.”<sup>438</sup> “To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the assets safely and efficiently.”<sup>439</sup>

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that Stoddard County and R. D. Sewer provide safe and adequate service to their customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the provision of sewer service less safe or less adequate, or which tends to make rates less just or less reasonable.<sup>440</sup> The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits.<sup>441</sup> The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the

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<sup>438</sup> *Id.*

<sup>439</sup> See *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071, et al, Report and Order issued February 8, 2007; *In Re the Matter of the Joint Petition of Frimel Water System, Inc. and Lake Lorraine Property Owners' Association for Authority for Frimel Water System, Inc., to Transfer Its Assets and Cease Operations*, Case No. WM-2006-0459 (Report and Order issued November 7, 2006, 2006 WL 3371567 (Mo. P.S.C.); See also *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C.3rd216, 220. See also *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

<sup>440</sup> *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108. See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

<sup>441</sup> *Id.*

transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.<sup>442</sup>

#### **4. Burden of Proof**

In cases brought under Section 393.190.1 and the Commission's implementing regulations, the applicant bears the burden of proof, which carries with it a preponderance of the evidence.<sup>443</sup> That burden does not shift. Thus, a failure of proof requires a finding against the applicant.<sup>444</sup> Consequently, the Commission may not withhold its approval of the proposed transaction unless the Applicants fail in their burden to demonstrate that the transaction is not detrimental to the public interest, and detriment is determined by performing a balancing test where attendant benefits are weighed against direct or indirect effects of the transaction that would diminish the provision of safe or adequate of service or that would tend to make rates less just or less reasonable.<sup>445</sup>

#### **5. Public Interest Defined**

While the standard for evaluating transactions proposed pursuant to Section 393.190 is clear, the term “public interest” must also be examined. “The public interest is found in the positive, well-defined expression of the settled will of the people of the state or nation, as an organized body politic, which expression must be looked for and

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<sup>442</sup> *Id.*

<sup>443</sup> Report and Order, *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108, issued October 6, 2004, effective October 16, 2004. See also Report and Order on Rehearing, issued February 10, 2005, effective February 20, 2005, reiterating the standard, 2005 WL 433375 (Mo.P.S.C.) Re Union Electric Company, d/b/a AmerenUE.

<sup>444</sup> *Id.*

<sup>445</sup> *City of St. Louis*, 73 S.W.2d at 400; *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980). See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

found in the Constitution, statutes, or judicial decisions of the state or nation, and not in the varying personal opinions and whims of judges or courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.”<sup>446</sup> “[I]f there is legislation on the subject, the public policy of the state must be derived from such legislation.”<sup>447</sup> The General Assembly of the State of Missouri many years ago, by enactment of the Public Service Commission Law (now Chapter 386), wisely concluded that the public interest would best be served by regulating public utilities.<sup>448</sup> The legislature delegated the task of determining the public interest in relation to the regulation of public utilities to the Commission when it enacted Chapter 386, and all other chapters and sections related to the exercise of the Commission’s authority.

The public interest is a matter of policy to be determined by the Commission.<sup>449</sup> It is within the discretion of the Commission to determine when the evidence indicates the public interest would be served.<sup>450</sup> Determining what is in the interest of the public is a balancing process.<sup>451</sup> In making such a determination, the total interests of the public served must be assessed.<sup>452</sup> This means that some of the public may suffer adverse

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<sup>446</sup> *In re Rahn’s Estate*, 291 S.W. 120, 123 (Mo. 1926).

<sup>447</sup> *Morrshhead v. Railways Co.*, 96 S.W. 261, 271 (Mo. banc 1907).

<sup>448</sup> *Missouri Public Service Co. v. City of Trenton*, 509 S.W.2d 770, 775 (Mo. App. 1974).

<sup>449</sup> *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

<sup>450</sup> *State ex rel. Intercon Gas, Inc. v. Public Service Com’n of Missouri*, 848 S.W.2d 593, 597 -598 (Mo. App. 1993). That discretion and the exercise, however, are not absolute and are subject to a review by the courts for determining whether orders of the P.S.C. are lawful and reasonable. *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980).

<sup>451</sup> *In the Matter of Sho-Me Power Electric Cooperative’s Conversion from a Chapter 351 Corporation to a Chapter 394 Rural Electric Cooperative*, Case No. EO-93-0259, Report and Order issued September 17, 1993, 1993 WL 719871 (Mo. P.S.C.).

<sup>452</sup> *Id.*

consequences for the total public interest.<sup>453</sup> Individual rights are subservient to the rights of the public.<sup>454</sup> The “public interest” necessarily must include the interests of both the ratepaying public and the investing public. In fact, the Commission notes that the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property.<sup>455</sup> However, as noted, the rights of individual groups are subservient to the rights of the public in general.

## **6. Standard for Granting an Interim Rate Increase**

“The Public Service Commission has the power in a proper case to grant interim rate increases within the broad discretion implied from the file and suspend statutes and from the practical requirements of utility regulation.”<sup>456</sup> Emergency conditions requiring especially speedy rate relief, exist ‘where a showing has been made that the rate of return being earned is so unreasonably low as to show such a deteriorating financial condition that would impair a utility's ability to render adequate service or render it unable to maintain its financial integrity.’<sup>457</sup>

The Commission has previously set out standards for granting interim rate relief. To be eligible for interim rate relief a utility company must show: (1) that it needs the additional

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<sup>453</sup> *Id.*

<sup>454</sup> *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

<sup>455</sup> In *State ex rel. City of St. Louis v. Public Service Com'n of Missouri*, 73 S.W.2d 393 (Mo. banc 1934), a case involving the sale of stock, and thus partial ownership, of two Missouri public utility corporations to a Virginia Corporation, the Missouri Supreme Court held: “The owners of this stock should have something to say as to whether they can sell it or not. To deny them that right would be to deny to them an incident important to ownership of property. A property owner should be allowed to sell his property unless it would be detrimental to the public.” *Id.* at 400.

<sup>456</sup> *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 566-568 (Mo. App. 1976); *State ex rel. Utility Consumers Council of Missouri, Inc., v. Public Service Commission*, 585 S.W.2d 41, 48 (Mo. banc 1979); Sections 393.140(11) and 393.150.

<sup>457</sup> *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 568 -569 (Mo. App. 1976).

funds immediately, (2) that the need cannot be postponed, and (3) that no other alternatives exist to meet the need but rate relief.<sup>458</sup> The Commission also has the power, on a case-by-case basis, to grant interim rate relief on a nonemergency basis where the Commission finds that particular circumstances necessitated such relief.<sup>459</sup> The standard for granting interim relief on a nonemergency basis is good cause shown by the company, and determination of good cause shown is at the Commission's discretion.<sup>460</sup>

### **7. Final Conclusions Regarding Jurisdiction, Applicable Statutes, Burden of Proof, and Applicable Standards for Evaluating the Transfer Application and Interim Rate Increase Request**

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) Stoddard County and R. D. Sewer are subject to the jurisdiction, control, and regulation of the Commission; (2) Stoddard County and R. D. Sewer have properly pled and requested all appropriate relief from the Commission with regard to their asset transfer application pursuant to Section 393.190 and the Commission's Rules; (3) the standard to apply to transfer of assets application is the "not detrimental to the public interest standard," and application of this standard is a balancing test as described in detail, *supra*; (4) determination of what constitutes the "public interest" is a matter of policy to be determined by the Commission; (5) Stoddard County and R. D. Sewer bear the burden of

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<sup>458</sup> *In the Matter of Timber Creek Sewer Company, Inc.'s Tariff Designed to Increase Rates for Sewer Service*, Case No. SR-2008-0080, Order Approving Small Company Rate Increase On An Interim Basis, Subject to Refund, and Approving Tariff, issued October 30, 2007, 2007 WL 3243348 (Mo.P.S.C.); *In re Missouri Public Service Company*, Case No. 18,502, 20 Mo. P.S.C. (N.S.) 244 (1975); *In re Missouri Power & Light Company*, Case Nos. GR-81-355 and ER-81-356 (1981); *State ex rel. Laclede Gas Co. v. Public Serv. Comm'n*, 535 S.W.2d 561 (Mo. App. 1976); *State ex rel. Arkansas Power & Light Company v. Public Service Commission*, 736 S.W. 2d 457 (Mo. App. 1987).

