BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Approval of Stoddard County Sewer Co., Inc. for permission, approval, and a certificate of public 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 of Stoddard County, Missouri.	)	Case No. SA-79-11

BRIEF OF THE STAFF OF THE PUBLIC SERVICE COMMISSION

I. JURISDICTION OF THE COMMISSION:

This case is before the Commission pursuant to Section 393.170 RSMo which requires the permission of the Commission before a gas, electric, water or sewer corporation begins construction of its plant or exercises any right or privilege under any franchise. The Commission has the power to grant such permission "whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service."

As the Missouri Court of Appeals said in Ozark Electric Cooperative v. Public Service Commission, 527 S.W.2d 390, 394 (Mo. App. 1975):

> For some reason, either intentional or otherwise, the General Assembly has not seen fit to statutorily spell out any specific criteria to aid in the determination of what is "necessary or convenient for the public service" within the meaning of such language as employed in Section 393.170, supra."

The Commission has been faced with divining what is necessary or convenient for the public service since 1913. Its opinions and construction of that statute over the years are entitled to "great consideration" by the courts. State ex rel. Harline v. Public Service Commission, 343 S.W.2d 177, 182(9)(Mo. App. 1960). Recent reported decisions give an indication of what factors the Commission considers after hearing the evidence presented at the hearing:

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Where applicant has the financial and technical ability to serve and service is shown to be economically feasible and necessary and convenient for the public interest a certificate will be granted. In re CMPS Sewer Co. Inc. 17 Mo. PSC (N.S.) 513 (Jan. 24, 1973).

Where applicant has the ability to provide safe and reliable sewer service in an area in which applicants may desire such service, certificate will be granted. In re Smokerise Development Corporation, 17 Mo. PSC (N.S.) 490 (Jan. 16, 1973).

II. SHOULD A CERTIFICATE BE GRANTED BY THE COMMISSION:

The Staff takes note of the lengthy recitation of the facts in this proceeding in the brief of the Applicant and adopts it in the interests of brevity. The Staff also notes that the Public Counsel does not apparently quarrel with Stoddard County Sewer Company receiving a certificate of public convenience and necessity in his brief. Staff witness testified that the Staff recommends approval of the application. (Tr. 176) The Applicant has shown that it has the financial ability to operate the system since it is financing twenty percent of the initial construction. (Tr. 146) It has the technical ability to construct the system since it has hired consulting engineers to design the system and has consulted with the engineers on the Staff on the best design methods. Several alternative methods were contemplated and a combination gravity and pressure system was determined to be the best in these particular circumstances. (Tr. 125, 126) Some of the alternatives pursued were establishment of a public sewer district which was found to not be economically viable (Tr. 84, 85) and treatment of the waste by the City of Dexter, which was not possible because of the capacity of its system. (Tr. 85)

There is no evidence in the record that indicates or implies the Applicants do not have the financial or technical ability to construct the system. Since all the evidence points to the conclusion that the Applicants should be granted a certificate, and Staff personnel in their examination of the feasibility study, as modified, recommend certification, the Commission should approve the construction of a sewer system by Stoddard County Sewer Company.

III. CONNECTION FEES:

The Public Counsel's brief states that office "is opposed to the concept of connection fees which are involuntary capital contributions paid for by the ratepayers." (P.C. Brief, p.2) The Public Counsel cites neither statutes or case law as authority for this proposition which it advocates the Commission adopt.

Connection fees or contributions in aid of construction have been approved by the Commission on previous occasions. In State ex rel. Martigney Creek Sewer Company v. Public Service Commission, 537 S.W.2d 388 (Mo. banc 1976) contributions in aid of construction and connection fees were discussed in a case which determined that donated property should not be included in the rate base of a utility or depreciation on it considered in rate-making. If contributions in aid of construction or connection fees were somehow against public policy as Public Counsel advocates, surely the Supreme Court en banc would have taken the opportunity in that case to so hold.

