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September 26, 2001

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED²
SEP 26 2001

Missouri Public
Service Commission

Re: Warren County Water & Sewer Co. and Gary L. Smith
Case No. WC-2002-155

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Complaint** and **Motion to Consolidate**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED²
SEP 26 2001
Missouri Public
Service Commission

Office of the Public Counsel,)
Complainant,)
)
v.)
)
Warren County Water and Sewer)
Company and Gary L. Smith,)
Respondents.)

Case No. WC-2002-155

COMPLAINT

COMES NOW, the Office of the Public Counsel (Public Counsel), pursuant to Section 386.390 RSMo (2000), and respectfully files this complaint against Warren County Water and Sewer Company (Company) with the Missouri Public Service Commission. The Public Counsel respectfully moves the Missouri Public Service Commission (the Commission) to open a complaint docket to investigate whether the Company has committed acts and/or omissions in violation of Missouri law. This Complaint is made for the reason that the Company has failed to comply with its statutory duty to provide safe and adequate service to its customers, as required by §393.130.1 RSMo.

Public Counsel respectfully moves the Commission to undertake such procedures as are necessary to (1) direct the Company to cease and desist from acts and omissions in violation of Missouri law, and (2) to place the system under the control and responsibility of a receiver. The Board of Trustees of Incline Village is willing to assume the responsibilities of being the receiver for this Company, and have the present ability to comply with the requirements of 393.145 RSMo to be appointed as receiver.

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In the alternative, Public Counsel respectfully moves that the Commission revoke the Company's certificates of convenience and necessity and order the Company to stop providing service to the area, and direct the Company to sell its facilities and plant to an entity which is capable of providing safe and adequate service to the customers of in the certificated area. Admittedly, Public Counsel reluctantly suggests this alternative, as it creates the risk that the Company's customers will be left without water and sewer system for a period of time. However, for numerous reasons, Public Counsel believes that it is not in the public interest to allow the current management of the Company to continue operations.

SUGGESTIONS IN SUPPORT OF THE COMPLAINT

1. Warren County Water and Sewer Company (Company) holds certificates of convenience and necessity to provide water service and sewer service in an area near Foristell, in Warren County, Missouri, which includes the development known as Incline Village. The Company has also previously been granted conditional certificates of convenience and necessity to provide services to undeveloped areas of Warren, Lincoln and St. Charles Counties in Missouri. However, those certificates were conditioned on the installation of a water storage tank, which has not been done to date. Therefore, it is unclear whether the Company is currently serving any areas outside Warren County.

2. The Company is a small water and sewer corporation, incorporated under the laws of the State of Missouri. The Company is regulated by the Commission, and also regulated by the Missouri Department of Natural Resources (DNR) and the United States Environmental Protection Agency (EPA). The Company is owned and operated by Gary Lett Smith, and is believed to have no full time employees. In August 2000, the

corporation was administratively dissolved for failure to comply with various filing and financial requirements of the Missouri Secretary of State. As of September 1, 2001, that condition had not been rectified.

3. The Company has fewer than 1,000 customers.

4. Section 386.390.1 RSMo provides that a complaint may be made by the Public Counsel "setting forth any act or thing done or omitted to be done by a corporation, person or public utility."

5. Section 386.360.1 RSMo states that:

"Whenever the commission shall be of the opinion that a public utility...is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of have such violation or threatened violations stopped and prevented either by mandamus or injunction."

6. Section 393.145.1 RSMo provides that:

"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 or has defaulted on a bond, note, or loan issued or guaranteed by any department, office, commission, board, authority or other unit of state government, 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."

7. Although rare, the Commission has previously found occasion to exercise its regulatory power to revoke the certificate of convenience and necessity from a regulated public utility when circumstances warranted such action. In Staff of the Missouri Public Service Commission v. Briarwood Utility Co, Inc., 26 Mo. PSC (N.S.) 530 (1984), the

Commission discovered that a certificated sewer company had obtained a certificate to serve an unincorporated area of Jefferson County. However, upon investigation into complaints of residents of the area, the Commission Staff discovered that no sewers had been built and the water system was not being operated. The Commission held that, because the utility had not exercised its authority "to operate, control and maintain a water and sewer system....the Commission concludes that said certificate of convenience and necessity should be declared null and void." Although there are sewer lines and water mains in place in Incline Village, the system there is not being operated in a manner which provides the customers with safe and adequate service.

