

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

In the Matter of Delmer Towns d.b.a. Towns)
Riverview to Show Cause Whether it Should)
Not be Required to Obtain a Certificate of) Docket No. 20-DTRW-120-SHO
Convenience and Necessity to Operate as a)
Potable Water Public Utility.)

MOTION FOR EMERGENCY RELIEF PURSUANT TO K.S.A. 77-536

The Staff of the State Corporation Commission of the State of Kansas (“Staff” and “Commission” respectively) hereby moves the Commission for an emergency order 1) declaring Delmer Towns d.b.a. Towns Riverview (“Towns Riverview”) a public utility subject to Commission jurisdiction; 2) requiring Towns Riverview to begin complying with ten listed directives enumerated below and detailed in Staff’s Report and Recommendation (“Report”), which is attached hereto as **Attachment A** and incorporated herein by reference; and 3) imposing civil penalties against Towns Riverview in the amount of \$370,400 for violation of K.S.A. 66-131 and K.S.A. 66-117 since at least April 20, 2010. In support of its Motion, Staff states the following:

I. BACKGROUND

1. In March 2019, the Kansas Department of Health and Environment (KDHE) required Towns Riverview to cease using its water wells to serve the customers of Towns Riverview due to water quality concerns.¹ As a result of the cessation, Towns Riverview began purchasing water for its customers from the City of Garden City, Kansas.

¹ Staff R&R at 4, (Jun. 10, 2020).

2. In June 2019, Staff received its first inquiry from a Towns Riverview customer regarding the company's public utility status, concerns with the cost of the water, and fluctuating delivery pressure.²

3. On September 26, 2019, the Commission issued its Show Cause Order directing Towns Riverview to show cause as to why it should not be required to file an application for a Certificate of Convenience and Necessity pursuant to K.S.A. 66-131. As part of the Show Cause Order, Towns Riverview was directed to file certain accounting information to allow Staff to begin its investigation into the reasonableness of the company's water rates.³ The Order provided Towns Riverview thirty (30) days from the date of the Order to respond.⁴

4. Staff's August 22, 2019, Report and Recommendation ("August 2019, Report") which was incorporated into the Commission's Show Cause Order, explained that based on conversations with Mr. Delmer Towns, the owner of Towns Riverview, he supplies water service to 232⁵ retail customers.⁶ Further evidence suggests that Mr. Towns has been operating this water distribution system since at least 1975, and Staff found no record of Mr. Towns applying for or receiving a Certificate of Convenience and Necessity (COC) to operate as a water utility, or seeking approval of rates or charges associated with the provisioning of water service.⁷

5. On December 2, 2019, Towns Riverview responded to the Show Cause Order acknowledging the fact it was operating a water utility and that it was unaware of the statutory requirement to obtain a COC. The response further stated that it would cooperate and assist in the Commission's process moving forward.⁸

² *Id.* at 4.

³ Docket No. 20-DTRW-120-SHO, *Show Cause Order*, ¶ B (issued Sept. 26, 2019).

⁴ *Id.* at ¶ A.

⁵ The customer count was later determined to be 232 customers instead of the previous estimate of 270.

⁶ August 22, 2019, Staff R&R, at 2.

⁷ *Id.*

⁸ Towns Riverview Response to Order to Show Cause, at 3, (Dec. 2, 2019).

6. On December 27, 2019, Staff received from Mr. Towns' accountant part of the accounting information the Commission directed Towns Riverview to provide to Staff as part of the Show Cause Order.

7. On January 9, 2020, in an email from Mr. Towns' attorney, Mr. Towns conceded that Towns Riverview is a public utility subject to the Commission's jurisdiction. A copy of that email is attached hereto as **Attachment B** and incorporated herein by reference.⁹

8. On January 31, 2020, Staff sent Mr. Towns a letter and packet of information with seven attachments. The letter and attachments explained step-by-step to Mr. Towns the process he needs to undertake to file an Application for a Certificate of Convenience and Necessity pursuant to K.S.A. 66-131. The letter also included a request for additional information Staff needed to better analyze Mr. Towns' public utility rates and service. The letter further suggested that Mr. Towns hire a regulatory attorney to assist him through the process. To Staff's knowledge, Mr. Towns retained a regulatory attorney, but made no steps to filing an application, nor has he provided Staff with any of the additional information requested in the January 31, 2020, letter.

9. On April 20, 2020, the KDHE issued a boil water advisory for Towns Riverview because the company could not maintain 20 psi minimum pressure in the water system, creating a health hazard for its customers.¹⁰

10. On May 8, 2020, KDHE issued an emergency order in KDHE Docket No. 20-E-008 BOW, directing Towns Riverview to perform certain tasks and fining Towns Riverview ten-

⁹ Attachment B at 3.

¹⁰ See, Attachment A, Staff Report, Staff Exhibit 1. Potable drinking water is required to be maintained at 20 psi, anything less is considered unsafe to drink.

thousand dollars (\$10,000).¹¹ That order is attached to Staff's Report. Towns Riverview has contested that order and a hearing was set for June 17, 2020.

11. Since KDHE's emergency order, Staff and KDHE have received multiple calls from Towns Riverview customers complaining of erratic or nonexistent water pressure, leaving many with the inability to drink water, bathe, cook or use the restroom.¹² Further, KDHE conducted an on-site inspection and observed five customer addresses with less than 4 psi of water pressure on two occasions.¹³

II. STAFF'S EMERGENCY MOTION

12. Pursuant to K.S.A. 77-536(a), a state agency may use emergency proceedings in situations involving an immediate danger to the public health, safety or welfare, and requiring immediate state agency action. Staff is concerned for the welfare of Towns Riverview customers due to the quality and pressure issues associated with the water service being provided by Towns Riverview. Staff contends that Towns Riverview is at the very least not providing sufficient and efficient service to its customers by distributing unsafe, and in some cases nonexistent, water service.

TOWNS RIVERVIEW IS A PUBLIC UTILITY

13. Based on the admissions made by Towns Riverview as to its status as a public utility, Staff requests the Commission declare Towns Riverview to be a public utility subject to Commission jurisdiction pursuant to K.S.A. 66-104.¹⁴ To be clear, Staff is not recommending that the Commission certificate Towns Riverview at this time, but rather acknowledge the fact

¹¹ *Id.* Staff Exhibit 2, KDHE emergency order.

