

FIRST REGULAR SESSION
SENATE COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 462
93RD GENERAL ASSEMBLY

Reported from the Committee on Commerce, Energy and the Environment, March 17, 2005, with recommendation that the Senate Committee Substitute do pass.

1848S.02C

TERRY L. SPIELER, Secretary.

AN ACT

To repeal section 393.145, RSMo, and to enact in lieu thereof two new sections relating to certain sewer and water corporations.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Section 393.145, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 393.145 and 393.146, to read as follows:

393.145. 1. If, **after hearing**, the commission [shall determine] **determines** that any sewer or water corporation [having one thousand or fewer customers] **that regularly provides service to eight thousand or fewer customer connections** is unable or unwilling to provide safe and adequate service [or], has been actually or effectively abandoned by its owners, or has defaulted on a bond, note or loan issued or guaranteed by any department, office, commission, board, authority or other unit of state government, 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. **The venue of such cases shall, at the option of the commission, be in the circuit court of Cole County or in the circuit court of the county in which the utility company has its principal place of business.**

2. **If the commission orders its general counsel to petition the circuit court for the appointment of a receiver under subsection 1 of this section, it may in the same order appoint an interim receiver for the sewer or water corporation. The interim receiver shall have the**

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

authority generally granted to a receiver under subsection 6 of this section, except that the commission cannot authorize the interim receiver to transfer by sale or liquidate the assets of the utility. The interim receiver shall be compensated in an amount to be determined by the commission. The interim receiver shall serve until a judgment on a petition for writ of review of the commission's order, if any, is final and unappealable, and until the circuit court thereafter determines under subsection 5 of this section whether to grant the commission's petition for appointment of receiver.

3. When the commission files its petition for appointment of receiver in the circuit court, it shall attach to its petition an official copy of its determination under subsection 1 of this section. The commission shall not file such action until its determination under subsection 1 of this section is final and unappealable.

4. The summons and petition for an order attaching the assets of the utility and appointing a receiver shall be served as in other civil cases at least five days before the return date of the summons. In addition to attempted personal service, upon request of the commission, the judge before whom the proceeding is commenced shall make an order directing that the officer or other person empowered to execute the summons shall also serve the same by securely affixing a copy of the summons and petition in a conspicuous place on the utility system in question at least ten days before the return date of the summons, and by also mailing a copy of the summons and petition to the defendant at its last known address by ordinary mail and by certified mail, return receipt requested, deliver to addressee only, at least ten days before the return date. If the officer or other person empowered to execute the summons makes return that personal service cannot be obtained on the defendant, and if proof be made by affidavit of the posting and of the mailing of a copy of the summons and petition, the judge shall, at the request of the commission, proceed to hear the case as if there had been personal service, and judgment shall be rendered and proceedings had as in other cases. If the commission does not request service of the original summons by posting and mailing, and if the officer or other person empowered to execute the summons makes return that personal service cannot be obtained on the defendant, the commission may request the issuance of an alias summons and service of the same by posting and mailing in the time and manner provided in this subsection. Upon proof by affidavit of the posting and of the mailing of a

copy of the alias summons and the petition, the judge shall proceed to hear the case as if there had been personal service, and judgment shall be rendered and proceedings had as in other cases.

[3.] **5.** The court [shall], after hearing [determine whether to], **may** grant the **commissioner's petition for appointment of a receiver**. Where the defendant is in default, the court shall mail to the defendant at its last known address by certified mail with a request for return receipt and with directions to deliver to the addressee only, a notice informing the defendant of the judgment and the date it was entered. A receiver appointed pursuant to this section shall be a responsible person, partnership, or corporation knowledgeable in the operation of utilities.

[4.] **6.** The receiver shall give bond, and have the same powers and be subject to all the provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the law providing for suits by attachment. The receiver shall operate the utility so as to preserve the assets of the utility and to serve the best interests of its customers. The receiver shall be compensated from the assets of the utility in an amount to be determined by the court **with the assistance of the commission staff**. **Any receiver or interim receiver appointed under this section shall be immune from personal liability for any civil damages arising from acts performed in his or her official capacity for actions the receiver or interim receiver would not otherwise be liable except for his or her affiliation with the utility. This immunity shall not, however, apply to intentional conduct, wanton or willful conduct, or gross negligence. Nothing in this subsection shall be construed to create or abolish an immunity in favor of the utility itself.**

[5.] **7.** Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interests of its customers, be returned to the owners. **[If] However, if the commission or another interested party petitions and** the court determines, after hearing, that control of and responsibility for the utility should not, in the best interests of its customers, be returned to the owners, **[the receiver shall proceed to] the court shall direct the receiver to transfer by sale or** liquidate the assets of the utility in the manner provided by law.

[6.] **8.** The appointment of a receiver **or an interim receiver** shall be in addition to any other remedies provided by law.

