BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

Office of the Public Counsel,	)	
	)	
Complainant,	)	
	)	
v.	)	**Case No. WC-2002-155**
	)	
Warren County Water and Sewer Company and Gary L. Smith,	)	
	)	
Respondents.	)	

REPORT AND ORDER

Issue Date: October 8, 2002

Effective Date: October 18, 2002

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v.	)	**Case No. WC-2002-155**
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Deputy Chief Regulatory Law Judge Lewis R. Mills, Jr.

REPORT AND ORDER

Syllabus: The Commission determines that Warren County Water and Sewer is unwilling or unable to provide safe and adequate service, and directs its General Counsel to seek the appointment of a receiver to operate the utility and liquidate its assets.

FINDINGS OF FACT

Brief Procedural History:

On September 26, 2001, the Office of the Public Counsel filed two complaints against Warren County Water and Sewer Company and Gary L. Smith, one concerning water operations and one concerning sewer operations. Mr. Smith is the sole owner of

Warren County Water and Sewer Company,[1] which has approximately 325 customers, and certainly less than 1000 customers. The Commission consolidated the two cases.

The complaints alleged that the Company is not providing safe and adequate service to its customers, and for relief, requested that the Commission petition for the appointment of a receiver, pursuant to Section 393.145, RSMo 2000.

Pursuant to an order of the Commission, the Staff of the Commission filed a list of issues on May 7. Staff and Public Counsel timely filed their statements of positions on these issues; the Company failed to do so. An evidentiary hearing was held on June 3 and 4, and was reconvened on July 26. Staff and Public Counsel timely filed briefs, but the Company did not file any briefs.

Water and Sewer Service Quality:

The Company has a history of frequent violations of the Missouri Department of Natural Resources (DNR) regulations. It has received at least ten notices of violations from the DNR in the last few years, and the rate has increased of late. The Company received several notices of violation during the pendency of this case. The notices of violations involve both sewage treatment plants.

Mr. Smith is slow to respond to customer complaints, slow to take corrective action, and slow to let customers know that any action has been taken. Mr. Smith has reacted violently toward Commission Staff members trying to help him, and has been verbally abusive to his customers.

[1] In their Answer to the complaint, Respondents deny that the Company is owned and operated by Mr. Smith. But at the evidentiary hearing, when asked about his relation to Warren County Water and Sewer, Mr. Smith testified, “I’m the owner.”

Drinking water systems must maintain a minimum pressure of at least 20 pounds per square inch in the distribution system at all times during normal operating pressures. Some of the houses in Incline Village that are nearest the standpipe, in terms of elevation, do not maintain the minimum pressure of 20 pounds per square inch (psi). Staff witness Steve Loethen installed pressure recorders on the system and obtained readings of less than 20 psi. Mr. Loethen also noted that the well pump cycles more often than it should because of the inadequate storage capacity.

Although the system was designed originally to provide 20 psi of pressure at all points in the system, the combination of customer growth and the resulting higher demand has resulted in pressure problems.

The DNR Public Drinking Water Program recommends storage volume equal to or greater than the average daily demand in the system. The average daily demand in the Company's system is currently about 66,000 gallons. The existing standpipe has a capacity of only 30,500 gallons – less than half of the system's current average daily demand. Additional storage capacity is therefore necessary.

In Case Number WA-96-449, the Company agreed that additional storage was needed. The Stipulation and Agreement in that case, to which the Company was a signatory, provided that:

> The construction of an elevated 100,000 gallon water tower and storage tank (the 'Water Tower') is necessary for the health, safety and welfare of the public in the *present* service area, including the residents of the Incline Village subdivision.

On June 18, 1998, the Commission approved the Stipulation and Agreement.

Despite the recognition of all involved – including the Company – that a storage tank is urgently needed, and has been urgently needed for years, the Company has

made no progress on installing one. In fact, the significant growth that has occurred in the area makes the need for additional storage even more pressing, and the Company's failure to install it an even more significant failure in the provision of safe and adequate service.

During an inspection of the system, Public Counsel witness Meisenheimer discovered that the warning indicator was not working properly at one of the sewage treatment plants, and that the cover of the lift station pit was not locked. She also discovered that the electrical boxes at the treatment plants were unlocked, and that the fences and gates were in poor repair. Although a later inspection by Ms. Meisenheimer revealed that some of the problems with fencing and gates had been addressed, many problems remained. In fact, the fence at the second sewage treatment plant was actually in worse condition on Ms. Meisenheimer's second and third visits than it had been on her first visit.

