BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission and Missouri Office of Public Counsel, Complainants,	)	
vs.	)	CASE NO. WC-91-18
Merriam Woods Water Company, Inc. Respondent.	)	

APPEARANCES: John B. Coffman, Assistant Public Counsel, P. O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the Public.

William K. Haas, Assistant General Counsel, P. O. Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

HEARING EXAMINER: C. Gene Fee

REPORT AND ORDER

This case is before the Commission as a result of the filing of a complaint on July 23, 1990, by the Staff of the Commission (Staff) and the Office of Public Counsel (Public Counsel). The complaint alleges that the water system operated by Merriam Woods Water Company, Inc. (Company or Respondent) has persistent service problems which constitute a continuing failure to provide safe and adequate service to its customers. The complaint sought a finding that the Respondent is in violation of Section 393.130, RSMo 1986 for failure to provide safe and adequate service; sought permission to seek penalties pursuant to Sections 386.570, et seq., RSMo 1986; and requested an order to the Respondent to make reasonable improvements, designed by a professional engineer licensed in Missouri, to its water system to correct the service problems.

In response to a request for a local hearing, a hearing was held in Merriam Woods Village on September 27, 1990, for the purpose of taking testimony from the Company's customers. At that hearing 14 customers and two other witnesses testified. Other people present declined to testify stating that their testimony would be much similar to that of prior witnesses.

A technical hearing was held on November 1, 1990, in the Taney County Courthouse in Forsyth, Missouri. At that session of the hearing the Complainants produced witnesses from the Commission Staff, a water specialist from the Missouri Department of Natural Resources (DNR), the operator of the Respondent's system, and the president of an adjacent water company. Although the Respondent was not represented by counsel at either hearing, the president of the Respondent appeared at the hearing in Forsyth and voluntarily testified in narrative form.

Briefs were filed by the Staff and Public Counsel. The Respondent did not file a reply brief.

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact:

The Respondent holds a certificate of public convenience and necessity issued by this Commission authorizing the rendering of water service to the public in an unincorporated portion of Taney County near Forsyth, Missouri. The Company's most recent annual report indicates that it has 143,000 feet of water lines or approximately 27 miles. The Company has approximately 428 customers and its tariff provides for a charge of $5.09 for the first 2,000 of gallons of water and $1.62 for each 1,000 gallons thereafter.

The Company's customers have been complaining to the Company's management about the quality of water service since approximately 1982.

The most persistent problem described by the customers is that of water pressure so low as to sometimes be nonexistent. Merriam Woods Village is a very hilly area. Most of the customers indicate that people residing at the higher elevations have virtually no water while the people residing in the lower elevations have adequate water at the same time. Several of the customers described incidents, over a long period of time, of being required to carry water from locations as far as four miles in order to bathe, flush toilets, or perform other simple household chores. One of the customers, living at a higher elevation, estimates that since moving to Merriam Woods in February, 1988, his house has not had enough water pressure to shower approximately 60 percent of the time. It is common for that low pressure to persist for as much as three or four weeks at a time and that customer has contacted the Company about the problem at least weekly for approximately two years. That customer resorted to taking his children for a bath in a nearby creek during the previous summer because there simply was not enough water delivered to the house for that purpose.

One customer recounted the necessity of waiting until after midnight for enough water to wash clothes. Even at that time of day it takes 15 minutes to fill a washer.

In addition to frequent outages as a result of low water pressure, several of the customers have experienced outages because of freezing water lines during the winter months. Some of the customers experienced freezing outages of three weeks during the winter of 1989. Some of the customers described seeing water lines excavated at shallow depths including partial exposure at the ground surface. The freezing problem was so acute that the system's contract operator was required to replace approximately 1,500 feet of water lines during the winter of 1989 because they were not buried below the frost line. The contract operator, appearing under subpoena, verified that some of the lines that he replaced were exposed at the

surface of the ground. He buried all of the new lines approximately 24 to 40 inches, but in his estimation there still remains approximately 4,000 feet of the Company's lines that are insufficiently buried. Following the winter of 1989, the Commission authorized a surcharge of $2.00 per month for a 12-month period commencing March 1, 1990, for the purpose of paying for the extraordinary expenses of repairing lines from freezing breaks during the winter.

