

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE OUCC'S REQUEST FOR) CAUSE NO. 44262
INVESTIGATION OF THE UTILITY OPERATIONS)
OF CENTURIAN CORPORATION AND MTA, LLC.) APPROVED:

JUL 31 2013

ORDER OF THE COMMISSION

Presiding Officers:

James D. Atterholt, Chairman

Jeffery A. Earl, Administrative Law Judge

On October 26, 2012, the Indiana Office of Utility Consumer Counselor ("OUCC") filed its petition with the Indiana Utility Regulatory Commission ("Commission") in this matter. On December 20, 2012, the Commission held a Prehearing Conference and Preliminary Hearing, during which the Presiding Officers granted the Petition to Intervene filed by the Indiana State Department of Health ("ISDH") and the Indiana Department of Environmental Management ("IDEM") (collectively "Intervenors").

On February 18, 2013, the OUCC prefiled the direct testimony and exhibits of Margaret A. Stull, Senior Analyst in the OUCC's Water/Wastewater Division, and Scott A. Bell, Director of the OUCC's Water/Wastewater Division. Neither Centurian Corporation ("Centurian"), MTA, LLC ("MTA")¹, nor Intervenors prefiled any evidence in this Cause. On December 19, 2012, and January 10, 2013, the Presiding Officers issued Tender of Communication docket entries that contained communications the Commission received from interested members of the public. On March 4, 2013, the Presiding Officers issued a docket entry allowing members of the public to file written comments in this case. On April 1, 2013, the OUCC filed the written public comments it had received.

Pursuant to notice given and published as required by law, the Commission held an evidentiary hearing in this Cause at 10:30 a.m. on May 1, 2013 in Hearing Room 222, 101 West Washington Street, Indianapolis, Indiana. The OUCC and Intervenors appeared and participated in the hearing. Respondents appeared and participated in the hearing without counsel. Evidence offered by the OUCC, Respondents, and Intervenors was admitted into the record. Interested members of the public attended the hearing, but did not seek to testify.

On June 20, 2013, the OUCC filed a Verified Motion to Reopen the Record and Request for Abbreviated Response Time to this Motion. On June 28, 2013, the OUCC filed a Second Verified Motion to Reopen the Record. These motions will be addressed below.

Based on the evidence presented and the applicable law, the Commission finds:

¹ Throughout this Order, Centurian and MTA are collectively referred to as "Respondents."

1. **Notice and Commission Jurisdiction.** Notice of the hearings in this Cause was given and published as required by law. Centurian is an investor-owned utility that holds a Certificate of Territorial Authority (“CTA”) from the Commission to provide sewage disposal service to customers in the Fox Chase Farms subdivision (“Fox Chase”) in rural Porter County, Indiana. MTA is a limited liability corporation owned by Mr. Richard Ostergren that currently owns the sewage utility’s physical and real property.

Under Ind. Code § 8-1-30-3, the Commission may, after a request by the OUCC, review a water or sewer utility’s operations, including: technical, financial, and managerial capacity; physical condition and capacity of the utility company’s plant; compliance with Indiana or federal law or the Commission’s orders; and provision of service to customers. Therefore, the Commission has jurisdiction over Respondents and the subject matter of this proceeding.

2. **Background and Relief Requested.** In the August 30, 1995 Order in Cause No. 40157, the Commission issued a CTA to Fox Chase Utility Company, LLC, to provide sewage disposal service to customers in Fox Chase. In the August 15, 2001 Order in Cause No. 41741, the Commission approved a transfer of the CTA to Centurian. At that time, John Curley was the President of Centurian. In 2004, Richard Ostergren purchased all of the stock of Centurian Corporation. In December 2005, Mr. Ostergren contracted Radtke & Associates (“Radtke”) to operate the utility. In 2008, Mr. Ostergren transferred all of Centurian’s real property to MTA without Commission approval. On April 24, 2008, the Indiana Secretary of State administratively dissolved Centurian.

On August 6, 2011, ISDH issued an Emergency Order to Abate, citing various violations that resulted in sewage discharge and ponding. On January 11, 2012, the Indiana Attorney General’s Office filed a Verified Complaint for Preliminary and Permanent Injunction in the Porter County Superior Court to enforce the Emergency Order to Abate.

