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April 30, 2002

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Re: Environmental Utilities, LLC
Case No. WA-2002-65

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Initial Brief of the Office of the Public Counsel and Proposed Findings of Fact and Conclusions of Law of the Office of the Public Counsel**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "M. Ruth O'Neill".

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

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

In the Matter of the Application of Environmental)	
Utilities, LLC, for Permission, Approval, and a)	
Certificate of Convenience and Necessity Authorizing)	
It to Construct, Install, Own, Operate, Control, Manage))	
and Maintain A Water System for the Public)	Case No. WA-2002-65
Located in Unincorporated Portions of Camden)	
County, Missouri (Golden Glade Subdivision).)	

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

M. Ruth O'Neill (#49456)
Assistant Legal Counsel

April 30, 2002

INTRODUCTION

The primary issue in this case is whether the Missouri Public Service Commission should approve the Application of Environmental Utilities, LLC, for a certificate of convenience and necessity to operate a water system in the Golden Glades subdivision in rural Camden County, Missouri. This issue is complicated by a number of secondary issues.

These secondary issues include the fact that the applicant, a limited liability corporation, is owned by persons, Greg and Debra Williams, who are also principals in another closely held, regulated public utility company, Osage Water Company, which has a rather checkered history before the Commission. Greg and Debra Williams are also the developers of Golden Glade subdivision. Pursuant to the requirements of the Golden Glade Landowners' Association, Mr. and Mrs. Williams control the homeowners' association, and will continue to have control over the association for the foreseeable future. This issue is further complicated by the fact that the financial viability of the proposed water system depends, in significant degree, on the ability of Environmental Utilities, LLC to provide wholesale water service to Eagle Woods, a subdivision in rural Camden County which is adjacent to Golden Glade. Eagle Woods receives regulated water service from Osage Water Company. During 2001-2002, Osage Water Company experienced internal difficulties among its stakeholders, and management of Osage was assumed by Greg and Debra Williams from another stakeholder, William "Pat" Mitchell. The internal turmoil of Osage Water Company is a factor which the Commission should consider in deciding what course of action to take in this case, and will be further discussed at the appropriate time.

The crux of the primary issue, however, is not whether Environmental Utilities will be allowed to "construct, install [or] own" a water utility in Golden Glades. Mr. and Mrs. Williams, as the developers of the subdivision, have already constructed/installed water plant for the purpose of providing water service to Golden Glade homeowners. As developers, they own the plant, which consists of a water well and distribution mains. If a certificate is granted, Environmental Utilities intends to contract with Osage Water Company to provide wholesale water service to Eagle Woods, an Osage Water service territory. The record indicates that the Williamses intend to sell the existing infrastructure to Environmental Utilities if a certificate is granted. Similarly, the record states that the Williamses intend to lease, rather than contribute, the infrastructure to the Golden Glade Landowners' Association if the Commission denies this application.

When the Williamses created the Landowners' Association, they guaranteed that they would control the system themselves for the foreseeable future. In any event, the Williamses, as developers of the subdivision, intend to sell the water to Golden Glade through whichever entity becomes the water service provider, and recover the cost of the infrastructure from Golden Glade customers through rates. It is likely that the Williamses intend to sell water to Osage for Eagle Woods under some business arrangement regardless of the Commission's decision in this case.

Against this backdrop, Environmental Utilities presents the Commission with a classic Hobson's Choice: Will the Commission grant a certificate to a company which is, at best, conditionally qualified to provide regulated utility service, or will the Commission deny a certificate with the result that current customers of Osage Water Company, which is regulated by the Commission, will suffer from the lack of an

adequate water source (because the Golden Glade Landowners' Association cannot serve customers outside the subdivision, and therefore cannot contract to provide water to Eagle Woods)?

FACTS AND PROCEDURAL HISTORY

Environmental Utilities, LLC (Environmental or Company) is a limited liability corporation formed under Missouri law. Environmental is owned by Greg and Debra Williams. On, August 23, 2001, Environmental filed an application with the Commission seeking a certificate of convenience and necessity to provide water service to Golden Glade subdivision as a regulated utility.

Golden Glade is a subdivision currently under development in Camden County, Missouri. The developers of the subdivision are Greg and Debra Williams. The subdivision consists of single family home lots. A set of restrictive covenants are contained in the property deeds to lots in Golden Glade. One of these covenants requires residents to connect with a central water utility service in the subdivision when such a service becomes available. [See, Exhibit 13.] Currently, residents of Golden Glade receive water from multi-family wells. Golden Glade residents receive sewer service from Osage Water Company.