9. In lieu of the payments to the public school fund of the state of

Missouri provided for in section 386.600, RSMo, penalties for violations of the public service commission law or related commission regulations that are collected from a sewer or water corporation that has been placed in receivership under the provisions of this section, or for which the commission has appointed an interim receiver under the provisions of this section, may, upon the order of the court that imposed the penalties, be used to support the operation of the subject small sewer or water corporation while it is under the control of the receiver.

393.146. 1. As used in this section the following terms shall mean:

(1) "Capable public utility", a public utility that regularly provides the same type of service as a small water corporation or a small sewer corporation to more than eight thousand customer connections, that is not an affiliate of a small water corporation or a small sewer corporation, and that provides safe and adequate service;

(2) "Department", the department of natural resources;

(3) "Small sewer corporation", a public utility that regularly provides sewer service to eight thousand or fewer customer connections;

(4) "Small water corporation", a public utility that regularly provides water service to eight thousand or fewer customer connections.

2. The commission may order a capable public utility to acquire a small water or sewer corporation if, after providing notice and an opportunity to be heard, the commission determines:

(1) That the small water or sewer corporation is in violation of statutory or regulatory standards that affect the safety and adequacy of the service provided by the small water or sewer corporation, including but not limited to the public service commission law, the clean water law, the federal Safe Drinking Water Act, as amended, and the regulations adopted thereunder; or

(2) That the small water or sewer corporation has failed to comply, within a reasonable period of time, with any order of the department or the commission concerning the safety and adequacy of service, including but not limited to the availability of water, the potability of water, the palatability of water, the provision of water at adequate volume and pressure, the prevention of discharge of untreated or inadequately treated sewage to the waters of the state, and the prevention of environmental damage; or

(3) That it is not reasonable to expect that the small water or sewer corporation will furnish and maintain safe and adequate service and facilities in the future; and

(4) That the commission has considered alternatives to acquisition in accordance with subsection 3 of this section and has determined that they are impractical or not economically feasible; and

(5) That the acquiring capable public utility is financially, managerially, and technically capable of acquiring and operating the small water or sewer corporation in compliance with applicable statutory and regulatory standards; and

(6) That the rates charged by the acquiring capable public utility to its preacquisition customers will not increase unreasonably because of the acquisition.

3. Except when there is an imminent threat of serious harm to life or property, before the commission may order the acquisition of a small water or sewer corporation in accordance with subsection 2 of this section, the commission shall discuss alternatives to acquisition with the small water or sewer corporation and shall give such small water or sewer corporation thirty days to investigate alternatives to acquisition, including:

(1) The reorganization of the small water or sewer corporation under new management;

(2) The entering of a contract with another public utility or a management or service company to operate the small water or sewer corporation;

(3) The merger of the small water or sewer corporation with one or more other public utilities; and

(4) The acquisition of the small water or sewer corporation by a municipality, a municipal authority, a public water supply district, a public sewer district, or a cooperative.

4. When the commission determines that there is an imminent threat of serious harm to life or property, the commission may appoint an interim receiver prior to the opportunity for hearing, provided that the commission shall provide opportunity for hearing as soon as practicable after the issuance of such order.

5. In making a determination under subsection 2 of this section,

the commission shall consider:

(1) The financial, managerial, and technical ability of the small water or sewer corporation;

(2) The financial, managerial, and technical ability of all proximate public utilities that provide the same type of service and constitute an alternative to acquisition;

(3) The expenditures that are needed to improve the facilities of the small water or sewer corporation to assure compliance with applicable statutory and regulatory standards concerning the adequacy, efficiency, safety, and reasonableness of utility service, and to sufficiently provide safe and adequate service to the customers of the small water or sewer corporation;

(4) The potential for expansion of the certificated service area of the small water or sewer corporation; and

(5) The opinion and advice, if any, of the department as to what steps may be necessary to assure compliance with applicable statutory or regulatory standards concerning the safety and adequacy of utility service.

6. Subsequent to the determination required under subsection 2 of this section, the commission shall issue an order for the acquisition of a small water or sewer corporation by a capable public utility. Such order shall include granting a certificate of public convenience and necessity to the acquiring capable public utility for the small water or sewer corporation's established service area.

7. The price for the acquisition of a small water or sewer corporation shall be determined by agreement between the small water or sewer corporation and the acquiring capable public utility, subject to a determination by the commission that the price is reasonable. If the small water or sewer corporation and the acquiring capable public utility are unable to agree on the acquisition price, or the commission disapproves the acquisition price to which the utilities agreed, the commission shall issue an order directing the acquiring capable public utility to acquire the small water or sewer corporation at an acquisition price that is equal to the ratemaking rate base as determined by the commission after notice and hearing, or providing that the acquiring capable public utility will not be allowed to earn a rate of return on the

portion of the purchase price that is in excess of the ratemaking rate base determined by the commission after notice and hearing. The burden of establishing the ratemaking rate base shall be upon the small water or sewer corporation.