Another common experience of the Company's customers is that of drawing water that is badly discolored or has an unpleasant odor and taste. It was indicated at the customer hearing that even people who have adequate water pressure carry water to drink because of the odor and taste. That particular complaint appears to be somewhat alleviated recently as a result of the cleaning of the Company's storage tank. That solution, however, was not without cost to the customers. The cleaning was accomplished with the funds from a surcharge of 71 cents per month which the Commission found necessary to approve for that purpose. That surcharge was for a period of one year commencing in April, 1989.

As an adjunct to the low supply problem some of the customers expressed the opinion that they were actually being billed for air in the water lines which activate the water meters. Some of the customers described turning on faucets and receiving only a few bubbles of water and an apparent large amount of air. One customer described a period when he was absent from his home for approximately one-half of the month of June, but was still billed for 9,000 gallons of use followed by a billing of 7,000 for July and 5,000 for August, when he was home the entire period.

Many of the Company's customers expressed anger, resentment, frustration and embarrassment by not being able to use their homes for themselves and guests in a normal way of life. In the Commission's opinion the resentment of the Company's customers is not without justification. We are of the opinion and find that the

evidence in this matter establishes that by any standard or measurement the water service rendered by the Merriam Woods Water Company is inadequate for common household purposes that most people take for granted.

Many of the customers described difficulty in contacting a Company representative for complaints and the frequency of a lack of a satisfactory response. The Company's office and phone is in Springfield, Missouri. Since the Company has no full-time employees, the person answering the Company's phone generally would only take a message for referral to the Company's president. The Company's licensed operator lives in Kirbyville, Missouri. Therefore, a call to either the operator or the Company's office necessitates a toll charge to the Company's customers. Because of the general lack of responsiveness to complaints, customers of the Company gradually started calling the Merriam Woods Village clerk who had no part in the operation of the Company. Because of the frequency of the complaints to her office the Village clerk started a log of such complaints. The clerk began keeping the written record in approximately March, 1989. At the time of the hearing the log consisted of 37 letter-sized pages some with as many as seven entries.

The Company is a closely held corporation affiliated with the Company which developed Merriam Woods Village. The 1989 annual report filed with the Commission reflects that Elliott Glasser and Jeanette Roberts each owned 325 shares of stock. During the hearing it has been developed that Al Roberts, the former husband of Jeanette Roberts, became the controlling stockholder on August 16, 1990. According to the testimony of Roberts, he has been involved in various capacities with the water company, as a stockholder or an advisor since 1981. However, until August 16, 1990, Glasser was the controlling stockholder and operator of the Company.

For approximately three years the system has been operated by Tom Liscum and his wife who both hold certificates from DNR and are equally involved in the operation of the Company's facilities. Since Liscum also operates a water system he

owns and four others under contract, he is frequently unavailable and it is necessary for customers to leave phone messages on his answering machine. Liscum ordinarily visits the Merriam Woods system twice a week unless it is necessary to go more frequently because of a break or problem. Liscum has authorization to perform repairs up to a cost of $225 and to perform emergency repairs. The only time Liscum contacts the president of the Company is for the purpose of securing funds to buy material or parts. Liscum is not required to maintain any records of complaints but has initiated such a log, on his own, stating, "we hadn't been until all the problems started coming up, and then we do now." The only other person known to be involved in the operation of the Company is a backhoe operator used for excavations on a contract basis. The backhoe operator has no authority to take any action on behalf of the Company or incur any expense without the authorization of Liscum. Liscum has frequently had to guarantee payment to secure the backhoe's operator services and has in the past paid the backhoe operator from his own funds. Liscum has always been repaid for advances to the backhoe operator but, at the time of the hearing, was owed approximately $2,300 for material and labor furnished personally to the Company. During the prior winter, Liscum's unpaid account was as high as $4,000.

