

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

**In the Matter of the Request of the Staff)
of the Missouri Public Service)
Commission for an Order Directing the)
General Counsel to Petition the Circuit)
Court of Cole County for the)
Appointment of a Receiver for Rogue)
Creek Utilities, Inc., and for the)
Appointment of an Interim Receiver.)**

Case No. WO-2007-0344

STAFF'S RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission and, for its Response to Order Directing Filing, states to the Missouri Public Service Commission as follows.

On April 24, 2007, the Commission issued its Order Directing Filing, in which it ordered the Staff to respond to the Answer and Consent to Application to Petition Circuit Court for Appointment of Receiver, which Rogue Creek Utilities, Inc. filed in this case on April 23, 2007. The Commission directed the Staff to state its position on whether a hearing before the Commission is required, whether it consents to filing its petition in Washington County, rather than Cole County, and its recommendation on the compensation that should to be paid to an interim receiver, if the Commission appoints one.

I. NECESSITY OF A HEARING

The Staff is seeking relief in this case pursuant to the provisions of Section 393.145, RSMo (Supp. 2006),¹ which provides, in part, as follows:

“1. If, *after hearing*, the commission [makes certain determinations], the commission may petition the circuit court for an order attaching the assets of the utility and placing the utility under the control and responsibility of a receiver.” (Emphasis supplied.)

¹ All statutory references are to RSMo 2000, as currently supplemented.

The issue, as the Staff understands it, is whether a hearing is required in the circumstances of this case, where there is substantial agreement among the parties about the relief that should be granted. The explicit language of the statute appears to unequivocally require a hearing. However, the courts and the Commission have found, in circumstances similar to the instant case, that a hearing is not required. The Staff will first examine these precedents.

City of Richmond Heights v. Bd. Of Equalization of St. Louis County, 586 SW.2d 338 (Mo. banc 1979). The Supreme Court said that “hearing” may be used as a participle or a noun. When used as a noun, it presupposes that there was a proceeding between adversary parties, the tribunal considered proofs and arguments, the parties were apprised of all evidence, and the parties had an opportunity to be heard on the issues. These attributes were not present in the case before the court. The court therefore decided that there was no hearing.

It is important to note that what the Supreme Court decided was this: Was there a hearing? The court did *not* attempt to decide whether the requirement for a hearing could be met without an actual hearing if those attributes were not present.

Deffenderfer Enterprises, Inc. v. Public Service Comm’n of the State of Mo., 776 S.W.2d 494 (Mo. App. W.D. 1989). A statute authorized the Commission to grant a certificate of convenience and necessity “after due hearing.” The Western District had to decide whether the Commission could grant the certificate without actually conducting a hearing.

The court found that the Commission had issued notice to “proper parties,” had established an intervention deadline, and had stated in its notice that if there was no intervention and no hearing request, it would allow evidence by affidavit. No party intervened and no party requested a hearing.

The Western District held that the requirement of “due hearing” was met when the opportunity for hearing was presented, and no one sought to present evidence.

State ex rel. Ozark Border Electric Cooperative v. Public Service Commission, 924 S.W.2d 597

(Mo. App. W.D. 1996). This was a territorial agreement case, in which the court had to construe a statute that said “The commission shall hold evidentiary hearings ...” The same statute said: “The commission may approve the application if it shall after hearing [make certain determinations].” In the case before the Commission, the Commission gave notice of the proceedings and invited intervention and comment, but no parties intervened. After notice was given, the parties presented a stipulation. The Western District found that this was sufficient to constitute a hearing. The court said a hearing is sufficient if there is an opportunity to intervene and request hearing, but no one seeks to present evidence.

Joint Application of the City of Centralia and PWSD No. 10 of Boone County for Approval of an Amendment to a Territorial Agreement. Commission Case No. WO-2005-0084 (2004). The Commission relied primarily upon the *Deffenderfer* and *Ozark Enterprises* cases, *supra*, to conclude that under the circumstances, it could approve an amendment to a territorial agreement without holding an evidentiary hearing. The parties had filed a verified application, the Commission gave notice and an opportunity for hearing, there were no requests for intervention, no party requested a hearing, and the parties filed a unanimous stipulation and agreement.

The Facts in the Present Case. In the instant case, the Staff filed a verified Application, seeking the appointment of a receiver for Rogue Creek Utilities, Inc. The Application did not seek any relief against William Rummel, Rogue Creek’s owner.

The Commission did not publish notice of the proceedings or invite intervention and comment. It did, however, give actual notice to Rogue Creek, Mr. Rummel, and Joe and Rita Coleman, and gave them an opportunity to respond. It also said that the failure to respond may result in the Commission granting all of the relief that the Staff requested.

Someone filed an Answer and Consent, but it is not entirely clear who did so. The attorney's signature block states that Kevan L. Karraker filed as "Attorney for William J. Rummel, for Rogue Creek Utilities, Inc." But the introductory paragraph of the pleading suggests it was filed only by Mr. Rummel, in a fiduciary capacity; the language of the numbered paragraphs suggests that the pleading was filed only by one person, an individual; and the pleading appears to be designed to protect only the interest of Mr. Rummel. It is not clear, though, that the Answer was filed on behalf of Rogue Creek Utilities, Inc.