Osage Water Company (Osage) is a small regulated public utility. Osage provides water and/or sewer service to several subdivisions and areas in or near Camden County, Missouri. Areas served by Osage are generally not interconnected to other Osage territories. Osage is incorporated under the laws of Missouri. Its primary shareholders

are Greg Williams and William "Pat" Mitchell. David Hancock, owner of Hancock Construction Company (together, Hancock), an intervenor in this application case, also holds a financial interest in Osage, in the form of preferred stock and a debenture owed to Hancock by Osage. Osage has not moved to intervene in this matter. However, it should be noted that Osage is generally represented by Greg Williams before this Commission, and Greg Williams is attorney of record for Environmental in this proceeding. This attorney is the same Greg Williams who owns parts of Environmental and Osage, and who developed Golden Glade.

On or about August 29, the Office of the Public Counsel (Public Counsel), requested that the Missouri Public Service Commission (Commission) conduct a hearing to determine whether it should grant the requested certificate to Environmental. The Commission held that hearing on January 7 and March 25, 2002.

At the January 7 hearing, Environmental witness Debra Williams presented testimony regarding whether the utility owners were "qualified" to provide utility service. She testified that, unlike Osage, Pat Mitchell had no ownership interest in Environmental. She also testified that neither she nor her husband, Greg Williams, had taken part in the management of Osage prior to July of 2001. [Tr. at p. 70.] She further testified that Mr. Mitchell, while still an owner of Osage, no longer participated in that company's management, and that she was attempting to rectify a number of deficient conditions in the operation of Osage which she attributed to Mr. Mitchell. Mr. Williams acted as the attorney for Environmental in this proceeding, and did not testify in this proceeding.

Mrs. Williams testified that she and her husband decided to form Environmental because they were unwilling to make further investments in Osage, and needed to provide water service to persons building homes in Golden Glade subdivision.

At the March 25 hearing, evidence was presented that Mr. Mitchell had been re-elected to his position as a director of Osage at the board of directors meeting, attended by Mr. and Mrs. Williams on January 8, 2002. Mr. and Mrs. Williams were also elected as directors. [Exhibit 28, p. 4.]

On or about April 17, 2002, residents of Golden Glade filed a complaint with the Commission alleging that Osage Water Company was attempting to bill them for water service within Golden Glade subdivision. While that complaint does not comprise a portion of the record in this case, this issue was discussed by Mrs. Williams in her testimony, during questions from the Commission. [Tr., at p. 137] Public Counsel respectfully requests that the Commission take judicial notice of this complaint.

ARGUMENT

I. If certain conditions are imposed by the Commission, and if Environmental Utilities complied with those conditions, Environmental Utilities would minimally satisfy the Commission's first four criteria which a utility must meet before it will be allowed to provide public water utility service within the proposed service area.

The Public Service Commission is authorized to grant permission and approval to investor-owned companies which seek to provide public utility services in the State of Missouri when "it shall after due hearing determine" determine that it is "necessary or convenient for the public service." §393.170.3 RSMo (2000).

In determining whether to grant a certificate of convenience and necessity, the Commission must determine first whether the applicant, in this case Environmental,

meets the criteria for receiving a certificate of convenience and necessity. This process was described in State ex rel. Intercon Gas, Inc. v. PSC of Missouri, 848 S.W.2d 593, 597-598 (Mo. App. W.D.1993):

The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost. State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d at 219. Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n, 600 S.W.2d 147, 154 (Mo. App. 1980). The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers. State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n, 527 S.W.2d 390, 394 (Mo. App. 1975). Furthermore, it is within the discretion of the Public Service Commission to determine when the evidence indicates the public interest would be served in the award of the certificate. Id. at 392.

In order to properly evaluate applications for certificates of convenience and necessity, the Commission developed a number of criteria. Those criteria were discussed in the case of Re Tartan Energy Company, L.C. d/b/a Southern Missouri Gas Company, Case No. GA-94-127. In that case, the Commission stated that

Although there is a dearth of statutory guidance, the Commission has articulated requirements for certificates in Commission Rule 4 CSR 240-2.060(2), and the criteria to be used in evaluating such applications 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. Id.

Public Counsel believes that the Commission should analyze each of these factors separately.

(1) Is the utility qualified to provide service?

