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MAR 08 2004

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS)
)
Complainant,)
)
v.) PCB 04-81
)
)
)
EMMETT UTILITIES, INC. an Illinois)
Corporation, and RUSSELL D. THORELL,)
individually and as president of EMMETT)
UTILITIES, INC.,)
)
)
Respondents.)

**RESPONSE TO COMPLAINANT'S MOTION TO STRIKE THORELL'S
MOTION TO DISMISS**

NOW COMES the Respondent, Russell D. Thorell, and for his response to Complainant's Motion to Strike states as follows:

1. Russell D. Thorell admits that copies of the complaint were served on him by the Attorney General. However, the Respondents did not seek counsel at the time; instead, they prepared a completely inadequate and inartfully drafted response to the complaint, and sent it to the Attorney General. That response is attached hereto as Exhibit A.

2. Subsequently, Thorell was notified by the Administrative Law Judge that he should seek counsel and that he could not represent the corporation. As a result, the Respondents engaged the services of John M. Myers, the undersigned attorney to

represent them in these proceedings. Undersigned counsel then filed the appropriate responses to the complaint, those responses being, in the case of the corporate respondent, an answer to the complaint, and in the case of the individual respondent, a Motion to Dismiss.

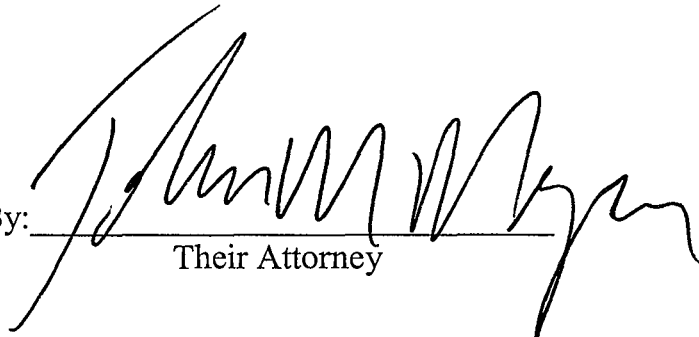
3. The Attorney General states in the Motion to Strike that the Commission can allow a late filed Motion to Dismiss if material prejudice would otherwise result. Obviously, this is such a situation; Thorell's Motion to Dismiss demonstrates that Russell Thorell has a serious and *bona fide* defense to the allegations against him. The motion should be heard in the interest of justice.

4. Contrary to the allegations in the Motion to Strike, the first time undersigned counsel became aware that these proceedings had actually been filed was when he received a phone call from Assistant Attorney General Tom Davis just in advance of the January 16, 2004 conference with ALJ Sudman, wherein Mr. Davis stated that the matter had been set for status conference and asked whether Thorell was being represented by undersigned counsel. While it is true that undersigned counsel had been informed of the likelihood of the filing of a complaint and was supplied with a copy of a *draft* complaint, undersigned counsel was not favored with an actual copy of the complaint when it was initially filed, apparently in November. Undersigned counsel did not see a copy of the actual complaint until late January, 2004; the answer and motion to dismiss were promptly filed the first week of February, 2004.

WHEREFORE, the Motion to Strike should be denied, and the Commission should hear the Motion to Dismiss.

Respectfully Submitted,

Emmett Utilities and Russell D. Thorell,
Defendants,

By: 
Their Attorney

John M. Myers
RABIN, MYERS, HANKEN & DURR, P.C.
1300 South Eighth Street
Springfield, IL 62703
217.544.5000
fax: 217.544.5017
email: jmyers@springfieldlaw.com

EMMETT UTILITIES, INC.

**RR2 Box 58N
Oquawka, Il. 61469**

DECEMBER 30, 2003

**Thomas Davis, Chief
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706**

Dear Mr. Thomas:

I received your letter dated November 6, 2003 and the accompanying complaint.

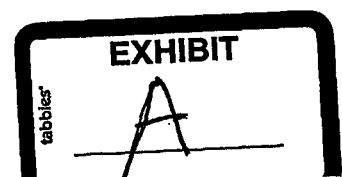
I have read the allegations in the complaint. They are absurd and simply not true; therefore, I deny all of them. The Company isn't polluting anything and the water is safe.