Staff witness Loethen also made a number of inspections of the Company's facilities. He noted that both sewage treatment plants had only one blower motor operational at each plant until February 2002 when the second blower motor at the first treatment plant was operational. Mr. Loethen testified that over the course of all his visits to the Company's system, he never saw all four lift stations working at the same time. Mr. Loethen also observed the problems with fences and gates that Public Counsel witness Meisenheimer detailed. The Commission finds Mr. Loethen's testimony credible and accurate.

Customer complaints are numerous relative to most other regulated utilities. These complaints concern water quality (odor and taste), water pressure, customer service, and sewer smells, among others.

Mr. Smith, the owner of the Company, was convicted of a felony for violating the Clean Water Act.[2] Upon conviction, Mr. Smith was placed on probation. A similar violation occurred later, and Mr. Smith was found to have violated the terms of his probation.

Despite offers of assistance from the DNR, the effluent from the sewage plants has degraded in the last year.

Business Practices:

The Company's business and accounting practices, while not a direct threat to the safety of the customers, indicate a general inability or unwillingness to comply with applicable standards. The Company routinely fails to pay its electric bills, risking discontinuation of its electric service and the resulting inability to run its water and sewer plants. The Company has been administratively dissolved by the Missouri Secretary of State's office for failing to pay its assessments. The Company has been delinquent on its assessments from this Commission. The Company has been delinquent in paying property tax on some of its real property, and owes about $20,000. Mr. Smith illegally attempted to sell the assets of the Company without prior Commission approval. It is unclear where that transaction stands today. The Company's records are so poorly documented, and Mr. Smith's other business so closely related, that it is impossible to conduct a thorough audit. The Company has been charging customers in some

[2] 33 U.S.C. Sec. 1251 *et seq.*

instances for those things which he should not be charging. The Company has not paid its primacy fees to the DNR for years, despite having collected those fees from its customers.

The Company, late in these proceedings, argued that the Commission should not proceed with the appointment of a receiver because it was attempting to sell the utility. The Company committed to let the Commission know how discussions with prospective purchasers were progressing, but has not done so.

As noted above, the Company attempted to transfer certain utility assets from the utility to a non-regulated corporation also owned by Mr. Smith, despite not having the Commission approval necessary under Section 393.190. The Company also failed to pay necessary fees to the Secretary of State, and became administratively dissolved. The Company committed to let the Commission know when it had recorded deeds that transfer the utility property back to the utility, and when it had filed with the Secretary of State to become reinstated as a corporation. The Company has not filed anything with the Commission on either of these items.

CONCLUSIONS OF LAW

Section 393.145 reads, in pertinent part:

> 1. If the commission shall determine that any sewer or water corporation having one thousand or fewer customers is unable or unwilling to provide safe and adequate service or has been actually or effectively abandoned by its owners ... the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver.
>
> ….
>
> 4. The receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment. The receiver shall operate the utility so as to preserve the

> assets of the utility and to serve the best interests of its customers. The receiver shall be compensated from the assets of the utility in an amount to be determined by the court.
>
> 5. Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interest of its customers, be returned to the owners. If the court determines after hearing that control of and responsibility for the utility should not, in the best interests of its customers, be returned to the owners, the receiver shall proceed to liquidate the assets of the utility in the manner provided by law.

The conclusion that the Company is unable or unwilling to provide safe and adequate service is inescapable. The record is full of un-rebutted examples.

Many of the problems discussed in the Findings of Fact section constitute violations of Missouri rules and statutes. For example, 10 CSR 20-8.020(13)(B) requires duplicate blowers and motors for the Company's treatment plants; the Company has routinely violated this regulation. The Company also has routinely violated 10 CSR 20-8.130(4)(C) which requires that lift stations have duplicate pumps.

During the pendency of this case, in January 2002, the Company violated Sections 644.051.1(2) and 644.076.1, RSMo 2000, 10 CSR 20-7.031(3)(A), 10 CSR 20-7.031(3)(B), and 10 CSR 20-7.031(3)(C), as well as 10 CSR 20-7.015(9)(E)1 and 10 CSR 20-7.015(9)(E)2 when it discharged untreated wastewater from the Shady Oaks lift station. The lack of adequate warning signs on treatment facilities is unsafe and is a violation of 10 CSR 20-8.020. Many of the issues related to the lack of adequate fencing and lack of adequate alarm systems are violations of the same rule.

The Company, late in these proceedings, argued that the Commission should not proceed with the appointment of a receiver because it was attempting to sell the utility. The Company committed to let the Commission know how discussions with prospective purchasers were progressing, but has not done so. Either there has been no progress,

or the Company simply did not bother to keep its commitment to the Commission. Regardless of which is the case, this is simply more evidence that the Company is unable or unwilling to live up to its responsibilities as a regulated public utility.

