

FIRST REGULAR SESSION

HOUSE BILL NO. 758

93RD GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVE SCHAD.

Read 1st time March 9, 2005 and copies ordered printed.

STEPHEN S. DAVIS, Chief Clerk

2011L.011

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Section A. Section 393.145, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 393.145 and 393.146, to read as follows: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

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

16 **the assets of the utility. The interim receiver shall be compensated in an amount to be**
17 **determined by the commission. The interim receiver shall serve until a judgment on a**
18 **petition for writ of review of the commission's order, if any, is final and unappealable, and**
19 **until the circuit court thereafter determines under subsection 5 of this section whether to**
20 **grant the commission's petition for appointment of receiver.**

21 **3. When the commission files its petition for appointment of receiver in the circuit**
22 **court, it shall attach to its petition an official copy of its determination under subsection**
23 **1 of this section. The commission shall not file such action until its determination under**
24 **subsection 1 of this section is final and unappealable.**

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

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

52 of utilities.

53 [4.] **6.** The receiver shall give bond, and have the same powers and be subject to all the
54 provisions, as far as they may be applicable, enjoined upon a receiver appointed by virtue of the
55 law providing for suits by attachment. The receiver shall operate the utility so as to preserve the
56 assets of the utility and to serve the best interests of its customers. The receiver shall be
57 compensated from the assets of the utility in an amount to be determined by the court **with the**
58 **assistance of the commission staff. Any receiver or interim receiver appointed under this**
59 **section shall be immune from personal liability for any civil damages arising from acts**
60 **performed in his or her official capacity for actions the receiver or interim receiver would**
61 **not otherwise be liable except for his or her affiliation with the utility. This immunity shall**
62 **not, however, apply to intentional conduct, wanton or willful conduct, or gross negligence.**
63 **Nothing in this subsection shall be construed to create or abolish an immunity in favor of**
64 **the utility itself.**

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

71 [6.] **8.** The appointment of a receiver **or an interim receiver** shall be in addition to any
72 other remedies provided by law.

73 **9. In lieu of the payments to the public school fund of the state of Missouri provided**
74 **for in section 386.600, RSMo, penalties for violations of the public service commission law**
75 **or related commission regulations that are collected from a sewer or water corporation that**
76 **has been placed in receivership under the provisions of this section, or for which the**
77 **commission has appointed an interim receiver under the provisions of this section, may,**
78 **upon the order of the court that imposed the penalties, be used to support the operation**
79 **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:

- 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 more than eight
4 thousand customer connections, that is not an affiliate of a small water corporation or a
5 small sewer corporation, and that 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, after providing notice and an opportunity to be heard, the
13 commission determines:

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

45 public utilities; and

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

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

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

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

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

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

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

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

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

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 to which the utilities agreed, the commission shall issue an order directing
80 the 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, or providing that the acquiring capable public utility will not be
83 allowed to earn a rate of return on the portion of the purchase price that is in excess of the
84 ratemaking rate base determined by the commission after notice and hearing. The burden
85 of establishing the ratemaking rate base shall be upon the small water or sewer
86 corporation.

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

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

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

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

115 **(1) Beyond the end of the timetable in the plan for improvements;**
116 **(2) Whenever the acquiring capable public utility is not in compliance with the plan**

117 for improvements;

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

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

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

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

147 13. The notice required by subsection 2 of this section, or any other provision of
148 this section, shall be served upon the small water or sewer corporation affected, the office
149 of the public counsel, the department, all proximate public utilities providing the same type
150 of service as the small water or sewer corporation, all proximate municipalities and
151 municipal authorities providing the same type of service as the small water or sewer
152 corporation, and the municipalities served by the small water or sewer corporation. The

153 commission also shall order the affected small water or sewer corporation to provide notice
154 to its customers of the initiation of proceedings under this section in the same manner in
155 which the utility is required to notify its customers of proposed general rate increases.

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

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

170 **16. The commission shall, not later than the effective date of this section, initiate**
171 **a rulemaking to promulgate rules to carry out the purposes of this section. Any rule or**
172 **portion of a rule, as that term is defined in section 536.010, RSMo, that is created under**
173 **the authority delegated in this section shall become effective only if it complies with and**
174 **is subject to all of the provisions of chapter 536, RSMo, and, if applicable, section 536.028,**
175 **RSMo. This section and chapter 536, RSMo, are nonseverable and if any of the powers**
176 **vested with the general assembly pursuant to chapter 536, RSMo, to review, to delay the**
177 **effective date, or to disapprove and annul a rule are subsequently held unconstitutional,**
178 **then the grant of rulemaking authority and any rule proposed or adopted after August 28,**
179 **2005, shall be invalid and void.**