Although at least one of the owners of Environmental Utilities has been involved with another regulated utility for several years, the evidence did not clearly establish whether Environmental is "qualified" to provide utility service.

In Environmental's Application for a certificate of convenience and necessity, the Company alleges that it is qualified to provide water service to Golden Glade. The application includes an assertion that "the proposed water system will meet all of the requirements of the Commission and the Department of Natural Resources."

[Application, p.1.]

To determine whether the entity is qualified to provide water service, the application references and incorporates a feasibility study, at "Exhibit C" attached to the application. The first text page of that study states that the qualifications of Debra Williams, the manager of the company, are that she holds a bachelor's degree and a real estate broker's license, and has "extensive training and experience as a paralegal." The study also states that Greg Williams is an attorney, and that he owns and operates "a title plant and title company". He is described as providing legal counsel to the Company on a contract basis and represents of "oversees representation of the company on regulatory matters." Mr. Williams' qualifications further include the facts that he "serves as a director and corporate secretary for Osage Water Company."

The further qualifications of the Company include the employment of Jeffrey Smith, who provides maintenance. Also, page 4 of the feasibility study describes the prior construction and installation water plant including water mains and a well at Golden Glade. The application states that "Environmental Utilities currently operates the facilities of Osage Water Company since the abandonment thereof by William P. Mitchell, its president, and has qualified staff to perform operations and maintenance of the proposed water facility and to provide customer service, billing and management." However, no elaboration of these claims exists in the application.

At the evidentiary hearing in this case, Debra Williams, the sole witness for the Company, provided little additional information in support of the claim that Environmental was qualified to provide public utility water service to the Golden Glade residents.

Prior to the evidentiary hearing, Public Counsel believed that Greg Williams, one of the LLC's owners, had substantial experience in operating a public utility, based upon his involvement with Osage Water for the past several years. However, the evidence presented at the hearing suggested that Mr. Williams had virtually no part in the day to day operations of Osage, at least prior to July of 2001. Upon cross examination, Ms. Williams claimed that, although she and her husband had been directors of Osage for several years, neither of them had "anything to do with operations" of that company. [Tr. at p. 69.]

In fact, at the time she assumed the management duties for Osage, Mrs. Williams claims that she was "unprepared" for this responsibility. [Tr. at p. 53.] During her testimony at the evidentiary hearing, Mrs. Williams was unable to answer questions

regarding several areas of water utility management for both Osage and Environmental, including questions regarding cost allocations between these companies and other non-regulated business enterprises owned by Mr. and Mrs. Williams. She seemed at a loss to describe what entity owned what property, and was not aware of tariff provisions for Osage regarding sewer service in Golden Glade.

When specifically asked whether Mr. Williams had any experience managing a water utility, Mrs. Williams testified: "Not until July 9. We have six months experience. He did—he was—let's see. He was president from 1996 to 2000, and I'm not real sure what his precise duties were at that time, but it was not management of the company." [Tr. at p. 70.] Later, on cross-examination by the Intervenor, Hancock Construction, Mrs. Williams agreed "without hesitation" that "Mr. Williams didn't have substantial knowledge and information and had a lot to say about the way OWC practiced over the years?" [Tr. at p. 91.]

Mrs. Williams further testified that she and Mr. Williams had installed water distribution mains [Tr. at p. 126] and constructed a well for providing water service [Tr. at p. 106] with their personal funds. Public Counsel respectfully suggests that the Commission, upon a review of the entire record in this case, is in the best position to judge the knowledge, management skills and credibility of the Company's only witness in this case, and to consider the ability of the other member of Environmental to operate a public utility.

At the time initially scheduled for the evidentiary hearing, neither Osage nor Environmental had a licensed operator in its employ. However, a part-time employee, Jeffrey Smith was scheduled to take his operators' test the day after the hearing. [Tr. at p.

72.] At the continuation of the evidentiary hearing on March 25, Staff witness Merceil testified that "the latest information I have is the operator passed the test and also the owner of the Company. In fact, I believe both owners of the Company passed the test." [Tr. at p. 331.]

