

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Joint Application of Stoddard)
County Sewer Company, Inc., R.D. Sewer Co.,)
LLC, and the Staff of the Missouri Public Service)
Commission for an Order Authorizing Stoddard)
County Sewer Co., Inc. to Transfer its Assets to R.D.)
Sewer Co., LLC, and for an interim rate increase.)

Case No. SO-2008-0289

STAFF'S POST-HEARING BRIEF

Comes now the Staff of the Commission by and through the Commission's General Counsel, and for its Post-Hearing Brief, states as follows:

INTRODUCTION

This case was initiated jointly by Stoddard County Sewer Co. (Stoddard County), R.D. Sewer Co., (RD Sewer), and the Staff. The parties alleged that Stoddard County was not able or willing to continue its business and that the assets of Stoddard County should be transferred to RD Sewer. RD Sewer claims it is currently operating the Stoddard County system assets and is willing and able to continue upon the approval of the transfer of assets from Stoddard County to RD Sewer. The parties also jointly requested an interim rate increase because the current rates are not sufficient to cover Stoddard County's cost of service.

OPC'S MOTION TO DISMISS

On August 11, 2008, the Office of the Public Counsel (OPC) filed a Motion to Dismiss this case for lack of jurisdiction. OPC's motion is not clear about whether its challenge is to personal jurisdiction or subject matter jurisdiction. It appears in paragraph 11 that OPC claims Mrs. Bien is a necessary or indispensable party and therefore the Commission does not have jurisdiction to render a decision or is not competent to render

a decision.¹ But OPC's motion mistakes the nature of the transaction currently before the Commission: This case is an asset transfer case seeking approval of a transfer of assets from Stoddard County to RD Sewer. Both Stoddard County and RD Sewer are properly before the Commission and represented by counsel. Clearly the Commission has subject matter jurisdiction over an asset transfer by a public utility and personal jurisdiction over the parties. OPC fails to understand that it makes no difference who owns Stoddard County stock in order for the Commission to consider the asset transfer before it. By virtue of their appearance before the Commission, the Commission has jurisdiction over all the necessary and indispensable parties to this case.

In other words, it doesn't matter if Mrs. Bien really owns the Stoddard County stock. The assets are to be transferred from Stoddard County to RD Sewer. There is no question regarding stock ownership before the Commission. Therefore, the Commission is competent to grant the relief requested.

OPC's motion also misinterprets the meaning of section 393.190.3. In order for the statute to apply to the transfer of stock from Mr. Bien to RD Sewer, RD Sewer must be a "stock corporation." OPC failed at hearing to elicit evidence that RD Sewer is a stock corporation. In fact, the evidence clearly established that RD Sewer is a limited liability company (LLC) formed under Chapter 347 of the Revised Statutes of Missouri 2000.² One need only review Chapter 347 to conclude that LLC's do not issue stock; they have "member's interests"³. And the word "corporation" may not even be used in

¹ See *Iowa Steel & Wire v. Sheffield Steel Corp.*, 227 S.W.3d 549 (Mo. App. W.D. 2007).

² Transcript, V. 3, p. 246.

³ Section 347.015(12) RSMo. 2000.

the LLC's name⁴. An LLC is not a stock corporation, an LLC is not even a corporation, section 393.190 does not apply to the transfer of stock between Mr. Bien and RD Sewer, and OPC's motion to dismiss must be denied.

Even if section 393.190 applied to the transfer of stock from Mrs. Bien to RD Sewer and made the transfer void, such a fact is irrelevant to the asset transfer at issue. Stoddard County's stockholders are not parties that are necessary for adjudication of this asset transfer; the necessary and indispensable parties are Stoddard County and RD Sewer.

ISSUES FOR DETERMINATION

Issues Resolved by Agreement or Tried by Consent of the Parties

The Commission will recall that the following issues were identified in the Joint Application, but did not appear on the parties' agreed-upon List of Issues: 1. Request for changes to Stoddard County's existing tariff;⁵ 2. Request to cancel the certificate of convenience and necessity (CCN) issued to Stoddard County; 3. Request to waive the requirement of rule 4 CSR 240-3.305 that RD Sewer provide a feasibility study; and 4. Request to issue a new CCN to RD Sewer.⁶

No party objected to these requests or identified them as issues as requiring Commission determination at the hearing. No party elicited evidence in opposition to these requests. In effect, the parties have consented to the Commission granting these requests and the Commission should do so.

