

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 12th day of August, 2008.

In the Matter of the Joint Application of Stoddard)
County Sewer Company, Inc., R.D. Sewer Co., L.L.C.)
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., L.L.C., and for an Interim Rate Increase)

Case No. SO-2008-0289

ORDER DENYING MOTION IN LIMINE

Issue Date: August 12, 2008

Effective Date: August 12, 2008

Background

On August 6, 2008,¹ the Office of the Public Counsel (“Public Counsel”) filed a Motion in Limine requesting the Commission to exclude from the record in this case any testimony, reports or exhibits prepared or assembled in connection with the scheduled hearing testimony from Mr. Rodger Williams with Smith & Co. Engineers, and from Randall R. Shepard with The Bonadio Group. Public Counsel claims that Commission is acting as a non-neutral party by retaining these witnesses.

Mr. Williams and Mr. Shepard were independently retained by the Commission to provide an accounting and engineering analysis because the Commission’s Staff joined the Applicants in their request for approval of a transfer of assets of Stoddard County Sewer Company, Inc. (“Stoddard County”) to R. D. Sewer Company, L.L.C. (“R. D. Sewer”). The

¹ All dates throughout this order refer to the year 2008 unless otherwise noted.

Commission used a blind request for proposal procedure to ensure the Commission's neutrality when choosing these subject matter witnesses.² The evidentiary hearing where their testimony is scheduled to be heard is set to begin on August 13.

In conjunction with requesting the Commission exclude this evidence, Public Counsel also asserts that the Commission has no authority to determine what legal issues exist in a matter before it. Specifically Public Counsel claims that the Commission has assumed the role of being a party by identifying an issue for hearing which Public Counsel contends is beyond the scope of the Application filed in this matter. The issue that Public Counsel takes exception with is the issue of safe and adequate service, an issue the Commission made clear in its order adopting the parties' proposed issue list was a part of this matter.³

Because the hearing date was rapidly approaching, the Commission set an expedited deadline for responses to Public Counsel's motion; that deadline being August 8. No other party opposed or joined Public Counsel in its motion.

Analysis

The Commission would first point out that the Joint Applicants reference the provision of safe and adequate service multiple times in their Application; specifically in

² A Special Master was appointed who conducted the entire process of soliciting bids and retaining the experts without involvement from the Commissioners or the Regulatory Law Judge assigned to this proceeding. See *Order Appointing Special Master for Retaining Outside Experts*, issued April 8, 2008, EFIS Docket No. 6.

³ See *Order Adopting List of Issues, Order of Opening Statements, List and Order of Witnesses and Order of Cross-Examination, and Notice Advising Parties and Witnesses Regarding How to Participate in the Evidentiary Hearing by Phone*, issued August 1, 2008, EFIS Docket No. 31.

paragraphs 27, 31, 50, and 52.⁴ In paragraph 27 of the application, the Applicants state: **“In order to continue to provide safe and adequate service to its customers, Stoddard County would need to increase its rates and charges for sewer service.”** In paragraph 31 of the Application the Applicants make a specific allegation that: **“R. D. Sewer is able to provide safe and adequate service at just and reasonable rates to the customers now served by Stoddard County.”** In paragraph 50 of the application, the Applicants assert: **“If the Commission does not approve the requested transfer of assets, the present customers may lose their sewer service, or may not receive safe and adequate sewer service.”** In paragraph 52, the Applicants claim: **“The requested transfer of assets will not be detrimental to the public interest, but will benefit the public interest, because the customers of Stoddard County will receive safe and adequate service from R. D. Sewer, and the services will be provided at just and reasonable rates as established by the Commission.”**⁵ (Emphasis added).