8. The Company is owned and operated by Gary Lett Smith. Mr. Smith recently pled guilty in the federal district court of the Eastern District of Missouri for a felony violation of the Clean Water Act, in case number 4:01CR195. In his guilty plea, Mr. Smith admitted to the charge that in April of 2001, he "did knowingly discharge or caused to be discharged pollutants, to wit: sewage waste water, from a point source at Incline Village sewage treatment system, into the Incline Village Lake, a water of the United States, in Warren County, Missouri, without permit." Mr. Smith admitted to violating Title 33, USC §1311(a) and §1319(c)(2), and Title 18 USC §2. These admissions relate to the operation of the Company's sewer treatment plant. If convicted, 33 USC §1319(c)(2) provides that Mr. Smith "shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation, or by imprisonment for not more than 3 years, or by both." Pursuant to the plea agreement, Mr. Smith limited his prison exposure to not more than six (6) months, and became eligible for probation. By violating the environmental laws of the United States and the State of Missouri, the

Company's sewer system has failed to provide safe and adequate service to its customers, as is required by §393.130.1 RSMo. Further, if Mr. Smith is incarcerated at the conclusion of his federal criminal case, no one will be available to operate the water and sewer systems. The incarceration of Mr. Smith will effectively cause the systems to be abandoned. Mr. Smith's case is currently set for sentencing on November 9, 2001 at the Federal District Courthouse in St. Louis, Missouri.

9. Since 1996, the Staff of the Public Service Commission (Staff), the Public Counsel and the Company have agreed that the Company does not have adequate storage capacity in its water system. In Case No. WA-96-449, the Company, which then operated as Gary L. Smith, d/b/a Incline Water and Sewer, submitted the testimony of Robert E. Vogler. Mr. Vogler is an engineer who was employed, at the time of that proceeding, by MECO Engineering Company, Inc. of Hannibal, MO. In his testimony in that case, Mr. Vogler stated that the Company did not have adequate water storage facilities to accommodate DNR requirements or the needs of the system. Mr. Vogler stated: "The existing storage facility includes one standpipe of a total capacity approximately 32,000 gallons. The standpipe is 38 feet tall and 12 feet in diameter." Mr. Vogler then testified to two problems with the storage facility:

(1) "the existing 32,000 gallon storage tank is not adequately sized to serve the **existing needs of this development.**" (Vogler Dir., at p. 2.)

(2) "the existing standpipe alone **does not meet the minimum pressure recommendations of DNR** for those homes located near the standpipe." (Vogler Dir., at p.3.) The report also recommended that the untreated water in the water system be treated with chlorination and aeration to eliminate hydrogen sulfide from the water.

Since the date of the MECO report, the customer base of Incline Village has increased from less than 200, to nearly 350 customers, but the Company still has not added needed storage capacity. The inadequate storage and failure to meet minimum pressure requirements, are evidence that the Company is failing to provide safe and adequate water service.

10. In 1997, the Commission directed the Company to construct and install a storage tank. The Company has failed to construct and install the tank. According to the DNR, although the Company obtained a permit to construct the water storage tank, no construction occurred, and the Company allowed the permit to expire. Although the Commission, Staff and Public Counsel have repeatedly explained to the Company that the water storage tank must be built and placed in service before it can be included in rate base, the Company has repeatedly requested that the Commission allow it to collect the costs associated with the water storage tank from its customers before construction begins. No tank has yet been constructed. In a letter to the Commission dated June 28, 2001, the Company made the following request:

“In addition, the Company proposes additional water revenue totaling the sum of \$31,250.00 per year to cover estimated annual interest, depreciation, and a rate of return on stockholder investment in said proposed tank. Said amount should be obtained from an increase in the monthly availability charge and usage charge. An increase of approximately \$5.44 per month per customer would be required to generate said sum. The Company estimates the total investment in said tank, upon completion, to total approximately \$250,000.00. The Company

proposes that this increase be effective on the 1st of the month following said tank being placed in service.” (Letter of 6/28/01 at p. 3).

Earlier in the same letter, the Company admits that it wants pre-approval in the above amounts “so that bank financing can be finalized and the tank ordered.” (Letter of 6/28/01, at p. 2.) No documentation in support of the alleged estimated costs is provided with the letter.

