

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,)	
)	
)	
Complainant,)	
)	
vs.)	<u>CASE NO. WC-92-77</u>
)	
Bill Beeny, or Bill Beeny d/b/a Shady Oaks Water Association, Service Road, Box 377, Wright City, MO 63390)	
)	
)	
Respondent.)	

APPEARANCES: R. Andrew Beeny, Attorney at Law, R. Andrew Beeny & Associates, P.C., 111 South Bemiston, Suite 408, Clayton, Missouri 63105, for Respondent.

John B. Coffman, Assistant Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

Thomas H. Luckenbill, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

Hearing Examiner: Mark Grothoff

REPORT AND ORDER

On September 18, 1991, water service to the residents of Shady Oaks Subdivision (Shady Oaks), near Wright City, Missouri, was terminated due to an unpaid electric bill for power to the water pump. On September 20, 1991, a Petition For Temporary Restraining Order Injunction Mandamus and Penalties was filed by William K. Haas, Assistant General Counsel, on behalf of the Missouri Public Service Commission (Commission) in the Circuit Court of Warren County, Missouri.

On September 21, 1991, the Circuit Court issued a Temporary Restraining Order requiring Bill Beeny (Respondent) to restore water service to Shady Oaks. On

October 9, 1991, the Circuit Court dissolved the Temporary Restraining Order and continued a hearing on a preliminary injunction in that matter in order to allow the Commission to determine if it has jurisdiction over Respondent or the water system at Shady Oaks, and to make such findings as are necessary to bring the matter before the Circuit Court.

On October 16, 1991, the Staff of the Commission (Staff) filed a Complaint against Respondent, alleging that Respondent operates a "water corporation" as defined by Section 386.020(51), RSMo. Supp. 1990, and thus is a "public utility" pursuant to Section 386.020(32), RSMo Supp. 1990, and therefore subject to Commission jurisdiction pursuant to Section 386.250(3), RSMo Supp. 1990. Staff further alleges that Respondent has failed to provide safe and adequate water service to the customers of the water system. Staff also requests Commission authority to seek mandamus or injunctive relief pursuant to Section 386.360, RSMo Supp. 1990, and penalties pursuant to Section 386.570, 1986.

On November 4, 1991, Respondent filed an Answer to Staff's Complaint denying that he is a "water corporation" or "public utility" subject to the Commission's jurisdiction.

A prehearing conference and a hearing were held on November 22, 1991. Briefs were subsequently filed by all parties.

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:

Two issues have been raised by this case. The first issue is whether the Commission has jurisdiction over Respondent. The second issue is whether safe and adequate water service was provided to the residents of Shady Oaks. The Commission

shall address these issues separately. If no jurisdiction is found over Respondent, a discussion of the second issue will not be necessary.

Sections 386.020(32) and 386.250(3), RSMo Supp. 1990, extend the Commission's jurisdiction to "water corporations". Thus, the threshold issue of whether Respondent is within the Commission's statutorily mandated jurisdiction hinges upon whether Respondent can be considered a "water corporation".

Section 386.020(51), RSMo Supp. 1990, defines "water corporation" as follows:

"Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing, or selling for distribution, or selling or supplying for gain any water.

Staff's position is that Respondent is a person who owns, operates, controls or manages plant or property or a water supply or a power station which distributes, or sells or supplies water for gain.

Respondent argues that the Commission has no authority over him because he does not operate or control a water system, but rather, the Shady Oaks Water Association (SOWA) is solely responsible for the maintenance and operation of the neighborhood water system. Respondent further argues that neither he nor SOWA can be classified as a "water corporation" because neither has operated a water system "for gain".

The Office of the Public Counsel (OPC) supports Staff's position in that it believes enough evidence was produced to show Respondent operated the water system "for gain". Nonetheless, OPC argues that a finding that Respondent acted "for gain" is not essential, but rather the Commission need only find that Respondent operated, controlled or managed any of the water system's plant or property, or that Respondent merely distributed water or sold water for distribution.

An analysis of Commission jurisdiction is based upon the evidence concerning Respondent's conduct rather than any distinctions, legal or otherwise, which do not bear upon utility service. Such an analysis is consistent with previous Commission decisions. In *Mayor of Parkville, et al. v. Park College*, 22 Mo. P.S.C. 207, the Commission stated, "Whether any individual or corporation is a 'water corporation' and all or part of its system of water distribution a public utility depends upon what is actually done...The functions performed by the corporation and the character of the use made of its property are determining factors." Id. at 212.

