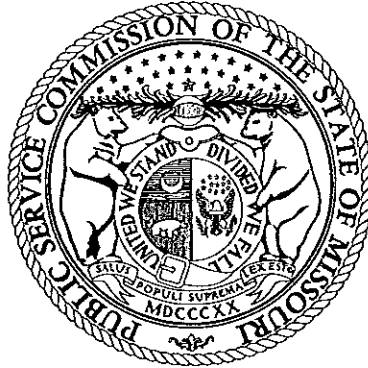


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**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Application of)
Osage Water Company 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 Located)
in Parkview Bay Subdivision, Osage)
Beach, Missouri.)

Case No. WA-98-236

Osage Beach Fire Protection District,)
Complainant,)

v.)

Case No. WC-98-211

Osage Water Company,)
Respondent.)

REPORT AND ORDER

Issue Date: August 10, 1999

Effective Date: August 20, 1999

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of)	
Osage Water Company for Permission,)	
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Convenience and Necessity Authorizing)	
It to Construct, Install, Own,)	<u>Case No. WA-98-236</u>
Operate, Control, Manage and Maintain)	
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Osage Beach Fire Protection District,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-98-211</u>
)	
Osage Water Company,)	
)	
Respondent.)	

REGULATORY LAW JUDGE: Lewis R. Mills

REPORT AND ORDER

Procedural History

On November 19, 1997, the Osage Beach Fire Protection District (the District) filed a complaint against Osage Water Company (Osage), alleging that Osage was providing water utility service in an area known as the Passover Road Expansion without having received a certificate of convenience and necessity from the Commission. The District requested that the Commission order Osage to stop providing water or, in the

alternative, to stop charging for it¹. On December 10, 1997, Osage filed an application with the Commission requesting permission, approval, and a certificate of convenience and necessity authorizing it to construct, own, operate and maintain a water system for the public located in the Parkview Bay Subdivision (Parkview Bay) in Osage Beach, Camden County, Missouri. On February 11, 1998, the Commission issued an order consolidating the two cases, finding that they involve common questions of law and fact. For the purposes of these cases, the geographic area in each is the same².

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

The Commission has reviewed and considered all of the evidence and arguments presented by the various parties and intervenors in this case. Some evidence and positions of parties on some issues may not be addressed by the Commission. The failure of the Commission to mention a piece of evidence or a position of a party indicates that, while the evidence or position was considered, it was not found relevant or necessary to the resolution of the particular issue.

1 The District also requested that the Commission order it to provide water service. The District no longer seeks to provide water to customers.

2 During the course of these cases, there has been an inordinate amount of procedural squabbling. The Commission will not recite here the litany of motions to compel discovery, strike testimony, dismiss cases, dismiss parties, quash depositions, and the like. The procedural history set out in this section is sufficient for a determination of the issues.

There was a great deal of time and testimony devoted to "issues" as far reaching as, for example, the design and performance of fire hydrants at a condominium development other than the one for which Osage seeks a certificate here. Much of the evidence submitted has no bearing on the issues the Commission must consider to resolve these cases. The parties agreed upon the issues in the Hearing Memorandum³, and the Commission will resolve each of those issues.

The three issues set out in the Hearing Memorandum are:

- A. Do the Missouri statutes, the rules of the Missouri Public Service Commission, and the municipal ordinances of the City of Osage Beach, Missouri require Osage to obtain a franchise or consent from the City of Osage Beach before a certificate of convenience and necessity may be issued?
- B. Should Osage be granted a certificate of convenience and necessity authorizing it to install, acquire, build, construct, own, operate, control, manage and maintain a water system for the public, to serve the area known as Parkview Bay Subdivision in Osage Beach, Camden County, Missouri?
- C. Is Osage presently supplying water to customers located in the area known as the Passover Road Expansion in Osage Beach, Camden County, Missouri without a valid certificate, and if so, should it be ordered to cease and desist from supplying water to those customers?

³ The District filed additional issues in a pleading filed separately from the Hearing Memorandum. The Commission will address these issues as well.

The District, in a pleading filed contemporaneously with the Hearing Memorandum, proposed to add the following two issues:

D. Has Staff actively participated in these two proceedings in an unbiased fashion?

E. Should the long-term financial viability of Osage be reviewed as a condition precedent to deciding if the Company should be granted a certificate of convenience and necessity authorizing it to install, acquire, build, construct, own, operate, control, manage and maintain a water system for the public, to serve the area known as Parkview Bay Subdivision in Osage Beach, Camden County, Missouri?

The Commission will deal with each issue separately⁴.

A. Is a franchise or consent necessary?

Staff and Osage argue that no franchise is needed, and the District argues that one is needed. The District's argument is circular and unpersuasive. The District cites rules from the Code of State Regulations and City ordinances in support of its argument, but its citations address the question of what is required of a franchisee, not the question of when a franchise is required. The District essentially assumes that a franchise is necessary, and then argues that Osage cannot lawfully provide water service without one. However, it is clear from the citations of the other parties that a franchise is necessary only to

4 In its Application, Osage requested that the Commission, in addition to granting a certificate of convenience and necessity, approve a loan apparently obtained in connection with the Parkview Bay project. The loan approval was not listed as an issue in either the Hearing Memorandum or the District's supplement, nor was it discussed in the parties' briefs. Accordingly the Commission will not address it.

use public rights of way. It is equally clear from the record evidence that there are no public rights of way in the area Osage is seeking to serve. The Commission concludes that a franchise or consent is unnecessary.

B. Should Osage be granted a certificate?

In accordance with Section 393.170, RSMo 1994, the Commission has authorization to grant a certificate when such a certificate is necessary or convenient for the public service. 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 interest⁵. The Commission will apply these standards to Osage's application.