Based on his familiarity with water systems, Liscum expressed the opinion that the Merriam Woods system has an unusually large number of leaks and outages for one of its size. Liscum is required to read the meters only once a year and has suggested to the Company's management that water leaks would be detected sooner if the meters were read more frequently. So far the Company's management has only thought about his proposal. Liscum also expressed the opinion that the Company's problems are due to inadequate storage and inadequate pump capacity. According to Liscum, the pump runs constantly in the summer since its capacity is only 53 gallons per minute. It is Liscum's belief that the pressure in the system goes to approximately 15 pounds per square inch in the late afternoon of an average day.

Everett Williams, a water specialist with DNR, has had frequent involvement with the Merriam Woods system since at least early in 1989. Williams has been involved in correspondence with the Company since as early as April 6, 1989, requesting action to correct low pressure and the possibility of contamination in the system. DNR's regulations require a minimum pressure of 20 pounds per square inch to prevent a flow of contamination into the water system. Pressure checks of the water system by Williams on August 6, 1990, showed three locations with zero water pressure, one actually having a vacuum. Williams has checked Liscum's records in the past and found water use of 100,000 gallons per day which is the amount that the master meter indicates the supply can produce. As a result of low pressures, the DNR has issued abatement orders requiring the water of the Merriam Woods system to be boiled before consumption. The most recently issued abatement order was on July 2, 1990, requiring the boiling of the Merriam Woods water and is still in effect. A further order of July 11, 1990, required several corrective actions in response to the "emergency condition that exists." The only portion of the abatement order that has been complied with by the Company is the performance of a connection between the Merriam Woods system and that of the nearby Taney County Utilities, another water system subject to the regulation of this Commission.

Mr. Vincent Chinell, president of the Taney County Utilities Company, indicates that the abatement order of July 11, 1990, was voluntarily complied with and his Company performed the connection between the two systems on July 16, 1990. Chinell's company donated the labor to make the connection and has yet to be paid approximately $632 for materials used. Chinell's company has been furnishing approximately 200,000 gallons of water per month to the Merriam Woods system. Although the connection is considered emergency or temporary in nature, Chinell expressed a willingness to allow it to remain as long as the people needed the water.

As a result of the failure to comply with DNR's July 11th abatement order, other than the connection performed by Taney County Utilities, DNR has referred the matter to the Office of the Attorney General of the State of Missouri for legal action.

Although none of the samples of water from the Company's system appear to have tested unsafe, Williams expressed the opinion that the continuing failure to make the necessary repairs or corrections constitutes a danger to the health and welfare of the Company's customers. Williams described a large portion of the problem to be the storage capacity of the Company which is inadequate to comply with DNR's public drinking water regulations which require a minimum storage of one day's use. The minimum use requirement is to cover well repairs, well house service and power outages. A February 6, 1990 communication to Elliott Gasser requested correction at a time when the water use was approximately 80,000 gallons per day. The Company's pneumatic storage tank is of 11,000 gallon capacity. It is designed to operate with two-thirds water, and one-third compressed air, with only one-half of the water available for use.

The Commission Staff has also frequently requested corrective actions for sometime, most of which have been ignored by the Company's management. Commission Engineer Merciel identified a letter to Elliott Glasser dated September 13, 1989, in which it was recommended that the Company make a connection with the system of Taney County Utilities. The letter, which was sent after a reported outage, also suggested the installation of an air release value to remove the accumulation of air from the system. Merciel also identified a letter written by the Staff in February, 1990, which recommended that the Company either sell the system, or make the necessary investment to operate it properly.

Another member of the Commission Staff, Bill Nickle, has worked closer with the Merriam Woods system and also expressed the opinion that most of the Company's

problems are the result of inadequate supply and inadequate source of water. Nickle is familiar with a request by the Commission Staff, as early as 1988, to perform a connection between the Merriam Woods system and that of Taney County Utilities. Nickle indicated that the inadequate capacity of the Merriam Woods system made it impossible to engage in the simple practice of allowing a small amount of water flow to prevent freezing breaks such as those frequently experienced by the Company.

