

SECOND REGULAR SESSION

HOUSE BILL NO. 1695

92ND GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE LUETKEMEYER.

Read 1st time March 29, 2004, and copies ordered printed.

STEPHEN S. DAVIS, Chief Clerk

4960L.011

AN ACT

To repeal section 393.145, RSMo, and to enact in lieu thereof two new sections relating to utility companies.

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Section A. Section 393.145, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 393.145 and 393.146, to read as follows:

- 2 393.145. 1. If **after hearing** the commission shall determine that any sewer or water
2 corporation [having one thousand or fewer customers] is unable or unwilling to provide safe and
3 adequate service or has been actually or effectively abandoned by its owners or has defaulted on
4 a bond, note or loan issued or guaranteed by any department, office, commission, board,
5 authority or other unit of state government, the commission may petition the circuit court for an
6 order attaching the assets of the utility and placing the utility under the control and responsibility
7 of a receiver.
- 8 2. **If the commission orders its general counsel to petition the circuit court for the**
9 **appointment of a receiver under subsection 1 of this section it may in the same order**
10 **appoint an interim receiver for the sewer or water corporation. The interim receiver shall**
11 **have the authority generally granted to a receiver under subsection 6 of this section, except**
12 **that the commission shall not authorize the interim receiver to liquidate the assets of the**
13 **utility. The interim receiver shall be compensated in an amount to be determined by the**
14 **commission. The interim receiver shall serve until a judgment on the petition for writ of**
15 **review if any is final and unappealable and until the circuit court thereafter determines**
16 **under subsection 5 of this section whether to grant the commission's petition for**

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

17 **appointment of receiver.**

18 **3. When the commission files its petition for appointment of receiver in the circuit**
19 **court, it shall attach to its petition an official copy of its determination under subsection**
20 **1 of this section. The commission shall not file such action until its determination under**
21 **subsection 1 of this section is final and unappealable.**

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

43 [3.] **5.** The court [shall] after hearing [determine whether to] **may** grant the petition.
44 Where the defendant is in default, the court shall mail to the defendant at its last known address
45 by certified mail with a request for return receipt and with directions to deliver to the addressee
46 only, a notice informing the defendant of the judgment and the date it was entered. A receiver
47 appointed pursuant to this section shall be a responsible person, partnership, or corporation
48 knowledgeable in the operation of utilities.

49 [4.] **6.** The receiver shall give bond, and have the same powers and be subject to all the
50 provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the
51 law providing for suits by attachment. The receiver shall operate the utility so as to preserve the
52 assets of the utility and to serve the best interests of its customers. The receiver shall be

53 compensated from the assets of the utility in an amount to be determined by the court **with the**
54 **assistance of the commission staff. Any receiver or interim receiver appointed under this**
55 **section shall be immune from personal liability for any civil damages arising from acts**
56 **performed in his or her official capacity. The immunity shall extend only to such actions**
57 **for which the receiver or interim receiver would not otherwise be liable but for his or her**
58 **affiliation with the utility. This immunity shall not apply to intentional conduct, wanton**
59 **or willful conduct, or gross negligence. Nothing in this subsection shall be construed to**
60 **create or abolish an immunity in favor of the utility itself.**

61 [5.] 7. Control of and responsibility for the utility shall remain in the receiver until the
62 utility can, in the best interests of its customers, be returned to the owners. [If] **However, if the**
63 **commission or another interested party petitions and the court determines after hearing that**
64 **control of and responsibility for the utility should not, in the best interests of its customers, be**
65 **returned to the owners, [the receiver shall proceed to] the court shall direct the receiver to**
66 **transfer by sale or liquidate the assets of the utility in the manner provided by law.**

67 6. The appointment of a receiver **or interim receiver** shall be in addition to any other
68 remedies provided by law.

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

2 (1) **"Capable public utility", a public utility that regularly provides the same type**
3 **of service as a small water corporation or a small sewer corporation to eight thousand or**
4 **more customer connections, that is not an affiliated interest of a small water corporation**
5 **or a small sewer corporation and which provides safe and adequate service;**

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

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

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

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

14 (1) **That the small water or sewer corporation is in violation of statutory or**
15 **regulatory standards including but not limited to the Public Service Commission Law, the**
16 **Clean Water Law, the federal Safe Drinking Water Act, as amended, and the regulations**
17 **adopted thereunder, that affect the safety and adequacy of the service provided by the**
18 **small water or sewer corporation; or**

19 (2) **That the small water or sewer corporation has failed to comply within a**
20 **reasonable period of time with any order of the department or the commission concerning**

21 the safety and adequacy of service including but not limited to the availability of water, the
22 potability of water, the palatability of water, the provision of water at adequate volume
23 and pressure, the prevention of discharge of untreated or inadequately treated sewage to
24 the waters of the state, and the prevention of environmental damage; or

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

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

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

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

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

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

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

44 (3) The appointment of a receiver to assure the provision of safe and adequate
45 service and facilities to the public;

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

48 (5) The acquisition of the small water or sewer corporation by a municipality, a
49 municipal authority, or a cooperative.

