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 STODDARD COUNTY SEWER COMPANY, INC.'S AND R. D. SEWER CO., L.L.C.'S MOTION IN LIMINE

Issue Date: August 12, 2008 Effective Date: August 12, 2008

Background

On August 11, 2008,[1] Stoddard County Sewer Company, Inc. and R.D. Sewer Co., L.L.C. ("Private Joint Applicants") filed a motion in limine requesting the Commission to exclude any evidence regarding the provision of safe and adequate service in this matter. Private Joint Applicants allege that: (1) the Commission did not give adequate notice that this issue would be considered in this matter; (2) they have had inadequate time to prepare to address this issue; and (3) to hear any evidence on this issue would constitute a denial of due process. Because the hearing date is rapidly approaching, the Commission finds good cause to rule on this motion expeditiously.

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

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

paragraphs 27, 31, 50, and 52.[2] 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."[3]** (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

---

[2] *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.

[3] 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.[4] 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.[5]

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.

Private Joint Applicants are incorrect about when the Commission put the parties on notice that safe and adequate service was an issue in this matter. Section 393.190, RSMo 2000,[6] 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.[7] Application of this standard requires the Commission to determine whether the

---

[4] *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.

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

[6] All statutory references throughout this order are to RSMo 2000 and its supplements unless other wise noted.

[7] 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 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).

transferring company is providing safe and adequate service and whether the company seeking to acquire the assets of the transferring company can, in fact, provide safe and adequate service.[8] 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.[9]

The Private Joint Applicants were put on notice by virtue of the statutes governing the transaction for which they seek approval. They also cannot complain because they raised the issue of safe and adequate service in their Application filed on March 4. Moreover, they 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.[10] That compliance report was filed on April 21.

It is also difficult to comprehend the Private Joint Applicants' claim that they would be denied due process if the Commission were to proceed to hear evidence on this issue. In the Commission's order formally adopting the issues list in this matter, the Commission states:

> The Commission further notes that as an ancillary issue to any case before the Commission, the Commission will always hear evidence as to the provision of safe and adequate service. Should the Commission find that evidence exists of unsafe or inadequate service, it may elect to authorize its General Counsel to pursue a complaint action or to seek penalties for any established violations of State statutes, Commission rules or the company's tariffs.

The language used clearly demonstrates that if the Commission should find evidence of there being unsafe or inadequate service it ***may*** (discretionary) authorize its General

---

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

[9] 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.

Counsel to initiate a complaint or seek penalties. A separate complaint action ensures additional process with the Commission, and a penalty action at the circuit court is tried *de novo*.[11]

IT IS ORDERED THAT:

1. Stoddard County Sewer Company, Inc.'s, R.D. Sewer Co., L.L.C.'s Motion in Limine filed on August 11, 2008, is hereby denied.

2. This order is effective immediately upon issue.

BY THE COMMISSION

Colleen M. Dale
Secretary

(S E A L)

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

Stearley, Senior Regulatory Law Judge

---

[10] See EFIS Docket Nos. 2 and 5.

[11] Sections 386.570 and 386.600 when taken together authorize the Commission to seek penalties for failing to provide safe and adequate service. *State v. Davis,* 830 S.W.2d 27 (Mo. App. 1992), However, the Commission may only initiate such a lawsuit seeking penalties after holding a contested hearing. *State ex rel. Sure-Way Transp., Inc. v. Division of Transp., Dept. of Economic Development, State of Mo.*, 836 S.W.2d 23, 27 (Mo. App. 1992) (relying on *State v. Carroll*, 620 S.W.2d 22 (Mo. App. 1981)); see also *State ex rel. Cirese v. Ridge*, 138 S.W.2d 1012 (Mo. banc 1940). And, an administrative order authorizing the commencement of any suit for a penalty shall not be considered as evidence of the violations alleged in such suit. Section 516.103, RSMo 2000; *State ex rel. Missouri Div. of Transp. v. Sure-Way Transp., Inc*., 884 S.W.2d 349, 353 (Mo. App. 1994).