

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

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| Office of the Public Counsel, |) | |
| Complainant, |) | |
| |) | |
| v. |) | WC-2002-155 et. al. |
| |) | |
| Warren County Water and Sewer |) | |
| Company and Gary L. Smith, |) | |
| Respondents. |) | |

RESPONSE TO APPLICATION FOR REHEARING

COMES NOW, the Office of the Public Counsel (Public Counsel), and respectfully files this response to the Application for Rehearing filed by Warren County Water and Sewer Company and Gary L. Smith (Respondents) in this case. The grounds offered in support of the Application for Rehearing are all without merit.

1. Public Counsel objects to the claim that the Commission's Report and Order is unlawful, unjust or unreasonable, because the Commission's order is based on substantial and competent evidence.

2. The Commission's order makes adequate findings of fact and conclusions of law. Further, the Commission, in its order, correctly applies the applicable law to the facts it found in this case.

3. The Respondent's claim that the decision is based largely on hearsay is without merit. Although the Respondent did object to a number of items as being hearsay, and had some of those objections sustained on that ground, many of the hearsay objections raised at hearing were without merit for a number of reasons. Most of the hearsay objections which were made concerned

documents written by persons who testified at the hearing. The Respondents were provided the opportunity to cross-examine the declarants of those out of court statements, but declined the opportunity.

4. The purpose of the rule against the admission of hearsay evidence is to guard against the use of unreliable evidence which cannot be subject to cross-examination. Technically, “hearsay” is testimony an out-of-court statement offered by a witness who did not make the statement, which is offered to prove the truth of the matter asserted in the statement. Evans v. Werle, 31 S.W.3d 489 (Mo. App. W. D. 2000.) The primary reason that hearsay statements tend to be inadmissible is that the person making the statement is not subject to cross-examination, which adversely affects the trier of fact from making a credibility assessment of the person making the statement. State ex. rel. Missouri Highway and Transportation Commission v. Buys, 909 S.W.3d 735 (Mo. App. W.D. 1995). However, there are a number of exceptions to the hearsay rule. Those exceptions include, but are not limited to, the following.

a) Facts of which a witness has personal knowledge, even if those facts exist in the form of a declaration made by another person are admissible. See, State v. Cannon, 692 S.W.2d 357 (Mo. App. W.D. 1985). For example, witnesses who personally observed the condition of the Respondent’s plant and equipment could testify regarding photographs depicting those conditions, whether or not they took the photos. Likewise, persons who observed violations of state or federal environmental laws committed by the Respondents could

testify about those violations, even if they did not author the notice of violation letter or report.

b) Statements offered only as proof of the fact that the statement was made, and not to prove the truth of the matter asserted are admissible. See, State v. Green, 575 S.W.2d 211 (Mo. App. E.D. 1978). For example, testimony of a witness that the reason he went to observe a violation was that he received a telephone call, is admissible to show that the call was made, and the actions he took as a result.

c) Statements of a party opponent which are adverse to the party's interest is admissible as substantive evidence to that fact, even if the proffered admission was not against the party's interest at the time. See, State v. Jones, 779 S.W. 2d 668 (Mo. App. E.D. 1989). Any statements attributed to Gary L. Smith by any witness may be admissible under this provision.

d) An expert may testify regarding an opinion based on his or her specialized knowledge, even if the information used to formulate that opinion includes out of court statements, if those statements are of the type reasonably relied on by persons in the witness's profession in forming such opinions. See, Sec. 490.065 RSMo (2000).

e) Records of "an act, condition or event" which are relevant, are "competent evidence if the custodian *or otherwise qualified witness*, testifies to its identity" and the manner in which it was prepared, when made in the "regular course of business" are admissible. Secs. 490.680 (RSMo); 490.692 (RSMo). (emphasis added.) Documents of the Department of Natural Resources,

including notices of violation, fall into this category. Most of the documents from the Mo. DNR which were admitted into evidence were prepared by Paul Mueller or Daniel Daugherty, both of whom testified at the hearing.

The preceding illustrations are not intended to restate all Missouri law regarding hearsay. However, given that virtually every piece of evidence objected to on hearsay grounds at the hearing falls into these or other hearsay exceptions, rehearing should not be granted in this case. The Respondents had the opportunity to cross-examine most persons whose out-of-court statements were admitted at the hearing, and chose not to cross-examine those witnesses regarding the veracity of the statements. Out of court statements by Respondent Smith are not hearsay. This request for rehearing should be denied.

5. The final ground on which Respondents rely for rehearing in this case is also without merit. The Respondents have failed to cooperate with the Commission Staff in their investigation of the Company's most recent request for a rate increase. The Company refuses to make necessary improvements which, under Missouri's rate of return regulation, must be in service, used and useful, before they may be included in rate base. The Company does not keep adequate records regarding revenues and expenses to allow an audit to be completed and a revenue requirement to be established. Therefore, any shortfall of revenue from the operation of this system is a problem which rests solely and squarely at the door of the Respondents. The Respondent Company has over 300 customers who pay monthly bills. Certainly, the Respondents had a choice regarding whether to use the revenue stream generated by these billings to

maintain the system to a degree that Respondent Smith would not continue to be charged with violating the Clean Water Act. Respondent chose to put those revenues to a different use.

WHEREFORE, none of the reasons submitted for rehearing by the Respondents in this case are sufficient for the Commission to re-open or reconsider its decision. Therefore, Public Counsel respectfully requests that the application for rehearing be denied.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 18th day of October 2002:

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