BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

CASE NO. SM-81-325

In the matter of LAKE SAINT LOUIS SEWER COMPANY, a Missouri corporation, Transferor, and the CITY OF O'FALLON, a municipal corporation, Transferee, for authority to sell and purchase utility assets.

APPEARANCES: W. R. England, III, Attorney at Law, Post Office Box 456, Jefferson City, Missouri 65102,
and
Rollin J. Moerschel, Attorney at Law, 131 Jefferson Street, St. Charles, Missouri 63301, for Lake Saint Louis Sewer Company.

Robert M. Wohler, Attorney at Law, 114 East Elm Street, O'Fallon, Missouri 63366, for the City of O'Fallon, Missouri.

James B. Herd, Attorney at Law, and James J. Sauter, Attorney at Law, 3411 Hampton Avenue, St. Louis, Missouri 63139, for Mueller Investment Properties, Inc.; DKE, Inc.; and Oak Bluff Preserve.

Leland B. Curtis, Attorney at Law, and Kenneth M. Romines, Attorney at Law, 230 South Bemiston, Clayton, Missouri 63105, for the City of Lake Saint Louis, Missouri.

Mary Ann Garr, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REPORT AND ORDER

On May 14, 1981, the Lake Saint Louis Sewer Company (hereinafter Company) and the City of O'Fallon, Missouri (hereinafter O'Fallon) filed the above-entitled application for authority to sell and purchase utility assets. On May 19, 1981, Mueller Investment Properties, Inc.; DKE, Inc.; and Oak Bluff Preserve (hereinafter developer-intervenors) filed a joint application to intervene.

The Commission set a prehearing conference in this matter, which took place on June 24, 1981. The City of Lake Saint Louis, Missouri, appeared and was allowed to participate subject to its agreement to file an application to intervene setting out its position. Said application to intervene was never filed by the City.

A record was made at the prehearing conference. Certain conditions were set out by the Commission which, if not met by a certain date, would result in the case being set for hearing. The conditions were not met and a hearing was held in this matter.

By this report and order the Commission is formally granting the developer-intervenors' application to intervene. Since the City of Lake Saint Louis did not, as instructed, file an application to intervene and did not, as instructed, file a brief in this case, the Commission is dismissing the City of Lake Saint Louis as a party to this proceeding.

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.

The Lake Saint Louis Sewer Company is a Missouri corporation duly organized and existing under the laws of the State of Missouri. Transferor is a sewer corporation as defined in Section 386.020, R.S.Mo. 1978, and as such is subject to the jurisdiction of this Commission.

Two memorandums of agreement were presented at the hearing. The first, marked as Exhibit 1, is an agreement entered into and signed by the Company, the City of O'Fallon, and the Staff of the Missouri Public Service Commission (hereinafter Staff). The purpose of the agreement was to modify those parts of the contract to sell between the Company and O'Fallon that the Staff believed to be unclear, improper or detrimental to the public interest.

Article II, Section B, Item 2.b. of the contract to sell was modified by Exhibit 1. The modification changed that part of the contract relating to sewer connections. The modification resulted in the contract reading the same as the Company's tariff rule 12 relating to contributions in aid of construction due before connection to the Lake Saint Louis Sewer Company's system. The change was basically a language change. Item 2.c. of the same Article and Section cited above was also modified. Item 2.c. contained language that would have restricted the City of O'Fallon from providing service to the developer-intervenors until certain conditions were met by those developer-intervenors. Said language was removed. Exhibit 2 is a memorandum of agreement between Company and Staff. It requires refund of a surcharge allowed in Case No. SR-79-24. Exhibit 2 also requires the Company to extend an offer to the residents of Dauphine Drive in Lake Saint Louis, Missouri, to fund one-half of the estimated cost of equipment required for the installation of an individual sewer lift station at each of the nine residences located on Dauphine Drive. The purpose of the offer is to remedy backup problems in the sewer serving those homes.

