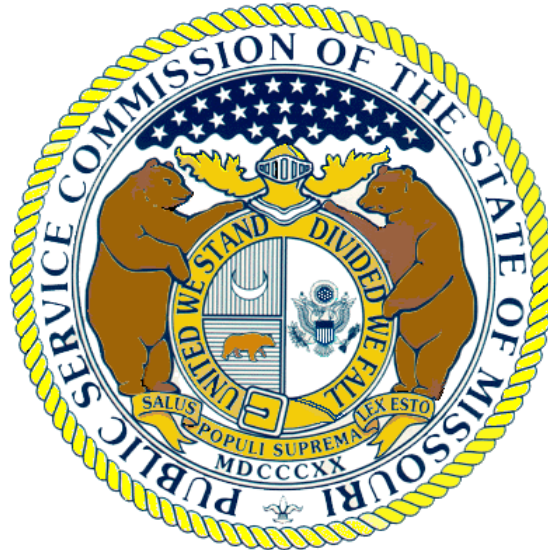


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of Carl R. Mills Trust)
Certificate of Convenience and)
Necessity Authorizing it to Install, Own,)
Acquire, Construct, Operate, Control,)
Manage and Maintain Water Systems in)
Carriage Oaks Estates)

File No. WA-2018-0370

REPORT AND ORDER

Issue Date: October 9, 2019

Effective Date: November 8, 2019

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Manage and Maintain Water Systems in)	
Carriage Oaks Estates)	

APPEARANCES

Appearing for **Carl Richard Mills**:

Carl Richard Mills, pro se, 209 Falling Leaf Court, Branson West MO 65737

Appearing for the **Staff of the Missouri Public Service Commission**:

Alexandra L. Klaus, Senior Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

Mark Johnson, Deputy Counsel, Governor Office Building, 200 Madison Street, Jefferson City, Missouri 65102.

Appearing for the **Office of the Public Counsel**:

John Clizer, Associate Counsel, Governor Office Building, 200 Madison Street, Suite 650, Post Office Box 2230, Jefferson City, Missouri 65102.

Appearing for **Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott**:

Karl Finkenbinder, Attorney, 100 Prairie Dunes Dr., Ste. 200, Branson MO 65616-6561,

Regulatory Law Judge: John T. Clark

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REPORT AND ORDER

Procedural History

On April 12, 2018, the Missouri Public Service Commission (Commission) issued its Report and Order in File No. WC-2017-0037. That proceeding involved several residents of the Carriage Oaks Estates subdivision filing a complaint with the Commission against subdivision developer Carl Richard Mills (Mills), the subdivision homeowners association (HOA), and several entities created by Mills. The Complaint alleged that Mills operated a public utility subject to the Commission's jurisdiction without having obtained a Certificate of Convenience and Necessity (CCN) from the Commission. The complaint also alleged that Mills transferred the subdivision's water assets to various entities owned or controlled by Mills without the Commission's approval.

The Commission determined that Mills was a water corporation within the definition of Section 386.020(59) RSMo, and as such was subject to Commission jurisdiction. The Commission also determined that any transfers of water assets were void and Mills retained ownership of the water assets. The Commission ordered Mills to apply for a CCN.

On June 7, 2018, the Carl Richard Mills Trust filed an Application for a CCN to install, own, acquire, construct, operate, control, manage and maintain the water system in the Carriage Oaks Estates subdivision. The Commission issued notice of the application, ordered its Staff to file a recommendation, and set a deadline for interventions. Subdivision residents Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (Intervenors) were granted intervention. An Amended

Application for Convenience and Necessity was filed on October 2, 2018, with Mr. Mills in his individual capacity as the applicant.

On October 11, 2018, Staff filed its recommendation that the Commission approve the application subject to certain conditions. The Intervenors filed a request for an evidentiary hearing on November 13, 2018.