⁴ Section 347.020(2) RSMo. 2000.

⁵ Joint Application, para. 59.

⁶ Joint Application, paras. 20, 35 and 38.

The tariff changes requested include the ability to bill customers monthly instead of yearly and charging customers a \$5.00 late fee if a bill is not paid by the 20th day after the bill date.⁷

The request to cancel Stoddard County's CCN and grant a new CCN to RD Sewer naturally follows the Commission's decision of whether to authorize the transfer of assets to RD Sewer. Stoddard County is administratively dissolved and can only act to wind up its business affairs.⁸ RD Sewer will be the new entity providing sewer services to Stoddard County's former customers in Stoddard County's service area.

The request to waive the feasibility study required by rule 4 CSR 240-3.305(5) is reasonable in the circumstances. Stoddard County is already constructed and has been operating since 1979.⁹ RD Sewer has been utilizing Stoddard County's assets to provide service since 2002 and will accept a transfer of Stoddard County's assets in order to continue service as RD Sewer.¹⁰ The rule may not even apply to this scenario since Stoddard County would have addressed this requirement when it began service and became certificated in 1979. Stoddard County's assets will continue service and there is no need for a feasibility study.

Issues Tried per the Agreed List of Issues

On July 31, 2008, the parties to this action, including the Office of the Public Counsel (OPC), agreed upon and filed a List of Issues for Commission determination.

⁷ Id., para 59 and Transcript, V. 3, pp. 131-133.

⁸ Unanimous Stipulation and Agreement, para. 2.

⁹ Id., para. 13.

¹⁰ Transcript, V. 3, p. 108., lines 5-8 and p. 125, lines 7-14.

The Commission approved the issues list and issued an order setting forth what must be decided:

- A. Is the proposed transfer of assets detrimental to the public?
- B. Did Stoddard County or any other entity, at any time since Stoddard County acquired the real and personal assets described in Paragraphs 42 and 43 of the Application in this case, secure from the Commission an order authorizing it to sell, assign, lease, transfer, mortgage, or otherwise dispose of or encumber any of the assets that are described in Paragraphs 42 and 43 of the Application in this case?
- C. Are any and all purported transfers of any security interest in the assets described in Paragraphs 42 and 43 of the Application in this case therefore void?
- D. Should the Commission approve an interim rate increase for the customers who are now served by Stoddard County?
- E. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, how much should the rate increase be?
- F. If the Commission determines that a rate increase for the customers who are now served by Stoddard County should be approved, should the Commission make the increased revenues subject to refund?

DISCUSSION

Transfer of Assets

All the parties to this case, including OPC, state in their position statement that the transfer is not detrimental to the public. This is not a contested issue. The “not detrimental to the public standard” was first set forth in *State ex rel. City of St. Louis v.*

Public Service Commission, 335 Mo. 448, 773 S.W.2d 393 (Mo. banc 1934) as the standard to apply to transfers under section 393.190. Unless the transfer “has a tendency to be injurious to public welfare,”¹¹ it should be approved by the Commission. The transfer of Stoddard County’s assets to RD Sewer is described in the Application and testimony as benefiting the public and Stoddard County’s customers by assuring safe and adequate sewer service.¹² At the hearing the following facts were established:¹³ Stoddard County is administratively dissolved and cannot continue business operations; Stoddard County has no way to successfully continue the sewer operations; RD Sewer is willing to accept the assets of Stoddard County and operate the system and is able to provide safe and adequate service; There is no other sewer service available to the customers of Stoddard County; RD Sewer has operated the facilities of Stoddard County since 2002 and has the technical, managerial, and financial skills necessary to operate the system; and finally, no customers have complained about the adequacy of the sewer service since RD Sewer began operating Stoddard County’s assets.¹⁴ Not only is the transfer not detrimental to the public interest, it promotes the public interest.