In order for the Commission to determine whether Environmental meets the criterion of being qualified to provide water service, it must consider "the safety and adequacy of the facilities" and "the relative experience and reliability" of potential providers. See, In the Matter of Osage Water Company (Eagle Woods Application), MPSC Case No. WA-99-437. In that case, the Staff and Public Counsel objected to granting a certificate of convenience and necessity to Osage Water. In granting that certificate, over objection, the Commission noted that Mr. Pat Mitchell testified extensively regarding the qualifications of Osage to provide water and sewer service. The Commission stated that

"Mitchell's testimony more than adequately displayed his knowledge of water and sewer systems, plus his knowledge of the operation of the equipment needed to run a water and sewer system. This experience is valuable to the operation of any water and sewer system. Osage and its principals have substantial knowledge regarding engineering, safety, and the technical ability and equipment to provide the service needed for the proposed water and sewer system." Id. at p. 17. (emphasis added.)

In The Matter of the Application of Osage Water Company (Golden Glade sewer service application), MPSC Case No. SA-99-268, the Commission also found that Mr. Mitchell's testimony in that case regarding his own experience in operating water and

sewer systems compelled the Commission to reach similar findings to those contained in its decision in WA-99-437.

Mrs. Williams did not provide such testimony in this case. In fact, her testimony revealed her lack of knowledge of the details of operating a public utility. She also denied that her husband and co-owner of Environmental had any significant experience operating a public utility. According to Mrs. Williams, Pat Mitchell ran all utility operations for Osage until July 9 of last year, and she and her husband have been trying to straighten things out. While, if true, this would show admirable determination, it does not establish that the Williamses are qualified, absent the presence of a partner or manager familiar with public utilities, to operate a public water system.

If neither Mr. nor Mrs. Williams has any prior experience with utility operations, then Public Counsel believes that it would be detrimental to the public interest to grant a certificate to Environmental, unless the certificate was expressly conditioned on the managing member of the LLC obtaining training, at his or her own expense, in the operation and management of a public utility. In addition, Public Counsel believes a necessary condition to granting a certificate would be for the company to continue to seek assistance from the Commission's Water and Sewer Department Staff in applying management techniques to the company.

2. Is there a need for the proposed service?

Public Counsel believes that there is, or soon will be, a need for a centralized water distribution system in Golden Glade subdivision. While early residents are connected to small, multi-family wells, as the subdivision grows this will not continue to

be a viable option. Public Counsel believes that this element of the Tartan Energy criteria has been met.

3. Is the company's proposal for providing service is economically feasible?

If Golden Glade develops as predicted, and if the operator of the Golden Glade well is able to sell water to Eagle Woods, the proposal will be financially feasible. If the certificate is not granted, the Williamses intend to operate the system without Commission oversight through the Golden Glade Landowners' Association. [Exh. 1, p. 12.] The Williamses effectively control the Landowner's Association, according to the bylaws of that Association. [Exhibit 13.] If the Williamses are allowed to operate this system via the Landowners' Association they will not be able to sell water to Eagle Woods. [Exh. 1, at p. 13.] Therefore, the Landowners' Association option is not economically feasible.

This option would have the added disadvantage of allowing marginally qualified persons to operate a water system with no effective checks or balances.

In the event that the Commission declines to grant a certificate in this case, Mr. and Mrs. Williams intend to lease the distribution system to the Landowners' Association, and sell water to the Association. It remains to be seen whether they will also attempt to sell water from that well to Osage customers living in Eagle Woods. Whatever decision the Commission makes regarding a certificate in this case, the Commission should closely scrutinize any water supply contract entered into between Osage Water and the Williamses -- or one of their companies-- in order to protect the customers at Eagle Woods. If Environmental had prepared a draft wholesale water

contract prior to the evidentiary hearing, the Commission could have considered that contract in determining the economic feasibility of the proposed certificate, and could also consider the contract in determining whether granting the certificate was in the public interest.

Public Counsel believes that the company's proposal is only economically feasible if Golden Glades continues to develop *and* if Environmental contracts with Osage Water to provide wholesale water to Eagle Woods subdivision. However, because of the joint ownership of Environmental and Osage, Public Counsel believes that, if a certificate is granted, the certificate should include a condition that Environmental submit, for Commission approval, any contracts it seeks to enter into with Osage or any other regulated company in which Mr. or Mrs. Williams may acquire an ownership interest.

4. Is the company is financially capable of providing the utility service?

The evidence presented on this point was not compelling. It appears that the owners of Environmental have made a considerable investment in installing distribution mains and constructing a well in anticipation of obtaining a certificate to provide water service in this subdivision. According to Mrs. Williams, she and Mr. Williams will either sell or lease these assets to whatever entity ultimately provides water service to residents of Golden Glade.