On June 24, 2019, an evidentiary hearing was held at the Commission's offices in Jefferson City, Missouri. During the hearings, the parties presented evidence relating to two unresolved issues previously identified by the parties. The Commission admitted the testimony of 4 witnesses, received 17 exhibits into evidence, and took official notice of certain matters.¹ The final post-hearing briefs were filed on August 6, 2019, and the case was deemed submitted for the Commission's decision on that date.²

General Matters

General Findings of Fact

1. Carl Mills is the developer of the Carriage Oaks Estates, a small subdivision located in Stone County, Missouri.³
2. Mills has operated the water system in Carriage Oaks Estates subdivision since its installation during the construction of the subdivision in 1999.⁴
3. The Intervenors are homeowners in the Carriage Oaks Estates subdivision and are required to connect to the water system.⁵

¹ At the hearing, the regulatory law judge took official notice of the Report and Order in File No. WC-2017-0037.

² "The record of a case shall stand submitted for consideration by the commission after the recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 20 CSR 4240-2.150(1).

³ Ex. 1, Mills Direct, page 3.

⁴ Ex. 1, Mills Direct, pages 4 and 9.

⁵ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

4. The Office of the Public Counsel (OPC) is a party to this case⁶ pursuant to Commission Rule 20 CSR 4240-2.010(10).

5. The Staff is a party to this case⁷ pursuant to Section 386.071, RSMo, and Commission Rule 20 CSR 4240-2.010(10).

6. There are 32 developed lots within the Carriage Oaks Estates subdivision.⁸

7. Homes are constructed on seven lots, and are connected to the water system.⁹

8. All seven homes currently receive water service from the water system, and it is anticipated that those seven customers will continue to receive water services from the subdivision water system.¹⁰

9. The water system consists of a single well with current production capacity of 55 gallons per minute, a ground storage tank with an approximate volume of 35,000 gallons, high service pumps to provide distribution system water pressure, and bladder type pressure tanks to normalize distribution system pressure. The distribution system is in place for all of the existing 32 lots in the developed area.¹¹

10. The system includes meters for six of the seven customers, but they are neither being read nor used for billing.¹²

11. Any finding of fact reflecting that the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight

⁶ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

⁷ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

⁸ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

⁹ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

¹⁰ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 2.

¹¹ Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 2.

¹² Ex. 100, McMellen Rebuttal, Memorandum, Appendix A., page 2.

to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.¹³

General Conclusions of Law

A. Carl Mills owns a “water corporation” and a “public utility” as defined in Sections 386.020(59) and 386.020(43), RSMo,¹⁴ respectively, and as such is subject to the personal jurisdiction, supervision, control and regulation of the Commission under Chapters 386 and 393 of the Missouri Revised Statutes.

B. Sections 393.130 and 393.140, RSMo, mandate that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable.

C. Carl Mills bears the burden of proving that granting his application is required by public convenience and necessity.¹⁵ In order to carry his burden of proof, Carl Mills must meet the preponderance of the evidence standard.¹⁶

Disputed Issues

- I. Does the evidence establish that the water system in Carriage Oaks Estates for which Carl R. Mills is seeking a certificate of convenience and necessity (CCN) is “necessary or convenient for the public service” within the meaning of that phrase in Section 393.170, RSMo.?**
- II. If the Commission grants Mr. Mills a CCN, what conditions, if any, should the Commission deem to be reasonable and necessary, and impose?**

¹³ An administrative agency, as fact finder, also receives deference when choosing between conflicting evidence. *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009)

¹⁴ Unless otherwise stated, all statutory citations are to the Revised Statutes of Missouri, as codified in 2016 and subsequently revised or supplemented.

¹⁵ 20CSR 4240-3.600(1)(D).

¹⁶ *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996), citing to, *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979).