Following the Staff’s response to that letter, the Company supplemented its rate request. At that time, the Company asked that rates be calculated to include the cost of the storage tank, and allowed to go into effect on the first day of the month after installation is completed, without requiring the Company to return to the Commission for approval of the new rates.

11. In February of 2000, a complaint against the Company was initiated by David and Michele Turner who are residential customers of the Company. In that Complaint, Case No. WC-2000-474, these customers alleged that the Company required them to purchase a lift station unit which was defective, that the Company failed to timely and effectively repair the pump and that the Company was engaging in improper business practices. The Complaint alleged that the Company should be responsible for repairs to a malfunctioning pump unit which the Turners were directed to purchase from another of Gary Smith’s companies. The Commission found that the Company had failed to provide the Turners with safe and adequate service. Although this matter was eventually resolved as to these customers, during the course of the investigation of this matter, Staff discovered that the Company was charging new connection customers for services in a

manner inconsistent with its tariffs. Eventually, the Company revised its letter to new customers to conform with its current tariffs.

12. On May 17, 2001, in response to customer complaints, members of the Public Counsel staff traveled to Incline Village to observe the facilities of the Company. During that visit, Public Counsel staff members photographed the condition of components of the sewer facilities including the two sewage treatment plants and a lift station. Those photographs will be presented to the Commission as an attachment to testimony sponsored by Public Counsel.

13. On July 10, 2001, the Office of the Public Counsel received notice from the Company that it is currently operating its two sewer plants without a valid permit from the DNR. (Letter of 6/28/01, at p. 3.)

14. In May 2001, members of the Staff and the Office of the Public Counsel met with agents from the DNR and EPA at Incline Village. During the week of this meeting, Mr. Smith was undergoing a 21-day period of hospitalization. In his absence, he turned the system over to a relative who is not an employee or owner of Warren County Water and Sewer Company. Visiting the service area and observing the condition of the Company's facilities raised numerous safety concerns, especially related to the sewer facilities. The sewage treatment facilities were observed not to have adequate fencing or other protection "designed to discourage the entrance of unauthorized persons or animals" as required by 10 CSR 20-8.140(9). Public Counsel has many concerns about the safety and adequacy of the treatment facilities as a result of this site visit.

15. On June 14, 2001, Public Counsel obtained copies of various records kept by the DNR relating to the operations of the Company. Those records revealed ongoing

enforcement problems which DNR has had with the Company. Included in those public records were:

a) an "Enforcement Action Request" dated June 6, 2001, requesting an enforcement action be commenced by the Water Pollution Control Program against Warren County Water and Sewer Co., seeking monetary penalties for numerous violations of the Missouri Clean Water Law and Missouri Clean Water Commission Regulations. This request classified Warren County Water and Sewer Co. as a "chronic problem 'small' facility." The violations alleged in this request were:

- Discharging pollutants in amounts or concentrations exceeding those specified in the regulations.

- Caused or permitted the bypass of wastewater, and failed to report the bypass to the department.

- Placed water contaminants where they would be reasonably certain to enter waters of the state, by pumping life stations to the environment.

- Facility failed to comply with effluent limits contained in Part A of State Operating Permit M-0098817 for months of June, August, September October, November and December 1999.

- Facility failed to comply with effluent limits contained in Part A of State Operating Permit (number omitted) for months of July, September, and November 1999.

- Facility failed to submit monthly Discharge Monitoring Reports as required contained in Part A of State Operating Permits MO-0098817 and MO-0100358 for months of March, 1999, January and March 2000.

- Failed to have duplicate operational blowers and motors.

- Failed to have proper back flow prevention at treatment plants

- Failed to conduct required operational monitoring."

b) Letter of Warning, dated March 2, 2001, to the Company. The letter states that testing revealed that the Company's drinking water distribution system found chlorine levels which were 10 percent higher than the Maximum Residual Disinfectant Levels allowed under the Missouri Safe Drinking Water Regulation 10 CSR 60-4.055(1)(A).

c) The Company has numerous notices of violation of DNR regulations related to safe drinking water levels, effluent levels from the sewage treatment systems, and reporting requirements.