¹² *Id.* at 2.

¹³ *Id.* at 1.

¹⁴ *Id.* at 3.

that Towns Riverview is providing a public utility service in contravention of the requirements K.S.A. 66-101 et. seq.

14. As discussed in Staff's August 2019 Report and reflected in the Commission's Show Cause Order, the evidence gathered suggested that Towns Riverview is a public utility, as defined in K.S.A. 66-104,¹⁵ and has been operating without a COC since April 20, 2010,¹⁶ contrary to K.S.A. 66-131, and charging non-tariffed rates to its retail customers, contrary to K.S.A. 66-117. With the subsequent admissions from the company, there remains no question as to Towns Riverview's status as a public utility subject to the Commission's jurisdiction. However, the question of whether Towns Riverview is qualified to be certificated under the Commission's standards as a public utility is a separate discussion.

15. The Commission has full power, authority, and jurisdiction to supervise and control public utilities and is empowered "to do all things necessary and convenient for the exercise of such power, authority and jurisdiction."¹⁷

TOWNS RIVERVIEW MUST COMPLY WITH CERTAIN DIRECTIVES TO PROVIDE SUFFICIENT AND EFFICIENT SERVICE

¹⁵ K.S.A. 66-104(a) provides in pertinent part that "[t]he term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, and all companies for the production, transmission, delivery or furnishing of heat, light, water or power."

¹⁶ On page 3 of Staff's Report (Attachment A), Staff notes that Towns Riverview began operating its water utility service in 1975, but at least a portion of the water system was governed by the Towns Riverview Home Owners Association (HOA), which would qualify the HOA portion of the system as private. However, on April 20, 2010, an amendment was made to the bylaws of the HOA to eliminate the provisions giving the HOA oversight of the water distribution system, thereby making that portion of the system a public utility. Therefore, Staff contends Towns Riverview has operated the entire water system as an investor-owned public utility (IOU) subject to Commission oversight since 2010, at a minimum. Staff does not know when Towns Riverview began serving the mobile home park south of the area included in the HOA, but believes it is possible that the southern portion of the distribution system was operated as an IOU well before 2010, and possibly dating back to 1975.

¹⁷ K.S.A. 66-101.

16. Pursuant to K.S.A. 66-1,232, every miscellaneous public utility¹⁸ governed by this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such miscellaneous public utility to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions and to make just and reasonable rules, classifications and regulations. The Commission shall have the power, after notice and hearing in accordance with the provisions of the Kansas administrative procedure act, to require all miscellaneous public utilities governed by this act to maintain reasonably sufficient and efficient service.

17. As mentioned in the Report, KDHE and Staff have heard from many Towns Riverview customers about the ongoing problems with their water service ranging from erratic water pressure to sometimes no water pressure at all.

18. Staff argues that sufficient and efficient service for a water utility would require such utility to provide, at minimum and among many other things, potable drinking water to its customers. However, just providing potable drinking water will not adequately satisfy the standard of sufficient and efficient service. Staff's review of Towns Riverview operations has led to the conclusion that the company is unable to provide sufficient and efficient service to its customers based on, but not limited to, the following operation and billing methodology issues:¹⁹

- System appears consistently to be unable to maintain 20 psi pressure;
- Lost and unaccounted for water is approximately 80% of the purchased volumes for the time frame and date reviewed by Staff;
- According to Mr. Towns and confirmed by customers, meters for many customers do not work or are not even installed;
- Aged piping is vulnerable to leaks. Staff has identified indications of six leaks on water mains within the month of May 2020.

¹⁸ K.S.A. 66-1,230. "Miscellaneous public utilities; definitions. As used in this act: (a) "Miscellaneous public utility" means any public utility, as defined in K.S.A. 66-104, and amendments thereto, which is not an electric public utility, telecommunications public utility, natural gas public utility, radio common carrier or common carrier."

¹⁹ Attachment A Staff Report at 5.

- Where meters exist, the meters are not read on a regular basis;
- Customers reading of meters is not enforced or properly recorded; and revenue and expenses for the utility operation are commingled with the financial information from other businesses operated by Towns.

19. Staff's Report recommends the Commission issue an Emergency Order requiring

Towns Riverview to take the following actions:²⁰

- Towns water system shall remain on a Boil Water Advisory until a rescind notice is issued by KDHE.
- Towns shall supply alternative water suitable for drinking, cooking, washing, and bathing to all customers until all requirements of the KDHE Emergency Order have been completed. Towns shall not apply additional charges to customers for the provisioning of this alternative water and shall keep records of the costs associated with the alternative water supply.
- Towns shall instruct all customers to curtail the watering of lawns, filling of pools, and all other extraneous usage of water that could place undue drawdown of available water pressure in the system until the Boil Water Advisory is lifted by KDHE. This instruction shall be delivered to each customer once per month along with an update on the status of required repairs being made to the system.
- Upon receipt of the Commission's Order, Towns shall acquire and install two continuously recording pressure charts tied directly to its water mains at two representative sites selected by KDHE on the southern and eastern extremities of the system. Data from the pressure recordings shall be submitted to Staff on a weekly basis until the construction projects required by KDHE are completed.
- Upon receipt of the Commission's Order, Towns shall install a meter that measures the quantity of water delivered to the mobile home section of the water distribution system. Volumes of water usage to the mobile home section shall be reported to Staff on a monthly basis.
- Towns shall initiate a meter installation/meter change out program to ensure each customer has an operable water meter by September of 2020.
- By July 15, 2020, Mr. Towns shall have a checking account for his personal use, a separate checking account for the water operations of Towns & Sons Enterprises, a separate checking for the excavation business, and a separate checking account(s) for any other businesses Mr. Towns has. The revenue collected from water ratepayers shall be

²⁰ *Id.* at 5.

deposited into the water company's checking account. All purchases and operating expenses associated with water operations shall be paid from the water company's checking account.