<sup>459</sup> *Id.* There is nothing to prohibit the Commission from authorizing interim rates. *State ex rel. GTE North, Inc. v. Missouri Public Service Com'n*, 835 S.W.2d 356, 368 (Mo. App. 1992).

<sup>460</sup> *In the Matter of the Empire District Electric Company's Tariff Revision Designed to Increase Rates, on an Interim Basis and Subject to Refund, for Electric Services Provided to Customers in the Missouri Service Area of the Company*, Case No. ER-97-82, Report and Order, issued February 13, 1997, 1997 WL 280093 (Mo.P.S.C.)

proof of satisfying the standard in order to gain approval of their proposed transfer of assets, and (6) the Commission may grant interim rate relief on an emergency basis or on a case-by-case basis for good cause shown.

**B. Purported Encumbrances on Stoddard County's Assets<sup>461</sup>**

In addition to governing the immediate application for the transfer of Stoddard County's assets to R. D. Sewer, Section 393.190.1 also requires Commission approval of any transaction that would encumber any part of Stoddard County's assets in any manner. Any security interest conveyed without Commission approval is void.

The documents identified by the parties, and delineated in the Findings of Fact Section of this order, that were executed by Carl Bien and purport to convey a security interest in Stoddard County's assets to Clinton Enterprises, Citizens Bank of Dexter, and Ed Maslansang were never approved or authorized by the Commission as is statutorily required in Section 393.190.1. Those attempts at conveyance are void. Moreover, there is no record evidence that the Commission has ever approved a secured interest in Stoddard County's assets to any person, group or entity.

Substantial and competent evidence in the record as a whole supports the conclusions that: (1) the instruments executed by Carl Bien that purport to convey a security interest in Stoddard County's assets, as delineated in the Findings of Fact section of this order, are void and non-enforceable; and (2) any purported security interest in Stoddard Count's assets that lacks Commission approval or authorization is void and non-enforceable.

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<sup>461</sup> Refer to Findings of Facts Numbers 95-101 for this section.

## **C. Stoddard County's Cost Structure<sup>462</sup>**

Determining Stoddard County's cost structure is a necessary prerequisite for the Commission to fully perform its balancing test when applying the not detrimental to the public interest test. Consequently, the Commission shall make that determination prior to rendering its conclusions on the proposed assets transfer and request for interim rate relief.

### **1. Methods for Calculating Revenue Requirements**

The Commission determined in its findings of fact that the methodology employed by Bonadio, determining actual costs, without rounding figures, was the most accurate methodology to determine Stoddard County's current cost structure for purpose of determining an appropriate interim rate increase. Bonadio's analysis is current, as opposed to Staff's 2002 audit; it involved onsite inspections of the WWTP, coordination with the engineering report completed by Smith & Co., interviews with Mr. and Mrs. Owens (WWTP operators) and Bonadio utilized the company's actual invoices, thus eliminating any errors in the accounting that generated the company's Annual Reports.

Public Counsel employed a hodgepodge of methods. Public Counsel found it immaterial to examine or analyze certain line items of the company's cost structure; it utilized the company's 2007 Annual Report, adjusted for CPI for some line items; and it provided little to no explanation on how it derived other suggested line item allocations. Public Counsel even failed to fully consider one line item, the company's liability insurance. Public Counsel did not conduct an onsite inspection, did not interview the Owens and did not examine the actual invoices of the company.

Staff's 2002 audit is the only full audit of the company. Bonadio and Public Counsel performed limited reviews. Staff's audit, having not been updated, serves as a basis of

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<sup>462</sup> Refer to Findings of Facts Numbers 102-351 for this section.



comparison and verification for Bonadio's and Public Counsel's suggested allocations. And, as will be described in detail below, in at least one instance, i.e. billing expenses, it provides the best calculation for determining the proper expense allocation.

Stoddard County's proposed allocations to Bonadio are simply that, proposals. No accounting methodology has been described by the company to verify its suggested line item allocations. At best, Stoddard County's suggested cost structure can be used to compare and contrast the various suggestions of the party. The dramatic difference between what Stoddard County proposed to Bonadio and what Bonadio's suggested for the company's cost structure is more evidence of Bonadio's impartiality and neutrality in this matter.

## **2. Presumption of Prudence**

While a utility has the burden of proof, there is initially a presumption that its expenditures are prudent. The Commission has previously cited the following description of this process as found to apply to the Federal Energy Regulatory Commission:

The Federal Power Act imposes on the Company the "burden of proof to show that the increased rate or charge is just and reasonable." Edison relies on Supreme Court precedent for the proposition that a utility's cost are [sic] presumed to be prudently incurred. However, the presumption does not survive "a showing of inefficiency or improvidence." As the Commission has explained, "utilities seeking a rate increase are not required to demonstrate in their cases-in-chief that all expenditures were prudent . . . However, where some other participant in the proceeding creates a serious doubt as to the prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent."<sup>463</sup>

The Commission has interpreted this process as follows:

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<sup>463</sup> *In the Matter of Union Electric Company*, 27 Mo.P.S.C. (N.S.) 183, 193 (1985) (quoting *Anaheim, Riverside, etc. v. Federal Energy Regulatory Commission*, 669 F.2d 779, (D.C. Cir. 1981)).

“In the context of a rate case, the parties challenging the conduct, decision, transaction, or expenditures of a utility have the initial burden of showing inefficiency or improvidence, thereby defeating the presumption of prudence accorded the utility. The utility then has the burden of showing that the challenged items were indeed prudent. Prudence is measured by the standard of reasonable care requiring due diligence, based on the circumstances that existed at the time the challenged item occurred, including what the utility’s management knew or should have known. In making this analysis, the Commission is mindful that “[t]he company has a lawful right to manage its own affairs and conduct its business in any way it may choose, provided that in so doing it does not injuriously affect the public.”<sup>464</sup>

While the parties have disputed individual line item allocation suggestions for Stoddard County’s cost structure, there is no evidence in this record that Stoddard County’s actual expenses were imprudently incurred.

### **3. Stoddard County’s Cost Structure - Line Item Allocations**

#### **a. Postage/Post Office Box**

With no party in the current action claiming an expense associated with a post office box, the Commission can only assume that Stoddard County no longer maintains a post office box. Consequently, the evidence supports no expense in this regard for the purpose of calculating a revenue requirement to determine an appropriate interim rate increase.

#### **b. Mowing, Miscellaneous Expenses, Real Estate Taxes, Annual Registration, PSC Assessment**

##### **Mowing**

Stoddard County, R. D. Sewer, Bonadio and Public Counsel are all in agreement concerning the amount of the expenses that should be allocated for of mowing expense, miscellaneous expenses, real estate taxes, annual corporate registration, and the Commission’s annual assessment. While the Commission has concluded that Bonadio’s

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<sup>464</sup> *State ex rel. City of St. Joseph v. Public Service Commission*, 30 S.W.2d 8, 14 (Mo. banc 1930).” *In the Matter of Missouri-American Water Company’s Tariff Sheets*, Report and Order, Case No. WR-2000-281 (August 31, 2000).

methodology is the most reliable, the fact that all three of these parties are in agreement with their calculations and suggestions serves to verify the accuracy of the suggested allocations. The Commission concludes there is substantial and competent evidence on the record as a whole to support the following allocations for Stoddard County's Cost structure: (1) \$750 for the company's annual mowing expense; (2) \$100 for the company's annual miscellaneous expenses; (3) \$230 for the company's annual real estate tax expense; (4) \$50 for the company's annual corporate registration expense; and (5) \$2,219 for the company's Commission assessment expense.

