

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

In the Matter of Application of Canyon Treatment)
Facility, LLC for Permission, Approval and a)
Certificate of Convenience and Necessity)
Authorizing it to Acquire, Construct, Install, Own,)
Operate, Control, Manage, and/or Maintain a Sewer)
System for the Public Located in Stone County,)
Missouri.)

Case No. SA-2010-0219

STAFF'S RESPONSE TO COMMISSION'S ORDER

COMES NOW the Staff of the Missouri Public Service Commission (Staff), by and through the undersigned counsel, and respectfully provides *Staff's Response to Commission's Order* to the Commission stating the following in support thereof:

1. On January 21, 2010, Canyon Treatment Facility, LLC, (Canyon Treatment) filed an Application for Permission, Approval and a Certificate of Convenience and Necessity (CCN) Authorizing it to Acquire, Construct, Install, Own, Operate, Manage, and/or Maintain a Sewer System for the Public Located in Stone County, Missouri.

2. Staff filed its *Recommendation* on December 22, 2011.

3. On February 22, 2012, the Commission issued an *Order Directing Filing* (*Order*) directing Staff to file a pleading stating "whether there are legal or practical concerns with the Commission first directing Staff to find a receiver. And, in an order appointing that receiver, grant the sought-after certificate."

4. On March 16, 2012, the Commission granted Staff's request for additional time, until March 30, 2012, to file any response the Commission's *Order*.

5. Staff hereby submits the Memorandum, attached and incorporated herein by reference as Appendix A, and asserts that there may be legal and practical concerns with the Commission's proposed action.

WHEREFORE, Staff respectfully submits this *Response to Commission's Order* and respectfully requests the Commission grant relief as recommended in *Staff's Recommendation* and any other relief as it deems necessary and appropriate.

Respectfully submitted,

/s/ Rachel M. Lewis

Rachel M. Lewis
Deputy Counsel
Missouri Bar No 56073

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 526-6715 (Telephone)
(573) 751-9285 (Fax)
rachel.lewis@psc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that I have provided a true and correct copy of the above pleading via electronic mail to W.R. England III and Brian T. McCartney, attorneys for Canyon Treatment Facility, LLC, at trip@brydonlaw.com and bmccartney@brydonlaw.com; David Woodsmall, attorney for VPG Partners, VI, LLC, at dwoodsmall@fcplaw.com; Kenneth N. Hall, attorney for Royal Vista, LLC, at khall@rmpllp.com; and the Office of the Public Counsel at opcservice@ded.mo.gov this 30th day of March, 2012.

/s/ Rachel M. Lewis

**Memorandum in Support of
Staff's Response to Commission's Order
Commission Case No. SA-2010-0219**

**Rachel M. Lewis
Staff Counsel's Office
Deputy for Water and Sewer**

Summary

On December 22, 2011, Staff filed its *Recommendation* that the Commission grant a Certificate only with the condition that a receiver be appointed to take over the day-to-day operations of the system and provide safe and adequate service to the current customers with the current utility plant that is in service to the best of his or her ability, and continue discussions with potential purchasers of the system with the goal of finding or creating a permanent and stable utility to serve this area.

On February 22, 2012, the Commission directed Staff to file a pleading stating "whether there are legal or practical concerns with the Commission first directing Staff to find a receiver. And, in an order appointing that receiver grant the sought-after certificate." Before filing its *Recommendation*, Staff determined that, without a Certificate of Convenience and Necessity (Certificate), the Commission is prohibited from exercising its powers, and Staff is unable to provide adequate assistance in this unique situation. Staff is concerned that continuing to allow this sewer system to operate outside of the Commission's jurisdiction may result in harm to the public interest or the health and safety of individuals.

Staff's *Recommendation* is unique, but it is also lawful. It was not an easy determination for Staff to make, so it is understandable that the Commission has questions. The Commission has statutory authority to act in this matter and should assert such authority. Admittedly, Staff's conclusion is difficult to carry out, as the concept of being a receiver is not appealing to a large

group of individuals or entities within the state of Missouri. The process of appointing receivers is rarely utilized as a result of the small list of possible receivers and the stringent statutory requirements needed before a receiver may be appointed. However, Section 393.145 RSMo 2000¹ provides for a receiver to be appointed in unique situations. Waiting until a receiver is located and then issuing a Certificate may prove harmful practically because of the current state of the sewer system and the possibility of sale to other entities. Staff asserts that it would be in the best interest of the system and its customers for Commission to have regulatory oversight, power and control over this utility. While the sewer system is, and has been, operating as a utility, under various entities, without a Certificate, Canyon Treatment or any other entity operating or owning the system is not recognized as a regulated entity and has been unlawfully operating the system.