- h) Beginning August 1, 2020, Towns & Sons Enterprises shall implement and use the NARUC Uniform System of Accounts for small water utilities. Separate general ledger accounts shall be established for the customer service charge, revenue collected for water usage above the 5,000 gallon minimum, the cost of purchased water, the Water Protection Fee, and realized gains and losses related to the water operations of Towns & Sons Enterprises. Appropriate separate expense accounts shall be established to record the water operation expenses of Towns & Sons Enterprises. Appropriate balance sheet accounts shall be established for the partnership's assets, liabilities, and partner capital.
- i) Beginning July 1, 2020, a representative (either employee, partner, or independent contractor) of Towns & Sons Enterprises shall read the water meters each month. If no meter is present or the meter is not working, the billing account shall reflect that information.
- j) Beginning August 1, 2020, the water customer's monthly bill shall show:
 - i. Customer charge.
 - ii. Beginning and ending water meter readings along with the date the meter was read.
 - iii. Volume of water used stated in thousand gallons and any volumetric water charges.
 - iv. Water Protection Fee.
 - v. Other elements of a customer bill as required by the Commission's Billing Standards.²¹

REQUEST FOR PENALTY

20. Pursuant to K.S.A. 66-138, a water public utility that fails to perform any duty enjoined upon it, or fails, neglects or refuses to obey any lawful order made by the Commission, shall for every violation, failure or refusal, forfeit or pay to the state treasurer a sum of not less than \$100 and no more than \$1,000 for such offense.²²

21. Further, every day during which any such public utility or officer, agent or employee thereof, fails to comply with any order or direction of the Commission, or to perform

²¹ https://kcc.ks.gov/images/PDFs/pi/billing_2012.pdf

²² K.S.A. 66-138(a).

any duty required or enjoined by this act, shall constitute a separate and distinct violation of the provisions of this act.²³

22. Here, Towns Riverview has been operating in violation of the public utility act since approximately 1975 because it failed to seek and obtain certification as a public utility before providing service to its customers²⁴, and it has charged untariffed rates for the public utility service it provides.²⁵ While the clear language of the statutes indicates that Towns Riverview could be subject to penalties dating back decades for its violations of Commission statutes, rules, and regulations, Staff is requesting for civil penalties to apply as of April 20, 2010.²⁶ Therefore, as of June 10, 2020, Towns Riverview has been in violation of the Commission's Order for three thousand seven hundred and four days (3,704) days. Because each day constitutes a separate and distinct violation, this constitutes 3,704 separate violations. As such, Staff moves the Commission to impose a minimum civil penalty on Towns Riverview in the amount of one hundred dollars (\$100) per day beginning on April 20, 2010, totaling three hundred seventy thousand four hundred dollars (\$370,400).

23. Finally Staff asserts that it continues to investigate whether Towns will be capable of providing sufficient and efficient service in the future.²⁷ To date, Staff's investigation demonstrates that Towns Riverview is unqualified to be a certificated public utility at this time. If Towns Riverview continues to be unable to provide sufficient and efficient service, Staff recommends the Commission direct Towns Riverview to divest its water utility business to a buyer that is capable of providing the minimum requirement for potable water utility service.²⁸

²³ Id.

²⁴ K.S.A. 66-131.

²⁵ K.S.A. 66-117.

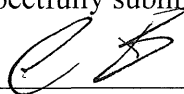
²⁶ Attachment A Staff Report at 5.

²⁷ Id. at 7.

²⁸ Id.

WHEREFORE, Commission Staff respectfully requests the Commission grant this motion; 1) declaring Towns Riverview a public utility subject to Commission jurisdiction; 2) require Towns Riverview to begin complying with ten listed directives enumerated in this motion and detailed in Staff's Report; and 3) to impose civil penalties against Towns Riverview in the amount of three hundred seventy thousand four hundred dollars (\$370,400) for its years of violating K.S.A. 66-131 and K.S.A. 66-117, and for any other relief the Commission deems just and reasonable.

Respectfully submitted,



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For Commission Staff

VERIFICATION

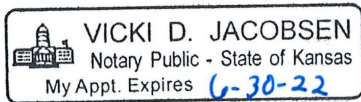
STATE OF KANSAS)
) ss.
COUNTY OF SHAWNEE)

Cole Bailey, of lawful age, being duly sworn upon his oath deposes and states that he is Litigation Counsel for the State Corporation Commission of the State of Kansas; that he has read and is familiar with the foregoing *Motion for Emergency Relief Pursuant to K.S.A. 77-536*, and attests that the statements therein are true and correct to the best of his knowledge, information and belief.



Cole Bailey, S. Ct. #27586
Litigation Counsel
The State Corporation Commission
of the State of Kansas

SUBSCRIBED AND SWORN to before me this 17th day of June, 2020.





Notary Public

My Appointment Expires: June 30, 2022

ATTACHMENT A

**REPORT AND RECOMMENDATION
UTILITIES DIVISION**

TO: Chair Susan Duffy
Commissioner Shari Feist Albrecht
Commissioner Dwight D. Keen

FROM: Ian Campbell, Regulatory Auditor
William Baldry, Senior Auditor
Leo M. Haynos, Chief Engineer
Justin Grady, Chief of Accounting and Financial Analysis
Jeff McClanahan, Director, Utilities Division

DATE: June 10, 2020

SUBJECT: Docket No. 20-DTRW-120-SHO: Recommendation to Issue Emergency Order
Addressing the Operational Deficiencies of the Towns Riverview Water
Distribution System

EXECUTIVE SUMMARY:

On September 26, 2019, the Commission issued an Order to Delmer Towns d.b.a. Towns Riverview (Towns) to Show Cause as to why Towns should not be required to file an application for a Certificate of Convenience and Necessity (COC) pursuant to K.S.A. 66-131. This Order considered Staff's Report and Recommendation (Report) filed on August 22, 2019, which explained that Towns operates a potable water utility service providing retail sales of water to approximately 270 residential customers¹.

Towns filed its Response to the Commission's Order on December 2, 2019. In its Response, Towns acknowledged operating a water utility and that it was unaware of the statutory requirement to obtain a COC. Towns stated it intended to cooperate fully with Staff to investigate the reasonableness of its current water rates and would provide Staff with financial documents referred to in the Commission's Order. On January 9, 2020, Towns through its counsel, notified Staff it did not contest Staff's contention that the water utility is a public utility subject to Commission jurisdiction. Towns also reiterated its willingness to cooperate with Staff in resolving this matter.