**c. Billing Expenses**

The Commission rejects Public Counsel's position that nothing should be allowed for billing expense and that this expense, without quantification, should just be considered to be part of the operator's expense. In addition to the time and personnel elements involved with billing and maintaining customer accounts, there are actual expenses associated with the use of monthly bills/cards, or payment books, mailing bills and with attempts to collect late-payments.

The Commission further concludes, that for purposes of determining Stoddard County's cost structure that Stoddard County's and Bonadio's recommendations for the allocation for total billing expenses is not supported by substantial evidence in the record. There is simply not enough information in this record to support these recommendations.

In this instance, the Commission concludes that using Staff's per billing expense from 2002 is the best method for determining this allocation for Stoddard County's cost structure. Staff's method resulted from the preparation of a full audit, while Public Counsel and Bonadio conducted limited reviews. The number of customers served by Stoddard County has not changed since 2002 and expenses of billing have, without doubt, increased

since 2002.<sup>465</sup> Utilizing Staff's method will prevent over-estimating actual expenses and more accurately reflect the time, personnel and cost of materials actually expended with billing Stoddard County's customers pending the completion of a formal small company rate increase case.

Stoddard County serves 172 customers; however, 51 of those customer bills are paid by one entity, Maco property management company. Consequently, Mr. Owens, if allowed to bill monthly, would be required, at minimum, to mail 122 bills utilizing a monthly billing system or 1462 bills annually. Applying Staff's \$1.55 calculated expense for each bill from its 2002 audit (an expense that has most probably increased since 2002) results in an annual billing expense of \$2269.20. Because Mr. Owens is going to be required to file a formal small company rate increase case within thirty days of this order, and because there is a nine month deadline for completing such cases, should the Commission authorize an interim rate increase for Stoddard County, Mr. Owens will undoubtedly recover less than what the cost structure utilizing this allocation would allow. To build in a margin to correct for any possible error with this allocation, the Commission will authorize ten months of billing expenses at this rate to be included in the company's revenue requirement should it authorize an interim rate increase. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's billing expense is \$1891.

Mr. Owens testified that he obtained better collections from his customers when he billed with monthly cards, but that the current tariffs for the company restrict him to the use

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<sup>465</sup> Postage alone has increased in this time period, and no party has adduced evidence of decreasing expenses.

of payment books. Should the Commission authorize an interim rate increase in this case or if it should authorize a rate increase in a subsequent case, the Commission will direct Mr. Owens to submit revised tariffs including a provision establishing monthly billing. This will improve Mr. Owens cash flow to allow for better operation and maintenance of the WWTP. Any new tariff submissions the Commission direct shall also instruct Mr. Owens to include a provision for collection of fees for late-payment of bills, another item that is presently missing from Stoddard County's tariffs, the lack of which encourages customers to default on timely payments.

**d. Operator Expense**

Mr. Owens, an experienced operator of three water companies in addition to operating Stoddard County testified that operating a sewer company is more intensive than operating a water company. In order to operate and maintain Stoddard County, Mr. Owens works on the WWTP, on average, two to three hours per day, seven days a week or a total of 728 to 1092 hours annually. He is essentially on-call for repairs 24 hours a day, 7 days a week to keep this system operational. He also provides labor and services to other individuals in order to obtain their labor and services to keep the WWTP operational. The engineering report, describing the poor condition of the WWTP substantiates Mr. Owens' testimony regarding how much labor is involved to maintain the system. The current earnings from the plant generated him a wage ranging between 21 cents to \$1.59 per hour for all of his labor.

Bonadio attempted to make a comparison of operator salary costs for similar sized regulated utilities operating in southeast Missouri and was unable to make a full comparison because Stoddard County's mechanical system, and the size of its system, made it not easily comparable to other systems. Bonadio, examining publicly available

information from other Commission water and sewer rate cases, developed a range for operators' fees and chose the higher end of that scale for its recommendation allocation of \$13,800. Similarly, Staff's full audit from 2002 determined that the appropriate operator expense should be \$13,000, and because it is doubtful an appropriate fee would decrease since 2002, the Commission concludes that Staff's calculation serves to verify Bonadio's.

Public Counsel, utilizing the same information as Bonadio along with one other Commission case, produced a recommendation for the operator's expense to be \$8,749. It is clear from the record; however, that Public Counsel's witness: (1) has no actual experience with operating a WWTP; (2) did not perform an on-site inspection of the facility; (3) did not know what type of systems were involved in the prior Commission cases to compare their operations to Stoddard County's operations; (4) did not know if the operator expenses he reviewed from the prior cases involving combination water and sewer companies for both portions of the operations; (5) was unfamiliar with testing requirements for sewer systems; and, (6) did not provide the Commission with any of the salary or market studies upon which he allegedly based his recommendation.

Public Counsel claims it is difficult to calculate an appropriate hourly wage for operators of sewer companies, but Staff correctly notes in its brief, that accepting Public Counsel's recommendation that operator expense be set at \$8,749 annually would allow Mr. Owens a wage for operating the WWTP ranging between \$8 to \$12 per hour. Utilizing Staff's recommendation of \$13,000 from the 2002 audit<sup>466</sup> would produce a wage ranging between approximately \$12 and \$18 per hour. Using Bonadio's recommendation of

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<sup>466</sup> As previously noted, Staff combined \$2000 from billing expenses in its recommended salary of \$15,000, and because the Commission has kept that expense as a separate line item, it bases this calculation on \$15,000 minus the \$2000 in personnel and labor included from billing expenses. See Finding Facts Numbers 152 and 172.

\$13,800 would produce a wage for the operator ranging between approximately \$12.50 and \$19 per hour.

The average number of hours per year worked by Mr. Owens at Stoddard County is approximately 910 hours. However, the Commission concludes that using only this average would not adequately reflect the number of hours Mr. Owens contributes to operating the system, especially given the extensive maintenance and repairs that demand his time and attention and the fact that he must barter additional labor hours in order to secure additional labor for maintaining the plant. Consequently, the Commission concludes that to more accurately capture an approximate total of Mr. Owens' labor it must add in a load factor. The Commission concludes that adding an additional 10% of the lowest annual projection of the hours Mr. Owens works is the appropriate amount of additional hours to factor into the wage determination. Thus, adding 73 hours to the average 910 hours in labor produces a total of approximately 983 annual hours of labor. The Commission concludes that, for purposes of determining the company's current cost structure for this case, 983 annual hours, which falls significantly below the maximum estimate of 1092 annual hours, is the appropriate number of annual labor hours to use for determining the operators' fee.

While the record supports a determination that Bonadio's methodology and calculation for operator's salary is superior to Public Counsel's, to prevent over-estimating the appropriate wage, the Commission will average the wage ranges provided by Public Counsel, Bonadio and Staff. This average produces an average hourly wage of approximately \$13.50 per hour. To further ensure the Commission is not drifting too high in its determination, it will use a lower value of \$13 per hour, factoring out the highest

recommendation from Bonadio. Multiplying a wage of \$13 per hour times a total of 983 annual labor hours results in an annual wage of approximately \$12,799 per year.

The Commission would note that this calculated wage is in line with Bonadio's calculations and recommendations (\$13,800) and is also in line with Staff's 2002 audit (\$13,000). This comparison serves to verify the reasonableness of the calculation, and the Commission does not believe that labor costs will have dropped since Staff performed its full audit in 2002.

While using Public Counsel's suggestion to produce an average that errs on the low side of the scales, the Commission emphasizes that Public Counsel's calculation, for the reasons stated above, is flawed and the Commission assigns it less weight and credibility than the suggestions from Bonadio or Staff. Because it is flawed, the Commission concludes that Public Counsel's recommendation of \$8,749 is too inaccurate to use it as a comparison for verifying the Commission's final calculation. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's operator expense is \$12,799.