The OUCC asserts that the utility is not being operated properly and that MTA is operating the utility without a CTA. As a result, the OUCC requests that the Commission initiate an investigation for the purpose of assuring compliance with Commission orders, remediation of severe deficiencies, and the provision of reasonable adequate sewage disposal service.

3. **OUCC’s Evidence.** Mr. Bell testified about severe deficiencies that the utility has failed to remedy and Centurian’s failure to provide reasonable and adequate service. He provided documents and photographs that showed deficiencies in service beginning in at least April of 2011, including ponding sewage and sand mound failures. Mr. Bell noted that both ISDH and the Porter County Superior Court have issued orders requiring the utility to abate any public health hazards. Mr. Bell said that the utility has failed to fully comply with these orders. Mr. Bell also testified that both Mr. Ostergren and Gary Radtke, President of Radtke, have admitted that the utility has severe deficiencies. Mr. Bell presented several customer complaints and testimonials that show improper maintenance procedures, long response times by the utility to service requests, and improper requests made by the utility to its customers for funding and clean up assistance. Mr. Bell recommended that

the Commission find that the utility has severe deficiencies and has failed to provide reasonable and adequate service to its customers.

Mr. Bell also testified about the transfer of utility assets from Centurion to MTA, LLC without Commission approval and MTA's provision of service without a CTA. Mr. Bell noted that in 2008 Mr. Ostergren transferred the utility's real property from Centurion to MTA, LLC. Mr. Bell testified that when the Commission became aware of this transfer, it recommended that the assets be transferred back to Centurion, and requested that the utility contact the Commission to explain the transfer. Mr. Bell stated that in his understanding, the utility had not complied with the Commission recommendation. Mr. Bell recommended the Commission find that the utility assets were transferred without Commission approval and that therefore MTA is operating without a CTA. Due to the ongoing and continuing nature of the violations, Mr. Bell recommended that the Commission find that MTA lacks the managerial, financial, and technical capacity to operate the wastewater utility and that the Commission either provide for the acquisition of the utility or the appointment of a receiver.

Ms. Stull also discussed MTA's lack of managerial, financial, and technical capacity to operate the wastewater utility. Ms. Stull identified several areas of concern, including: MTA's operating agreement with Radtke; Radtke's accounting methods, records, and oversight; required IURC filings; and MTA's tax filings.

Ms. Stull noted the highly unusual nature of the Operating Agreement between Radtke and Centurion. Ms. Stull said that the Operating Agreement lacks termination procedures, a clear allocation of responsibilities, and a billing rate or fee schedule. Ms. Stull is also concerned that the parties are not complying with the Operating Agreement. As an example, she said that Mr. Radtke had not filed monthly reports required by the Agreement and Mr. Ostergren had failed to enforce the reporting requirement.

Ms. Stull testified about multiple deficiencies with the accounting methods and records of the utility. She noted that records have not been properly separated between the utility and Radtke and that the methods used for accounting transactions have been inconsistent from year to year. Ms. Stull testified that because of Radtke's inadequate invoicing practices there is no way to know the specific costs incurred by the utility, which leads to inaccurate financial statements. Ms. Stull also noted problems that arose with the utility's bank accounts, such as four thousand dollars in overdraft fees since 2006 and undocumented cash withdrawals after Mr. Radtke obtained a debit card in 2012.

Finally Ms. Stull testified to several tax issues facing the utility. She first noted that the utility did not file either state or federal income tax returns from 2007 to 2011. Ms. Stull said that tax returns should have been filed regardless of whether the utility had a profit. She also pointed out that the utility is currently delinquent on both its personal property and real estate taxes and owes over twenty-six thousand dollars after interest and collection charges. Due to these issues, Ms. Stull testified that she believed that MTA lacks the managerial, financial, and technical capacity to operate

the wastewater utility. Ms. Stull recommended that the Commission find that MTA lacks the managerial, financial, and technical capacity to operate the waste water utility.

4. Evidence Adduced at the Hearing.

A. OUCC. Mr. Bell testified that he did not personally visit the system, but reviewed the extensive reports from ISDH and IDEM. Mr. Bell summarized the most critical problems with the system. Mr. Bell said that Mr. Ostergren has not made necessary capital improvements to the system and that Mr. Ostergren claims he does not have the funds to invest in capital improvements. Mr. Bell indicated that the utility has asked its ratepayers to contribute to the system. Mr. Bell testified that he does not think this is appropriate behavior from an investor-owned utility. Mr. Bell said that he believes appointment of a receiver to take over the utility is the best solution in this case.