On April 20, 2020, the Kansas Department of Environment (KDHE) issued a Boil Order because Towns was unable to maintain 20 psi minimum pressure in the system. The Boil Order is

¹ The customer count was later determined to be 232 customers.

attached to this Report as Exhibit 1. On May 8, 2020, KDHE issued an Emergency Administrative Order to Towns directing certain tasks to be taken to provide safe potable water to its customers (see Exhibit 2). Since that time, KDHE has observed five customer addresses with less than 4 psi of water pressure on two occasions. Staff also has received calls from Towns customers complaining of erratic or nonexistent water pressure. Based on the information received from KDHE and customer calls, Staff contends that Towns is at the very least not providing sufficient and efficient service to its customers by distributing unsafe (and in some cases nonexistent) water service. Due to customer complaints, the KDHE reports on water quality and pressure, the COVID-19 pandemic, and the fact that we are entering into the summer months where the access to water becomes a heightened concern, Staff is concerned for the welfare of Towns customers. Therefore, Staff recommends the Commission issue an Emergency Order that finds Towns is a public utility and requires Towns to comply with the following directives:

1. Towns water system shall remain on a Boil Water Advisory until a rescind notice is issued by KDHE.
2. Towns shall supply alternative water suitable for drinking, cooking, washing, and bathing to all customers until all requirements of the KDHE Emergency Order have been completed. Towns shall not apply additional charges to customers for the provisioning of this alternative water and shall keep records of the costs associated with the alternative water supply.
3. Upon receipt of the Commission's Order, Towns shall instruct all customers to curtail the watering of lawns, filling of pools, and all other extraneous usage of water that could place undue drawdown of available water pressure in the system, if a KDHE Boil Water Advisory due to inadequate system pressure is in effect. This instruction shall be delivered to each customer once per month and provide an update on the status of required repairs being made to the system.
4. Upon receipt of the Commission's Order, Towns shall acquire and install two continuously recording pressure charts tied directly to its water mains at two representative sites selected by KDHE on the southern and eastern extremities of the system. Data from the pressure recordings shall be submitted to Staff on a weekly basis until the construction projects required by KDHE are completed.
5. Upon receipt of the Commission's Order, Towns shall install a meter that measures the quantity of water delivered to the mobile home section of the water distribution system. Volumes of water usage to the mobile home section shall be reported to Staff on a monthly basis.
6. Towns shall initiate a meter installation/meter change out program to ensure each customer has an operable water meter by September of 2020.
7. By July 15, 2020, Mr. Towns shall have a checking account for his personal use, a separate checking account for the water operations of Towns & Sons Enterprises, and a separate checking account(s) for any other businesses Mr. Towns has. The revenue

collected from water ratepayers shall be deposited into the water company's checking account. All purchases and operating expenses associated with water operations shall be paid from the water company's checking account.

8. Beginning August 1, 2020, Towns & Sons Enterprises shall implement and use the NARUC Uniform System of Accounts for small water utilities. Separate general ledger accounts shall be established for the customer service charge, revenue collected for water usage above the 5,000 gallon minimum, the cost of purchased water, the Water Protection Fee, and realized gains and losses related to the water operations of Towns & Sons Enterprises. Appropriate separate expense accounts shall be established to record the water operation expenses of Towns & Sons Enterprises. Appropriate balance sheet accounts shall be established for the partnership's assets, liabilities, and partner capital.
9. Beginning July 1, 2020, a representative (either employee, partner, or independent contractor) of Towns & Sons Enterprises shall read the water meters each month. If no meter is present or the meter is not working, the billing account shall reflect that information.
10. Beginning August 1, 2020, the water customer's monthly bill shall show:
 - a. Customer charge.
 - b. Beginning and ending water meter readings along with the date the meter was read.
 - c. Volume of water used stated in thousand gallons and any volumetric water charges.
 - d. Water Protection Fee.
 - e. Other elements of a customer bill as required by the Commission's Billing Standards.²

Staff recommends the Commission require Towns to begin complying with the above ten listed directives according to the listed time schedule with potential penalties to be applied for noncompliance, as provided in greater detail in the following paragraphs.

Because Towns has operated as a public utility since at least April 20, 2010, without obtaining a COC from the Commission, Staff also recommends the Commission impose a civil penalty of \$370,400 for failure to comply with K.S.A. 66-131.³

Staff continues to investigate whether Towns will be capable of providing sufficient and efficient service in the future. To date, our investigation demonstrates that Towns is unable to operate as a public utility. If Towns continues to be unable to provide sufficient and efficient service, Staff recommends the Commission order Towns to divest its water utility business to a buyer that is capable of providing the minimum requirements for potable water utility service.

BACKGROUND:

² https://kcc.ks.gov/images/PDFs/pi/billing_2012.pdf

³ The calculation of the civil penalty amount of \$370,400 is set forth below in the Analysis section of this Report.

Towns began operating its water utility service in 1975 and currently serves 232 customers (82 houses and 150 mobile homes). At one time, at least a portion of the water system was governed by the Towns Riverview Home Owners Association (HOA).⁴ In 2010, an amendment was made to the bylaws of the HOA to eliminate the provision giving the HOA oversight of the water distribution system.⁵ It is unknown to Staff when Towns began operating as a public utility serving the mobile home park south of the area included in the HOA.

Until recently, Towns supplied water to its customers from two water wells owned by the utility. Within the last few years, the Kansas Department of Health and Environment (KDHE) required Towns to cease using the supply wells because of the presence of radionuclides in the water that are above the maximum contaminant level allowed by KDHE regulations. In order to continue supplying its customers, Towns contracted with the City of Garden City to deliver water to the northwest corner of the water distribution system. It is Staff's understanding that Towns paid 63% of the construction costs for 1.8 miles of 12-inch diameter water supply line to deliver the purchased water to its system. The supply contract requires pressure of at least 20 psi; however, the delivery pressure is generally 55 psi. In order for Towns to maintain a minimum pressure of at least 20 psi (and as a condition of an operating permit from KDHE), Towns installed a booster pump near the point of receipt from Garden City. Towns began taking delivery of water from Garden City in March of 2019. Staff received its first inquiry from a Towns customer regarding Towns public utility status in June 2019. In general, the customer inquiry was concerned with the cost of the water service and the fluctuating delivery pressure. After investigating the status of the utility operation, Staff concluded Towns was operating a public utility subject to the Commission's oversight and did not have a COC. Therefore, Staff filed its Report and Recommendation recommending the Commission issue a Show Cause Order to Towns requesting an explanation of its public utility status.