Very truly yours,

Russell D Thorell

**Russell D Thorell
President**

**Copies sent to:
Bob Bland
Dave Kentner
Jenna Link
John Myers
John Sullivan**



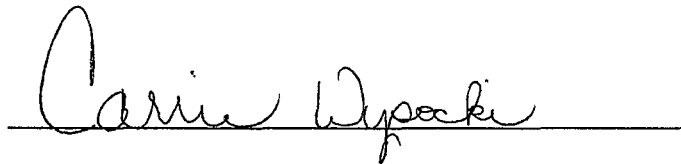
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **RESPONSE TO
COMPLAINANT'S MOTION TO STRIKE THORELL'S MOTION TO DISMISS**
was served upon all counsel of record by placing same in the United States Post Office
mail box, postage prepaid in Springfield, Illinois on March 5, 2004 and addressed to:

Thomas Davis, Assistant Attorney General
Office of the Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, IL 60601

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

and that the original was filed with the Clerk of the Court in which said cause is pending.



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)	
Respondents.)	

**RESPONSE OF EMMETT UTILITIES, INC. TO
MOTION TO STRIKE ANSWER**

NOW COMES, Emmett Utilities, Inc., and for its response to Petitioner's Motoin to Strike Answer, states as follows:

1. It is true that the answer filed on behalf of Emmett Utilities, Inc. by undersigned counsel was not timely under the rules.
2. However, as set forth more fully in the Respondent Thorell's Response To Complainant's Motion To Strike Thorell's Motion To Dismiss, it is also true that Emmett Utilities, Inc., without benefit of counsel, attempted to answer the complaint on December 30, 2003. A copy of this attempted, inartfully drawn and obviously inadequate answer is attached hereto as Exhibit A. As inartful as the answer is, it clearly contains a general denial of the charges in this matter.

3. In her order of January 16, 2004, the Administrative Law Judge ordered Thorell to consult with counsel because he could not represent Emmett Utilities, Inc. in these proceedings. Thereupon he did consult counsel, retained undersigned counsel, and undersigned counsel filed a proper answer on his behalf.

4. Mr. Thorell is over 70 years old; he is in ill health; he has limited funds; his company, Emmett Utilities, Inc., is broke and losing money; Mr. Thorell lives alone in a little rural town and his income is primarily Social Security; he can hardly afford an attorney. His failure to comply with the rules should be excused.

WHEREFORE the Motion to Strike the Answer of Emmett Utilities, Inc. should be denied.

Respectfully Submitted,
Emmett Utilities and Russell D. Thorell,
Defendants,

By: _____

Their Attorney

John M. Myers
RABIN, MYERS, HANKEN & DURR, P.C.
1300 South Eighth Street
Springfield, IL 62703
217.544.5000
fax: 217.544.5017
email: jmyers@springfieldlaw.com

EMMETT UTILITIES, INC.

**RR2 Box 58N
Oquawka, Il. 61469**

DECEMBER 30, 2003

**Thomas Davis, Chief
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706**

Dear Mr. Thomas:

I received your letter dated November 6, 2003 and the accompanying complaint.

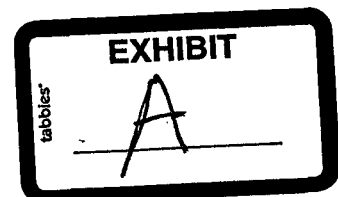
I have read the allegations in the complaint. They are absurd and simply not true; therefore, I deny all of them. The Company isn't polluting anything and the water is safe.

Very truly yours,



**Russell D Thorell
President**

**Copies sent to:
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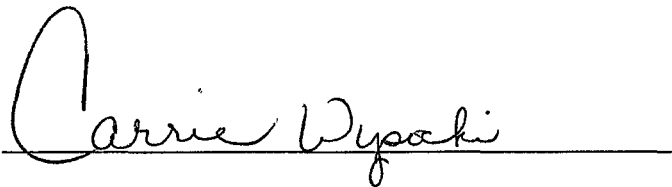
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **RESPONSE OF EMMETT UTILITIES, INC. TO MOTION TO STRIKE ANSWER** was served upon all counsel of record by placing same in the United States Post Office mail box, postage prepaid in Springfield, Illinois on March 5, 2004 and addressed to:

Thomas Davis, Assistant Attorney General
Office of the Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, IL 60601

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
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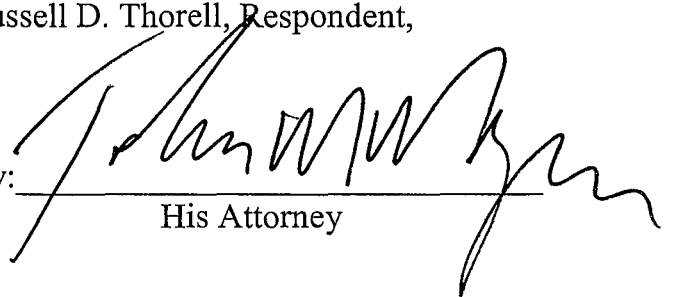
SUPPLEMENT TO MOTION FOR STAY OF PROCEEDINGS

Now come Respondents, by their attorney, John M. Myers, and supplement the previously filed Motion for Stay of Proceedings, as follows.