There are currently ten residences within Shady Oaks. The property upon which Shady Oaks is situated had been owned by Baptist Mission, Inc. (Baptist Mission), a non-profit corporation for which Respondent is president. Residential lots were sold for Baptist Mission by Bill Beeny Real Estate. In the process of selling the property for Baptist Mission through his real estate office, Respondent held out the availability of water at Shady Oaks to the buyers. A promotional brochure distributed by Bill Beeny Real Estate, and including a personal message from Respondent, advertises that all tracts in Shady Oaks have water service. Residents of Shady Oaks testified that they were told by Respondent that the lots came with water and sewer service.

Water customers in Shady Oaks paid Respondent \$10 per month for their water service. Their water bills have always been paid at Respondent's real estate office. At various times, checks for water service were made payable to various entities, including Bill Beeny, Bill Beeny Real Estate, and Baptist Mission. In 1987, Respondent instructed the water customers to make their checks for water service payable to SOWA.

The water customers always directed complaints about their water service to Respondent, and Respondent always responded satisfactorily to such complaints until approximately one and one-half years ago. The water customers always relied on

Respondent to address their water service problems and they were never referred to anyone else by Respondent.

Despite Respondent's contention that SOWA was responsible for the water service at Shady Oaks, there was no evidence of a functioning water association in Shady Oaks. Nothing contained in the record establishes that a water association exists in Shady Oaks, and no one testified to being a water association member. Further, Respondent conceded in testimony that no association has been formed yet. Respondent also conceded that fact in a letter sent to the residents of Shady Oaks which stated, in part: "I tried two times to get a well association formed and you did not respond." Respondent did produce a copy of a document Respondent claimed to be SOWA's bylaws. However, a copy of bylaws does not alone establish that an association exists. Also, there was no indication that the document has ever been filed in a Recorder's office, and the only signature on the document was Respondent's.

While Respondent wants a valid water association to relieve him of responsibility for Shady Oaks water service, such an association does not exist. All activity attributed to SOWA by Respondent is either activity performed by Respondent himself, or by someone or some entity acting under the direction of Respondent.

Based upon the evidence, the Commission finds that Respondent manages or controls the water system at Shady Oaks. The Commission further finds that Respondent was distributing water through the water system. Thus, the Commission finds that Respondent constitutes a "water corporation" as defined by Section 386.020(51), RSMo Supp. 1990, and, therefore, Respondent is subject to the Commission's jurisdiction. The Commission further finds that Respondent has never sought nor been granted a certificate of convenience and necessity for Commission authorization to construct and operate a water system, pursuant to Section 393.170, RSMo 1986.

Since the Commission has found that Respondent falls within its jurisdiction, the issue of whether Respondent provided safe and adequate service must be addressed. Every "water corporation" within Commission jurisdiction is required to "...furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." Section 393.130.1, RSMo 1986. The record establishes that Respondent has failed to meet this standard.

Water customers in Shady Oaks have experienced numerous water outages, especially during cold weather. They also have experienced severe water pressure problems. Dan Daugherty, an environmental engineer for the Department of Natural Resources (DNR), identified several problems with the condition of the water system for Shady Oaks, including the poor condition of the casing seal and the improper elevation of the well casing. Thomas Seigel, also an environmental engineer with DNR, stated that the water system for Shady Oaks must be upgraded in order to provide safe and adequate service.

Bacterial contamination also poses a danger. Mr. Daugherty and Joseph Hainline, a sanitarian with the Department of Health, both submitted bacteriological analyses of water samples taken from the Shady Oaks water system. All of these analyses resulted in findings of "TNCT WITHOUT", which means that the bacteria in the sample taken were too numerous to count, and thus it was not possible to determine whether fecal coliform was present. Fecal coliform is a dangerous bacteria. Dr. Arlon Meyer, a public health laboratory scientist III, explained that fecal coliform would be hidden by the presence of such an abundance of bacteria.