The parties also filed position statements on the issues adopted by the Commission in this matter, stating their positions on issue of the provision of safe and adequate service. Stoddard County/R. D. Sewer acknowledged in their position statement that there were pending Missouri Department of Natural Resources (“DNR”) compliance issues for which

⁴ *Joint Application of Stoddard County Sewer Company, Inc., R. D. Sewer Co., L.L.C., and the Staff for an Order Authorizing Stoddard County Sewer Co. to Transfer its Assets to R. D. Sewer Co. and Establishing New Rate for R. D. Sewer Co., Subject to Review*, filed on March 4, 2008, EFIS Docket No. 1.

⁵ In addition to these specific references, Commission Rule 4 CSR 240-3.310, delineating the filing requirements for Applicants seeking authority to transfer utility assets, requires that the reasons for the transfer of assets not be detrimental to the public interest. Paragraphs 50-52 specifically address this requirement and clearly safe and adequate service is a requirement under the not detrimental to the public interest standard.

they were negotiating a compliance schedule.⁶ Staff, in its position statement, represented that: “Stoddard County Sewer Company is not able to provide safe and adequate service to its customers, without an increase in its rates and charges for sewer service, as alleged in Paragraphs 26 through 30 of the Application herein” – thus, identifying two additional references to the provision of safe and adequate service in the Joint Application.⁷ Public Counsel, in its position statement asserted:

Public Counsel states that it has made a good faith effort to provide a position statement on this issue, but the Commission added it a mere twelve days before the scheduled start of the evidentiary hearing and Public Counsel is concerned that due to the time frame, it is not able to take a definite position. At this time, it is Public Counsel’s position that there is sufficient evidence to support an argument that Stoddard County is not providing safe and adequate sewer service to its customers. Public Counsel makes no statement regarding its position on this issue in the future.⁸

Certainly, the Commission must make findings of fact and conclusions of law with regard to the Applicants’ allegations, assertions or representations, and clearly for the Commission to make such findings and conclusions is not beyond the scope of the Application – this issue is identified in the Application at least six times, and the parties have acknowledged that there is a definite issue regarding the provision of safe and adequate service in their position statements.

Public Counsel is not only incorrect in its assertion that the issue of safe and adequate service is not part of the Application, it is wrong about when the Commission put the parties on notice that safe and adequate service was an issue in this matter. The parties were put on notice that safe and adequate service was an issue in this case when

⁶ *Statement of Positions on Issues of Stoddard County Sewer Company, Inc, and R. D. Sewer Co., L.L.C., Private Joint Applicants*, filed August 4, 2008, EFIS Docket No. 33.

⁷ *Staff Statement of Positions on Issues*, filed August 4, 2008, EFIS Docket No. 34.

the Application was filed on March 4, by virtue of the governing statutes and by virtue of the Application itself, but they also received additional notice regarding this issue when the Commission directed the DNR to provide it with a compliance report, both on March 5 and April 7.⁹ That compliance report was filed on April 21.

Moreover, Public Counsel defeats its own motion within its motion. To quote Public Counsel directly from its motion in limine:

The Commission's interest in a case brought before it is two-fold: (1) the Commission is the statutory fact-finding body and the adjudicator of disputes regarding a public utility; and (2) the Commission has a statutory duty to safeguard the public interest by ensuring that public utilities provide safe and adequate service to all customers. *Lollar v. Ameren UE*, 2004 Mo. PSC LEXIS 1264.

Public Counsel acknowledges that the Commission must gather facts to adjudicate disputes and that it is a statutory requirement that the Commission ensure the provision of safe and adequate service – yet Public Counsel argues that the Commission cannot adopt the issue of safe and adequate service in this case or call witnesses to assist with its fact-finding mandate.

Section 393.190, RSMo 2000,¹⁰ governing transfer of assets cases, requires there be Commission approval for the transfer of assets of one public utility to another and the standard the Commission must apply to make its determination is the “not detrimental to the public interest” standard.¹¹ Application of this standard requires the Commission to

⁸ *Office of the Public Counsel's Position Statement*, filed August 4, 2008, EFIS Docket No. 35.