16. Public Counsel has received several calls and letters from the Company's customers, and has spoken to customers about their complaints regarding service. The customers complain about the quality of the service, and about the rude, unprofessional treatment they have received at the hands of Mr. Smith when they attempt to resolve issues concerning their water and/or sewer service. Among the common complaints which customers relay to Public Counsel are:

- a) low water pressure
- b) frequent water outages
- c) rusty or dirty water from the tap
- d) excessive odor from the sewer treatment plants
- e) release of raw sewage into the Incline Village lake, which was intended for use by residents for fishing and swimming.
- f) frequent excavation for installation of pipes and correction of installation errors
- g) frequent system breakdowns requiring repairs, and delays in performing repairs
- h) poor customer relations

17. Public Counsel has been in contact with persons involved with the Board of Trustees for Incline Village, and on September 4, 2001, received confirmation that the Board of Trustees is willing to undertake the duties of receivership of the Company. Public Counsel believes that the Board of Trustees is able and willing to retain or contract with a responsible person "knowledgeable in the operation of utilities" as required by

§393.145.3 RSMo. Public Counsel believes receivership is necessary in order to correct this deficiencies in this Company's current service.

18. The Warren County Water and Sewer Company has chronically failed in its obligation to provide safe and adequate service to its customers, in that:

(1) The Company knowingly discharged pollutants, to wit: sewage waste water, from a point source at its Incline Village sewage treatment system, into the Incline Village Lake.

(2) The Company failed to construct and install a necessary water storage tank for its drinking water system. Further, although the Commission approved the Company's request to obtain financing for the storage tank, and Company obtained a permit to construct the water storage tank, no construction occurred, and the Company allowed the permit to expire. As a result, there is inadequate storage for water and many customers experience problems related to lack of storage, including low water pressure.

(3) The Company previously engaged in business practices regarding contracting for utility work which were contrary to the provisions contained in its tariff.

(4) The Company that it has been operating its two sewer plants without a valid permit from the DNR during the summer of 2001.

(5) The Company has failed to perform its duties to install and repair water and sewer mains in a safe and professional manner.

(6) The Company has a significant history of violating provisions of the Missouri Clean Water Law regarding discharges of effluent from its sewer treatment plant in violation of state law and DNR regulations.

(7) The Company has been cited by DNR for violations for having excessive amounts of chlorine in its drinking water system.

(8) The Company engages in poor management practices, including failure to timely file reports with this Commission, the Department of Natural Resources and the Secretary of State, and failure to timely pay required assessments and fees required to continue to operate the Company in good standing. The Company has an extremely poor customer service record.

(9) On May 17, 2001, the Company was in violation of safety regulations concerning accessibility of the public to its two sewer treatment facilities, in that there was not an adequate locked fence around either facility, as required by 10 CSR 20-8.140(9). This condition was observed by members of the Commission staff and the Office of the Public Counsel.

WHEREFORE, Public Counsel requests the following relief:

(1) that the Commission set this matter for an early public hearing at Incline Village in order to gather evidence and statements from the Company's customers regarding the safety and adequacy of the service being provided;

(2) that the Commission set an early pre-hearing conference for the purpose of proposing a procedural schedule in this matter;

(3) that the Commission take such steps as are necessary to cause the Company to cease and desist from any and all violations of statute, state and federal regulations and Commission rules;


(4) that the Commission petition the circuit court for the appointment of a receiver for the Company, or, in the alternative, that the Commission revoke the Company's certificates of convenience and necessity and direct the Company to sell, lease or otherwise transfer all assets, including plant, to an entity which is capable of providing safe and adequate water and sewer service to customers in the certificated area.

(5) In the alternative, Public Counsel reluctantly requests, that if the Commission declines to have a receiver appointed for the system, that the Company's certificates of convenience and necessity to provide water and sewer service be cancelled or revoked.

(6) Public Counsel further requests that the Commission grant such other relief as may be just and proper.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 
M. Ruth O'Neill (#49456)
Assistant Public Counsel

P O Box 7800
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 26th day of September 2001:

General Counsel
Missouri Public Service Commission
P O Box 360
Jefferson City, MO 65102

Gary L. Smith
Warren County Water & Sewer Company
P O Box 150
Foristell, MO 63348

COPY

FILED

APR 26 2001

U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY LETT SMITH,

Defendant.

No.