Findings of Fact

1. There is a need for the service.¹⁷
2. There are no other utility companies providing water services to the Carriage Oaks Estates Subdivision.¹⁸
3. As the subdivision developer, Mills paid for the installation of the water system.¹⁹
4. The water system is already constructed, so there will be no additional financing required.²⁰
5. Mills used his personal finances to pay for upgrades and repairs.²¹
6. Staff's observation of current operations indicates that upgrades and repairs appear to have been adequate in the past.²²
7. Mills has provided safe and adequate service for the Carriage Oaks Estates subdivision for the prior 19 years.²³
8. The Intervenors have asserted that Mills lacks the physical and mental capacity to operate the water system.²⁴
9. Mills credibly testified that he is physically capable of operating the system.²⁵

¹⁷ Commission Ex. 1, Joint Stipulation of Agreed Upon Facts, page 3.

¹⁸ Ex. 1, Mills Direct, Exhibit 1, Amended Application for Convenience and Necessity, page 2.

¹⁹ Ex. 1, Mills Direct, page 9.

²⁰ Ex. 1, Mills Direct, Exhibit 1, Amended Application for Convenience and Necessity, page 2.

²¹ Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 5.

²² Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 5.

²³ Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 5.

²⁴ Tr., page 36.

²⁵ Tr., pages 46-47.

10. Mills competent testimony at the hearing, his prior experience operating the water system,²⁶ and his prior employment experience²⁷ indicate that he has sufficient mental capacity to operate the Carriage Oaks Estates water system.

11. The homeowners in the Carriage Oaks Estates subdivision pay an annual assessment for to the Carriage Oaks Estates Homeowners' Association, a portion of which pays for the costs of the water system.²⁸

12. Mills previously informed the Carriage Oaks Estates Homeowners' Association, that he would shut off the water for nonpayment of the assessment fee.²⁹

13. Mills hired a third party contract operator to operate the water system for two and a half months,³⁰ and terminated that contractor three weeks prior to the evidentiary hearing due to a contract dispute.³¹

14. A contract operator/manager could solve many of the issues or perceived issues associated with water quality and customer relations, because it would remove Mills from the day-to-day issues, although he would remain involved as the owner, financier, and executive of the utility.³²

15. Mills has expressed that in the near future he would like to turn over operation of the system to Ozark Clean Water.³³

16. Ozark Clean Water is a company that maintains all aspects of drinking water systems.³⁴

²⁶ Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 5.

²⁷ Ex. 1, Mills Direct, page 3.

²⁸ Ex. 300, Morgan Direct, page 6.

²⁹ Tr., pages 126-128.

³⁰ Tr., pages 86-87

³¹ Tr., page 89.

³² Ex. 101, Merciel Rebuttal, page 7.

³³ Ex. 1, Mills Direct, page 11.

³⁴ Ex. 3, Mills Surrebuttal, attached Exhibit 501.

17. Mills stated that Ozark Clean Water has confirmed that it would be willing to take over management and maintenance of the water system.³⁵

18. The Intervenors ask the Commission to deny Mills' application for a CCN and order another public utility to acquire the water system under Section 393.146, RSMo.³⁶

19. The Intervenors have asserted that they are not included in the decision making process, and want the water system placed with an entity in which all owners are members of the entity and each member receives one vote.³⁷

20. The Department of Natural Resources does not currently monitor or test the Carriage Oaks Estates water supply because there are less than 15 connections to the water system and less than 25 individuals using it.³⁸

21. The Intervenors have testified to service quality issues involving rocks,³⁹ water pressure, and iron content.⁴⁰

22. The water quality issues involving discoloration from iron, sediment, and water flow are not health related or violations of drinking water standards.⁴¹

23. The record in the WC-2017-0037 complaint, in which the Intervenors in this matter were also intervenors, does not demonstrate any abuse by Mills in regard to rates or safety.⁴²

³⁵ Ex. 3, Mills Surrebuttal, page 3.

³⁶ Tr., pages 38-39.

³⁷ Ex. 300, Morgan Direct, pages 6-7.

³⁸ Ex. 101, Merciel Rebuttal, page 3.

³⁹ Tr., page 177.