#### **e. Office Supplies**

Stoddard County's 2007 Annual Report lists Supplies and Expenses as being \$3,508.26. Bonadio calculated Stoddard County's actual office supply expense as being \$3,065 based upon interviews with Mr. and Mrs. Owens and from the company's documents, and then rounded his actual value up to \$3,100. Public Counsel, who claimed they were relying on the 2007 Annual Report, produced a figure of \$1,340. Staff's 2002 audit only reflected an office supply expense of \$180.



Clearly, Stoddard County's day-to-day operational expenses have not decreased since 2002. Staff's witness testified accordingly. And despite Public Counsel's claim to have relied upon the company's Annual Report, there is an obvious discrepancy between Public Counsel's recommendation for this allocation versus what is included in the 2007 Annual Report, a discrepancy that Mr. Robertson, Public Counsel's witness, did not explain at hearing. Nor is the Commission convinced that it is proper to round up all expense figures, as was done by Bonadio, even if this is a common accounting practice.

Bonadio produced an actual cost figure of \$3,065, verified by analyzing Stoddard County's invoices. The Commission finds Bonadio's actual cost calculation without roundup to be the most accurate and concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's for office supplies is \$3,065.

#### **f. Effluent Testing**

Bonadio based its calculation of the expense for effluent testing directly on the notice sent to Stoddard County from the company that the company contracts to perform the service. Public Counsel extrapolated their calculation by utilizing the expense reported the company's 2007 Annual Report and factoring in an adjustment for CPI. These amounts only varied by \$11.

Staff's 2002 audit reflects a combined expense for Testing and Supplies of \$1,703. The Commission concludes, however, that Staff's audit with regard to this expense is too outdated to reflect current actual costs for determining Stoddard County's current cost structure.

The Commission concludes that the actual notice from the company performing the effluent testing is the most accurate measure of Stoddard County's expense for this testing. Consequently, the Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's effluent testing expense is \$1,252.

**g. Repairs and Maintenance**

There is overwhelming evidence in the record that the condition of Stoddard County's WWTP is in decline, requires continual and extensive maintenance, needs significant upgrading and improvement, and lacks necessary back-up equipment. The company's 2006 and 2007 Annual Reports reflect an average annual repair and maintenance expense of approximately \$2,000. Smith & Co. recommended an annual allocation of \$2,400 for this expense based upon information provided to it by Mr. Owens and obviously based upon its extensive knowledge of the cost of materials and equipment required to operate a WWTP. Bonadio, in turn, relied upon Smith and Co. when it recommended \$2,400 in repair and maintenance expense.

Public Counsel, on the other hand, examined only the 2007 Annual Report, and refused to acknowledge the company's current operating condition. Public Counsel did not conduct an on-site inspection of the WWTP and provided no controverting evidence to the Preliminary Engineering Report completed by Smith & Co., a report that documents significant repair and maintenance issues. These repair and maintenance issues are further documented by the WWTP's extensive environmental problems reported by the DNR. Public Counsel also failed to factor in the projected continual need for repairs as was testified to by Mr. Merciel.

The Commission concludes that the substantial and competent evidence on the record as a whole supports Smith & Co.'s and Bonadio's recommendation that \$2,400 be allocated for repairs and maintenance. The Commission concludes that the correct amount to be allocated in Stoddard County's current cost structure for repairs and maintenance is \$2,400.

**h. Rent**

Bonadio determined that Stoddard County's share of the rent expenses of all of the companies Mr. Owens operates should be \$1,050. Public Counsel concurred with Bonadio's analysis. The allocation for rent included in Staff's 2002 audit is outdated and inaccurate. Mr. Owens believes this estimate fails to capture one other small office that he utilizes; however, Mr. Owens provided no accounting of expenses associated with that office to support adjusting the \$1,050 recommendation agreed to by the other parties.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for rent is \$1,050.

**i. DNR Annual Operating Permit Fee**

The record evidence establishes that Stoddard County is currently permitted for operating a WWTP with a design capacity of 25,000 gallon per day and the proper DNR permit fee for that capacity is \$2,500. The actual total of gallons per day being treated by the WWTP or discharged in its effluent is irrelevant in that the permitted design capacity controls the cost of the permit.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for its DNR operating permit fee is \$2,500.

**j. Utilities**

Bonadio has provided the Commission with an actual cost figures of \$8,236 for utility expenses based upon an actual review of Stoddard County's invoices. Bonadio's rounded-up figure of \$8,500 artificially inflates the expense. The fact that Public Counsel's projection is only \$17 less than the actual costs incurred (\$8,219) confirms the reasonableness of these expenses and the Commission concludes that utilizing the actual cost figure, as opposed to Public Counsel's projected cost is more accurate in this instance.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for its utility expenses is \$8,236.

**k. Telecommunications**

Bonadio determined that the combined actual, annual telecommunications expenses for all of Mr. Owens' water and sewer companies was \$3,333. These expenses included essential Internet expenses and negligible cable expenses. The phone expenses were billed to the companies as flat fees and not minute-by-minute purchases. Consequently, any personal use of the phones is irrelevant to the total expense. Bonadio recommended the shared expenses be apportioned accordingly with Stoddard County's share being \$834.

Public Counsel did not provide an explanation of how it determined its \$309 recommended allocation of for this expense. Lacking any foundation in any methodology to compare its recommendation to the actual telecommunications costs, Public Counsel's recommendation does not rise to the level of being considered as controverting evidence to Bonadio's analysis.

Staff's 2002 audit reflects that Stoddard County's telecommunications expenses were \$860. This determination, while outdated, serves as a check on Bonadio's

calculations. While the Commission does not believe the day-to-day operations expenses of Stoddard County have decreased, increased competition in the telecommunications market and sharing these expenses between four separate companies could account for the decrease in this expense. Moreover, as the Commission has done with each of the individual cost allocations for Stoddard County's cost structure, the Commission would prefer to err on the conservative side when rendering its determination until a current full audit of the company is conducted in association with a formal small company rate case.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for its telecommunications expense is \$834.

### **I. Sludge Hauling**

There is overwhelming evidence in the record that Stoddard County's WWTP is not adequately being cleared of sludge. This is evidenced by sludge build-up in the system itself and in the effluent from the WWTP. Smith & Co. inspected the facilities, performed a very exact calculation of the amount of sludge produced annually by the WWTP and compared its determinations, and the expenses required to adequately dispose of that sludge, with other Missouri regulated utilities.

Bonadio relied upon Smith & Co.'s analysis to determine its proposed allocation for expenses for sludge hauling. Public Counsel, on the other hand, attempted to extrapolate a value for this expense based upon what was spent by the company in 2007 for sludge removal, not for what is actually required to properly operate and maintain the WWTP.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for sludge hauling expense is \$1,800.

### **m. Uncollectibles**

Bonadio reviewed Stoddard County's history of uncollectible expenses and discovered the company's Annual Reports had erroneously overstated these expenses by reporting the cumulative balance for these expenses. Bonadio determined an appropriate estimate based upon Stoddard County's actual experience, an experience that is individual to this company. Comparisons of Stoddard County to other Missouri utilities would not be indicative of Stoddard County's experience and not serve as an appropriate means for comparison or verification.

Public Counsel did not provide an explanation of how it derived its \$303 recommended allocation of for this expense. Lacking any foundation in any methodology to compare its recommendation to Bonadio's estimate that was based upon the company's history of bad debts, the Commission concludes that Public Counsel's recommendation does not rise to the level of being considered as controverting evidence to Bonadio's analysis.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for uncollectible expenses is \$500.

### **n. Insurance**

After examining the company's insurance policies, Bonadio determined that the insurance expenses for one company vehicle should be \$415. Bonadio then rounded that amount up to \$490 in its Report.<sup>467</sup> Bonadio also determined that company documentation supported an expense of \$1,011 for liability insurance for the WWTP.