Staff, upon further reflection, has proposed a few alternatives for the Commission to consider in this Memorandum, but seeks approval from the Commission of a Certificate for Canyon Treatment with the conditions included in Staff's *Recommendation* and authorization to continue to pursue a receiver, or to find another entity that is interested in purchasing or acquiring the system.

Procedural Background

On November 24, 2009, Staff filed a *Complaint* with the Commission against Box Canyon Watershed Association, Inc., *inter alia*, asserting that all Respondents to that *Complaint* are operating as a regulated sewer corporation and public utility. Staff's Complaint further alleges that ownership of the sewer system was not adequately set up as a nonprofit organization so that it is exempt from the Commission's jurisdiction. In Count I of the Complaint, Staff asked that the Commission find that all Respondents are sewer corporations and thus public utilities

¹ All statutory references, unless otherwise specified, refer to the 2000 revisions.

and subject to the jurisdiction, regulation and control of this Commission. In Count II, Staff sought penalties for unlawful sewer service since May 2003, pursuant to Section 386.570, RSMo. Two parties, VPG Partners VI, LLC (VPG) and Royal Vista, LLC (Royal Vista), filed for, and were granted, intervention in the *Complaint* case.

As a possible resolution to this *Complaint*, on January 21, 2010, Canyon Treatment Facility, LLC (Canyon Treatment or Company) filed an *Application* with the Commission seeking approval of a Certificate of Convenience and Necessity (Certificate) authorizing it to acquire, install, build, construct, own, operate, control, manage and/or maintain a sewer system for the public within the area described within the *Application*. VPG and Royal Vista are also intervening parties in the *Application* case. On February 8, 2010, Staff asserted that the parties were working on a settlement and asked for permission to file status reports, rather than a recommendation in hopes the parties could reach a settlement agreement. The Commission granted Staff's Request, and Staff continued to keep the Commission informed by regularly filing Status Reports with the Commission. During this time, Staff continued its investigation, which included ongoing conversations with all of the involved parties. Meanwhile Canyon Treatment entered into a Contingent Purchase Agreement with the Stone County Sewer District No. 1 (Sewer District). Staff provided Status Updates and continued the matter in order to give those entities time to finalize a sale agreement, which did not occur. After months of waiting for that sale to come to fruition, Staff thought it was in the best interest to move this *Application* forward and so Staff's *Recommendation* was filed on December 22, 2011.

On February 22, 2012, the Commission directed Staff to file a pleading stating "whether there are legal or practical concerns with the Commission first directing Staff to find a receiver. And, in an order appointing that receiver grant the sought-after certificate." As described more

fully below, there may be both legal and practical concerns with the Commission's proposed directive. The Commission has statutory authority to act in this matter and should assert such authority.

Legal Analysis

The Commission's jurisdiction extends "to all sewer systems and their operations within this state and to persons or corporations owning, leasing, operating or controlling the same." Section 386.250(4) RSMo. A "sewer corporation" includes every corporation, company, association, joint stock company or association, partnership or person, their lessees, trustees or receivers appointed by any court, owning, operating, controlling or managing any sewer system, plant or property, for the collection, carriage, treatment, or disposal of sewage anywhere within the state for gain, except that the term shall not include sewer systems with fewer than twenty-five outlets." Section 386.020(49), RSMo. (Supp 2010). A "sewer system" includes all pipes, pumps, canals, lagoons, plants, structures and appliances, and all other real estate, fixtures and personal property, owned, operated, controlled or managed in connection with or to facilitate the collection, carriage, treatment and disposal of sewage for municipal, domestic or other beneficial or necessary purpose. Section 386.020 (50), RSMo (Supp 2010). A "public utility" includes every sewer corporation and is subject to the jurisdiction, control and regulation of the commission. Section 386.020 (43), RSMo (Supp 2010).