Towns filed its Response to the Commission's Order on December 2, 2019. In its Response, Towns acknowledged operating a water utility and that it was unaware of the statutory requirement to obtain a COC. Towns stated it intended to cooperate fully with Staff to investigate the reasonableness of its current water rates and would provide Staff with financial documents referred to in the Commission's Order. On December 27, 2019, Towns provided Staff with a portion of the financial information listed in the Commission's Show Cause Order. On January 9, 2020, Towns' counsel notified Staff it did not contest Staff's contention that the water utility is a public utility subject to Commission jurisdiction. Towns also expressed its willingness to cooperate with Staff in resolving this matter. Since January of 2020, Staff has provided Towns with information regarding the process of filing to obtain a COC. Staff has had several conversations with Mr. Delmer Towns, the owner of the Towns public utility. The primary topic in those meetings was recommending Towns acquire the services of a regulatory attorney and pointing out the water meter discrepancies were a source of lost revenue for the utility. Staff and Mr. Towns also discussed the operations of the booster pump serving the system and the concern with fluctuating pressure.

ANALYSIS

⁴ See, *Order to Show Cause*, Staff Report & Recommendation, Exhibit LMH-4, p. 2, ¶ 17 (issued Sept. 26, 2019).

⁵ See, *Order to Show Cause*, Staff Report & Recommendation, Exhibit LMH-5.

Prior to 2010, Staff believes the water system was a public utility but the northern portion of the system may have been exempt of Commission oversight because it was governed by a nonprofit HOA similar to a cooperative. However, on April 20, 2010, the Towns Riverview HOA was amended to remove the water distribution system from the HOA oversight.⁶ Therefore, Staff contends Towns has operated the entire water system as an investor-owned public utility (IOU) subject to Commission oversight since that time.

It is possible that the southern portion of the distribution system, which was not covered by the HOA, was operated as an IOU well before 2010. However, Staff has been unable to establish a clear history of the status of that part of the system. Therefore, Staff conservatively estimates the IOU status of the system started when the HOA was amended. When it began operating as an IOU, Towns was required to obtain a COC from the Commission. Failure to obtain a COC is a violation of K.S.A. 66-131, and Towns' violation has occurred since at least April 20, 2010, when the amended HOA was filed in Finney County. Under K.S.A. 66-138, Towns is obliged to pay a civil penalty of \$100 per day for each violation in which a water public utility neglects to perform a duty imposed by the public utility statutes. Under this provision, Towns is subject to a civil penalty of at least \$370,400.⁷

After receiving Towns' Response to the Commission's Show Cause Order, Staff began a series of interviews with involved parties to get a better understanding of the water system. Staff's review of Towns' operations consisted of interviews with Mr. Towns, staff of the Kansas Department of Health and Environment (KDHE), operators of water utilities adjacent to Garden City, and customers of the Towns water utility. Staff also received water metering readings for water sold by Towns as well as water purchase records from its supplier (the City of Garden City). Based on this information, it has become clear to Staff that Towns is unable to provide sufficient and efficient service to its customers based on the following operational issues that have been identified by Staff:

- System appears consistently to be unable to maintain 20 psi pressure;
- Lost and Unaccounted for water is approximately 80% of the purchased volumes for the time frame and data reviewed by Staff;
- According to Mr. Towns and confirmed by customers, meters for many customers do not work or are not even installed; and
- Aged piping is vulnerable to leaks. Staff has identified indications of six leaks on water mains within the month of May 2020.

After review of Towns' financial records, Staff also observed the following irregularities in Towns' billing methodology:

- Where meters exist, the meters are not read on a regular basis;
- Customer reading of meters is not enforced or properly recorded; and
- Revenue and expenses for the utility operation are commingled with the financial information from other businesses operated by Towns.

⁶ Id.

⁷ From 4/20/2010 to 6/10/2020, 3,704 days have elapsed. At a penalty of \$100 per day, the cumulative amount of the penalty would be \$370,400 under the conservative assumption that the southern part of the system was not operating as an IOU prior to April 2010.

RECOMMENDATION

Given the informal acknowledgement to Staff by Towns that Towns does not contest that it is a public utility and that Towns generally agreed in its Response to Staff's depiction of the water utility operations, Staff recommends the Commission find that Towns is a public utility. Further, Staff recommends the Commission find that Towns has been operating as a public utility without a COC since at least 2010, which is a violation of K.S.A. 66-131. Because of this failure to follow public utility statutes, Staff also recommends the Commission impose a civil penalty of \$370,400.

Further, Staff recommends the Commission issue an Emergency Order requiring Towns to take the following action:

1. Towns water system shall remain on a Boil Water Advisory until a rescind notice is issued by KDHE.
2. Upon receipt of the Commission's Order, Towns shall supply alternative water suitable for drinking, cooking, washing, and bathing to all customers until all requirements of the Order have been completed. Towns shall not apply additional charges to customers for the provisioning of this alternative water and shall keep records of the costs associated with the alternative water supply.
3. Upon receipt of the Commission's Order, Towns shall instruct all customers to curtail the watering of lawns, filling of pools, and all other extraneous usage of water that could place undue drawdown of available water pressure in the system if a KDHE Boil Water Advisory due to inadequate system pressure is in effect. This instruction shall be delivered to each customer once per month and provide an update on the status of required repairs being made to the system.
4. Upon receipt of the Commission's Order, Towns shall acquire and install two continuously recording pressure charts tied directly to its water mains at two representative sites selected by KDHE on the southern and eastern extremities of the system. Data from the pressure recordings shall be submitted to Staff on a weekly basis until the construction projects required by KDHE are completed.
5. Upon receipt of the Commission's Order, Towns shall install a meter that measures the quantity of water delivered to the mobile home section of the water distribution system. Volumes of water usage to the mobile home section shall be reported to Staff on a monthly basis.
6. Towns shall initiate a meter installation/meter change out program to ensure each customer has an operable water meter by September 15, 2020.
7. By July 15, 2020, Mr. Towns shall have a checking account for his personal use, a separate checking account for the water operations of Towns & Sons Enterprises, a separate checking account for the excavation business, and a separate checking account(s) for any other businesses Mr. Towns has. The revenue collected from water ratepayers shall be deposited into the water company's checking account. All purchases and operating expenses associated with water operations shall be paid from the water

company's checking account.