If the Commission grants Environmental a certificate of convenience and necessity, the Williamses will transfer the water system to Environmental, in exchange for "40% equity" and "a note for 60% of the cost, bearing interest at the rate of 8% and

amortized over 20 years.” [Exh. 1, pp. 16-17.] The company wants to “capitalize the cost of construction of the water supply, including a general contractors fee of 10%. The cost of construction of the distribution system will be booked as a contribution in aid of construction by the developer.” [Exhibit 1, p. 16.] At the evidentiary hearing, Mrs. Williams stated that the 10% fee was intended to compensate the Williamses “for the oversight of the work that we’ve done on our projects.” [Tr. at p. 47.]

If the Commission grants a certificate in this case, Public Counsel respectfully suggests that it condition its grant of certificate on reviewing and approving all transactions between the regulated utility and its owners, Greg and Debra Williams, which could affect the rates charged to the company’s customers. Public Counsel further suggests that the Commission either explicitly state that its decision is not binding on any ratemaking issue, or expressly **exclude** the 10% “general contractors’ fee” from rates.

II. Subject to stringent conditions imposed and enforced by the Commission, granting a certificate may be the best way to protect the interests of Golden Glade and Eagle Woods residents. If Environmental Utilities complied with those conditions, then granting a conditional certificate of convenience and necessity would be in the public interest.

Unlike the general position of the Commission Staff, which would find that granting a certificate is in the public interest as long as the first four Tartan Energy criteria are satisfied, Public Counsel believes that the fifth criterion, that granting the certificate would be in the public interest, requires its own analysis. Public Counsel believes that, unless the Commission is satisfied that this fifth element is also met, no certificate should be granted. As noted in the opening statement, Public Counsel faced a difficult decision in taking a position with regard to whether granting this certificate would be in the public interest.

At the time the hearing began, Public Counsel had reached a preliminary conclusion that the Commission, whatever its decision, could not effectively prevent the principals of Environmental Utilities from selling water service to the residents of Golden Glade. It appeared that, if the Commission declined to grant a certificate of convenience and necessity, Mr. and Mrs. Williams would have free rein to operate an unregulated public utility. Public Counsel believes strongly that it would be detrimental to the public interest for Mr. and Mrs. Williams to operate a water utility system without Commission oversight.

During the evidentiary hearing, Staff witness Merceil mentioned the Application of Rocky Ridge Ranch Utilities Company, matter, which the Commission decided in Case No. WM-93-136; 1 MPSC 3d 476; 1992 Mo. PSC LEXIS 56 (1992). In that case, the Commission agreed to approve an application of a regulated utility and a homeowners' association to transfer ownership of all water utility assets to the homeowners' association. The transfer was intended to transfer control of the utility assets from a for-profit company to an Association which would operate the system "not for gain." In that case, the Commission allowed the transfer of the assets from the regulated utility to the Association, even though the Association would also provide service to customers who were not members of the Association. The Commission's approval was conditioned on the agreement of the applicants, the Staff and Public Counsel that the Commission would continue to exercise jurisdiction over the homeowners' association. The Commission stated that it "has previously exercised, and continues to exercise, jurisdiction over the entities which provide water to persons other

than their members even if the entity provides the water 'not for gain.' The Commission will retain jurisdiction over the Association on that basis." Id.

If the Commission denies the application for a certificate of convenience and necessity, Public Counsel believes it would be appropriate for the Commission to consider the Rocky Ridge Ranch case in crafting its order. If the Commission believes that Environmental Utilities should not receive a certification, it should also determine whether the "Plan B" of providing water service through the Golden Glades Landowners' Association requires that the Association be regulated by the Commission.

At the evidentiary hearing, Public Counsel witness Bolin acknowledged that

"We do have concerns based on their (Greg and Debra Williams) prior history they have in operating Osage Water Company. However, our – we felt that it would be better to provide a regulated utility service to the customers than nonregulated in hopes that the regulated utility would provide more—that the ratepayers would be able to get more remedy or recourse for bad customer service." [Tr. at p. 230.]

Ms. Bolin further testified that Public Counsel remained concerned about the residents of Golden Glade and that she was "worried these people will operate it in an unregulated fashion and it will be even worse than what it would be under a regulated" environment. [Tr. at p. 232.]