⁹ See EFIS Docket Nos. 2 and 5.

¹⁰ All statutory references throughout this order are to RSMo 2000 and its supplements unless otherwise noted.

¹¹ The standard governing the Commission's review of an application for sale of assets is set forth in *Fee Fee Trunk Sewer, Inc. v. Litz*: “The Commission may not withhold its approval of the disposition of assets unless it

make a determination as to if the transferring company is providing safe and adequate service and if the company seeking to acquire the assets of the transferring company can, in fact, provide safe and adequate service.¹² This statute alone puts the parties on notice that the Commission will address this issue, and the Commission needs not further cite to every statutory reference regarding this statutory mandate because Public Counsel has already acknowledged that duty.¹³

The Commission also notes that Public Counsel's argument that the Commission has no authority to call subject matter experts or any other witnesses would, in fact, be in direct contravention of Sections 386.420, 386.440, 386.460, 386.470, and 393.140. These sections authorize the Commission, and any individual Commissioner, to utilize their investigatory powers to issue subpoenas and compel the testimony of any person or the production of documents in any matter before the Commission. To adopt Public Counsel's position that the Commission lacks authority to call witnesses to assist it with its fact-finding mandate would be to negate the statutory authority provided to the Commission by this state's General Assembly creating a tremendous impairment to the Commission's ability to carry out its statutory duties.

Conclusion

The Commission's statutory mandate to ensure public utilities will provide of safe and adequate service places parties to any action before the Commission on notice that the Commission will consider that issue in their case. Section 393.190 specifically places

can be shown that such disposition is detrimental to the public interest." 596 S.W.2d 466, 468 (Mo. App. 1980). *Environmental Utilities, LLC v. Public Service Com'n*, 219 S.W.3d 256, 265 (Mo. App. 2007).

¹² See *Environmental Utilities, LLC v. Public Service Com'n*, 219 S.W.3d 256, 265 (Mo. App. 2007).

¹³ At minimum see Sections 386.310, 386.360, 386.390, 393.110, 393.130, 393.140, 393.145, 393.146, 393.160, 393.170, 393.190, 393.260, and 393.270, RSMo 2000 and its supplements.

parties on notice that the issue of safe and adequate service is a part of every case filed pursuant to that statute. Additionally, the parties were provided additional notice that the issue of safe and adequate service was a part of this case in the Application expressly identifying that issue.

The parties were put on notice about the Commission's intent to call independent witnesses when the search for subject matter experts was formalized on April 8; the date when the Commission appointed a Special Master for the purpose of retaining the experts.¹⁴ The Commission reset the hearing date and the deadline for position statements three times in this matter to accommodate the parties' schedules and to give the parties adequate time to review the reports that were filed by the retained experts and to articulate their positions on the issues.¹⁵

There has been no prejudice to any party in relation to the retention of witnesses Shepard and Williams or in relation to addressing the issue of safe and adequate service. Furthermore, the Commission has not prejudged any issue in this matter.

IT IS ORDERED THAT:

1. The Office of Public Counsel's Motion in Limine filed on August 6, 2008, is hereby denied.

¹⁴ See *Order Appointing Special Master for Retaining Outside Experts*, issued April 8, 2008, EFIS Docket No. 6.

¹⁵ See *Order Adopting Procedural Schedule*, issued April 25, 2008, EFIS Docket No. 13; *Order Modifying Procedural Schedule*, issued June 5, 2008, EFIS Docket No. 20; *Order Modifying Procedural Schedule*, issued June 9, 2008, EFIS Docket No. 22; and *Order Modifying Procedural Schedule*, issued July 10, 2008, EFIS Docket No. 29.

2. This order is effective immediately upon issue.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written in a cursive style.

**Colleen M. Dale
Secretary**

(S E A L)

Davis, Chm., Murray, Clayton, Jarrett,
and Gunn, CC., concur.

Stearley, Senior Regulatory Law Judge