8. Beginning August 1, 2020, Towns & Sons Enterprises shall implement and use the NARUC Uniform System of Accounts for small water utilities. Separate general ledger accounts shall be established for the customer service charge, revenue collected for water usage above the 5,000 gallon minimum, the cost of purchased water, the Water Protection Fee, and realized gains and losses related to the water operations of Towns & Sons Enterprises. Appropriate separate expense accounts shall be established to record the expenses of Towns & Sons Enterprises. Appropriate balance sheet accounts shall be established for the partnership's assets, liabilities, and partner capital.
9. A representative (either employee, partner, or independent contractor) of Towns & Sons Enterprises shall read the water meters each month.
10. The water customer's monthly bill shall show:
 - a. Customer charge.
 - b. Beginning and ending water meter readings along with the date the meter was read.
 - c. Volume of water used stated in thousand gallons and any volumetric water charges.
 - d. Water Protection Fee.
 - e. Other elements of a customer bill as required by the Commission's Billing Standards.⁸

Staff continues to investigate whether Towns will be capable of providing sufficient and efficient service in the future. To date, our investigation demonstrates that Towns is unable to operate as a public utility. If Towns continues to be unable to provide sufficient and efficient service, Staff recommends the Commission order Towns to divest its water utility business to a buyer that is capable of providing the minimum requirements for potable water utility service.

⁸ https://kcc.ks.gov/images/PDFs/pi/billing_2012.pdf

EXHIBIT 1

Division of Environment
Curtis State Office Building
1000 SW Jackson St., Suite 400
Topeka, KS 66612-1367



Phone: 785-296-1535
Fax: 785-559-4264
www.kdheks.gov

Lee A. Norman, M.D., Secretary

Laura Kelly, Governor

For Immediate Release

April 20, 2020

For more information, contact:

Kristi Zears

Kristi.Zears@ks.gov

785-296-1317

Boil Water Advisory Issued for Towns Riverview Subdivision, Finney County

TOPEKA – The Kansas Department of Health and Environment (KDHE) has issued a boil water advisory for the customers served by the Towns Riverview Subdivision Public Water Supply System, located in Finney County. This advisory is not related to the COVID-19 pandemic.

Customers should observe the following precautions until further notice:

- If your tap water appears dirty, flush the water lines by letting the water run until it clears.
- Boil water for one minute prior to drinking or food preparation or use bottled water.
- Dispose of ice cubes and do not use ice from a household automatic icemaker.
- Disinfect dishes and other food contact surfaces by immersion for at least one minute in clean tap water that contains one teaspoon of unscented household bleach per gallon of water.
- Water used for bathing does not generally need to be boiled. Supervision of children is necessary while bathing so that water is not ingested. Persons with cuts or severe rashes may wish to consult their physicians.
- their physicians.

The advisory took effect on April 20 and will remain in effect until the conditions that placed the system at risk of bacterial contamination are resolved. KDHE officials issued the advisory because of a loss of pressure. Failure to maintain adequate pressure may result in a loss of chlorine residuals and bacterial contamination.

Regardless of whether the public water supplier or KDHE announced a boil water advisory, only KDHE can issue the rescind order following testing at a certified laboratory.

For consumer questions, please contact the water system or KDHE at 785-296-5514. For consumer information please visit KDHE's PWS Consumer Information webpage:

http://www.kdheks.gov/pws/emergencyresponse/water_disruption.htm

EXHIBIT 1

Restaurants and other food establishments that have questions about the impact of the boil water advisory on their business can contact the Kansas Department of Agriculture's food safety & lodging program at kda.fsl@ks.gov or call 785-564-6767.

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EXHIBIT 2

STATE OF KANSAS BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

IN THE MATTER OF:

Delmer E. Towns
d.b.a. Towns Riverview Subdivision
725 S Towns Rd
Garden City, KS 67846

Case No: 20-E-008 BOW

Federal Water Supply ID No. KS2005530

EMERGENCY ADMINISTRATIVE ORDER

NOW ON THE 8th of May, 2020, the following Findings of Fact and Conclusions of Law are made and Emergency Administrative Order (“Order”) issued pursuant to the authority vested in the Secretary of the Kansas Department of Health and Environment (“Secretary”) and the Director of the Division of Environment (“Director”) by Kansas statute.

JURISDICTION

1. Kansas Department of Health and Environment (“KDHE”) is a duly authorized agency of the State of Kansas created by an act of the legislature. K.S.A. 75-5601 *et seq.*
2. The Secretary has general jurisdiction over matters involving the environment and the public health and safety of the people of Kansas, K.S.A. 65-101 *et seq.*, including general jurisdiction over matters involving public waters supply pursuant to K.S.A. 65-163 *et seq.*
3. Delmer E. Towns d.b.a. Towns Riverview Subdivision is a legal entity with authority to operate and maintain a public water supply system in Kansas and is subject to K.S.A. 65-163 *et seq.*
4. The Secretary is authorized to issue orders for compliance with public water supply statutes and regulations, as set forth in K.S.A. 65-163.
5. K.S.A. 65-171r(e) prohibits the failure of a supplier of water (“SOW”) to comply with a primary drinking water standard established under K.S.A. 65-171m, and amendments thereto, and rules and regulations adopted pursuant thereto unless a variance or exception has been granted.
6. Pursuant to K.S.A. 65-171s, the Secretary is authorized to impose civil penalties of up to \$5,000 per violation per day for violations of any provisions of K.S.A. 65-171r.