8. Any capable public utility that is ordered by the commission to acquire a small water or sewer corporation shall, within thirty days after acquisition, submit a plan, including a timetable, for bringing the small water or sewer corporation into compliance with applicable statutory and regulatory standards to the commission for approval. The capable public utility shall also provide a copy of the plan to the department and such other state or local agency as the commission may direct. The commission shall give the department adequate opportunity to comment on the plan and shall consider any comments submitted by the department and shall expeditiously decide whether to approve the plan.

9. Upon the acquisition of a small water or sewer corporation by a capable public utility, and approval by the commission of a plan for improvements submitted under subsection 8 of this section, the acquiring capable public utility shall not be liable for any damages if the cause of those damages is proximately related to identified violations of applicable statutes or regulations by the small water or sewer corporation and the acquiring capable public utility remains in compliance with the plan for improvements submitted under subsection 8 of this section. This subsection shall not apply:

- (1) Beyond the end of the timetable in the plan for improvements;
- (2) Whenever the acquiring capable public utility is not in compliance with the plan for improvements; or
- (3) If, within sixty days after receipt of notice of the proposed plan for improvements, the department submitted written objections to the commission and those objections have not subsequently been withdrawn.

10. Upon approval by the commission of a plan for improvements submitted under subsection 8 of this section, and the acquisition of a small water or sewer corporation by a capable public utility, the acquiring capable utility shall not be subject to any enforcement actions by state or local agencies that had notice of the plan, if the basis of such

enforcement action is proximately related to identified violations of applicable statutes or regulations by the small water or sewer corporation. This subsection shall not apply:

(1) Beyond the end of the timetable in the plan for improvements;

(2) Whenever the acquiring capable public utility is not in compliance with the plan for improvements;

(3) If, within sixty days of having received notice of the proposed plan for improvements, the department submitted written objections to the commission and those objections have not subsequently been withdrawn; or

(4) To emergency interim actions of the commission or the department, including but not limited to the ordering of boil-water advisories or other water supply warnings, of emergency treatment, or of temporary alternate supplies of water or sewer services.

11. If the commission orders the acquisition of a small water or sewer corporation, the commission shall authorize the acquiring capable public utility to implement, and revise semi-annually thereafter, a rate surcharge to be applied to the rates of the small water or sewer corporation, or to the rates of both the acquiring capable public utility and the small water or sewer corporation, as determined by the commission. Such surcharges may be designed to recover one hundred per cent of the revenues necessary to provide a net after-tax return on the ratemaking rate base value of the small water or sewer corporation's facilities acquired by the capable public utility, and the ratemaking rate base value of any improvements made to the facilities by the acquiring capable public utility subsequent to the acquisition, at a rate of return equivalent to one hundred basis points above the rate of return authorized for the acquiring capable public utility in its last general rate proceeding. Such surcharges may be utilized by the acquiring capable public utility only until such time that a determination is made on the acquiring utility's next company-wide general rate increase.

12. Proceedings under this section may be initiated by complaint filed by the staff of the commission, the office of the public counsel, the mayor, or the president or chair of the board of aldermen, or a majority of the council, commission, or other legislative body of any city, town, village, or county within which the alleged unsafe or inadequate service

is provided, or by not less than twenty-five consumers or purchasers, or prospective consumers or purchasers, of the utility service provided by a small water or sewer corporation. The complainant shall have the burden of proving that the acquisition of the small water or sewer corporation would be in the public interest and in compliance with the provisions of this section.

13. The notice required by subsection 2 of this section, or any other provision of this section, shall be served upon the small water or sewer corporation affected, the office of the public counsel, the department, all proximate public utilities providing the same type of service as the small water or sewer corporation, all proximate municipalities and municipal authorities providing the same type of service as the small water or sewer corporation, and the municipalities served by the small water or sewer corporation. The commission also shall order the affected small water or sewer corporation to provide notice to its customers of the initiation of proceedings under this section in the same manner in which the utility is required to notify its customers of proposed general rate increases.

14. A public utility that would otherwise be a capable public utility except for the fact that it has fewer than eight thousand customer connections may petition the commission to be designated a capable public utility for the purposes of this section regardless of the number of its customer connections and regardless of whether it is proximate to the small water corporation or small water corporation to be acquired.

15. Notwithstanding the requirement of section 386.600, RSMo, to the contrary for payments to the public school fund of the state of Missouri, penalties for violations of the public service commission law or related commission regulations that have been imposed upon a small sewer or water corporation that has been placed in receivership under the provisions of section 393.145 may, upon the order of the court that imposed the penalties, be used to reduce the purchase price paid by a capable public utility for the acquisition of the assets of the subject small sewer or water corporation. In such a case, the commission also shall make a corresponding reduction to the ratemaking rate base value of the subject assets for purposes of future ratemaking activities.

16. The commission shall, not later than the effective date of this

section, initiate a rulemaking to promulgate rules to carry out the purposes of this section. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo, that is created under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028, RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2005, shall be invalid and void.

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