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<sup>467</sup> Mr. Shepard, testifying for Bonadio, stated that he had rounded this amount up to \$500, but \$490 is the amount reflected in Bonadio's report.

Public Counsel recommended \$591 for one company vehicle, extrapolating up from the amount listed in the company's 2007 Annual Report. Public Counsel did not address the issue of liability insurance for the WWTP and provided no recommendation for this part of the company's insurance expenses.

Bonadio's recommendation was based upon a review of the actual insurance policies, the actual expense of those policies, and isolating one company vehicles from those policies. Consequently, the Commission finds that the \$415 actual cost figure is more accurate and reliable than Bonadio's rounded-up figure or Public Counsel's extrapolated figure. Because the only evidence in the record for liability insurance is an annual expense of \$1,011, the Commission accepts this uncontroverted amount as being the only accurate and reliable information to establish that expense.

The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for insurance expenses, both automobile and liability, is \$1,426.

**o. Legal and Professional**

The Commission has reviewed all of the parties analyses and suggestions for legal and professional expenses and finds them all to be inadequately supported and incomplete. Public Counsel based its recommended allocation solely on the cost of tax preparation, i.e. \$584. Public Counsel factored in no legal expenses, and Bonadio, while noting Stoddard County's accounting services were inadequate appears to have only factored in a recommended increase base solely on that deficiency. Neither of these analyses conform adequately account for the evidence of the expenses Stoddard County is incurring in this category.

Stoddard County and R. D. Sewer require legal representation when they appear before the Commission and in all legal matters that require an “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.”<sup>468</sup> Stoddard County incurred, at minimum, the costs of 16.25 hours of legal representation in this matter alone (the hearing time and at least one hour per pleading – clearly an underestimate). Stoddard County is receiving representation in its negotiations with DNR. Stoddard County will require legal representation in the future rate case the Commission will mandate in this very order.

As a reference, the Commission will apply the statutory minimum of \$75/ hour for administrative cases where a party prevails against the agency to the low estimate of hours involved in this action.<sup>469</sup> That calculation (16.25 hours at a rate of \$75 per hour) yields legal fees of approximately \$1,219. Additionally, Missouri courts have routinely sanctioned attorney’s fees ranging from \$75 to \$200 per hour.<sup>470</sup> Consequently, the average of the legislatively and judicially sanctioned hourly rates is \$137.50 per hour.<sup>471</sup> At the average

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<sup>468</sup> Section 484.010. See also Section 484.020 and Commission Rule 4 CSR 240-2.040.

<sup>469</sup> Section 536.087.

<sup>470</sup> *In re C.W.*, 257 S.W.3d 155, 158 (Mo. App. 2008); *Wallace v. Wallace*, 2008 WL 4402435, 9 (Mo. App. 2008) ); *Hutchings ex rel. Hutchings v. Roling*, 193 S.W.3d 334 (Mo. App. 2006); *Washington v. Jones*, 154 S.W.3d 346, 352 (Mo. App. 2004); *H.S.H. ex rel. R.A.H. v. C.M.M.*, 60 S.W.3d 656, 659 (Mo. App. 2001); *McIntosh v. McIntosh*, 41 S.W.3d 60, 73 (Mo. App. 2001); *Dildine v. Frichtel*, 890 S.W.2d 683, 687 (Mo. App. 1994); *American Bank of Princeton v. Stiles*, 731 S.W.2d 332 (Mo. App. 1987).

<sup>471</sup> Missouri Courts have also recognized that administrative agencies, legislatively authorized to award attorney’s fees are granted the same discretion of that of a trial court. “The language of the statute mirrors established judicial principles in the award of litigation expenses. That is, the determination of reasonable litigation expenses is a matter within the sound discretion of the trial court. Furthermore, the trial judge is considered to be an expert on the matter of the reasonable value of legal services rendered and his



rate sanctioned by the legislature and the courts, Stoddard County will have incurred, at minimum, \$2,234 dollars in legal fees for prosecuting this case.

Stoddard County already has a debt of approximately \$2,617 owed to the Holden Law Firm. Spreading costs of \$4,851 in legal fees (\$2,234 plus \$2,617) out over a three-year time period, without factoring in the additional legal fees that are forthcoming, would produce an annual average of approximately \$1,617.

Bonadio has indicated that Stoddard County is going to require better accounting services at increased cost and recommends an increase of \$408 annually for this expense, bringing their total recommendation to \$1000 for annual accounting expenses. Averaging Bonadio's and Public Counsel's recommendation yields an approximate amount of \$790 and added to the average of \$1,617 for legal fees results in a total of \$2,407.

The Commission realizes these amounts are estimates, but believes the record supports these estimates and they are on the lower end of the scale.<sup>472</sup> To ensure against over-inflating the allocation for this expense in the interim between this case and the formal rate case that will be ordered by the Commission, the Commission will round this estimate down to an even lower amount. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's annual legal and professional expenses is \$2,000.

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determination will not be disturbed in the absence of a clear showing of manifest abuse of discretion." *Colony-Lobster Pot Corp. v. Director of Revenue*, 770 S.W.2d 705, 708 (Mo. App. 1989).

<sup>472</sup> While it is not part of the record in this case, the Commission notes that it is common knowledge that the average charge in the state of Missouri for one billable hour of an attorney in private practice is \$270. See *Who Bills What: Missouri Lawyers Weekly's First Billable-Hour Rate Listing*, Dolan Media Company Newswire Story, March 24, 2008. Also, the hourly attorney's charge for trial work ranged from \$126 to \$200 for 89% of attorneys responding to the Missouri Bar's 2007 Economic Survey. The charge was over \$300 per hour for 11% of the attorneys responding. See Missouri Bar Economic Survey 2007.

**p. Depreciation Expense and Return on Investment**

To the extent Mr. Owens contributed more to the WWTP than has been depreciated in the past six years since he began operating the plant the rate base of the WWTP would increase and he would be allowed a return and depreciation on that amount. The evidence establishes that Mr. Owens contributed at least \$17,388 to the plant in the past three years. Because he has been operating with a revenue deficit he has not earned an appropriate rate of return on that investment. It is also difficult to discern what amounts, if any, have been depreciated from his contributions to plant and the record is not clear with regard to how much of the investment was contributed in the various category of depreciation percentage that the Commission routinely approves. Consequently, the Commission will allow Stoddard County to include a return on investment in the company's cost structure in the interim between this case and the completion of the formal small company rate case to follow this case. Not being able to positively identify the amounts and proper categories for depreciation, i.e. structures and improvement, collection, electric pumping and treatment and disposal facilities, the Applicants have failed in their burden to prove to the Commission that an amount for depreciation should be included in the company's current cost structure.

The record reflects that in recent prior small water and sewer company rate case, the Commission has approved rates of return ranging between 8.88% and 10.09%. Additionally, Mr. Merciel, one of Staff subject matter experts, informed Bonadio that a 11% rate of return would be appropriate for a company similar to Stoddard County. The average of the range between 8.88% and 11% is 9.94%. Mr. Owens has contributed at least \$17,388 to the WWTP and the commission shall allow him to recover a return on his investment of 9.94%. The Commission concludes that the substantial and competent evidence on the record as a whole supports the determination that the correct amount to be

allocated in Stoddard County's current cost structure for the company's return on investment is \$1,728.

**q. Total Cost of Service**

The parties are all in agreement that Stoddard County's normalized operating revenues are \$21,970. There is no evidence in the record to controvert this fact. The Commission concludes that the substantial and credible evidence on the record as a whole supports the determination that the correct amount to be allocated in Stoddard County's current cost structure for the company's total cost of service is \$21,970.

**r. Net Revenue Requirement**

Having made its findings and conclusions regarding the appropriate line item expense allocations for Stoddard County's current cost structure, Commission concludes that the substantial and credible evidence on the record as a whole supports the determination that Stoddard County's total cost of service is \$44,830; its total revenue is \$21,970; and its net revenue deficit is \$22,860.