Ms. Bolin's concerns are legitimate. In her direct testimony, Mrs. Williams stated that, if the Commission declined to grant a certificate in this case,

"My husband and I will retain ownership of the water system, and lease it to Golden Glade Landowner's Association, Inc. a not-for-profit homeowners association provided for in the subdivision restrictions for the project, for operation, maintenance and repair. It will pass its costs and expenses on to the residents of Golden Glade as homeowners' assessments....

"The same capital costs will be incurred either way, but there would be no opportunity for the homeowners' association to provide water service to anyone outside the Golden Glade project, effectively eliminating the possibility of economies of scale that can be derived by a regulated utility company. Operating the Golden Glade water system alone, without any other water or sewer systems, will be more expensive than operating it as part of a utility company." [Exh. 1, at p. 12.]

"The Commission's principle purpose is to serve and protect ratepayers." State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). (Citing State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (1944).) In this application for a certificate, the Commission has the duty to determine what best serves the public interest. In this case, the public interest includes the interests of the residents of Golden Glade and the existing customers of the regulated Osage Water Company who reside in the Eagle Woods subdivision.

The Commission has an existing duty to Eagle Woods customers, because they currently receive service from a regulated utility. The customers of Eagle Woods need access to water. If Environmental is granted a certificate, it will be able, with Commission approval, to enter into a contract to provide water on a wholesale basis to the customers at Eagle Woods. If Environmental is denied a certificate, other sources, including unregulated sources, of water must be found. On the other hand, the initial plan for Eagle Woods was that Osage would construct a well to provide water to this subdivision. The Williamses made a business decision that they would personally construct the well, rather than obtain financing for Osage to construct the well. It may not be in the public interest for the Commission to allow owners of regulated utilities to

create multiple business entities in order to circumvent internal management issues or Commission oversight, as it appears was done in this case.

The current and potential future residents of Golden Glade are also members of the public, and the Commission must consider their interests as well. Golden Glade residents, even if they have their own wells, will eventually have to obtain water service from a central source. If the Commission grants the certificate, under stringent conditions, the Commission will retain oversight over the operations of the water provider, and will have the ability to ensure that the service provided is safe and adequate and that the rates paid for that service are just and reasonable, as required by §393.130 RSMo. The owners of the company will have an opportunity to earn a reasonable return on their investment in the water system.

If the Commission denies the certificate, it will probably not have jurisdiction over how the Landowners' Association conducts its business (absent a finding that this situation is analogous to the Rocky Ridge Ranch situation). Mr. and Mrs. Williams will continue to own the well and the water mains, and they will lease these to the Association, which they also control. No regulatory body will review the amount customers will have to pay for the privilege of "leasing" the water system from the Williamses. The Association, which may nominally be a party able to "vote" on this issue will be controlled by the Williamses. No matter how many other persons join the Association while the subdivision is being developed, the developer (Greg and Debra Williams) "shall be entitled to vote equal to 66 2/3% of all the votes of all classes of members" until "100% of the lots within the development (either in its present form or

including annexed property shall have been sold by the Developer” or “January 1, 2010” or “voluntary dissolution” of the developer’s membership class. [Exh. 13, p. 3.]

Public Counsel generally agrees with the observation of Commissioner Murray during the evidentiary hearing that granting a certificate, even subject to stringent conditions, to a company which has not demonstrated that it is willing and able to provide safe and adequate service could lend legitimacy to a marginal operation. [See, Tr. at pp. 231-243] However, in evaluating the actual probable outcomes of this case, Public Counsel reluctantly concludes that residential water service customers face greater risks to their water service, and greater risk of paying unjust and unreasonable rates, if the Commission denies a conditional certificate in this case.

According to the testimony from Staff witnesses Merceil, there have been some improvements in the management of Osage Water Company since Mrs. Williams assumed management of operations. [Tr. at p. 281.] Public Counsel believes that, with additional assistance, Mr. and Mrs. Williams would be capable of providing safe and adequate service to customers through a regulated utility.

However, Public Counsel is familiar with the history of Osage Water Company, and the historical ties between the Williamses and Osage, despite claims made by Mrs. Williams on the witness stand. Being capable of providing safe and adequate service, and actually providing such service are not synonymous. The history of Osage suggests that Commission supervision is necessary for any utility operation conducted by these owners. Indeed, because of the identity of ownership, any service problems which arise from the unregulated association are likely to be reported to the Commission, regardless of jurisdiction, because Osage is a regulated utility.