⁴⁰ Ex. 300, Morgan Direct, pages 9-11.

⁴¹ Ex. 101, Merciel Rebuttal, page 4.

⁴² Commission Ex. 2, Report and Order, page 14.

24. Mills has testified that the water system is now titled in his name, and therefore in compliance with the Commissions prior orders.⁴³

25. Staff has expressed concern regarding Mills' failure to timely title the water system in his name, though the Commission's order in WC-2017-0037 voided any of Mills' transfers of the water system to other entities.

26. Staff observed that the water system appears to be adequately designed and constructed, is in good condition, and at the time of Staff's report, customers were not complaining about service issues.⁴⁴

Conclusions of Law

A. No water corporation can construct a water system without prior Commission authorization.⁴⁵

B. No water corporation may exercise any franchise right or privilege without the Commission's authorization.⁴⁶

C. The Commission may grant a water corporation a certificate of convenience and necessity to operate after determining that the construction and operation are either "necessary or convenient for the public service."⁴⁷

D. The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed service" would be an improvement justifying

⁴³ Tr., page 91.

⁴⁴ Ex. 100, McMellen Rebuttal, Memorandum, Appendix A, page 4.

⁴⁵ Section 393.170.1, RSMo.

⁴⁶ Section 393.170.2, RSMo.

⁴⁷ Section 393.170.3, RSMo.

its cost,"⁴⁸ and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.⁴⁹

E. The Commission has articulated the filing requirements for water utility CCNs in Commission Rule 20 CSR 4240-3.600, and the specific criteria to be used when evaluating applications of water utility CCNs are more clearly set out in *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991).

The *Intercon* case combined the standards used in several similar certificate cases, and set forth the following criteria: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest.⁵⁰

F. It is within the Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.⁵¹ In determining the public interest, "[P]ositive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest."⁵²

⁴⁸ *St. ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

⁴⁹ *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973); *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

⁵⁰ The factors have also been referred to as the "Tartan Factors" or the "Tartan Energy Criteria." See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173 (September 16, 1994), 1994 WL 762882, *3 (Mo. P.S.C.).

⁵¹ *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra*, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

⁵² *In Re Tartan Energy Co., L.C.*, No. GA-94-127, 1994 WL 762882 at *11 (Sept. 16, 1994).

G. The Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN.⁵³

H. The Commission may order a capable utility to acquire a small water corporation if the Commission determines that the small water corporation is in violation of statutory or regulatory standards that affect safety and adequacy of service, that it has not complied with orders concerning the safety and adequacy of service, or that it is unreasonable to assume it will furnish and maintain safe adequate service in the future. In the absence of an imminent threat of serious harm to life or property, the Commission shall discuss alternatives to acquisition including having the small water corporation enter into a contract with another public utility or management service to operate the small water corporation.⁵⁴

Decision

After applying the facts to the applicable law, the Commission finds that Carl Mills qualifies for the requested CCN. The Commission has considered the positions and arguments of all of the parties. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the material was not dispositive of this decision.

The Commission finds that there is a need for water service, as stipulated by the parties. Therefore, the service is necessary within the meaning of Section 393.170, RSMo. The water system is convenient because it is set up to provide service to all current residents of Carriage Oaks Estate and a distribution system capable of supplying water

⁵³ Section 393.170.3, RSMo.

⁵⁴ Section 393.146, RSMo.

to all 32 developed lots. The Commission also concludes that Carl Mills possesses adequate technical, managerial, and financial capacity to operate the water system in the Carriage Oaks Estates subdivision. The factors for granting certificate of convenience and necessity to Carl Mills have been satisfied and it is in the public interest for Carl Mills to provide water service to the customers residing in the Carriage Oaks Estates subdivision. The Commission does not find that sufficient reasons exist for the Commission to consider ordering another utility to acquire the water system.