**4. Final Conclusions Regarding Stoddard County's Cost Structure**

Substantial and competent evidence in the record as a whole supports the conclusion that Stoddard County's current cost structure, as compared to recommendations of the parties, is as follows:

<b>Recommendations</b>	<b>Stoddard County</b>	<b>OPC</b>	<b>Bonadio</b>	<b>Staff's 2002 Audit</b>	<b>Commission</b>
<b>Description</b>					
<b>Postage</b>					
Post office Box	\$0	\$0	\$0	\$55	\$0
<b>Payroll/Services</b>					
Billing Expense	\$9,600	\$0	\$4,160	\$1,200	\$1,891
Operator Expense	\$24,000	\$8,749	\$13,800	\$15,000	\$12,799

<b>Mowing</b>		<b>\$750</b>	<b>\$750</b>	<b>\$750</b>	<b>\$400</b>	<b>\$750</b>
<b>Miscellaneous</b>						
<b>Misc.</b>		<b>\$100</b>	<b>\$100</b>	<b>\$100</b>	<b>\$0</b>	<b>\$100</b>
<b>Office Supplies</b>		<b>\$3,508</b>	<b>\$1,340</b>	<b>\$3,100</b>	<b>\$180</b>	<b>\$3,065</b>
<b>Effluent Testing</b>		<b>\$1,252</b>	<b>\$1,241</b>	<b>\$1,252</b>	<b>\$1,703</b>	<b>\$1,252</b>
<b>Repair &amp; Maint.</b>		<b>\$0</b>	<b>\$1,012</b>	<b>\$2,400</b>	<b>\$743</b>	<b>\$2,400</b>
<b>Real Estate Taxes</b>		<b>\$230</b>	<b>\$230</b>	<b>\$230</b>	<b>\$163</b>	<b>\$230</b>
<b>Depreciation</b>		<b>\$5,400</b>	<b>\$0</b>	<b>\$5,400</b>	<b>\$4,150</b>	<b>\$0</b>
<b>Rent</b>		<b>\$4,200</b>	<b>\$1,050</b>	<b>\$1,050</b>	<b>0</b>	<b>\$1,050</b>
<b>Assessments/Permits</b>						
<b>Annual Registration</b>		<b>\$50</b>	<b>\$50</b>	<b>\$50</b>	<b>\$50</b>	<b>\$50</b>
<b>DNR Ann Op Permit</b>		<b>\$3,000</b>	<b>\$2,500</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$2,500</b>
<b>PSC Assessment</b>		<b>\$2,219</b>	<b>\$2,219</b>	<b>\$2,219</b>	<b>\$1,449</b>	<b>\$2,219</b>
<b>Utility Expense</b>						
<b>Utilities</b>		<b>\$8,500</b>	<b>\$8,219</b>	<b>\$8,500</b>	<b>\$9,484</b>	<b>\$8,236</b>
<b>Telecommunications</b>		<b>\$3,060</b>	<b>\$309</b>	<b>\$834</b>	<b>\$860</b>	<b>\$834</b>
<b>Other Expense</b>						
<b>Sludge Hauling</b>		<b>\$3,800</b>	<b>\$446</b>	<b>\$1,800</b>	<b>\$0</b>	<b>\$1,800</b>
<b>Uncollectibles</b>		<b>\$500</b>	<b>\$330</b>	<b>\$500</b>	<b>\$0</b>	<b>\$500</b>
<b>Insurance</b>		<b>\$1,499</b>	<b>\$591</b>	<b>\$1,501</b>	<b>\$0</b>	<b>\$1,426</b>
<b>Legal &amp; Professional</b>		<b>\$3,600</b>	<b>\$584</b>	<b>\$1,000</b>	<b>\$0</b>	<b>\$2,000</b>
<b>Total Expenses</b>		<b>\$75,268</b>	<b>\$29,720</b>	<b>\$51,646</b>	<b>\$38,437</b>	<b>\$43,102</b>
<b>Return on Investment</b>		<b>\$7,021</b>	<b>\$0</b>	<b>\$7,021</b>	<b>\$9,637</b>	<b>\$1,728</b>
<b>Total Cost of Service</b>		<b>\$82,289</b>	<b>\$29,720</b>	<b>\$58,667</b>	<b>\$48,074</b>	<b>\$44,830</b>
<b>Total Revenues</b>		<b>\$21,970</b>	<b>\$21,970</b>	<b>\$21,970</b>	<b>\$22,093</b>	<b>\$21,970</b>
<b>Net Revenue Deficit</b>		<b>\$60,319</b>	<b>\$7,750</b>	<b>\$36,697</b>	<b>\$25,981</b>	<b>\$22,860</b>

If the Commission determines that it will approve the transfer of assets when it performs its balancing test (in a later section in this Report and Order), the Commission will determine if it shall authorize an interim rate increase based upon this cost structure.

#### **D. The Provision of Safe and Adequate Service<sup>473</sup>**

##### **1. Relevant Commission Rule**

<sup>473</sup> Refer to Findings of Facts Numbers 352-371 for this section.

Commission Rule 4 CSR 240-60.020 provides, in pertinent part:

(1) Each sewer utility shall maintain and operate a sewage treatment facility of adequate capacity and properly equipped to treat the sewage and discharge effluent of the quality required by the laws of the state of Missouri and in other respects shall comply with the laws and regulations of the state and local health authority.

(2) The design and construction of a utility's system of sewers, treatment facility and all additions and modifications shall conform to the requirements prescribed by law except that any rule contained in this chapter shall apply which is more stringent than those prescribed by the Clean Water Commission.

(3) The sewer utility shall make reasonable efforts to eliminate or prevent the entry of surface or ground water into its sanitary sewer system. It may request assistance from the appropriate state, county or municipal authorities, but such a request does not relieve the sewer utility of its responsibility to prevent the entry of such surface or ground water.

## **2. Stoddard County's Service Quality Issues**

While there have been no complaints raised by Stoddard County's customers with regard to the provision of sewer service or with the company's billing practices, it would appear that Stoddard County is in violation of Commission Rule 4 CSR 240-60.020 for exceeding the system's design capacity, failure to comply with environmental and health regulations, and failure to control the surface and ground water that drains into its system.<sup>474</sup> Also, because 4 CSR 240-60.020(1) and (2) requires Stoddard County to maintain compliance with all other pertinent Missouri laws that govern the operation of its system, each violation of DNR regulations is also a violation of the Commission's rules.

It would appear that Stoddard County is providing adequate service in that its customers are receiving service, although the long-term provision of that service is in jeopardy without implementing improvements to the system. However, there are issues with the provision of safe service as are reflected by the company's environment problems.

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<sup>474</sup> See Findings of Fact Numbers 94(n), 94(o), 233-236; Transcript, pp. 151-152.

The Commission acknowledges that Stoddard County is engaged in ongoing negotiations with DNR to resolve its compliance issues. Indeed, Mr. Owens still timely files his DNR reports, even though his MSOP has expired, and it is clear to the Commission that Mr. Owens is doing his best to bring the system into compliance. The Commission also recognizes that much of what has contributed to the problems Stoddard County is experiencing is directly related to the age of the system and being unable to generate sufficient revenue to properly maintain the system.

Given the circumstances of this case, the Commission shall defer any determination with regard to whether Stoddard County is in violation of its rules until such time that the company has had an adequate opportunity, with adequate funds, to address the repair and maintenance problems the company is facing. The Commission shall require the company to file semi-annual compliance reports with the Commission delineating the steps it is taking to resolve the repair, maintenance and effluent problems that have been documented in this case. The Commission's Staff shall be ordered to perform annual inspections and file annual reports regarding the status of the company's compliance with the Commission's rules.