As disclosed to the ALJ Sudman at the status conference of this matter, after the Motion for Stay of Proceedings was filed, the hearing examiner for the Illinois Commerce Commission entered an Order dismissing the Petition to Abandon Service. Thorell has filed exceptions to the hearing examiner's recommendation, and the matter will be heard by the Illinois Commerce Commission. A copy of the Hearing Examiner's recommended decision, and Thorell's exceptions thereto, are attached hereto.

Respectfully Submitted,
Russell D. Thorell, Respondent,

By:



His Attorney

John M. Myers
RABIN, MYERS, HANKEN & DURR, P.C.
1300 South Eighth Street
Springfield, IL 62703
217.544.5000
fax: 217.544.5017
email: jmyers@springfieldlaw.com

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Emmett Utilities, Inc.

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04-0065

Petition to Abandon and Discontinue
Service.

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

On February 2, 2004, Emmett Utilities, Inc. ("Petitioner") filed with the Illinois Commerce Commission ("Commission") a verified Petition to Abandon and Discontinue Service ("Petition"). Petitioner states that it operates a water and sewer utility with 22 customers in McDonough County, Illinois, and is experiencing financial difficulties.

Petitioner also states that it is subject to an Order from the Circuit Court of McDonough County in People v. Emmett Utilities et al., No. 01-CH-2 ("Court Order"), which was attached to the Petition. The Court Order, dated April 29, 2003, mandates system upgrades and payment of penalties to the Environmental Protection Trust Fund by January 31, 2004.

Part D of the Court Order, entitled "Jurisdiction", states in relevant part that the Circuit Court of McDonough County "shall retain jurisdiction of this matter for the purpose of enforcing this order and for the purpose of adjudicating all matters of dispute among the parties." Court Order at 8.

Part C of the Court Order, entitled "Compliance", establishes January 31, 2004, as the deadline for completion of the required actions. Id. It also, at one time, stated:

2. In the alternative [to implementing corrective action], Defendant shall secure, from the Illinois Commerce Commission, an Order allowing it to terminate or abandon service pursuant to Section 8-508 of the Public Utilities Act.

3. Any petition to terminate or abandon service shall be filed with the Illinois Commerce Commission within 60 days of the date of this Order. A copy of any such petition, and all other motions and papers filed by the Defendant in the Commission, shall be served upon the Attorney General, Environmental Bureau.

The language quoted above has been stricken by hand, however. Each stricken line bears the initials of the Judge that entered the Court Order. See id. at 8. Based on

the language of Part D, and the language that was stricken from Part C, the Commission concludes that it lacks jurisdiction over the Petition at this time.

The Commission, having reviewed the Petition and the attachments thereto, is of the opinion and finds that:

- (1) Emmett Utilities, Inc. is an Illinois corporation engaged in the provision of water and sewer service to the public in Illinois, and, as such, is a public utility within the meaning of Section 3-105 of the Public Utilities Act;
- (2) the Commission ordinarily would have jurisdiction over Petitioner and over the subject matter of this proceeding;
- (3) jurisdiction in this matter has been retained by the Circuit Court of McDonough County; accordingly, the Commission lacks jurisdiction in this matter;
- (4) the Petition should be dismissed without prejudice for lack of jurisdiction;
- (5) Commission Staff should monitor the status of the Petitioner and the McDonough County proceeding discussed herein to ensure that, consistent with the public interest and necessity, customers of Petitioner are provided safe, adequate, and reliable water and sewer service.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the verified Petition to Abandon and Discontinue Service, filed on February 2, 2004, by Emmett Utilities, Inc. be, and the same is hereby, dismissed without prejudice.

IT IS FURTHER ORDERED that Commission Staff should monitor the status of the Petitioner and the McDonough County proceeding discussed herein to ensure that, consistent with the public interest and necessity, customers of Petitioner are provided safe, adequate, and reliable water and sewer service.