Based upon the above evidence, the Commission finds that Respondent has failed to provide safe and adequate water service pursuant to Section 393.130.1, RSMo 1986.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

Sections 386.020(32) and 386.250(3), RSMo Supp. 1990, extend the Commission's jurisdiction to "water corporations". Pursuant to Section 393.170, RSMo 1986, no water corporation may construct a water system without first having obtained the permission and approval of the Commission. Further, every water corporation is required to furnish and provide such service instrumentalities as facilities and shall be safe and adequate and in all respects just and reasonable, pursuant to Section 393.130.1, RSMo 1986. Section 386.020(51), RSMo Supp. 1990, defines "water corporation" as follows:

"Water corporation" includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing any plant or property, dam or water supply, canal, or power station, distributing, or selling for distribution, or selling or supplying for gain any water.

While OPC argues that the statutory phrase "for gain" applies solely to the words "selling or supplying" which precede it, Respondent contends the "for gain" language applies to the entire definitional statute.

The Commission is of the opinion that a finding that an activity was "for gain" is not necessary in order to exercise Commission jurisdiction. The Commission interprets the statute as extending the definition of "water corporation" to such entities as owns, operates, controls, or manages a water system for the purpose of: (1) distributing water or selling water for distribution, or (2) selling or supplying for gain. The purpose of Section 386.020(51) is to cover water service activity which falls into any of these three categories, and the "for gain" condition is a requirement in the third category only. The statutory language is in the disjunctive and therefore the

conditions are separate indices for determining if a water system is being operated as a public water corporation.

While Respondent claims such an interpretation is contradictory to the advisory opinion of the General Counsel (Opinion No. 68-11, May 1, 1968) the Commission does not find the opinion persuasive since it interprets Section 386.020(38).

The Commission's interpretation of the statute is supported by case law. According to the Missouri Supreme Court, the word "or" is to be considered disjunctive, rather than conjunctive, and should be interpreted as meaning "either this or that". *Norberg v. Montgomery*, 173 S.W.2d 387 (Mo. banc 1943). The word "or" has also been interpreted to mean "and/or". *Hawkins v. Hawkins*, 511 S.W.2d 811 (1974). Thus, Respondent's interpretation would require substituting the conjunctive word "and" for the disjunctive word "or" throughout the statute. Further, the Missouri Supreme Court has adopted the "Doctrine of the Last Antecedent". This doctrine states that relative and qualifying words and phrases are to be applied to the words immediately preceding them, and are not to be construed as extending to or including other words more remote. *Norberg* at 390. When the Doctrine of the Last Antecedent is applied to Section 386.020(51), the words "for gain" modify only the words "selling or supplying".

The Commission is of the opinion that because there is no previous interpretation of the statute in question, these rules of construction adopted by the Missouri Supreme Court should be used in interpreting the statute. Thus, the Commission finds that a finding that a water service activity was undertaken "for gain" is not necessary in order to exercise Commission jurisdiction.

Respondent is a water corporation and a public utility subject to the jurisdiction of the Commission pursuant to Sections 386.020(32) and (51), and 386.250(3), RSMo Supp. 1990. Respondent has not been granted a certificate of

convenience and necessity authorizing Respondent to construct and operate a water system as required by Section 393.170, RSMo 1986. Respondent has failed to provide such service instrumentalities and facilities as are safe and adequate and in all respects just and reasonable as required by Section 393.130.1, RSMo 1986.

IT IS THEREFORE ORDERED:

1. That Respondent shall take all actions necessary to ensure safe and adequate water service is provided to the residents of Shady Oaks pursuant to Section 393.130.1, RSMo 1986.

2. That Respondent shall take such action as directed in Ordered Paragraph 1, or present a plan for doing so to the Commission, within thirty (30) days of the effective date of this Report and Order.

3. That Respondent shall file appropriate tariffs and seek a certificate of convenience and necessity from the Commission pursuant to Section 393.170, RSMo 1986, within thirty (30) days of the effective date of this Report and Order.

4. That the General Counsel of the Commission is hereby authorized to seek mandamus or injunctive relief pursuant to Section 386.360, RSMo Supp. 1990, to ensure Respondent provides safe and adequate water service to the residents of Shady Oaks.

5. That the General Counsel of the Commission is hereby authorized to seek penalties against Respondent pursuant to Section 386.570, RSMo 1986.

6. That this Report and Order shall become effective on January 8,
1992.

BY THE COMMISSION

Brent Stewart

Brent Stewart
Executive Secretary

(S E A L)

Steinmeier, Chm., Rauch, McClure,
and Perkins, CC., Concur.
Mueller, C., Absent.

Dated at Jefferson City, Missouri,
on this 27th day of December, 1991.