**E. Application of the “Not Detrimental to the Public Interest” Standard<sup>475</sup>**

Stoddard County is operating under a rate structure established in 1979 and has been substantially under-earning rendering it unable to properly repair and maintain the system. The fact that the company is having extreme difficulty maintaining the system jeopardizes its customers because it threatens the company's ability to maintain the provision of safe and adequate service. Indeed, while Stoddard County's customers may be receiving adequate sewer service in the sense that the system is currently functional,

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<sup>475</sup> See Findings of Fact 1-371 for this section.

the disrepair and degradation of the system, along with lack of any back-up equipment, places those customers at risk of losing service for an extended length of time on a minute-by-minute basis. DNR's many compliance citations also indicate that the service being provided is not safe service and could constitute a threat to the public health.

The substantial and competent evidence on the record as a whole demonstrates that granting the Applicants' transfer of assets request will restore the facility's corporate status and will allow the company to seek the monetary return it should be earning. This in turn will promote better operation and management of the facility by allowing the current operator to properly repair and maintain the system. Proper operation will eliminate the risk to the public health.

The company's current cost structure quantifies the known revenue deficit, and no other entity is interested in repairing or operating the WWTP. Approving the Applicants' request for interim rate increase is appropriate under both applicable legal standards. The interim rate case is needed on an emergency basis to ensure the safe and adequate provision of service at just and reasonable rates. The funds are needed immediately, the need cannot be postponed further and no other alternatives exist to meet the need but rate relief. Additionally, good cause exists to grant the request; that cause being the deterioration and degradation of the WWTP that threatens the provision of safe and adequate service. Moreover, because the interim rate relief will be granted subject to refund, the ratepayers will be protected from any possible overcharge that could occur during the interim between implementing those rates and completing the formal small company rate case that will be mandated in this order.<sup>476</sup>

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<sup>476</sup> While Public Counsel has expressed concerns about refunds actually being achievable, the Commission can, in the alternative to requiring cash refunds, direct that credits be provided to customers in the event of over-earning.

Performing its required balancing test, the Commission determines that the substantial and competent evidence on the record as a whole supports the conclusions that: (1) operational benefits, improved and stabilized customer service and improved public health safety will all result from approving the proposed transfer ; (2) because in addition to granting the transfer the Applicants will be allowed to implement interim rate relief, Stoddard County will be able to immediately begin the process of improving its service and eliminating potential threats to the environment; (3) because the Commission will condition approval of interim rate relief so that it is subject to refund, the ratepayers will be protected from any possible over-charge; (4) because the Commission has found the purported security interests that Mr. Bien attempted to convey without Commission approval are void, Stoddard County's assets are not jeopardized by any lingering claims from the parties to those defective instruments; and (5) because the Commission will direct its Staff to provide additional oversight of the company, the Commission can ensure that Stoddard County will continue to provide safe and adequate services at just and reasonable rates.

All of these conclusions weigh in favor of approving the transfer of assets. The Commission concludes that there is no competent or credible evidence in the record to support a conclusion that anything would directly or indirectly make Stoddard County's sewer service less safe or less adequate, or would tend to make rates less just or less reasonable by approving the requested transfer and interim rate relief with the conditions that it plans to impose upon the transfer. In fact, the contrary is true. Approving the transfer will promote the provision of safe and adequate services at just and reasonable rates. There is no detriment to the public interest associated with approving the transfer and the requested interim rate relief.



The Commission further concludes the Applicants met their burden of establishing that there is no detriment to the public interest if the Commission authorizes the proposed transfer. The Commission shall authorize the proposed transfer subject to the conditions already contemplated and will consider other potential conditions in other sections of this Report and Order.

## **F. Additional Conditions for Approval of the Transfer of Assets**

### **1. Recording Order Concluding Security Interests Are Void**

The Commission shall issue a separate companion order to this case concluding the security interests addressed in the body of this order are void pursuant to Section 393.190.1. The Commission shall require, as a condition of approval of the transfer of assets, R. D. Sewer to file a certified copy of said order with the Stoddard County Recorder and the Secretary of State.

### **2. Future Rate Case Filings**

The Applicants agreed that should the Commission approve the requested transfer of assets and provide interim rate relief, that R. D. Sewer would file a formal small sewer company rate increase request pursuant to the applicable Commission rules within thirty days of the effective date of the Commission's order granting the relief requested in their application. The Commission shall so order; however, the Commission shall further require R. D. Sewer to file a subsequent small company rate increase request no later than three years following the effective date of this order. The subsequent case will hopefully capture any additional contributions made to the WWTP from any upgrades and improvements made to the system and will ensure that R. D. Sewer is providing safe and adequate service at just and reasonable rates.

## G. Precedential Effect

An administrative body, that performs duties judicial in nature, is not and cannot be a court in the constitutional sense.<sup>477</sup> The legislature cannot create a tribunal and invest it with judicial power or convert an administrative agency into a court by the grant of a power the constitution reserves to the judiciary.<sup>478</sup>

An administrative agency is not bound by stare decisis, nor are agency decisions binding precedent on the Missouri courts.<sup>479</sup> “Courts are not concerned with alleged inconsistency between current and prior decisions of an administrative agency so long as the action taken is not otherwise arbitrary or unreasonable.”<sup>480</sup> The mere fact that an administrative agency departs from a policy expressed in prior cases which it has decided is no ground alone for a reviewing court to reverse the decision.<sup>481</sup> “In all events, the adjudication of an administrative body as a quasi-court binds only the parties to the

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<sup>477</sup> *In re City of Kinloch*, 362 Mo. 434, 242 S.W.2d 59, 63[4-7] (Mo. 1951); *Lederer v. State, Dept. of Social Services, Div. of Aging*, 825 S.W.2d 858, 863 (Mo. App. 1992).

<sup>478</sup> *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 75 (Mo. banc 1982); *Lederer*, 825 S.W.2d at 863.

<sup>479</sup> *State ex rel. AG Processing, Inc. v. Public Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003); *Fall Creek Const. Co., Inc. v. Director of Revenue*, 109 S.W.3d 165, 172 -173 (Mo. banc 2003); *Shelter Mut. Ins. Co. v. Dir. of Revenue*, 107 S.W.3d 919, 920 (Mo. banc 2003); *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002); *Ovid Bell Press, Inc. v. Dir. of Revenue*, 45 S.W.3d 880, 886 (Mo. banc 2001); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004); *Cent Hardware Co., Inc. v. Dir. of Revenue*, 887 S.W.2d 593, 596 (Mo. banc 1994); *State ex rel. GTE N. Inc. v. Mo. Pub. Serv. Comm'n*, 835 S.W.2d 356, 371 (Mo. App. 1992). On the other hand, the rulings, interpretations, and decisions of a neutral, independent administrative agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 843 (Mo. App. 2004). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

<sup>480</sup> *Columbia v. Mo. State Bd. of Mediation*, 605 S.W.2d 192, 195 (Mo. App. 1980); *McKnight Place Extended Care, L.L.C. v. Missouri Health Facilities Review Committee*, 142 S.W.3d 228, 235 (Mo. App. 2004).

<sup>481</sup> *Id.*

proceeding, determines only the particular facts contested, and as in adjudications by a court, operates retrospectively.”<sup>482</sup>

The Commission emphasizes that its decision in this matter is specific to the facts of this case. Evidentiary rulings, findings of fact and conclusions of law are all determined on a case-by-case basis. Consequently, the Commission makes it abundantly clear that, consistent with its statutory authority, this decision does not serve as binding precedent for any future determinations by the Commission.

#### **IV. Final Decision**

In making this decision, the Commission has considered the positions and arguments of all of the parties.<sup>483</sup> Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. After applying the facts, as it has found them, to its conclusions of law, the Commission has reached the following decisions.

The Commission concludes that the Applicants have met their burden of proof and the transaction proposed by the Applicants, as conditioned by the Commission, is not detrimental to the public interest and shall approve it.<sup>484</sup> The specific conditions the Commission shall impose will be delineated in the Ordered Paragraphs below.