IT IS FURTHER ORDERED that, subject to the provisions of the Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:
BRIEF ON EXCEPTIONS DUE:

February 10, 2004
February 24, 2004

Ian Brodsky,
Administrative Law Judge

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

ILLINOIS
COMMERCE COMMISSION

2004 FEB 24 P 4 01

Emmett Utilities, Inc.)
)
Petition to Abandon and Discontinue Service)

04-0065 CHIEF CLERK'S OFFICE

EXCEPTIONS TO PROPOSED ORDER

Emmett Utilities, Inc., ("Emmett") by its attorney, John M. Myers, hereby respectfully submits its exceptions to the proposed order of February 10, 2004, (the "Proposed Order") and states as follows:

1. The Proposed Order cites an order entered by the Circuit Court of McDonough County in *People v. Emmett Utilities*, No. 01-CH-2, (April 29, 2003), which mandated repairs to Emmett's water and sewer system. (the "Circuit Court Order"). The Proposed Order takes the position that the Circuit Court has, in effect, ousted the jurisdiction of this Commission to consider abandonment of service. The Proposed Order points to certain portions of the Circuit Court Order which were lined out and which would have provided, in effect, that Emmett Utilities could in lieu of making ordered repairs, file a petition to abandon service in this Commission.

2. Preliminarily, and to clear up any possible confusion, we represent to the ALJ and to the Commission that the lined-out portions of the Circuit Court Order were proposed language submitted by Emmett to the Circuit Court, and which were rejected by the trial judge when he entered the Circuit Court Order. The lined-out portions of the order are therefore not and have never been part of the relief ordered by the Circuit Court.

3. There is nothing in the Circuit Court Order which ousts the Commission of jurisdiction over this Petition. Nor is there anything in the Public Utilities Act suggesting that a court of law can, even in principle, oust the Commission of jurisdiction to hear cases which are expressly provided for by statute.

4. As the Proposed Order notes, the Circuit Court Order did mandate certain system repairs. Emmett recently had a modest rate increase under a simplified rate case, but as shown by the annual report for 2003 attached to the Verified Petition, the modest rate increase has not been sufficient to put Emmett's finances in the black. As stated in the Verified Petition, the simple truth is that there is no money to do the repairs and zero likelihood of obtaining funds to do the repairs. Emmett is precluded by the Commission from borrowing funds from its sole shareholder, Russell Thorell, to do the repairs (see letter from Commission dated July 2, 2003, attached as Exhibit A, threatening penalties for shareholder loans). And even assuming that Emmett could find a willing lender or investor (who would have to be blind, or naive, or both) this Commission would have to approve the transaction.

5. Emmett was plainly in a "Catch 22" situation before it filed this case. It is subject to an order of a court to make system repairs, but there are no funds with which to make the repairs. It cannot get the funds from its shareholder; it cannot borrow the funds from a third party. It cannot shut its system down without permission of this Commission, but it cannot operate its system in accordance with the stringent mandates of the Illinois EPA.

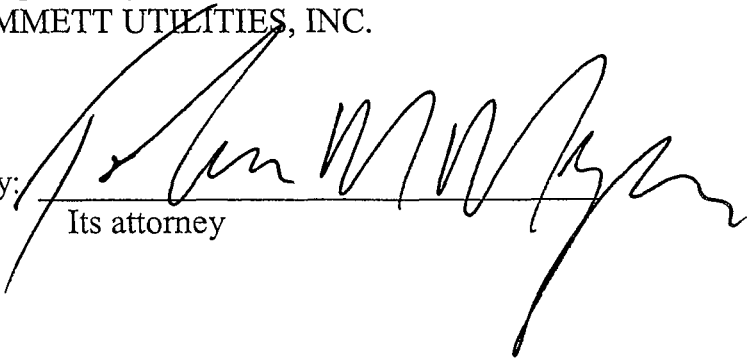
6. The Proposed Order compounds Emmett's "Catch 22" problem, for if adopted, the Commission would be saying in effect that it has no jurisdiction over Emmett Utilities. Under the view of the Circuit Court Order propounded in the proposed order, if the hypothetical naive and blind lender could be found to fund the system repairs, the Commission would lack jurisdiction to approve the loan.

7. The Proposed Order says the Verified Petition is dismissed "without prejudice" for lack of jurisdiction. We respectfully suggest that dismissal for lack of jurisdiction and without prejudice is a contradiction in terms. The proposed order nowhere suggests how or under what circumstances the Verified Petition could be reinstated. That is prejudice, pure and simple.