Nickle took continuous pressure readings on the Merriam Woods system for six weeks commencing approximately August 21, 1990. Nickle made his gauge installation on one of the higher points of the system in a vacant meter well so as to avoid any influence by customer use since his measurement was of the pressure in the main itself. Nickle's recording charts show that over the six-week period it was common for the pressure to drop to five pounds per square inch. Nickle's charts also showed a water flow, estimated by him to be 40 gallons per minute, between the hours of midnight and six o'clock a.m. In Nickle's opinion that amount of flow at that time indicates significant leaks in the system.

Nickle had previously visited the Merriam Woods system three times in August and six times in July in response to reported problems. Nickle's most recent pressure check was during the week of October 11th during which the continuous reading chart shows that the pressure dropped to 15 pounds per square inch on several occasions.

Nickle reiterated the necessity to maintain a positive pressure on a water main of at least 20 pounds per square inch to keep surface water from infiltrating. In addition, Nickle testified that many household appliances such as dishwashers and clothes washers would not operate on less than 20 pounds of pressure.

Nickle expressed the opinion that during the frequent periods when his pressure gauge showed five pounds per square inch there would be no water flow at the shower head in nearby homes. For each additional 10 feet of elevation water pressure

drops 4.33 pounds. Since nearby houses were uphill from his pressure gauge installation, it is unlikely that any water would be available in the houses during certain periods of his pressure checks. Nickle also described the action of air entering the water system when a faucet is opened at a time of zero pressure. If the system's well starts to pump, air in the system becomes compressed and will register when passing through a water meter. Under those conditions Nickle indicated that the customers' belief that they were paying for air is not unfounded.

Staff Accountant Larry Cox expressed the opinion that the Company has no rate base, or investor-provided facilities. In Cox's opinion, based on his audit of the Company's books, virtually all of the water system was contributed by the land developer and recovered in the price of lots sold to the residents. Staff witness Nickle had expressed the opinion that, based on his experience, a typical rural water system would have an investment of $200 to $300 per customer with systems in municipal areas requiring a higher investment. It was the Staff Accountant's opinion that the Company's revenues were adequate to meet its expenses.

In early 1990, the Village clerk was informed that the owner of the Company expressed a willingness to sell the system for $50,000 plus the assumption of the Company's debts. The Village trustees voted to place before the residents the proposal to issue bonds in the amount of $143,000 for the purchase and improvement of the water company. In March, 1990, the trustees tendered an offer of $54,000 to the owners of the system who rejected it as being too low to be considered. In June, 1990, the Village trustees tendered an offer of $70,000 for the water system. The owners of the water company responded with a counteroffer of $107,500 which included $10,000 incurred in repairing the freeze damage of the winter of 1989 for which the customers were already paying a $2.00 per month surcharge. A counteroffer of $77,500 by the board of trustees met no response. That offer remains outstanding.

At the hearing, Roberts, the sole stockholder, stated the offer was not being considered because it was inadequate to pay his debts. The Company's debts of approximately $110,000 apparently includes $75,000 borrowed for the purpose of purchasing the stock of the Company. The balance of the debt is for unpaid repair bills.

Roberts appears to realize that borrowing for the purpose of purchasing the Company's stock does not represent investment by the Company but nonetheless includes that amount in the demanded purchase price. The record is unclear as to whether the $110,000 represents personal debt of Roberts, debt of the Company, or partly both. If the borrowing for that purpose was by the Company there is a violation of the statutory requirement to secure permission from this Commission for a borrowing by any public utility. We take official notice of our records to establish the fact that the only recent filing by the Company, other than the surcharges, was for a rate increase filed January 27, 1989 in Case No. WR-89-152. That case was withdrawn March 20, 1989, because the Company did not tender the required notice to its customers. Our files do not reflect any application by the Company to borrow money.

It is the position of Roberts that he does not have the funds available to install the new facilities requested by the Commission Staff and DNR. It is his further contention that he is making repairs as fast as funds become available, and that he needs a rate increase to properly operate the present system.

Although the deadline has passed, Roberts indicates that he has complied with the condition in the DNR abatement order of July 11, 1990, to retain the services of a professional engineer to recommend improvements to the system. A letter furnished from Howard Moore Group of Springfield, Missouri, dated October 25, 1990, requests additional information necessary to complete their analysis and recommendations. The letter also requests payment of the balance of a $2,250 retainer.