Staff witness Johansen testified that the Commission has the ability to enforce conditions imposed on a certificate of convenience and necessity, and has in the past taken action to enforce conditions against companies. [Tr. at p. 417.]

Public Counsel witness Bolin testified that the Office of the Public Counsel has filed complaints against water companies in the past when they were not in compliance with Commission orders, and that "we would scrutinize" Environmental Utilities to make sure that, if a complaint should be filed, Public Counsel would file such a complaint. [Tr. at p. 248.]

Public Counsel's decision not to oppose a conditional certificate in this matter should not be taken by any party to suggest that the office would not carefully scrutinize any attempt by the Williamses to "merge" Osage and Environmental operations in the future. It would be extremely premature for any party to take a position on any hypothetical future merger based on the evidence presented in this case. Moreover, Public Counsel believes that only time will tell whether the Williamses are capable of successfully operating a regulated utility. Therefore, Public Counsel makes one additional recommendation regarding conditions which the Commission should impose if it grants a certificate in this case. Public Counsel recommends that the Commission condition the granting of this certificate on Environmental's agreement not to seek to acquire by purchase, merger or other transfer any other regulated utility territory or assets, for a period of not less than 12 months from the granting of the conditional certificate.

III. If the Commission grants a certificate of convenience and necessity to Environmental Utilities, it should impose a number of conditions which must be met prior to the certificate taking effect, as well as conditions of operation of the public utility pursuant to that certificate.

Public Counsel believes that it would be detrimental to the public interest for this Commission to grant a certificate of convenience and necessity to Environmental, unless strict conditions are imposed which the company must meet prior to beginning to provide service, and unless strict conditions regarding the manner of operation are also imposed. Public Counsel and the Staff agree that it would be detrimental to the public interest to grant a certificate to Environmental without imposing conditions.

At the evidentiary hearing in this case, Greg Williams, attorney for and co-owner of Environmental Utilities, LLC., made the following statement:

“Judge, prior to going on with another witness, I would like, for the record, to advise the Commission that the company is not opposed either to the conditions recommended by the Office of Public Counsel (sic) or to those listed in issue 7 of the Staff’s Positions Statement being included in any certificate that’s granted.... The company agrees with those.” [Tr. at p. 249.]

Assuming that Mr. Williams has the power and authority to bind Environmental by this statement, the Commission should impose all of the conditions set forth in pre-filed testimony, in position statements or on the record at the evidentiary hearing by the Staff or Public Counsel.

In her pre-filed rebuttal testimony, Public Counsel witness Bolin set forth 12 additional conditions which Public Counsel believes Environmental should be required to meet before a certificate should be granted, at Schedule KKB-2. Public Counsel believes that the Commission should require the Company to make a showing that it has complied with these requirements before being allowed to serve customers. In addition, Ms. Bolin

set forth four additional operating conditions which are designed to address possible problems which may arise as a result of the ownership and management by Mr. and Mrs. Williams of two regulated utilities and a number of unregulated, but related enterprises. These conditions, which are set forth in Schedule KKB-3 attached to Ms. Bolin's rebuttal testimony, are the minimum conditions which are necessary to allow the Staff and Public Counsel to review and audit the manner in which the regulated companies or providing services to their customers.

In his testimony at the evidentiary hearing, Staff witness Dale Johansen stated that Staff concurred with Ms. Bolin's conditions, and believed that, if a certificate is granted, all of these conditions should be imposed. [Tr. at p. 414.] Mr. Johansen then set forth additional conditions which the Staff believed should be imposed on any certificate in this case, and which were presented to the Commission as part of the Staff's pre-filed position statement. Public Counsel believes the Commission should impose these conditions as a prerequisite for receiving the certificate and prior to beginning operations as a regulated utility. Those pre-requisite conditions, at page 415 of the evidentiary hearing transcript, are:

- 1) a showing that that Environmental "has obtained the services of a licensed operator that meets the applicable MDNR requirements";
- 2) a showing that Environmental "has entered into an agreement for wholesale (water) service to Osage Water Company related to OWC's Eagle Wood Service Area";
- 3) a showing that "the facilities necessary to serve OWC as a wholesale customer have been installed";

4) a showing that Environmental has obtained "all necessary MDNR permits or approvals related to the construction of the supply and distribution system"; and

5) a showing that Environmental "has applied for the required MDNR permit to dispense."