Void Security Interests

The parties also agree in their position statements that the Commission never authorized Stoddard County to encumber any of its assets and that the encumbrances are void. There was no evidence to the contrary presented at the hearing. Section 393.190 requires that any encumbrance upon a public utility’s assets be approved by the

¹¹ *State ex rel. City of St. Louis v. Public Service Commission*, 335 Mo. 448, 458; 773 S.W.2d 393, 400 (Mo. banc 1934).

¹² Transcript, V. 3, pp. 123-131 (Testimony of Rodger Owens, Operator for RD Sewer).

¹³ Id.

¹⁴ Id. See also Transcript, V. 2 (June 4, 2008 Local Public Hearing in Dexter, MO).

Commission. Commission approval of the security interests described in paragraph 45 of the Joint Application was never given.¹⁵ In addition to the encumbrances identified in the Joint Application, the parties Unanimous Stipulation and Agreement identifies other security interests in paragraph 15. By agreement and consent of the parties, paragraph 15 of the Unanimous Stipulation and Agreement is intended to amend paragraph 45 of the Joint Application and determine the issue of the additional security interests by consent under Supreme Court Rule 55.33(b). The following encumbrances identified were never approved by the Commission and should be declared void under section 393.190:

A. Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises, dated May 24, 1996 and recorded on June 3, 1996, in Book 289 at Page 451 of the land records of Stoddard County, Missouri;
Corporation Guaranty Agreement by and between Clinton Enterprises and Carl Bien and Ruth Bien dated May 24, 1996;
Security Agreement by and between Bien Co., Inc. and Clinton Enterprises dated May 24, 1996;
Uniform Commercial Code – Financing Statement from Bien Co., Inc. to Clinton Enterprises;
Modification and Extension Agreement by and between Carl Bien and Ruth Bien and Clinton Enterprises, dated June 3, 1997;
Note dated June 3, 1997 in the amount of \$30,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises;
Trust Deed by and between Carl Bien and Ruth Bien and Clinton Enterprises dated September 8, 1997, recorded September 17, 1997 in Book 298 at Page 898 of the land records of Stoddard County, Missouri;
Promissory Note dated May 24, 1997, in the amount of \$100,000.00 from Carl Bien and Ruth Bien to Clinton Enterprises.
Deed of Trust and Security Agreement by and between Stoddard County Sewer Co., Inc. and Clinton Enterprises, dated May 24, 1996 (unrecorded).

B. Deed of Trust by and between Stoddard County Sewer Co., Inc. and Citizens Bank of Dexter dated April 20, 1980 and recorded April 30, 1980 in Book 209 at Page 635 of the land records of Stoddard County, Missouri; and note subsequently assigned to the

¹⁵ Unanimous Stipulation and Agreement, para. 16 and Transcript, V. 3, pp. 126-127.

Small Business Administration on December 14, 1983, and recorded on December 22, 1983, in Book 71 at Page 39 of the land records of Stoddard County, Missouri.

C. Second Deed of Trust executed by Stoddard County Sewer Co., Inc. in favor of Ed Maslansang, trustee for Michael Brennan, to secure payment of a promissory note, in the amount of \$40,000, from Carl Bien to Michael Brennan. The said Second Deed of Trust was executed on May 1, 2000, and recorded in the office of the Recorder of Deeds for Stoddard County, Missouri, on May 3, 2000, in Book 324, at Page 136.

Interim Rate Increase, Subject to Refund

The parties all agree that an interim rate increase is appropriate and that it should be subject to refund. Even OPC states in its position statement that “Public Counsel does not oppose an interim rate increase subject to refund, as long as that amount is reasonable given the current revenues.” The Commission has the authority to grant interim rate relief. In *State ex rel. Laclede Gas Co. v. Public Service Commission*,¹⁶ the Western District Court of Appeals held that the Commission has the power to grant interim rate increases under its broad discretion implied from the file and suspend statutes¹⁷ and the practical requirements of utility regulation.¹⁸ Most recently, the Commission decided in favor of an interim rate increase in *Matter of Timber Creek Sewer Co.’ Tariff*, SR-2008-0080, where the Commission cited to *In re Missouri Public Service Co.*, Case No. 18,502, 20 Mo. PSC 244 (1975) for the factors justifying interim rate relief: 1. Additional funds are needed immediately, 2. The need cannot be postponed, and 3. No other alternatives exist to meet the need but rate relief.