Staff, OPC and the Intervenors submitted proposed conditions in their post-hearing briefs. The Commission concludes that Staff's and OPC's conditions are reasonable and necessary in granting a CCN to Mills to ensure safe and adequate service because of Mills' inexperience with utility regulation, customer concerns with water quality, continued inappropriate billing of customers through the HOA, and Mills' difficulty in fully complying with the Commission's prior orders in File No. WC-2017-0037. The Commission will order conditions that it feels are necessary to safeguard the interests of the customers residing in the subdivision and are articulated in the ordered paragraphs below.

OPC additionally states that Staff's proposed flat quarterly rate for water services of \$271.42 is consistent with Mills not contracting with a company to manage the water system. Staff updated that rate to \$289.68⁵⁵ premised on Mills contracting with a third party operator for management of the water system. OPC opposes granting Mills the higher rate in the absence of a third party operator managing the water system. The Commission concludes that because Mills is being required to hire a third party contractor, a flat quarterly rate of \$289.68 is just and reasonable.

⁵⁵ Ex. 102, Updated D-1.

The Commission makes no findings that would preclude it from considering the ratemaking treatment to be afforded any matters in any later proceeding.

THE COMMISSION ORDERS THAT:

1. Carl Mills is granted a certificate of convenience and necessity to provide water service within the Carriage Oaks Estates subdivision service area as depicted by the map metes and bounds description included with Staff's Memorandum, as Attachments A and B.

2. The Commission approves the depreciation rates for water utility plant accounts as described and shown on Staff's Memorandum Attachment E: Schedule of Depreciation Rates for Water Plant.

3. The Commission approves a quarterly flat rate for water service of \$289.68, as a just and reasonable rate.

4. The Commission extends the requirement for Mills to submit a rate case ordered in the Commission's *Report and Order* issued in WC-2017-0037. Mills shall submit a rate case one year after the effective date of the issuance of the Certificate of Convenience and Necessity in this Report and Order.

5. The Commission orders the following reasonable and necessary conditions:

- a. Mills shall follow all applicable requirements pertaining to regulated water companies.
- b. Mills shall create and keep financial books and records for plant-in-service, revenues, and operating expenses (including invoices) in accordance with the NARUC Uniform System of Accounts.
- c. Mills shall, going forward, keep and make available for audit and review all invoices and documents pertaining to the capital costs of constructing and installing the water utility assets.

- d. Mills shall submit a complete tariff for water service, as a 30-day filing, within ten days after the effective date of this Report and Order.
- e. Mills shall submit information to the Commission's Staff indicating he owns pertinent water utility real estate, and has access and control of water-related utility easements throughout the service area, within 30 days after the effective date of this Report and Order.
- f. Mills shall distribute to all customers an informational brochure detailing the rights and responsibilities of the utility and its customers regarding its water service, consistent with the requirements of Commission Rule 20 CSR 4240-13, within 30 days after the effective date of this Report and Order.
- g. Mills shall provide to the Customer Experience Department staff a sample of three bills from the first billing cycle after the effective date of this Report and Order.
- h. Mills shall file notice in this case once conditions f. and g. above have been completed;
- i. Mills shall take water samples for laboratory analysis at least twice per year at approximately six-month intervals for bacterial contamination, chlorine residual and iron content, such sample to begin within 30 days of the effective date of this Report and Order.
- j. Mills shall report the twice-annual water testing results to customers at least annually, beginning within 240 days after the effective date of this Report and Order.
- k. Mills shall provide the Commission's Staff and OPC evidence of his purported contract with Ozark Clean Water within 30 days of the effective date of this Report and Order.
- l. Mills shall notify the Commission's Staff and OPC within one week of any termination of the purported contract with Ozark Clean Water.
- m. Mills shall initiate a rate case proceeding within two months of any termination of the purported contract with Ozark Clean Water.

6. This Report and Order shall become effective on November 8, 2019.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris Woodruff
Secretary

Silvey, Chm., Kenney, Hall, Rupp, and
Coleman, CC., concur.

Clark, Senior Regulatory Law Judge