The Public Counsel presented no evidence in the hearing that the proposed connection fee of $1,035 was unreasonable, arbitrary or capricious. Mr. Sankpill of the Staff of the Commission detailed the derivation of the amount (Tr. 171-173) which basically requires the customers to pay for 80 percent of the initial facilities and the Applicants to pay for 20 percent. Of the $174,000 estimated cost, Applicants are to be responsible for $34,800. All of the testimony regarding the estimated costs substantiated the reasonableness of the estimates. (Tr. 184-186)

The Public Counsel speculated as to what will happen if the sewer company is sold. (P.C. Brief, p. 3) This is pure speculation and the proper forum for such an argument is a sale case should one ever be presented to the Commission. The Public Counsel also asserts that the customers will be paying for the system twice. Unfortunately, this assertion is without evidentiary support. It rests upon a provision in a restrictive convenant that connection to a yet-to-be-constructed central sewer system would be at no cost to the lot owner, and the assumption that the cost of that system

was passed on in the price of the lot sold to the customer. There is no evidence in the record to support this assumption. Bare logic argues against the validity of the assumption since the restrictive covenant was recorded in July, 1973, by Emerson and Naomi Tucker who owned all the land in the Ecology Acres subdivision. The Applicants did not buy the remaining lots from the Tuckers until 1974. (Tr. 7) There were already four houses in Ecology Acres when Applicants bought the subdivision. (Tr. 10) Mr. Bien testified several times that he had not charged or received any compensation for sewers in the price of the lots sold. (Tr. 14, 15, 16, 21, 22) The interim rates stipulated to between the Company and the Staff contain no return on rate base; they simply cover the estimated expenses. So the cost of the sewer system will not be paid for twice through contributions and the rates.

IV. RESTRICTIVE COVENANT REGARDING CENTRAL SEWER:

After a ruling by the hearing examiner that introduction of a copy of the restrictive covenant referred to earlier would not be permitted in the hearing, (Tr. 164) the Public Counsel was allowed to make an offer of proof regarding the document. It provides in paragraph 11 that "There shall be no cost to the lot owner in connecting to the central sewage disposal system, but each lot owner agrees to pay the monthly service charge for use of said system as determined by the owner of said system and approved by the Missouri Public Service Commission or other regulatory agency having jurisdiction thereof." These and other restrictions were placed on the books of the Recorder of Deeds of Stoddard County by Emerson and Naomi Tucker who sold the subdivision to Mr. Bien and Mr. Gibbs in 1974, who later transferred it in 1975 or 1976 to their lumber company. (Tr. 18, 19)

The Public Counsel contends that the covenant led lot purchasers to believe that the cost of the sewer system was included

in the price of the lot, and that the lot owners in effect have already paid for a system which does not exist.

The Staff objected to consideration of the restrictive covenants since Missouri courts have held that private contractual provisions regarding utility service are void if in conflict with tariffs approved by the Public Service Commission. In Kansas City Power and Light Co. v. Midland Realty Co., 93 S.W.2d 954, 958 (Mo. 1936) the Supreme Court stated:

> "It seems to be well settled by our decisions that the commission has the power to fix by order reasonable telephone, light, power and heating charges at rates exceeding the maximum prescribed by ordinance, franchise, or individual contracts, that such an order does not in the constitutional sense impair the obligations of such contracts, and that such rates automatically supersede all rates coming into conflict therewith."

In Kansas City Bolt and Nut Co. v. Kansas City Light and Power Co., 204 S.W. 1074 (Mo. banc 1918) the power company had entered into a contract with the bolt company that called for the former to supply electricity at a certain rate. The Commission subsequently approved rates for the utility that were higher than the contract rate. The bolt company refused to pay the higher rate and sought an injunction prohibiting the power company from discontinuing service. The circuit court refused to enter the injunction. The bolt company appealed to the Missouri Supreme Court, which in affirming the circuit court's decision, said:

> "(1) That the power to make rates for public service arises from the police power of the state; (2) that the instrumentality designated by statute to exercise such ratemaking power is the Public Service Commission; (3) that under the provision of Art. 12, Sec. 5, Constitution of Missouri, the police power cannot be abridged by contract; (4) that therefore, when the Public Service Commission fixes a schedule of reasonable rates for public service in conformity with the provisions of the Public Service Commission Act, such rates automatically supersede all contract rates coming in conflict therewith." 204 S.W. at 1075.

These rulings have been upheld by the United States Supreme Court. Chicago and Alton Railroad Co. v. Tranbarger, 238 U.S. 67, 35 S.Ct. 678, 59 L.Ed. 1204 (1914).

The Staff submits that should the Commission approve the connection fee, and there is no evidence in the record to reject it, that it governs over a provision in a restrictive covenant.