"To constitute a public utility and be subject to regulation by the Commission, a service must be devoted to public use." *Khulusi v. Southwestern Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. 1995) (citing *State ex rel. M.O. Danciger & Co. v. Public Serv. Comm'n*, 275 Mo. 483, 205 S.W. 36, 40 (Mo. banc 1918)). By professing public service and furnishing service to the general public, a service may be considered a "public utility." *Danciger*, 205 S.W.

at 39. If the granting of the authorization subserves a genuine and reasonable public interest in promptness and economy of service, then the public “convenience and necessity” or “public need” is served. *State ex rel. Twehous Excavating Co., Inc. v. Pub. Serv. Comm'n, State of Mo.*, 617 S.W.2d 104, 106 (Mo. Ct. App. 1981), citing *State ex rel. Beaufort Transport Co. v. Clark*, 504 S.W.2d 216, 219 (Mo.App.1973); *State ex rel. National Trailer Con., Inc. v. Public Serv. Comm.*, 488 S.W.2d 942, 945 (Mo.App.1972); *State v. Burton*, 374 S.W.2d 639, 643 (Mo.App.1963).

Our State's policy for regulated monopoly over distractive competitions is a flexible one created to protect the public first and concerning itself with the existing utility only in an incidental manner. *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 575-76 (Mo. Ct. App. 1997) citing *State ex rel. Public Water Supply Dist. No. 8 of Jefferson County v. Public Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. App. 1980). If there is competent and substantial evidence on the whole record that the certificate of convenience and necessity awarded to a utility was ‘necessary and convenient for the public service’ then the Commission's order in granting the certificate was both reasonable and lawful. *State ex rel. Ozark Elec. Co-op. v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 392 (Mo. Ct. App. 1975), internal citations omitted.

Here, the system proposed to be operated by Canyon Treatment is professing public service and furnishing service to the general public, and is thus a public utility. See *Danciger, supra*. That system consists of a 29,715 gallon per day re-circulating sand filter treatment facility with an organic population equivalent of 398, a gravity sewer collection system, and one lift station. The system provides sewer service to a total of 277 customers, as of June 2011. The current rate for customers is a flat rate of \$25 per month for a single family residence or single family condominium unit and one commercial property, while the other commercial property is

charged a flat rate of \$460 per month. As a result, the system is a public utility subject to the Commission's jurisdiction. Staff is unclear how the Commission could assert jurisdiction and all of its power, absent issuing a Certificate.

The Commission has "general supervision of all sewer corporations having authority under any special or general law ... for purpose of collecting, carrying, treating, or disposing of sewage and sewer systems owned, leased or operation by a sewer corporation". Section 393.140(1), RSMo. The Commission also has the "power to order such reasonable improvements as will best promote the public interest, preserve public health and protect those using such ... sewer system and ... power to order reasonable improvements and extension of the works, wires, poles, pipes, lines conduits, ducts and other reasonable devices, apparatus and property for ... sewer corporations." Section 393.140 (2) RSMo. This statute provides the standard for reviewing certificate cases, which is focused on the *public interest*.

Keeping that standard in mind, Staff focused its review and investigation on what was in the best interest of all those involved, including Canyon Treatment, Intervenor (2 customers of the system), the customers not named in this suit, and the sewer system. Staff concluded that it is in the best interest of this system to be regulated by the Commission and operated by someone other than the current owner and operator. After much internal discussion and review, Staff filed its *Recommendation* that the Commission grant a Certificate only with the condition that a receiver be appointed to take over the day-to-day operations of the system, to provide safe and adequate service to the current customers with the current utility plant that is in service to the best of his or her or the entity's ability, and continue discussions with potential purchasers of the system with the goal of finding or creating a permanent and stable utility to serve this area

The system is functional, but needs to undergo an expansion. There is a potential for growth if the correct operator is located and reasonable and practical plans for future growth are made and submitted to the Missouri Department of Natural Resources (DNR). The current owner is experiencing difficulty in operating the system, carrying out necessary expansion of the system, is in financial distress, demonstrates a desire to leave the sewer utility business, and experiences difficulty in dealing with the current customers. The system has received several violations from DNR, the system is financially strapped as a result of the current owner's poor financial situation and cannot pay its current debts, yet the current owner is unable to force collection of unpaid charges from some of its customers, which is further hindering the system. If a Certificate is granted, then the system and its owner or operator would be able to enforce payment through its tariffs and various Commission proceedings.

A receiver is a unique statutory remedy for small water and sewer systems. Section 393.145 RSMo. Without a certificate of convenience and necessity, Staff is unable to provide adequate assistance in this situation and is concerned that continuing to allow it to operate outside of the Commission's jurisdiction may result in harm to the public interest or the health and safety of individuals. Staff's conclusion is admittedly difficult to carry out because the process of appointing receivers is rarely utilized as a result of the small list of possible receivers and the stringent statutory requirements needed before a receiver may be appointed.