EXHIBIT 2

7. K.S.A. 65-163 states in part: “(b)(2) Whenever an investigation of any public water supply system is undertaken by the Secretary, it shall be the duty of the supplier of water under investigation to furnish to the Secretary information to determine the sanitary quality of the water supplied to the public and to determine compliance with applicable state laws and rules and regulations. The Secretary may issue an order requiring changes in the source or sources of the public water supply system or in the manner of storage, purification or treatment utilized by the public water supply system before delivery to consumers, or distribution facilities, collectively or individually, as may in the Secretary’s judgment be necessary to safeguard the sanitary quality of the water and bring about compliance with applicable state law and rules and regulations. The supplier of water shall comply with the order of the Secretary.”
8. K.A.R. 28-15-18, as authorized by K.S.A. 65-171m, states in part: “(e) Each community water supply system shall be operated and maintained to provide a minimum positive pressure of 20 psi (140 kN/m²) throughout the entire distribution system except under extraordinary conditions including unusual peak fire flow demand and major distribution system breaks.”
9. Pursuant to K.S.A. 77-536, a state agency may use emergency proceeding in a situation involving an immediate danger to the public health, safety or welfare requiring immediate state agency action.

FINDINGS OF FACT

10. Delmer E. Towns d.b.a. Towns Riverview Subdivision (“SOW” or “Respondent”) operates a public water supply system (“PWS”) and is subject to K.S.A. 65-163 *et seq.*
11. The Respondent operates a community PWS located in Finney County. The PWS serves a population of 970 individuals, and has 244 service connections.
12. The PWS utilizes water from the City of Garden City as the source for the PWS. The point of entry to the distribution system is a consecutive connection to the City of Garden City.
13. KDHE received a complaint of low water pressure and confirmed issue with Respondent. KDHE verified low pressure through its technical assistance contractor.
14. KDHE issued a Boil Water Advisory for the PWS on April 20, 2020.

CONCLUSIONS OF LAW

15. The SOW is a person within the meaning of K.S.A. 65-162a(a) and a supplier of water within the meaning of K.S.A. 65-162a(d).

EXHIBIT 2

16. The PWS is a public water supply system within the meaning of K.S.A. 65-162a(b).
17. The SOW is in violation of K.A.R. 28-15-18(e) for failing provide a minimum positive pressure of 20 psi (140 kN/m²) throughout the entire distribution system.

POLICY REASONS

18. Inadequate water pressure can cause a loss of chlorine residual and lead to bacterial contamination in the entire PWS distribution system. Bacterial contamination in the distribution system may cause spread of disease.
19. Inadequate water pressure can result in an inability to bathe, or wash clothing and dishes which may cause a spread of disease.
20. Any discharge of water or other liquids or solids into sink drains, toilets, bathtubs, showers, or other drains utilizing inadequate water pressure will quickly result in a backup of sewage into homes, buildings, and outside areas.
21. Backup of sewage into homes and other buildings provides a definite and immediate threat to public health, safety, and welfare. Human contact with sewage may cause the spread of disease. KDHE is vested with the authority and responsibility to prevent whenever possible such spread of disease and other harms.
22. Due to the potential spread of disease KDHE must take emergency action to prevent danger to the public health, safety, and welfare.

ORDER

23. The Secretary hereby orders the Respondent to return the PWS to compliance and be bound by the terms set forth herein.
24. All documentation required pursuant to this Order shall reference the case number (Case No. 20-E-008 BOW) and be mailed to:

Kansas Department of Health and Environment
Public Water Supply Section
Attn: Christopher Tucker
1000 SW Jackson, Suite 420
Topeka, KS 66612-1367

25. The SOW shall provide a copy of this Order to any subsequent owners or successors before ownership rights are transferred. The SOW shall provide a copy of this Order to all

EXHIBIT 2

contractors, sub-contractors and consultants who are retained to conduct any work performed under this Order, within fourteen (14) days after the effective date of this Order or the date of retaining their services. Notwithstanding the terms of any contract, the SOW is responsible for compliance with, and for insuring that its contractors and agents comply with this Order.

26. The activities conducted under this Order are subject to approval by the KDHE, and the SOW shall provide all necessary information consistent with this Order requested by the KDHE.
27. This Order shall be terminated upon the SOW's receipt of written notice from KDHE that the SOW has demonstrated the terms of this Order to have been satisfactorily completed, including any additional tasks the KDHE has deemed necessary.

COMPLIANCE ACTIONS

28. The following required actions are necessary to protect public health during periods of noncompliance and shall be fulfilled as outlined below until full compliance is achieved.
 - A. The PWS must remain on a Boil Water Advisory until a rescind notice is issued by KDHE.
 - B. Within 24 hours, Respondent must supply alternative water suitable for drinking, cooking, washing, and bathing to all customers until all requirements of the Order have been completed.
 - C. Within 24 hours, Respondent must supply portable toilets, and handwashing stations to all customers of the PWS affected by low water pressure until all requirements of this Order have been completed.
 - D. Respondent shall perform and submit daily system pressure readings to KDHE from four locations representative of the area impacted by low pressure within the distribution system. These readings will begin being taken immediately upon service of this Order and shall continue until Respondent is notified in writing by KDHE.
29. KDHE strongly recommends Respondent instruct all customers to halt the watering of lawns, filling of pools, and all other extraneous usage of water that could place undue drawdown of available water pressure in the system until all requirements of this Order have been completed.

EXHIBIT 2

30. Based upon the above referenced Findings of Fact and Conclusions of Law and pursuant to the authority vested in the Secretary, the SOW is hereby ordered to meet the following compliance schedule:

- A. Within seven (7) days of the effective date of this order, the respondent shall engage the services of a professional engineer licensed in the State of Kansas to assist the SOW in fulfillment of this order.
- B. Within seven (7) days of the completion of 30.A, the SOW shall consult with KDHE in regard to deliverables required pursuant to this Order. To schedule this consult please contact:

Christopher D. Tucker
(785) 296-5946
Christopher.D.Tucker@ks.gov

- C. Within thirty (30) days of completion of 30.B, the SOW shall submit to KDHE project plans, specifications, public water supply permit application, and other information as may be requested for review and approval.
- D. Within fifteen (15) days of completion of Paragraph 30.C, the SOW shall award a contract for improvements to the water system treatment facilities.
- E. Within sixty (60) days of completion of Paragraph 30.D, upgrades and improvements of water system treatment facilities shall be substantially completed.
- F. Within seven (7) days of Paragraph 30.E, the PWS shall produce and provide water that will achieve compliance with public drinking water requirements and maintain a minimum positive pressure of 20 psi throughout the entire distribution system except under extraordinary conditions including unusual peak fire flow demand and major distribution system breaks no later than September 15, 2020.

