

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 10th day of August, 2011.

In the Matter of the Joint Application of Taney County)
Utilities Corporation and Taney County Water, LLC)
for authority of Taney County Utilities Corporation to) File No. WM-2011-0143
sell certain assets to Taney County Water, LLC)

ORDER APPROVING APPLICATION

Issue Date: August 10, 2011

Effective Date: August 20, 2011

The Missouri Public Service Commission is approving the application for sale of a water system (“application”) as of the effective date of this order.

A. Procedure

On November 18, 2010, Taney County Utilities Corporation (“Utilities Corporation”) and Taney County Water, LLC, (“Water LLC”), (together, “applicants”) filed the application. By order dated November 22, 2011, the Commission gave notice of the application. On July 18, Water LLC filed a certificate showing service of tax revenue impact information.¹

On March 4, 2011, Staff filed its recommendation in favor of granting the application with certain conditions. On March 14, 2011, the Office of the Public Counsel (“OPC”) filed a response to the recommendation. On June 16, 2011, Staff filed its *Supplemental Recommendation*, suggesting additional conditions.

¹ Section 393.190.1. All sections are in RSMo 2000.

On June 29, 2011, the Office of the Public Counsel (“OPC”) filed a response stating that OPC has no opposition to Staff’s *Supplemental Recommendation*. Applicants filed no response to Staff’s *Supplemental Recommendation* within the time provided.² The Commission received no application for intervention within the time provided.³ No law requires a hearing to approve the unopposed application. Therefore, the Commission will determine all issues based on the verified pleadings,⁴ and without separately stating its findings of fact.

B. Discussion

The application seeks the Commission’s authorization to sell Utilities Corporation’s water system to Water LLC (“the sale”), which the Commission will only deny if approval would be detrimental to the public interest.⁵

i. Conditions

Staff and the applicants agree that the public interest favors the sale. Staff recommends that the Commission approve the sale subject to certain unopposed conditions. All such conditions appear in the ordered paragraphs below, except the effective date of the authorization, as to which the facts and law are as follows.

ii. Effective Date

² June 30, 2011, by order dated June 20, 2011.

³ August 2, 2011, by the order dated July 7, 2011.

⁴ Section 393.190.3; *State ex rel. Rex Deffenderfer Ent., Inc. v. Public Serv. Comm’n*, 776 S.W.2d 494, 496 (Mo. App., W.D. 1989). All sections are in RSMo 2000.

⁵ *State ex rel. City of St. Louis v. Public Service Comm’n of Missouri*, 73 S.W.2d 393, 400 (Mo.1934).

On January 13, 2010, applicants signed their sale agreement. In the sale agreement, the applicants chose an effective date for the sale of August 18, 2010. But applicants were unaware of Section 393.190.1, which subjects every such sale to prior authorization.

Section 393.190.1 provides:

No . . . water corporation . . . shall hereafter sell . . . its . . . system . . . without having first secured from the commission an order authorizing it so to do.

And it voids every unauthorized sale:

Every such sale . . . other than in accordance with the order of the commission authorizing same shall be void.

Under that statute, as a matter of law, no sale occurs until the Commission authorizes it.⁶

Staff and applicants ask the Commission to cure the applicants' error and authorize the sale as of August 18, 2010. But the statute contains no provision for retrospective approval. Retrospective approval was the subject of the recent Missouri Court of Appeals opinion in State ex rel. Cass County v. Public Serv. Comm'n.⁷

In that case, the court gave a strict reading to the prior approval requirement in Section 393.170.1, which applies to construction:

No [public utility] shall begin construction of a [system] without first having obtained the permission and approval of the commission.

Retroactive authorization is absent from the statutes:

⁶ That statute is set forth at length in Appendix 2.

⁷ 259 S.W.3d 544, 547 (Mo. App., W.D. 2008).

[The statute] does not address the circumstances created by [a utility]'s chosen course of action, and authority to grant *post hoc* approval . . . cannot be found therein. [⁸]

The operative language of the Section 393.170 and 393.190 is the same,⁹ so the same result must follow.

The General Assembly's policy, according to the Court of Appeals, is plain: before-the-fact information is simply better than after-the-fact information. The Commission's authority to disallow expenditures after the event does not sufficiently protect the public:

[P]ost hoc authority is toothless if a major disallowance would jeopardize the interests of either ratepayers or investors. [¹⁰]

By contrast, prior authorization:

. . . allows for consideration of all the relevant constituencies and interests "without muddying the waters of a future rate case"[. ¹¹]

The same policy is manifest in the Section 393.190.1's requirement of notice to local government of revenue impact.¹²

iii. Ruling

No party cites any law against, or alleges any prejudice from, an authorization that is prospective only. Therefore, the Commission will not approve the application retrospectively. The Commission will approve the sale as of this order's effective date.

⁸ 259 S.W.3d at 550.

⁹ A side-by-side comparison is attached to this order as Appendix 1.

¹⁰ 259 S.W.3d at 549 -550.

¹¹ *Id.*

¹² Section 393.190.1.

C. Conclusion

The Commission independently finds and concludes that the sale is not detrimental to the public interest, so the Commission will approve the sale effective with this order's effective date.

THE COMMISSION ORDERS THAT:

1. The application of Taney County Utility Corporation ("Utility Corporation") and Taney County Water, LLC ("Water LLC") is approved.
2. The approval set forth in paragraph 1 is conditioned as follows.
 - a. No later than five days after the effective date of this order, by use of documents substantially as shown in Attachment B of the *Supplemental Recommendation*, Water LLC shall adopt Utility Corporation's:
 - i. Schedule of rates, rules and regulations, currently on file and approved, by filing an adoption notice and a revised index page with a 30-day effective date; and
 - ii. Currently approved water utility plant depreciation schedule.
 - b. On the effective date of the adoption notice:
 - i. Utility Corporation's certificate for the provision of water service shall be canceled; and a

- ii. A certificate shall issue to Water LLC for the provision of water service in the Venice on the Lake and Lakeway Subdivision service areas.
- c. Water LLC shall not assert the purchase price of \$304,500.00 as its rate base when filing its next rate case with the Commission.
- d. Nothing in this order precludes the Commission from considering the ratemaking treatment to be afforded any matters pertaining to the granting of Water LLC's certificate, including future expenditures by Water LLC, in any later proceeding.
- e. Water LLC shall manage the existing deposits of customers and, as Water LLC refunds deposits, Water LLC will deduct those amounts from the sewer payment amounts sent monthly to Utilities Corporation.
- f. Water LLC shall assume full responsibility for payment of the Commission assessment and filing the annual report with the Commission.
- g. Water LLC shall:
 - i. Maintain utility plant records and all customer account records as acquired from Utility Corporation, and
 - ii. Keep all books and records, including plant property records, in accordance with the Uniform System of

Accounts as described in the *Supplemental Recommendation*.

3. This order shall become effective August 20, 2011.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Davis, Jarrett, and
Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

Appendix 1

Section 393.170, RSMo 2000:

1. No [public utility] shall begin construction of a [system] without first having obtained the permission and approval of the commission.

Section 393.190, RSMo 2000:

1. No [public utility] shall hereafter sell [its system] without having first secured from the commission an order authorizing it so to do.

Every such [transaction] made other than in accordance with the order of the commission authorizing same shall be void.

Appendix 2

393.170. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission [.]

393.190. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void.

* * *

Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located.