¹⁶ 535 S.W.2d 561 (Mo app. W.D. 1976).

¹⁷ Sections 393.140 and 393.150 RSMo. (2000).

¹⁸ *Id.* at 567.

In addition to the parties' unanimous agreement that interim rate relief is appropriate, the evidence establishes that: Stoddard County is currently operating at a loss,¹⁹ the plant requires several upgrades and needs to be repaired,²⁰ if there are no changes or repairs to the system it will be in violation of the DNR regulations and will not be able to provide safe and adequate service,²¹ and Stoddard County needs a 100 percent increase in rates to provide safe and adequate service.²²

The final remaining issue, and the only issue that the undersigned is able to determine is really contested, is the amount of the interim rate increase. Whatever the interim rate allowed, RD Sewer commits to filing a small company rate case within 30 days of the date the Commission issues its decision in this transfer of assets case.²³ The Commission should order this commitment carried out.

According to the report filed by Bonadio & Co., the Commission should allow an interim revenue requirement of \$58,667, an increase of 99% over 2007 revenues.²⁴ Bonadio's recommendation is appropriate but may be more than absolutely necessary to keep Stoddard County's assets working to provide safe and adequate service until permanent rates are established. The Staff conducted an audit in 2002 as part of a small company rate increase request that was not prosecuted to completion.²⁵ The Staff concluded in 2002 that Stoddard County's total cost of service was \$48,074; \$25,981 less

¹⁹ Transcript, V. 3, pp. 49 and 129.

²⁰ Id., pp. 95-96 and p. 169.

²¹ Id., p. 99-100.

²² Id., p.128.

²³ Transcript, V. 3, p. 137.

²⁴ Exhibit 1, p. 1.

²⁵ Transcript, V. 3, pp. 182, 195.

than its then total revenues.²⁶ Notably, OPC's current calculations shown in Exhibit 13 differ in only two significant categories from the Staff's 2002 calculations: Operator expense and Depreciation. OPC claims there are no assets to depreciate and that Stoddard County's rate base is zero.²⁷ OPC's claim ignores the evidence of Rodger Owens, operator, who testified that since 2002 when he took over he has installed a blower and electric motor and other improvements totaling about \$17,000²⁸ and a new roof and siding on the lab building.²⁹

Staff's 2002 audit allowed an operator expense of \$15,000 while OPC asserts that \$8,749 is appropriate. Rodger Owens testified that the sewer plant requires his labor every day, seven days a week, 2-3 hours a day.³⁰ Over the course of a year this amounts to somewhere between 730 to 1095 hours. OPC's operator expense would allow Owens about \$8 to \$12 per hour. Staff's expense would allow between \$13 and \$20 per hour. Given Owens' expertise with utilities³¹ and proven ability to operate the Stoddard County sewer system on a shoestring, the higher end of Staff's hourly rate is appropriate and should be included on an interim basis.

The just and reasonable decision in this case is to accept the Staff's calculations based upon the 2002 audit and order an interim rate increase, subject to refund, so that RD Sewer can begin operating the sewer system with sufficient revenues to begin necessary upgrades and repairs to ensure safe and adequate service.

²⁶ Exhibit 12.

²⁷ Exhibit 13.

²⁸ Transcript, V. 3, p. 114 and pp. 133-135.

²⁹ Id., p. 116

³⁰ Id., pp. 117-118.

³¹ Id., pp. 107-108, 144-147.

Respectfully submitted,

/s/ Steven C. Reed

Steven C. Reed
Missouri Bar No. 40616

Shelley Brueggemann
Missouri Bar No. 52173

Attorneys for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-3015 (telephone)
(573) 751-9285 (facsimile)
steven.reed@psc.mo.gov (e-mail)

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, or transmitted by facsimile or electronic mail to all counsel of record this 18th day of September, 2008.

/s/ Steven C. Reed