The City of O'Fallon is currently engaged in the business of providing sewer service and has agreed by Exhibit 1 to retain by written contract the services of Mid-Missouri Engineers, Inc., who presently operates the Company's system. The purpose of retaining Mid-Missouri Engineers, Inc., is to assure continued adequate and competent service of the system should the Commission authorize transfer of the Company's system to O'Fallon.

The Company set out several points which addressed the proposition that a transfer of the Company's system to O'Fallon will not be detrimental to the public interest. First, capital funds will be available to the City of O'Fallon at a lower cost than the Company could attain, for expansion and improvement of the Company's system. Secondly, O'Fallon currently has treatment facilities that will (1) eliminate several smaller treatment facilities of the Company around the City of

Lake Saint Louis, and (2) eliminate the present necessity of system expansion to meet demand. The basic proposition is that if the Company were to continue, it would immediately need to begin development of a program to expand capacity. The ultimate result would be higher rates to cover the necessary cost of expansion. However, if O'Fallon takes over, immediate expansion is not necessary, and any expansion necessary in the long run would be funded by cheaper capital resources available to the City of O'Fallon. There was no evidence to the contrary on any of the above points. Certain parts of the Staff's evidence supported the above points.

Staff's position in this matter is set out in both Exhibits 1 and 2. The following appeared in those exhibits:

> "...Staff has reviewed said application, appendices, and exhibits attached thereto, and has independently examined and investigated the proposed sale and purchase and based on said review, examination, and investigation, Staff concludes and commends to the Commission the approval of the proposed sale and purchase with the following additional terms and conditions..."

Those conditions were the ones discussed earlier. The Staff further stated in both Exhibits 1 and 2 the following:

> "In light of the foregoing, Staff believes that the transfer of the utility assets pursuant to the contract and the agreements herein contained is not detrimental to the public interest."

The developer-intervenors' position is basically one of pecuniary interest as set out in paragraph 5 of their application to intervene. That application also complained of the two paragraphs in the contract of sale between the Company and O'Fallon that were changed by Exhibit 1. The developer-intervenors still found fault in paragraphs B.2.b. and B.2.c. of Article II of the contract for sale after modification of the contract by Exhibit 1. The developer-intervenors correctly state that should the transfer be allowed, contributions in aid of construction due on or before connection (hereinafter referred to as connection fees) per platted lot will increase and the fees due before connection will be for all platted lots to be served by the connection.

Presently, the connection fee under the Company's tariff is $400.00. O'Fallon proposes to charge $600.00. As to the effect on the public of such a change, the manager of the Commission's water and sewer department stated that overall, higher contributions in aid of construction will result in lower rates to customers.

The intervenors claim they have a right to be connected to the Company's sewer system under the Company's tariff rule 12 as it existed before December 8, 1980. Under the Company's prior tariff, the connection fees for a subdivision were due for each platted lot as each lot's building permit was issued. Consequently, connection fees were due only as the construction of houses occurred. The Company's tariff was changed and after December 8, 1980, the connection fee for each platted lot in a subdivision was due for the entire subdivision when the application for connection was made by the developer, rather than as homes were built.

The rationale behind that change is that a sewer company cannot increase its capacity piecemeal as the houses in a subdivision are built. A sewer company must build capacity to meet the number of platted lots to be served by an extension. Hence the change to the up-front payment requirement.

The developer-intervenors also complained that the Company had failed to abide by Commission orders as a planned method of discrimination. The developer-intervenors brought out that the Company had not provided service pursuant to the Commission's orders in Case No. SC-78-257 and Case No. SC-81-63. The evidence shows the complainants in SC-78-257 have not sought enforcement of that order issued on October 16, 1979. That report and order required the complainants to comply with several conditions before the Company would be compelled to provide service. The evidence in the instant case shows those conditions were not met. The developer-intervenors claim that their efforts to comply with the conditions were frustrated by the Company. However, the sewer company appears to have made the first formal