While imposing conditions will not guarantee to the Commission that the Company will provide safe and adequate service at just and reasonable rates, the conditions will serve two important functions. First, the pre-certificate conditions require Environmental to demonstrate that it has complied with the legal requirements for dispensing water to its customers. Second, the accounting pre-certificate conditions should prevent later misunderstandings regarding how the management should be handling the finances for Environmental. Third, the operating conditions should prevent commingling of costs and revenues which has occurred with some other public utilities.

Upon review of the transcript of the evidentiary hearing, Public Counsel believes the Commission should consider imposing further operating conditions to those already recommended. These proposed conditions are suggested in light of testimony by Environmental witness Debra Williams. Ms. Williams testified that neither she nor her husband had any involvement in the day-to-day working operations of any public utility until July of 2001. [Tr. at p.70] She testified that, if a contract were entered into by Environmental Utilities to provide wholesale water to Osage Water, she was unsure who would sign that contract on behalf of Environmental. [Tr. at p. 71.] She testified that she was the "managing member" of Environmental, but was unable to testify how her duties differed from the other member's. [Tr. at 71.] She testified that she and her husband would retain control over the water distribution system if the Golden Glade Landowners'

Association were to operate the system, and that, in such an event, she and her husband would also retain ownership of the system itself, including the well, and lease the system to the Association. [Tr. at pp. 78-83] However, she was unsure who would execute the lease on behalf of the association, and was unsure as to what the terms of the lease would be. [Tr. at p. 83.]

Mrs. Williams also testified at the January 7 hearing that Golden Glades customers have been billed for water service by Osage Water Company "in error" on at least one occasion, but claimed that this error had been corrected. [Tr., at p. 137-138]

Public Counsel therefore proposes the following additional conditions on any certificate granted in this matter:

(1) Environmental Utilities shall appoint one of its members to be the authorized signatory for all contracts regarding the regulated activities of the company, and shall file notice, in writing, with the Commission which states the identity of such member, and serve a copy of this notice on the Office of the Public Counsel. This designation shall not be changed without proper notice of such change to the Commission and the Public Counsel.

(2) Should Environmental Utilities seek to enter into a contract with another regulated utility which is owned, at least in part, by any member of Environmental Utilities, LLC., Environmental shall first submit such contract to the Commission Staff and the Office of the Public Counsel for review. If the Staff or the Public Counsel has reason to object to the contract, and the parties are unable to reach agreement regarding the wording of the contract within 30 days, the Company shall submit the contract to the Commission for approval.

(3) The member(s) responsible for managing the operations of Environmental shall complete, at that person's own expense, training in the management of small utility companies within six months of the granting of the certificate. The costs of this training shall not be recoverable from Environmental's customers, because a qualified manager should have been in place before the application was filed. Managing persons shall submit evidence of the successful completion of such training to the Commission and the Public Counsel.

(4) The managing member of Environmental Utilities shall seek, and abide by, direction provided by the Commission Staff's management assistance program.

(5) The Company shall provide the Commission, for review and approval, all proposed transactions between the regulated utility and its owners, Greg and Debra Williams, which could affect the rates charged to the company's customers.

(6) The Commission's decision regarding this certificate is not binding on any rate making issue, or, in the alternative,

(6a) The Commission expressly excludes the 10% "general contractors' fee" proposed by the Company from rates.

(7) Environmental shall not to seek to acquire by purchase, merger or other transfer any other regulated utility territory or assets for a period of not less than 12 months from the granting of the conditional certificate.

CONCLUSION

Environmental's application for a certificate of convenience and necessity is fraught with complications created by the applicants. These complications in turn create

a substantial risk that a detriment to the interests of the residents of Golden Glade and Eagle Woods subdivision will occur if the Commission denies this application. But for this substantial risk of public detriment for customers in those subdivisions, one of which is currently served by a regulated utility company, Public Counsel would recommend that the Commission deny this application.

However, if stringent conditions are imposed and enforced on the applicants, Public Counsel believes that this detriment can be substantially mitigated, and may even be eliminated. Public Counsel believes that greater harm would befall the customers who need safe and adequate water service in the proposed territory if the application is denied than if the application is granted. Therefore, Public Counsel would not oppose granting a conditional certificate at this time, subject to the conditions discussed above.

WHEREFORE, it is respectfully requested, that this Commission impose stringent conditions on any certificate of convenience and necessity granted to Environmental Utilities, LLC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 30th day of April 2002:

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A handwritten signature in dark ink, appearing to read "Gregory D. Williams", is written over a horizontal line.