As a result of the foregoing recitation, the Commission is of the opinion and finds that the evidence at the portion of the hearing held in Forsyth, Missouri, reinforces and explains the reasons for the inadequate water service rendered by the Company described by the customers at the earlier portion of the hearing. We are also of the opinion and find that the record adequately establishes that, in addition to the long-standing inadequate level of service, the Company has engaged in a continuing pattern of ignoring customer complaints and the requests for needed improvements to the system by both DNR and the Commission Staff. As a result of this continuing pattern of neglect and inadequate and potentially dangerous service, the Commission is of the opinion that the authority sought by the Public Counsel should be granted.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions:

The Respondent is a "public utility" and a "water corporation" subject to the jurisdiction of this Commission pursuant to Chapters 386 and 393, RSMo 1986.

Pursuant to Section 393.130, RSMo 1986, the Respondent is under an obligation to "...furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable". Since we have previously found that the Respondent's service fails to meet this standard, the Respondent is in violation of that section of our statutes. In interpreting that same statutory provision (then Section 5189, R.S. 1929) the Court of Appeals has determined that a violation of the requirement to provide safe service is negligence per se. *Martin v. Springfield City Water Company*, 128 S.W. 2d 674, 681. By inference we are of the opinion that the failure to provide the other requirement stated in the conjunctive, adequate service, is equally negligence per se.

As to safety, this Commission's rule found at 4 CSR 240-10.030(32) provides "All water furnished by utilities for human consumption and general household standards shall conform to standards adopted by the Missouri Division of Health. The source of supply shall be adequate to ensure a supply without interruption at all times...." The rulemaking authority of the Division of Health is now that of the Department of Natural Resources as previously referred to in this Report and Order.

We have previously stated the purpose of the DNR regulation requiring a minimum pressure of 20 pounds per square inch is primarily to eliminate unsafe public water systems. Although none of the water samples taken from the Respondent's system have thus far tested unsafe, we are of the opinion that it is undesirable and unnecessary to await the first determination of contamination, illness, or even a death to establish that the system is operated in an unsafe manner. Although 20 pounds per square inch of pressure may establish minimum health standards for operation of distribution facilities, "20 pounds per square inch of static pressure in the system will not provide 'adequate minimum pressure suitable for domestic service' as required by the Commission's General Order No. 20."[1] *Re: George C. Stubenrouch*, 16 Mo. P.S.C. (N.S.) 373, 379.

The Commission Staff recommends that the Commission order the Respondent to submit an engineering report within 30 days, to submit detailed engineering plans within 60 days, to provide an additional source of supply, increase storage, and permanent chlorination facilities by April 15, 1991, and to submit a schedule by April 15, 1991, for the improvements to the distribution system. Although we recognize that the current stockholder has only recently assumed control of the Company we must take into consideration the Company's repeated pattern of ignoring requests of our Staff and the Staff of DNR, including DNR orders similar to that

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[1]This language remains the same at 4 CSR 240-10.030(32).

sought herein by the Staff. We have no reason to believe that such an order issued by this Commission would receive speedier compliance.

We are therefore of the opinion that the authority sought by the Public Counsel should be pursued and the Commission's General Counsel should be authorized to seek the statutory penalties provided for in Section 536.570, RSMo 1986. Pursuant to that provision, penalties of up to $2,000 for each violation may be sought in a court of competent jurisdiction. We are mindful of the primary desire in this matter of securing safe water service that is simply adequate for domestic consumption rather than any objective of exacting a penalty from the operators of the system.

IT IS THEREFORE ORDERED:

1. The Commission's General Counsel be, and is, authorized to file an action in a court of competent jurisdiction against Merriam Woods Water Company, Inc., seeking the penalties provided for in Section 386.570, RSMo 1986.

2. That this Report and Order shall become effective on December 10, 1990.

BY THE COMMISSION

Brent Stewart OR
Brent Stewart
Interim Executive Secretary

(S E A L)

Steinmeier, Chm., Mueller, Rauch,
McClure and Letsch-Roderique, CC.,
Concur.

Dated at Jefferson City, Missouri,
on this 30th day of November, 1990.