Issues Potentially in Dispute Between the Parties. The Answer and Consent appear to place some issues in dispute, as explained in the following paragraphs.

In Paragraph 1 of the Answer, Mr. Rummel apparently denies that he is unwilling to manage Rogue Creek. It is not clear exactly what this statement responds to. The Staff did not state that Mr. Rummel is unwilling to manage Rogue Creek, but only stated in its Application that he is no longer willing to devote a significant amount of time to the management of Rogue Creek. Nonetheless, the Staff's allegation may be in dispute.

In Paragraph 2 of the Answer, Mr. Rummel admits that Rita Coleman is capable of managing Rogue Creek. The Staff agrees that this is so, and did nominate Rita Coleman to be the interim receiver for Rogue Creek. However, Rita and her husband, Joe, have now informed the Staff that they would prefer that Joe be appointed as interim receiver, and the Staff intends to request that Joe Coleman be so appointed. Mr. Rummel's Answer does not make it clear that he would consent to such change. Therefore, this may also be a disputed issue.

Mr. Rummel qualified his Consent, so that the Commission's actions would not affect him individually.² In the cover letter that he sent to the Commission, Mr. Rummel's attorney again expressed concern about the possibility that Mr. Rummel might have personal liability as a result of

² See Paragraphs 3 and 4 and the Prayer Clause.

the receivership. The Staff seeks relief against Rogue Creek only, and not against Mr. Rummel, individually. However, the Staff is not certain that Mr. Rummel has received sufficient assurance that the Commission's action would not affect him individually.

Finally, Mr. Rummel indicates in his answer that he consents to the appointment of a receiver "for the purpose of winding up the affairs of the corporation." This is not exactly the relief that the Staff seeks. The Staff seeks the appointment of a receiver in order to insure that the customers of Rogue Creek continue to receive safe and adequate water and sewer service. This may conflict with Mr. Rummel's stated goal of "winding up the affairs of the corporation." For example, in order to continue to provide safe and adequate water and sewer service to Rogue Creek's customers, the appointed receiver may find it necessary or desirable to rescind the forfeiture of Rogue Creek's charter, instead of "winding up the affairs of the corporation."

Conclusion. From the cases discussed above, it is clear that a hearing is sufficient if there is an opportunity to intervene and request hearing, but no one seeks to present evidence. However, in this case, the Commission did not publish notice of the proceedings or invite intervention and comment. It did give notice to Rogue Creek (and others) and an opportunity to respond, and it said that *if Rogue Creek failed to respond* the Commission could grant the relief requested. But Rogue Creek did respond. Rogue Creek did not request a hearing, but the Commission did not warn Rogue Creek that relief might be granted if Rogue Creek did not request a hearing. The parties have not filed a stipulation. The Staff has not filed an unobjected-to recommendation. And Rogue Creek's Answer and Consent does not unequivocally agree to all of the relief that the Staff requested.

The Staff therefore concludes that an evidentiary hearing is still required in this case. It is possible, however, that the hearing may become unnecessary if the parties subsequently file a stipulation and agreement or other appropriate documents that show that there are no issues in dispute.

II. VENUE OF CIRCUIT COURT PROCEEDINGS

In the Application that it filed to initiate this case, the Staff prayed that the Commission order the general counsel of the Commission to petition the Circuit Court of Cole County for the appointment of a receiver.

In its Order Directing Filing, the Commission ordered the Staff to tell whether it consents to filing its petition for appointment of a receiver in Washington County.

The Staff will not be filing a petition for the appointment of a receiver in any event, nor in any venue, and will not be a party to such a case. The petition, if any is filed, will be filed by the Commission, through its general counsel. The Staff requested that such petition be filed in Cole County, for the convenience of the Commission.

However, for the convenience of Rogue Creek, and in order to accommodate Rogue Creek's desires as set forth in the Answer and Consent that Rogue Creek filed, the Staff consents to the filing of the petition for appointment of receiver in Washington County.

III. COMPENSATION OF THE RECEIVER

In its Order Directing Filing, the Commission ordered the Staff to recommend what compensation should be paid to an interim receiver that the Commission may appoint.

In Rogue Creek's last rate cases (Case No. WR-2003-0152 and SR-2003-0153), the Staff built in the total amount of \$12,900 per year for management and operations, as compensation to all Rogue Creek personnel, including Mr. Rummel. Based upon this analysis and other considerations, the Staff recommends compensation to the interim receiver in the amount of \$1,000 per month, provided that all other "direct" operating and maintenance expenses will be paid first.

WHEREFORE, the Staff submits its Response to Order Directing Filing for the Commission's information and consideration in this case.

Respectfully submitted,

/s/ **Keith R. Krueger**

Keith R. Krueger
Deputy General Counsel
Missouri Bar No. 23857

Attorney for the Staff of the
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
(573) 751-4140 (Telephone)
(573) 751-9285 (Fax)
keith.krueger@psc.mo.gov

Certificate of Service

I hereby certify that copies of this Motion have been mailed with first-class postage, hand-delivered, transmitted by facsimile or transmitted via e-mail to all counsel and/or parties of record this 9th day of May 2007.

/s/ **Keith R. Krueger**