communication between the parties regarding SC-78-257, on November 20, 1979, expressing an intention to cooperate with Oak Bluff Preserve as long as Oak Bluff Preserve complied with the conditions set forth in the order. It was almost a year later before any correspondence was received by the Company from anyone representing Oak Bluff Preserve. The record indicates that the developers of Oak Bluff Preserve entered into an agreement with the City of Lake Saint Louis for sewer service after the hearing and before the report and order was issued in Case No. SC-78-257. The developers of Oak Bluff Preserve then proceeded to transfer the sewer lines to the City of Lake Saint Louis in May of 1981. It is apparent that the developers never intended to complete compliance with the orders in SC-78-257, believing such would prove not worthwhile, and proceeded on a different course.

The developer-intervenors also pointed to Case No. SC-81-63 as evidence of Company's noncompliance with a Commission order. The developer-intervenors were not parties to the case, but are interested parties. The record indicates that there was some confusion with the parties' interpretation of the Commission's order in that case. The Ordered 1 section of the report and order in SC-81-63 required the City of Lake Saint Louis to tender an "adequate conveyance". The City and the developers of the High Point Subdivision, the subject matter of the order, tendered to the Company quit claim deeds of the High Point sewer system on June 12, 1981, the effective date of the report and order in SC-81-63. The Company, by letter dated June 15, 1981 (Exhibit 14) to the manager of the Commission's water and sewer department, indicated that such a conveyance was not sufficient. The Company stated that a warranty deed with a title policy would be necessary, along with certain other conditions. At the time of the hearing, the High Point Subdivision was still not connected.

The City of Lake Saint Louis is on the record as being in support of the transfer. The City also stated that the developer-intervenors' subdivisions should be connected as part of the Company's system before the transfer. The City offered

into evidence Exhibit 6, which was a stipulation and agreement that was supposedly tendered to all of the parties involved at the hearing, to demonstrate the good faith effort that went into the prehearing conference between the parties. The City's contention was that the areas of difference between the developer-intervenors and the Company were not that great. The City's position in this matter by the end of the hearing was rather ambivalent. On the one hand, the City stated it believed the developer-intervenors should be connected before transfer, yet the City later stated that it had "concluded that the sale of the Lake Saint Louis Sewer Company is in the best interest of the residents of the City of Lake Saint Louis..." The City further stated it had signed Exhibit 6 as a demonstration of such. What is not known is whether the City, by the end of the hearing, favors the transfer contingent upon the developer-intervenors' being connected to the Company's system.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions.

The Company is a public utility subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, R.S.Mo. 1978. Section 393.190 of Chapter 393 requires Commission authorization for a sewer utility to dispose of assets necessary or useful in the performance of its duty to the public. The question before the Commission is whether such an authorization should be made by the Commission. The only criterion for determining that question is set out in State ex rel. Fee Fee Trunk Sewer v. Litz, 596 S.W.2d 466 (Mo. App. 1980):

> Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain approval of the Commission. Section 393.190, RSMo. (1969). The obvious purpose of this provision is to insure the continuation of adequate service to the public served by the utility. The 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. State ex rel. City of St. Louis v. Public Service Commission of Missouri, 335 Mo. 448, 73 S.W.2d 393, 400 (Mo. banc 1934).

Therefore, the only decision to be made by the Commission is whether the sale of the sewer company's entire system to the City of O'Fallon is detrimental to the public interest.

The only opposition to the sale was put forth by the developer-intervenors and the City of Lake Saint Louis. The developer-intervenors' application to intervene basically makes four points. The first is found in paragraph 5 of the application to intervene. That paragraph sets out that they have a "direct and substantial pecuniary interest in the proposed sale". The next two points are the intervenors' opposition to paragraphs B.2.b. and B.2.c. in Article II of the proposed contract of sale between the Company and O'Fallon. The last point made by the application to intervene is an allegation that the owner of the sewer company has a conflict of interest in his position as president of the Company and has engaged in a discrimatory fashion in his dealings with the developer-intervenors. The reformation of the contract by Exhibit 1 in effect satisfies the intervenors' complaint to paragraph B.2.c. of Article II of the contract to sell.