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

54 5. In making a determination under subsection 2 of this section the commission
55 shall consider:

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

57 corporation;

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

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

65 (4) The potential for expansion of the certificated service area of the small water
66 or sewer corporation to be acquired; and

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

70 6. Subsequent to the determination required under subsection 2 of this section the
71 commission shall issue an order for the acquisition of a small water or sewer corporation
72 by a capable public utility. Such order shall provide for the extension of the certificated
73 service area of the acquiring capable public utility.

74 7. The price for the acquisition of a small water or sewer corporation shall be
75 determined by agreement between the small water or sewer corporation and the acquiring
76 capable public utility, subject to a determination by the commission that the price is
77 reasonable. If the small water or sewer corporation and the acquiring capable public
78 utility are unable to agree on the acquisition price or the commission disapproves the
79 acquisition price the utilities agreed to the commission shall issue an order directing the
80 acquiring capable public utility to acquire the small water or sewer corporation at an
81 acquisition price that is equal to the ratemaking rate base as determined by the commission
82 after notice and hearing. The burden of establishing the ratemaking rate base shall be
83 upon the small water or sewer corporation.

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

93 **9. Upon the acquisition of a small water or sewer corporation by a capable public**
94 **utility, and approval by the commission of a plan for improvements submitted under**
95 **subsection 8 of this section, the acquiring capable public utility shall not be liable for any**
96 **damages beyond the amount of fifty thousand dollars, including a maximum amount of five**
97 **thousand per incident, if the cause of those damages is proximately related to identified**
98 **violations of applicable statutes or regulations by the small water or sewer corporation.**
99 **This subsection shall not apply:**

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

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

103 **(3) If, within sixty days after receipt of notice of the proposed plan for**
104 **improvements, the department submitted written objections to the commission and those**
105 **objections have not subsequently been withdrawn.**

106 **10. Upon approval by the commission of a plan for improvements submitted under**
107 **subsection 8 of this section and the acquisition of a small water or sewer corporation by a**
108 **capable public utility, the acquiring capable utility shall not be subject to any enforcement**
109 **actions by state or local agencies that had notice of the plan, if the basis of such**
110 **enforcement action is proximately related to identified violations of applicable statutes or**
111 **regulations by the small water or sewer corporation. This subsection shall not apply:**

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

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

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

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

121 **11. The commission shall if it orders such acquisition require the acquiring capable**
122 **public utility to implement and revise quarterly thereafter a rate surcharge to be applied**
123 **to the rates of the small water or sewer corporation or of both the acquiring capable public**
124 **utility and the small water or sewer corporation as determined by the commission that**
125 **would recover on a current basis all costs of such acquisition and of needed improvements**
126 **to the small water or sewer corporation's system. Such surcharge may be designed to**
127 **recover one hundred per cent of the revenues necessary to provide a net after-tax return**
128 **on investment actually made in the acquisition and improvement of the small water or**

129 sewer corporation, at a rate of return equivalent to that authorized for the acquiring
130 capable public utility in its last general rate proceeding. The commission shall not later
131 than the effective date of this subsection promulgate rules to carry out the purposes of this
132 subsection. Any rule or portion of a rule, as that term is defined in section 536.010, RSMo,
133 that is created under the authority delegated in this subsection shall become effective only
134 if it complies with and is subject to all of the provisions of chapter 536, RSMo, and, if
135 applicable, section 536.028, RSMo. This subsection and chapter 536, RSMo, are
136 nonseverable and if any of the powers vested with the general assembly under chapter 536,
137 RSMo, to review, to delay the effective date, or to disapprove and annul a rule are
138 subsequently held unconstitutional, then the grant of rulemaking authority and any rule
139 proposed or adopted after August 28, 2004, shall be invalid and void.

140 12. Proceedings under this section may be initiated by complaint filed by the staff
141 of the commission, the office of the public counsel, the mayor or the president or chair of
142 the board of aldermen, or a majority of the council, commission or other legislative body
143 of any city, town, village or county within which the alleged unsafe or inadequate service
144 is provided, or by not less than twenty-five consumers or purchasers, or prospective
145 consumers or purchasers of the utility service provided by a small water or sewer
146 corporation. The complainant shall have the burden of proving that the acquisition of the
147 small water or sewer corporation would be in the public interest and in compliance with
148 the provisions of this section.

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

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