The Company committed to let the Commission know when it had recorded deeds that transfer the utility property back to the utility, and when it had made the filing with the Secretary of State to become reinstated as a corporation. The Company has not filed anything with the Commission on either of these items. Either it has not taken action to rectify these problems, or it has ignored its commitment to the Commission. These failures to follow through on commitments are more indications that the Company has no intention of taking seriously its responsibilities as a public utility.

When the current owner displays a complete disregard for customers, routinely flaunts Commission authority, and regularly fails to comply with applicable statutes and rules, with no indication that a turn-around is possible, the only real solution is the appointment of a receiver. The Commission, based on the evidence before it and the Findings of Fact herein, determines that the Company is unable or unwilling to provide safe and adequate water and sewer service to its customers. The Commission will therefore direct its General Counsel to seek the appointment of a receiver.

Public Counsel urges the Commission to take the next step contemplated by Section 393.145: having the court find that the utility should not be returned to the owner but rather liquidated by the receiver. The Commission agrees with Public Counsel. The quality of service provided by the Company has historically been poor, and appears to be getting worse. The Commission has determined that the Company is unable or unwilling to provide safe and adequate service. There is absolutely no

credible evidence in the record to suggest that things would be better if the utility was returned to the owners after being in the hands of a receiver.

The duties of a receiver pursuant to Section 393.145 have not been the subject of much discussion by Missouri courts. Because the appointment of a receiver is pursuant to the Public Service Commission law, and because the protection of the public interest is the guiding principle of the Public Service Commission, it is no great leap to conclude that one of the duties of a receiver should be to protect the public interest. Indeed, the whole reason to appoint a receiver is to ensure the continuation of safe and adequate service to the utility customers when it appears that the utility itself is unable to do so. Section 393.145 uses the phrase "best interests of the customers" twice. It would be contrary to the best interests of the customers to allow a receiver to liquidate the assets of a utility in a manner that would prevent customers from continuing to receive utility service. Thus, it would be inconsistent to interpret the statute to allow the receiver to liquidate the assets in a fashion that would prevent them from being used to serve the customers, for example, by selling a pump to one entity, the real estate to another, etc. The situation here is not like a corporate dissolution where the primary duty of the receiver is to get as much as possible for the owners and creditors of the corporation. A receiver appointed to operate and liquidate a public utility must have the protection of the public at least as much at heart as the protection of the owner. The Commission will therefore ask the court to instruct the receiver to liquidate the assets of the company on terms that protect the interest of the customers of the utility, and allows them to continue to receive utility service from the assets put in place to serve them. As a practical matter, this will very likely require that the entire system

be sold as a piece to a buyer willing to operate it – and improve it – to serve the customers.

In *Deutsch v. Wolff*, the court stated that "a receiver is not an assignee but an agent of the court having only such powers, rights, duties, and functions as are conferred upon him or her by statutes, orders, or decrees of the appointing court."[3] The relevant statutes (Section 393.145, and by reference Section 521.300 et seq.) provide very broad authority. Section 393.145 allows a receiver to operate the utility in the interests of the customers and to liquidate the assets. Under this statutory scheme, it appears clear that a court has the authority to order that liquidation should be structured to "serve the best interests of the customers." Indeed, it appears clear that this is the only sort of liquidation that a court should order.

The applicable statute, Section 393.145, states that the receiver shall "have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment." In the law providing for suits by attachment, Chapter 521, a receiver may be granted broad powers, provided that the circuit court in the order grants such authority. It has long been held in Missouri that, when a court appoints a receiver, it is acting in equity,[4] and the court may grant to the receiver such powers as are reasonable in the circumstances. In this case, the receiver should be granted the power to liquidate the assets of the utility in a manner that serves the best interests of the customers.

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[3] 7 S.W.3d 460, *Deutsch v. Wolff*, (Mo.App. E.D. 1999), at 464.

[4] 300 S.W. 1054, *State ex rel. Bromschwig v. Hartman*, (Mo.App. 1928).

IT IS THEREFORE ORDERED:

1. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, petition the circuit court for an order attaching the assets of Warren County Water and Sewer Company and placing the utility under the control and responsibility of a receiver.

2. That the General Counsel of the Commission shall, on behalf of the Commission pursuant to Section 393.145, seek a determination from the circuit court that Warren County Water and Sewer Company should not be returned to the owners but rather liquidated by the receiver as discussed herein.

3. That this order shall become effective on October 18, 2002.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Murray, Lumpe, Gaw and Forbis, CC., concur
and certify compliance with the provisions of
Section 563.080, RSMo 2000.
Simmons, Ch., absent

Dated at Jefferson City, Missouri,
on this 8th day of October, 2002.