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<sup>482</sup> *State ex rel. Gulf Transport Co. v. Public Service Com'n of State*, 658 S.W.2d 448, 466 (Mo. App. 1983); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765, 89 S.Ct. 1426, 1429, 22 L.Ed.2d 709 (1969); *State ex rel. Summers v. Public Service Commission*, 366 S.W.2d 738, 741[1-4] (Mo. App. 1963); *State ex rel. Consumers Public Service Co. v. Public Service Commission*, 352 Mo. 905, 180 S.W.2d 40, 46[6-8] (banc 1944); §§ 386.490 and 386.510. 1 Cooper, *State Administrative Law*, pp. 177 et seq. (1965); Mayton, *The Legislative Resolution of the Rulemaking Versus Adjudication Problem in Agency Lawmaking*, *Duke Law Journal*, Vol. 1980: 103, 118.

<sup>484</sup> The approved transfer carries with it the need for the Commission to grant R. D. Sewer a certificate of convenience and necessity to provide sewer service in the same service area that Stoddard County services now. The findings in this case support the conclusion that R. D. Sewer has met all Commission requirements for the grant of the CCN, i.e. the plant is already constructed, there is a need for service, no other provider can provide that service, R. D. Sewer has demonstrated it has the technical, managerial and financial

## **THE COMMISSION ORDERS THAT:**

1. Stoddard County Sewer Company, Inc.'s, R. D. Sewer Company, L.L.C.'s and the Staff of the Missouri Public Service Commission's joint application for an order authorizing Stoddard County Sewer Co., Inc. to transfer its assets to R. D. Sewer Company, L.L.C., filed on March 4, 2008, is hereby granted, subject to the conditions delineated in the ordered paragraphs below.

2. R. D. Sewer Company, L.L.C., is authorized to acquire the assets Stoddard County Sewer Co., Inc. as described in Paragraphs 42 and 43 of the joint application filed on March 4, 2008 and, to the extent any law requires Commission approval, is authorized to acquire and assume the stocks, bonds, and other indebtedness and obligations of Stoddard County Sewer Co., Inc.

3. Stoddard County Sewer Company, Inc., R. D. Sewer Company, L.L.C. and the Staff of the Missouri Public Service Commission are authorized to take any and all other lawful actions that may be reasonably necessary and incidental to the performance of the approved Joint Application for the transfer of assets.

4. Prior to this Report and Order authorizing the transfer of Stoddard County Sewer Co., Inc.'s assets and obligations to R. D. Sewer Company, L.L.C., Stoddard County Sewer Co., Inc. has never secured from the Commission an order authorizing the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of the assets described in Paragraphs 42 and 43 of the joint application to authorize said transfer that was filed on March 4, 2008.

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experience to provide sewer service to this service area, and it would promote the public interest for sewer service to be provided to this service area. See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, \*3 (Mo. P.S.C.).

5. Any purported transfer of an interest in the assets of Stoddard County Sewer Co., Inc., as described in Paragraphs 42 and 43 of the March 4, 2008 joint application to authorize the transfer of Stoddard County Sewer Co., Inc.'s assets to R. D. Sewer Company, L.L.C. after the date the asset was placed in service to the public that lacks authorization or approval from the Missouri Public Service Commission is void.

6. Stoddard County Sewer Company, Inc.'s, R. D. Sewer Company, L.L.C.'s and the Staff of the Missouri Public Service Commission's joint application for an order establishing new, interim rates for R. D. Sewer Company, L.L.C. subject to review, filed on March 4, 2008, is hereby granted, subject to the conditions delineated in the ordered paragraphs below.

7. The cost structure of Stoddard County Company, Inc., as determined by the Commission and as fully described in the body of this order, shall be the cost structure utilized for establishing the interim rates for sewer service for R. D. Sewer Company, L.L.C. immediately upon completion of the transfer of assets.

8. Authorization of the transactions described in the Ordered Paragraphs above are subject to the following conditions:

- a. No later than thirty days after the date of issue of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission tariff sheets in compliance with this order establishing the interim rates and rate design sufficient to recover revenues based upon the cost structure as determined in this Report and Order;
- b. The tariffs filed by R. D. Sewer Company, L.L.C. shall include provisions for billing customers by monthly statement instead of the current practice of providing a yearly billing booklet, and for charging customers a late fee of Five Dollars (\$5.00) if the monthly bill is not paid by the 20<sup>th</sup> day after the bill date;
- c. The compliance tariffs filed by R. D. Sewer Company, L.L.C. shall bear an effective date of no less than 30 days; however, the company is authorized to file a motion for expedited approval of the tariffs, and the Commission has already determined, in this Report and Order, that good cause exists for

expedited approval if the filed tariffs are found to be in compliance with this Report and Order;

- d. Any interim rates approved by the Commission for R. D. Sewer Company, L.L.C. in association with this case shall be made subject to refund based upon an earnings review;
- e. No later than thirty days after the effective date of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission a formal small sewer company rate increase case pursuant to Commission Rule 4 CSR 240-3.050;
- f. No later than three years after the effective date of this Report and Order, R. D. Sewer Company, L.L.C. shall file with the Commission a formal small sewer company rate increase case pursuant to Commission Rule 4 CSR 240-3.050 or the applicable rule in effect at that time;
- g. Pursuant to the directions in the companion order to be issued in this matter that concludes the unapproved security interests in Stoddard County's assets are void, R. D. Sewer shall file a certified copy of the companion order with the Stoddard County Recorder and the Secretary of State.

9. No later than five days after R. D. Sewer Company, L.L.C. files the compliance tariffs directed by this order, the Staff of the Missouri Public Service Commission shall file with the Commission a recommendation stating if the tariffs are in compliance and providing the Commission with a recommendation as to if those tariffs should be approved. Any party wishing to respond to Staff's recommendation shall file said response no later than two days following the filing of Staff's recommendation.

10. The certificates of convenience and necessity heretofore issued to Stoddard County Sewer Company, Inc., in Case Number SA-79-11 and Case Number SA-86-115, are cancelled.

11. R. D. Sewer Company, L.L.C. is granted a certificate of convenience and necessity to provide sewer service to the sewer customers in the former service area of Stoddard County Sewer Company, Inc. The legal description of this service area is

identical to the legal description of Stoddard County's present service area, as contained in Stoddard County's tariff now on file with the Commission.

12. The Commission's August 5, 2008 order requiring Stoddard County Sewer Company, Inc. to file quarterly and other status reports is cancelled.

13. R. D. Sewer Company, L.L.C. shall file with the Commission semi-annual status reports. Those status reports shall include updated information regarding R. D. Sewer Company, L.L.C.'s negotiations with the Missouri Department of Natural Resources for a compliance schedule and include a report of the actions R. D. Sewer Company, L.L.C. has implemented to improve the repair, maintenance and overall condition of its waste water treatment plant.

14. R. D. Sewer Company, L.L.C. shall file with the Commission a copy of the compliance schedule it executes with the Missouri Department of Natural Resources as soon as it is formalized with the Missouri Department of Natural Resources and the Missouri Attorney General's Office. As part of R. D. Sewer Company, L.L.C.'s semi-annual status reports, R. D. Sewer Company, L.L.C. shall report to the Commission the steps it has taken to implement the compliance schedule it executes with the Missouri Department of Natural Resources.

15. Beginning on November 1, 2009, the Staff of the Missouri Public Service Commission shall commence annual inspections of R. D. Sewer Company, L.L.C. and shall within thirty days of completing those inspection file with the Commission a report describing the operating conditions of R. D. Sewer Company, L.L.C.'s waste water treatment plant.

16. All objections not ruled on are overruled and all pending motions not otherwise disposed of herein are hereby denied.

17. The Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

18. This Report and Order shall become effective on November 2, 2008.

**BY THE COMMISSION**

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

Colleen M. Dale  
Secretary

( S E A L )

David, Chm., Murray, Clayton, Jarrett,  
and Gunn, CC., concur.

Dated at Jefferson City, Missouri,  
on this 23<sup>rd</sup> day of October, 2008.