4: 01CR00195ERW

INDICTMENT

The Grand Jury charges:

INTRODUCTION

1. At all times material to this Indictment, the Warren County Water and Sewer Company had a National Pollutant Discharge Elimination System (NPDES) Permit (Number MO-0098817 & MO-0100358) to operate a wastewater treatment facilities at Incline Village in Warren County, Missouri, within the Eastern District of Missouri.

2. At all times material to this Indictment defendant Gary Lett Smith was a certified Waste Water Treatment Plant Operator, with Certificate No. 4238 and the owner and operator of the Warren County Water and Sewer Company.

3. Permit No's. MO-0098817 & MO-0100358 do not allow for the discharge of untreated sanitary waste from a manhole point source into Incline Village Lake.

4. The Federal Water Pollution Control Act, 33 U.S.C., Section 1251, et seq., more commonly known and hereafter referred to as the "Clean Water Act", was enacted by Congress to restore and maintain the chemical, physical, and biological quality of the

Nation's waters. 33 U.S.C., Section 1251(a). In addition, the Clean Water Act was enacted, inter alia, to prevent, reduce and eliminate water pollution in the United States and to conserve the waters of the United States for the protection and propagation of fish, aquatic life, and wildlife, recreational purposes; and the use of such waters for public drinking water. 33 U.S.C., Section 1252(a).

5. The Clean Water Act prohibits the discharge of any pollutant into waters of the United States, except in compliance with a permit issued pursuant to the Clean Water Act under the National Pollution Discharge elimination system ("NPDES") by the United States Environmental Protection Agency or an authorized State. 33 U.S.C., Sections 1311(a) and 1342.

6. The Administrator of the EPA, pursuant to Title 33, United States Code, Section 1342(a)(5), has delegated to the State of Missouri the authority to implement and enforce its own permit program regulating the discharge of pollutants from point sources within Missouri. The state agency responsible for implementing the Missouri permit program is the Missouri Department of Natural Resources ("MDNR"). Section 640.010 R.S.Mo. 1986. The United States retains the authority to enforce these permit standards in Federal Court. Title 33, United States Code, Section 1319(c), 1342(b).

7. Under the Clean Water Act, the discharge of any pollutant into waters of the United States without an NPDES permit or in violation of the conditions of an NPDES permit is unlawful. 33 U.S.C., Sections 1311(a) and 1342.

8. The term "discharge of a pollutant" is defined as the addition of any pollutant to navigable waters from any point source. 33 U.S.C. Section 1362(12).

9. The term "pollutant" is defined to include solid waste, sewage, garbage, sewage sludge, and chemical wastes. 33 U.S.C., Section 1362(6).

10. The term "sewage" is defined as human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes. 33 U.S.C., Section 1322(a)(6).

11. A point source is defined by the Clean Water Act as any discernible, confined or discrete conveyance from which pollutants are discharged. 33 U.S.C., Section 1362(14).

12. The Incline Village Lake is a navigable water of the United States within the meaning of the Clean Water Act, Title 33, United States Code, Section 1362(7); Title 40, Code of Federal Regulations, Section 122.2.

COUNT I

13. From on or about April 17, 2001 and continuing to on or about April 25, 2001, in the Eastern District of Missouri,

GARY LETT SMITH,


the defendant herein, did knowingly discharge or caused to be discharged pollutants, to wit: sewage waste water, from a point source at the Incline Village sewage treatment system, into the Incline Village Lake, a water of the United States, in Warren County, Missouri, without permit.

In violation of Title 33, United States Code, Sections 1311(a)
and 1319(c)(2). Title 18, United States Code, Section 2.

A TRUE BILL


FOREPERSON

AUDREY G. FLEISSIG
UNITED STATES ATTORNEY


PATRICK M. FLACHS #20484
Assistant United States Attorney

SPEEDY TRIAL INFORMATION:

RE: GARY LETT SMITH

Defendant is not in custody.

No Complaint has been issued as to this defendant.

The defendant never had an appearance before a U.S. Magistrate Judge.

Date of Indictment: April 26, 2001

Speedy trial information will be provided when defendant is taken into federal custody or appears before a judicial officer in this District for the first time.

PENALTY SLIP:

Re: GARY LETT SMITH

COUNT I - 33 U.S.C. § 1319(c)(2)(A)

I nmt 3 yrs; F nmt \$250,000.00 OR BOTH

Supervised release - nmt 1 year

\$100.00 Special Assessment