By approving the connection fee, the Commission is not determining the person who is ultimately responsible for paying it. The proper forum for that is circuit court in a case to determine if the successors in interest to the Tuckers are bound by the terms of the restrictive covenant that the central sewer system shall be connected at no cost to the customer. That question cannot be decided by the Commission since it lacks the power to construe contracts. Katz Drug Co. v. Kansas City Power and Light Co., 303 S.W.2d 672 (Mo. App. 1957).

V. INSTALLMENT PAYMENT OF CONNECTION FEE:

Public Counsel raises the issue that the proposed connection fee should be payable in installments rather than all at once. He makes an unsupported statement that "The homeowners in this area cannot afford a one-time connection fee of $1,035." Although the Staff takes no position on whether the Commission should order installment payment of connection fees, it does note that no other water or sewer company in the state has a tariff allowing such. If installment payments are ordered, it should be with the understanding that connection fees are customer-supplied capital used to construct part of the utility plant. If the customers do not pay in a lump sum, the utility will have to incur short-term debt to finance the construction. The interest paid by the company on that debt is normally considered by the Commission as a legitimate operating expense, which means that the ratepayers would ultimately pay for it. Initial payment in a lump sum would be cheaper for the ratepayers in the long run, especially since testimony indicated that several lending institutions were willing to lend the money to lot owners (Tr. 155) and add it on to an existing mortgage. The amount of the connection fee over the life of a mortgage would hardly be noticeable. And the appreciation in value of a home on a central sewer, as opposed to a home in an area designated one of the "Dirty Dozen" by the Department of Natural Resources because of septic tanks leaking over backyards, is bound to be more than $1,035.

VI. PASS-THROUGH OF FINANCING COSTS ON CONNECTION FEE:

Although no tariffs have been proposed concerning the method of assessing the connection fee, much discussion took place in the hearing regarding when it would be collected, from whom, and for what period. (Tr. 171-176) The fee was partially derived by taking the cost of the plant to the customers, (80 percent of the total cost) and dividing by the maximum number of customers that can be handled by the treatment plant (105). Mr. Sankpill testified:

> It was my understanding that for the first 105 customers that connected up, if they connected within one year from the time that the facilities were ready for service, and the tariff is in effect, of course, then the charge would be $1,035. All right. If a customer chooses to, having been advised by the Company, as Mr. Bien indicated they are willing to do, to wait that year, then there would be approximately a $100 interest expense, which would be 12 percent on $835. That $835 is the expense that the Company is going to have to put out of their pocket right away, because they are going to have to build this system. Now the other $200 average would be spent at the time the customer hooks on, so there wouldn't be any interest expense on that. So that was my reasoning, and their agreement, on the $100 or the 12 percent interest expense. (Tr. 173, 174).

The Public Counsel argues that the use of the pass-through of the finance costs forces "future customers to pay for a system that they were not using and which will act as a disincentive as more customers approach the demand level for additional capacity." (P.C. Brief, p. 5). This illustrates a misunderstanding of the derivation of the charge. The $1,035 connection fee was derived from the costs of the facilities to be used by the customers on the first treatment plant. The Staff calculated costs and then divided by the number of customers to use those facilities. For example, the treatment plant costs were divided by 105, its capacity. The collecting sewers total cost was divided by 270, the total number of lots in the company's area. The connection fee is, in effect, "weighted" so that people who will not be on the first treatment plant will not be paying for it, but they will be paying for their share of the collecting sewers and their share of a future treatment plant when one is started.

VII. SUMMARY:

The Commission should issue the applicants a certificate of public convenience and necessity since they have demonstrated that they have the financial and technical ability to administer a sewer company. The record discloses the expert opinion of two professional engineers that the system proposed is the most economically feasible for this particular location. The connection fee and proposed monthly rates are supported by competent and substantial evidence and have been characterized as reasonable by witnesses with many years of practical experience in the area.

Although some customers may have been misled by the original lot owners who created the restrictive covenants, the Commission has no power under law to right that alleged wrong. By approving the connection fee at $1,035 it will be helping to keep the monthly rate of $11.40 at a reasonable level and ensuring a substantial investment by the owners of the Company which should result in good management.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies that a copy of the foregoing instrument was served upon the attorneys of record or all parties of the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein with postage fully prepaid, and by depositing said envelopes in the United States mail at Jefferson City Missouri This 31st day of May 1971