That said, it is appropriate in this situation. Staff has begun the process of locating a receiver. There is a potential receiver interested, but that entity is still evaluating the situation. In order to foster an ongoing relationship with any potential receiver, it is best for the receiver to agree and commit with all possible information rather than to be forced to take over without adequate knowledge or time to evaluate the information. Staff's preference is to locate an

interim receiver prior to seeking a receiver in the circuit court so that someone with knowledge of how to operate a system is appointed, rather than a person or entity randomly selected by the courts whose knowledge of sewer system may be very limited. Still, Staff asserts that a receiver taking over this system is in the best interest of all involved. The current owner would like to get out of the sewer system business; the Customers, namely the Intervenor, would prefer the system be operated by someone else or some other entity; and Staff determined that it is in the public interest that this system should be operated by someone else.

Absent a bona-fide purchaser or Purchase Agreement, Staff's best recommendation is that a receiver be appointed.

Alternatives

Staff is unclear how the Commission can assert jurisdiction and all of its power, absent issuing a Certificate of Convenience and Necessity. Essentially, Staff's recommendation seeks a directive from the Commission affirming that the system is subject to the Commission's jurisdiction. Since filing its Recommendation, Staff has also been in talks with attorneys for the Company and the Sewer District and it appears that the sale may be forthcoming. Additionally, there may be other entities interested in such a purchase. In order to appropriately sell the system or its assets, Staff argues that the Commission would need to approve such sale. The Commission, alternatively, could find that the system is a "sewer system" and that Canyon Treatment, its owner or other closely related corporate entities is a "sewer corporation" and is subject to regulation by the Commission. The system is a "sewer system" under Section 386.020 (50) (Supp 2010) because there is a re-circulating sand filter treatment facility, collection system and lift station and service is being provided to the public. This system is currently owned, operated, controlled or managed by Canyon Treatment, or its owner and other closely affiliated

entities with Canyon Treatment's owner, as required for a "sewer corporation" under Section 386.020(49) (Supp 2010). So, the Commission could use the statutory definitions and determine that the system and Canyon Treatment (after proper transfer of all utility assets is made to Canyon Treatment) is a public utility and is subject to Commission jurisdiction. This would explicitly give Staff the authority to continue its efforts in this matter, which include discussing the possibility of a receivership or sales alternatives. It would also provide that any such sale of the system is approved by the Commission, thus ensuring that the best interests of all parties are considered as part of any such sale.

Such a finding allows Staff to actively seek a receiver, and to encourage the sale of the system. Without a certificate, Staff's hands are tied because it has an active complaint case, the only remedies of which are penalties that the sewer system, its owners, and the Company cannot afford. In addition, there is an active sewer system that has inadequate capacity and is therefore at risk if no further action is taken. If there is no certificate issued to the sewer system or a sewer corporation, as Staff proposed in its *Recommendation*, there is no means for Staff to enforce any of the Commission's jurisdiction, rules and laws.

Additional Issues

Section 393.170.1 RSMo states: "No sewer corporation shall begin construction of a sewer system without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation showing that it has received the required consent of the proper municipal authorities." Section 393.170.2, RSMo. The Commission may, by its order, impose such condition or conditions as it may deem reasonably and necessary. See 393.170.2 RSMo.

These statutes really contemplate an entity coming to the Commission before a system is established and providing service. Unfortunately, that is very often not the case for small sewer and water systems in the state of Missouri. As a result, Staff has an obligation to consider the facts as presented to them and make the best recommendation possible to the Commission. Sometimes that means considering alternatives that appear novel. In this case, Staff became aware of a sewer system operating as a sewer corporation, without a Certificate, and determined the system and entity, thereby, were violating the law. To remedy the unlawful behavior, Staff filed the *Complaint*. In response to the *Complaint*, Canyon Treatment applied for a Certificate. Upon further investigation, Staff determined that the current owner and operator should not own or operate a regulated utility, so it made a novel recommendation.

Conclusion

Staff has determined that there are legal and practical concerns with waiting until a receiver is located before issuing a Certificate of Convenience and Necessity to Canyon Treatment, its owner or any affiliated entities and the sewer system. The Certificate would bring this system into compliance with the statutes defining a sewer corporation, sewer system and public utility. The Certificate would ensure that any sale of the system or acquisition of its assets would be viewed at through the review of the best interest before it occurs. Finally, the Certificate would affirmatively establish this system as one of that is subject to the Commission's jurisdiction and all its powers and responsibilities.