PENALTY

31. Pursuant to K.S.A. 65-171s, KDHE hereby assesses a civil penalty in this matter as set forth below for the violation of K.S.A. 65-171r. Subject to the conditions that follow, the SOW shall remit to KDHE a check or money order in the amount of \$10,000 within 35 days of the date of service of this Order. The civil penalty payment shall be made payable to the Kansas Department of Health and Environment, and submitted to:

EXHIBIT 2

Kansas Department of Health and Environment
Office of Legal Services, Suite 560
1000 SW Jackson
Topeka, Kansas 66612-1371

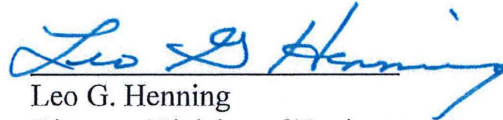
32. Failure or refusal to comply with this Order, or any portion thereof, shall subject the respondent to the imposition of further civil penalties and court action to enforce the terms of the Order.

RIGHT TO REQUEST A HEARING

33. This order is effective when rendered.
34. Pursuant to K.S.A. 65-163a and K.S.A. 77-536, this Emergency Order is subject to the provisions of the Kansas Administrative Procedures Act ("KAPA") and any action hereunder shall be reviewed in accordance with the Kansas Judicial Review Act ("KJRA").
35. Respondent may appeal this Order by sending a written notice of appeal and request for a hearing to the Office of Administrative Hearings, 1020 S. Kansas Avenue, Topeka, KS 66612-1327.
36. Notice of appeal must be received at the Office of Administrative Hearings within 15 days following service of this Order, plus three days for mailing. Service is effective upon mailing.
37. Failure to submit a timely notice of appeal will result in a waiver of Respondent's right to a hearing and the Order will become a final order without further proceedings.


EXHIBIT 2

IT IS SO ORDERED by the Director of the Division of Environment on this 8th day of May, 2020.



Leo G. Henning
Director, Division of Environment
Kansas Department of Health and Environment

IT IS SO ORDERED by the Secretary of the Kansas Department of Health and Environment on this 8th day of May, 2020.



Lee A. Norman, M.D.
Secretary
Kansas Department of Health and Environment

ATTACHMENT B

Cole Bailey

From: Cole Bailey
Sent: Monday, March 16, 2020 9:09 AM
To: 'John Lindner'
Subject: RE: 20-DTRW-120-SHO
Attachments: Attachments for Mr. Towns.docx

John,

Delmer and my staff have weekly Friday phone calls. He is making progress replacing some meters. He told us he has placed you in charge of vetting and deciding which regulatory attorney he should hire. Can you confirm this?

I have attached the list of attorneys again to this email. If you have any questions let me know. I would like to emphasize again attorney fees are included in rates and are paid by customers. I'm almost certain the attorneys on that list will not require a retainer because the Commission guarantees that rates will cover their fees.

Thanks,

Cole Bailey
Litigation Counsel



Office of Litigation Counsel
Kansas Corporation Commission
1500 SW Arrowhead Road | Topeka, KS | 66604-4027
Phone (785) 271-3186 | Fax (785) 271-3167 | <http://kcc.ks.gov/>

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From: John Lindner <john@lmandk.com>
Sent: Thursday, January 23, 2020 1:22 PM
To: Cole Bailey <c.bailey@kcc.ks.gov>
Subject: Re: 20-DTRW-120-SHO

This is an EXTERNAL EMAIL. Think before clicking a link or opening attachments.

Just saw your email. Yes, contact him direct.
He and Mr. Dirks will work directly with KCC.
If Delmer has questions or concerns along the way, he will let me know. That's the idea.

From: John Lindner <john@lmandk.com>
Sent: Thursday, January 9, 2020 6:49:58 PM
To: Cole Bailey
Subject: Re: 20-DTRW-120-SHO

This is an EXTERNAL EMAIL. Think before clicking a link or opening attachments.

This is an EXTERNAL EMAIL. Think before clicking a link or opening attachments.

Dear Mr. Bailey:

If what you say is true, I see no reason for Mr. Towns to incur the expense of an attorney. This looks like a numbers game and he has a perfectly capable CPA. You should feel free to deal directly with Mr. Towns and Mr. Dirks in your continued efforts to help Mr. Towns. This should not present much of a problem for you since you have obtained orders without notice to me and I do not seem to have an official presence even though I filed a response on behalf of Mr. Towns.

Mr. Towns does not contest that he is a public utility subject to KCC jurisdiction. He is trying to cooperate with you. I hope your threat of more discovery to him prior to a site visit is not onerous, as it seems he and his CPA have already furnished you all you have required. Mr. Towns does not see the necessity of redacting anything he has furnished thus far.

John M. Lindner
Attorney at law
505 N. 6th Street
Garden City, KS 67846
P: 620-275-9193
F: 620-276-9454

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On Dec 31, 2019, at 12:03 PM, Cole Bailey <c.bailey@kcc.ks.gov> wrote:

John,

The first thing the Commission needs to know is whether Mr. Towns is actually challenging the fact that he is a public utility. If he agrees that he is a public utility then we can draft a settlement agreement and file it with the Commission. If he wants to contest our position then I will likely just file a motion for the Commission to order that he is a public utility. He is within his right to contest but Staff is confident we will win this argument.

Cole:

Here is a response. I cannot explain why we do not have the stuff from the accountant but I called for him again yesterday. I do not know where to file this. Do I just send it to the Director's office?

JML

John M. Lindner
Attorney at law
505 N. 6th Street
Garden City, KS 67846
P: 620-275-9193
F: 620-276-9454

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CERTIFICATE OF SERVICE


20-DTRW-120-SHO

I, the undersigned, certify that a true and correct copy of the above and foregoing Motion for Emergency Relief Pursuant to K.S.A. 77-536 was placed in the United States mail, postage prepaid, or hand-delivered this 18th day of June, 2020, to the following:

PHOENIX ANSHUTZ, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
p.anshutz@kcc.ks.gov

COLE BAILEY, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
c.bailey@kcc.ks.gov

DELMER TOWNS
TOWNS RIVERVIEW
725 TOWNS RD
GARDEN CITY, KS 67846



Vicki Jacobsen