8. It may well be that after staff review, presentation of evidence and a hearing, that the Commission might determine that abandonment of service is improper. However, Emmett is entitled by statute to the Commission's consideration of its Verified Petition and a hearing thereon. Emmett should not be left in limbo with no hearing—which is exactly what the Proposed Order does.

WHEREFORE, Emmett takes exception to the Proposed Order, which should not be entered at all. Rather than this case being dismissed, this case should proceed.

Respectfully Submitted,
EMMETT UTILITIES, INC.

By: 
Its attorney

John M. Myers

RABIN, MYERS, HANKEN & DURR, P.C.
1300 South Eighth Street
Springfield, IL 62703
217.544.5000
fax: 217.544.5017
email: jmyers@springfieldlaw.com



ILLINOIS COMMERCE COMMISSION

July 2, 2003

Russell D. Thorell
Emmett Utilities, Inc.
RR 2 Box 58N
Oquawka, IL 61469

RE: Emmett Utilities, Inc.

Dear Mr. Thorell:

The Staff of the Illinois Commerce Commission ("Commission") has become aware that Emmett Utilities has been borrowing funds in excess of the \$40,000 limit the Commission authorized in its Order in Docket No. 83-0091, dated September 22, 1989. In the Section of the Order titled "Affiliated Interest Transactions," the Commission adopted Staff's recommendations to (1) authorize loans by Russell Thorell to Emmett Utilities, documented by notes, in an amount not to exceed a total of \$40,000, and at an interest rate not to exceed the prime rate plus two percent and (2) require further approval for loans made after January 1, 1991. Staff believes that Emmett Utilities has violated that Order. Loans in excess of \$40,000 are outstanding and funds were provided to the utility after 1991 without Commission approval. In addition, other individuals have loaned funds to Emmett Utilities.

Section 6-102(a) of the Illinois Public Utilities Act ("Act") specifies that a public utility may issue evidences of indebtedness payable at periods of more than 12 months after the date thereof for any lawful purpose only after an order authorizing such issue is secured from the Commission in accordance with this subsection. Section 7-101 of the Act provides the Commission with authority over transactions with affiliated interests. Section 7-101(3) of the Act states, among other things, that no financial contract made with any affiliated interest shall be effective unless it has first been filed with and consented to by the Commission or is exempted in accordance with the provisions of Section 7-101 or Section 16-111 of the Act.

To the extent that Section 7-101 of the Act applies and no exemption is otherwise applicable, it would appear that the loans currently outstanding and regarding the "Notes Payable to Associated Companies" are null and void.



ILLINOIS COMMERCE COMMISSION

Further, under Section 6-105, every public utility which issues notes without required Commission approval is subject to a penalty of not less than \$500 nor more than \$20,000 for each offense.

The Company has two options. It could petition the Commission for authorization for the notes payable under Section 6-102(a) and 7-101(3) of the Act. Alternatively, the outstanding balance of the notes payable could be converted to equity and reclassified as "Additional Paid In Capital." Commission authorization is not required for Additional Paid In Capital. Further, if additional capital is needed in the future and is obtained in the same manner, authorization would not be needed if the funds were accounted for in the Additional Paid in Capital account. However, if recorded as Notes Payable to Associated Companies with duration over 12 months, Commission authorization would be necessary.

Please notify me of your intended course of action, including a proposed completion date, by July 21, 2003. Resolution of this matter is necessary for Staff to complete its review of the Company's simplified rate case.

If you have any questions regarding this letter, please contact me by electronic mail at jfreetly@icc.state.il.us or by telephone at (217) 785-5421.

Sincerely,

A handwritten signature in cursive script that reads "Janis Freetly".

Janis Freetly
Senior Financial Analyst
Finance Department
Illinois Commerce Commission

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CLERK'S OFFICE

MAR 08 2004

STATE OF ILLINOIS
Pollution Control Board

ORIGINAL
~~CERTIFICATE OF SERVICE~~

The undersigned hereby certifies that a copy of the **SUPPLEMENT TO MOTION FOR STAY OF PROCEEDINGS** was served upon all counsel of record by placing same in the United States Post Office mail box, postage prepaid in Springfield, Illinois on March 5, 2004 and addressed to:

Thomas Davis, Assistant Attorney General
Office of the Attorney General
Environmental Bureau
188 W. Randolph Street, 20th Floor
Chicago, IL 60601

Carol Sudman
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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and that the original was filed with the Clerk of the Court in which said cause is pending.