Ms. Stull provided additional detail about the utility's finances. Ms. Stull personally reviewed the utility's books during an on-site visit. She testified that she saw intermingling of funds between the utility's account and Radtke's accounts, but that Radtke has recently done a better job of separating the accounts. Ms. Stull said that by order of the county court, only certain expenses can be paid with utility funds without pre-approval by the court, for example property taxes and insurance payments. Specifically, Mr. Radtke must get court approval for any payments to himself or his company.

Ms. Stull said that because of the comingling of funds and poor accounting, it is difficult to determine the utility's actual expenses. For example, Ms. Stull said that a few years ago, Mr. Radtke used personal or Radtke company funds to make repairs to the system and then reimbursed himself out of ratepayer funds. These reimbursements were recorded as operating expenses. Ms. Stull testified that the utility is currently delinquent in the payment of taxes and is at risk of being sold in a tax sale. Ms. Stull testified that she believes the comingling of utility funds with Radtke funds was the result of poor business practices rather than an intentional misappropriation of funds. She did not think there was intent to purposefully misrepresent financial transactions, just a lack of utility accounting experience.

B. Respondents. Mr. Ostergren testified that he attempted to run the utility himself for the first year or two but had problems with non-payment from residents. Therefore, he hired Radtke to operate the utility and collect the rates and charges. Mr. Radtke said that he has not earned any return or income from the utility, the corporation has not earned a profit, and he has not invested personal funds into the utility – although he said that he has donated equipment and time to help complete repairs.

Mr. Ostergren testified that the utility's annual operating income is approximately \$68,640. The funds from ratepayers are deposited into a checking account set up for the utility by Mr. Radtke, and Mr. Ostergren does not have direct access to those funds. Mr. Ostergren does not believe the utility currently has any cash on hand. Mr. Ostergren testified that in the past he did not personally

review the utility's books and records, he simply relied on verbal reports from Mr. Radtke. However, the county court has now ordered Radtke to produce monthly written reports that Mr. Ostergren reviews.

Mr. Ostergren testified that he does not know which company currently holds a CTA for the utility and that he doesn't really understand what a CTA is. Mr. Ostergren did not know when he acquired the utility that he had to seek Commission approval to transfer utility assets to another company, but he knows that now. He said that MTA currently owns the utility's physical and real property.

Mr. Ostergren testified that the major problem with the system is that the septic mounds are failing. Mr. Ostergren admitted that he does not have the operational expertise to run the utility, which is why he hired Radtke.

Although he is not formally a party to this case, Mr. Radtke agreed to testify under oath during the evidentiary hearing. Mr. Radtke laid out some of the utility's expenses, including: \$6,000 per month for Radtke's operator bill; \$1,000 per month for pump replacements; \$700 per month for pump and haul to comply with the county court order. Mr. Radtke estimated the utility's current annual income to be approximately \$81,600. With respect to use of utility funds for personal or business expenses, Mr. Radtke said that he understands that was wrong and intends to repay the money to the utility, although he could not give a date by which this might happen.

Mr. Radtke described the current state of the system. He said that the septic tanks, effluent pumps, and collection system are all in good condition. Major repairs to the collection system were made about a year ago, and the utility has experienced some problems with pumps needing to be replaced. He testified that the major problems are the sand mounds. There are four mounds with a total of eight cells, however, only four of the cells are currently functioning. Thus, the sand mounds do not have sufficient time to percolate the waste and it backs up onto the ground and into the system. Mr. Radtke does not believe the current system has the capacity to serve all of the utility's customers even if it was operating properly.

C. **Intervenors.** David Ortell, Environmental Scientist for ISDH testified that he has visited the system several times in the past year. He believes that the system cannot be sufficiently repaired in its current condition and that pumping and hauling individual septic tanks is not adequate to prevent sewage discharge to the surface from the system. Mr. Ortel presented several photographs from his report showing pooled sewage and the condition of the system.