The language change of paragraph B.2.b. changes the contract so that it follows the Company's present tariff in regard to connection fees. It is not the transfer of the Company that is offensive to the developer-intervenors, but the conditions the developer-intervenors will have to meet to receive service from the City of O'Fallon after transfer that are offensive. The developer-intervenors' main interest is, as they so aptly stated in their application to intervene, one of pecuniary interest. The developer-intervenors presently are not part of the Company's system. The developer-intervenors believe that they should be made a part of that system under the Company's tariff as it was prior to December 8, 1980. That is, if the sale is approved, the developer-intervenors will have to pay, not only a higher connection fee per platted lot to have service, but will have to pay a connection fee for each platted lot in a subdivision at or before the time of

connection, rather than as individual building permits are issued as prospective homeowners build houses. The issue concerning the developer-intervenors is how much, how soon.

The developer-intervenors argue that by past Commission orders they have a vested right to connection under the Company's old rules that will be extinguished if the sale goes through, hence a detriment to them and, by their reasoning, the public as a whole. The past orders referred to are SC-78-257 and SC-81-63. As the findings of fact set out, the developer-intervenors never complied with the conditions precedent in SC-78-257. The developer-intervenors claim that the actions of the Company precluded them from complying. However, it appears from the record that the Company was willing to comply with the order as of November 20, 1979. The developer-intervenors never proceeded to attempt compliance until a year later. Those intervenors now come to the Commission almost two years after the report and order in SC-78-257 was issued and demand that the Commission not authorize transfer of the Company's system unless the Company complies with the SC-78-257 order. The Commission is of the opinion that, first, the intervenors have not met the conditions precedent and, second, the intervenors are estopped by laches to request the Commission not to authorize the transfer, even if the intervenors had complied with the conditions precedent in the report and order of SC-78-257. As for the developer-intervenors' assertion that the owner of the sewer company has a conflict of interest, the Commission notes that such a conflict will be cured by the sale.

There was no evidence advanced that would contravene any of the evidence presented by the Company and Staff that went to the effects of the transfer on the public as a whole, as opposed to the particular interests of the developer-intervenors. The Commission concludes that the proposed transfer is not detrimental to the public interest, and by this report and order authorizes the transfer of the Company's assets to the City of O'Fallon. The developer-intervenors' pecuniary

interest does not outweigh the public as a whole. Furthermore, the Commission concludes that the predicament of the developer-intervenors in respect to SC-78-257 does not constitute a detriment to the public interest that should foreclose this transfer. The Commission likewise finds the situation in SC-81-63 not to be a detriment to the public interest. However, the Commission is concerned about the Company's compliance with its orders. Consequently, the Commission is issuing simultaneously with this case a supplemental order in SC-81-63. The Commission is not canceling, and will not cancel, the Company's certificate and thereby release the Company from the Commission's jurisdiction until such time as the Company has complied, if possible, with the supplemental order in SC-81-63, or, should the transfer occur before then and make compliance impossible, until such time as the Commission's General Counsel shall have completed an action for penalties pursuant to Section 386.570, R.S.Mo. 1978.

It is, therefore,

ORDERED: 1. That the Lake Saint Louis Sewer Company be, and it hereby is, authorized to sell and transfer its sewer franchise, works and system to the City of O'Fallon, Missouri, pursuant to the agreements entered into between the Company, Staff and the City of O'Fallon, as described in this report and order.

ORDERED: 2. That this report and order shall become effective on the 1st day of April, 1982.

BY THE COMMISSION

Harvey G. Hubbs
Secretary

(S E A L)

Fraas, Chm., McCartney and Musgrave, CC.,
Concur and certify compliance with the
provisions of Section 536.080, R.S.Mo. 1978.
Dority and Shapleigh, CC., Not Participating.

Dated at Jefferson City, Missouri, on this
9th day of March, 1982.