5. **Commission Discussion and Findings.** Ind. Code § 8-1-30-3, allows the Commission to conduct a review of a utility's operations when requested by the OUCC. Our review may include the following: the utility's technical, financial, and managerial capacity; the physical condition and capacity of the system; compliance with Indiana or federal law or the commission's orders; and provision of service to customers. Ind. Code § 8-1-30-3(a). If, after a review under Ind. Code § 8-1-30-3, the Commission finds that the utility has severe deficiencies that the utility has

failed to remedy, the Commission may move to proceedings under Ind. Code § 8-1-30-5 to provide for the acquisition of the utility or for the appointment of a receiver.

A. **Technical, Financial, and Managerial Capacity.** Based on the evidence presented, we find that Respondents have severe deficiencies with respect to the technical, financial, and managerial capacity to operate the utility. Mr. Ostergren admitted that he does not have operational expertise to operate the system, and displayed an almost complete lack of knowledge about how the system works or what its problems are. Similarly, Mr. Ostergren has completely abdicated his managerial responsibility, allowing Mr. Radtke to make all decisions and to have complete control over the utility with little or no oversight. Mr. Ostergren does not have access to the utility's bank account, did not review the utility's accounting records, and did not know the utility's current financial state. In addition, Ms. Stull testified that it is very difficult to deduce the utility's actual expenses and revenues due to the poor accounting records and the comingling of utility funds with Radtke funds.

B. **Physical Condition and Capacity of the Plant.** Based on the evidence presented, we find that Respondents have severe deficiencies with respect to the physical condition and capacity of the utility plant. Intervenors and the OUCC presented a great deal of evidence documenting the fact that the utility system is in a near complete state of failure. Sewage is backing up to the surface and ponding in numerous areas throughout the neighborhood. Mr. Radtke testified that he does not believe the utility system is sufficient to serve the existing customers even if it was operating properly. Mr. Ortel agreed with this statement and testified that the utility is incapable of being sufficiently repaired in its current state to function properly.

C. **Compliance with Indiana or Federal Law or the Commission's Orders.** Based on the evidence presented, we find that Respondents are not compliant with Indiana Law, the orders of the county court, or the Commission's statutes and rules. Mr. Ostergren improperly transferred all of the assets of the utility to MTA without Commission approval, and MTA is currently operating the utility without a CTA. In addition, the evidence shows numerous public health violations and non-compliance with orders to abate from Intervenors and the county court.

D. **Provision of Service to Customers.** Based on the evidence presented, we find that the Respondents have severe deficiencies with respect to its provision of service to its customers. The record contains many letters and emails from customers to the utility, to Radtke, and to the Commission complaining about inadequate service, sewage backup, septic failures, and responsiveness to service calls. These letters also support our findings above regarding the physical condition and capacity of the system and make clear that Respondents are not providing reasonable service to their customers.

Although Respondents presented some evidence supporting their attempt to bring the system into compliance and to seek possible solutions to the utility's problems, these efforts have been far too few and come far too late. Indeed, most of Respondents efforts began only after the county court issued an order demanding that they occur. Therefore, in light of our discussion above we find that

the Respondents have severe deficiencies that they have failed to remedy, and we conclude that this case should proceed to hearing on receivership under Ind. Code § 8-1-30-5.

6. **Hearing on Acquisition or Receivership.** An evidentiary hearing on the issue of the acquisition of the utility or the appointment of a receiver in this Cause shall be held at 9:30 a.m. on August 16, 2013, in Hearing Room 224, 101 West Washington Street, Indianapolis, Indiana.

In accordance with Ind. Code § 8-1-30-5(c), the Commission shall provide notice of the hearing to the following: Respondents; other utility companies in Indiana; and appropriate public agencies and political subdivisions, including all municipalities, located in utility's service territory. On June 28, 2013, the OUCC filed its Second Verified Motion to Reopen the Record, which identified a potential receiver, Mr. John R. Marshall. Therefore, the Commission shall also provide notice of the hearing to Mr. Marshall.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. An evidentiary hearing on the issue of the acquisition of the utility or the appointment of a receiver in this Cause shall be held on August 16, 2013 at 9:30 a.m. in Room 224 of the PNC Center, 101 West Washington Street, Indianapolis, Indiana.

2. This Order shall be effective on and after the date of its approval.

ATTERHOLT, BENNETT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: JUL 31 2013

I hereby certify that the above is a true and correct copy of the Order as approved.



Brenda A. Howe
Secretary to the Commission