(1) Is there a need for the service?

This is one of two issues on which there is no dispute. Both Staff and Osage testified that there is a need for public water utility

⁵ These five criteria are the same as the ones used in Case No. GA-94-127, In the Matter of the Application of Tartan Energy Company, 3 Mo. P.S.C. 3d 173. The parties generally cite the Tartan case rather than the Intercon case, but the criteria are the same.

service at Parkview Bay, and the District conceded as much in the response it filed on April 17, 1998, to Osage's requests for admissions.

(2) Is Osage qualified to provide the service?

Osage holds certificates from the Commission authorizing it to provide service in several other areas. It has been providing water as a regulated utility for a number of years. There was no evidence presented that customers in its other service areas, or in Parkview Bay, have complained about the quality of service Osage provides. Osage's vice president is an engineer, although not a licensed professional engineer, and has experience in the water utility industry.

The District raises a number of questions about Osage's compliance with Missouri Department of Natural Resources (MDNR) and Commission regulations. The District was unable to substantiate many of the alleged violations, and some of its claims were entirely specious. However, the Commission will address the claimed violations for which there appears to be supporting evidence.

The Commission finds that Osage has violated certain Commission regulations with respect to providing service at Parkview Bay without a certificate. However, Osage had applied to the Commission for a certificate for that area before it began providing service⁶. It also appears that MDNR has cited Osage for two violations. One has been

⁶ Osage filed its application to serve the area at issue here in Case No. WA-97-332 before it began providing service. However, Osage began providing service before its application was approved, and when the Commission dismissed the application in WA-97-332 because Osage had failed to show that it had received a franchise or to show that a franchise was not necessary, Osage continued to provide service.

corrected, and the other appears to have been minor, and unwittingly committed. The Commission finds that none of the violations claimed by the District are serious enough to make approval of its application against the public interest. The Commission further finds that Osage is qualified to provide water utility service.

(3) Is Osage financially able to provide the service?

The Staff examined the books and records of Osage and concluded that it has the financial wherewithal to provide water utility service to the Parkview Bay condominiums. Staff's audit of Osage's general ledger covered the period from 1991 through 1997, and showed that Osage is able to meet its operating expenses from its revenues. Osage's debt is primarily to the three original owners of the company, and the settlement, just before hearing, of litigation brought by one of those owners will improve Osage's financial position.

The District presented a great deal of confusing, and sometimes conflicting, evidence designed to prove that Osage is not only financially unable to provide service, but that it is currently insolvent. The Commission does not accept the District's definition of insolvency, finds that the District's evidence concerning Osage's financial condition is not persuasive, and finds that Osage is financially capable of providing service.

(4) Is Osage's proposal economically feasible?

Although the District did not discuss the feasibility of the project in its testimony or initial brief, it does address it in its

reply brief. However, it limits itself to a discussion of the physical feasibility of upgrading the present well. It does not point to any evidence that shows the project as planned, and as constructed so far, is economically infeasible.

The water system at Parkview Bay is in place and serving customers. Thus the situation in this case is unlike many applications for certificates of convenience and necessity where the system exists only on paper. It is much easier to conclude that an already built and operating system is economically feasible than one where the number of customers and the costs of construction are speculative. The Commission finds that Osage's proposal to serve Parkview Bay is economically feasible.

(5) Does the service promote the public interest?

Staff argues, and the District does not appear to disagree, that this question is essentially duplicative of the first four. In other words, if an applicant has met the first four tests, it meets this one by definition.

Nothing in the District's prefiled testimony directly speaks to this issue, although its entire case really is an attempt to prove that the public interest will be better served if the City rather than Osage provides water to Parkview Bay. The District's briefs are not well organized, and this issue seems to have escaped its attention in drafting its initial brief. In its reply brief, the District argues against points raised by other parties about this issue, but the arguments just

repeat those addressed elsewhere in this Report and Order. The Commission finds that it will be in the public interest to grant Osage a certificate of convenience and necessity to provide water utility service at Parkview Bay.

C. Is Osage presently providing water without a certificate?

This is the second of the two issues on which there is no dispute. All parties agree that Osage is presently providing water at Parkview Bay without a certificate, and the Commission so finds. In its filed complaint, the District asked that Osage be ordered to stop providing water without a certificate, but did not request sanctions or penalties against Osage. As a result, upon the effective date of this Report and Order, Osage will have a certificate, and this point will be moot.

Furthermore, Osage did apply for a certificate before it began providing service, and that application was dismissed because of Osage's lack of a franchise (an issue which is resolved in Osage's favor herein). Osage reapplied for a certificate in this case shortly after its application for rehearing was denied its first application. Thus, it does not appear that Osage acted in bad faith.

D. Was the Staff biased?

This issue is one that is raised, not in the Hearing Memorandum, but in the District's proposed additions to it. In its briefs, the District alleges various improprieties of which it believes the Staff is guilty. For example, Staff on a number of occasions made reference to

Commission cases that have relevance to the instant case. The District believes that because those cases were not consolidated with the instant case, the Staff has exhibited bias in referring to them. The District provides no support for this odd claim, and the Commission finds no merit to it.

Only one of the alleged instances of bias warrants discussion. It arises because a Staff member, prior to his current employment with the Commission, performed consultant services for Osage and received payment for those services during the pendency of this case. Although the Staff member showed poor judgment in becoming involved in a proceeding involving Osage while he was still owed money for services he had performed as a consultant, there is no evidence that the circumstances in any way affected Staff's position on the issues.

The Commission finds that the Staff showed no bias or prejudice in recommending approval of Osage's application.

**E. Should Osage's long-term financial viability
be reviewed?**

The District never really defines long-term financial viability or proposes a specific way to measure it, and the Commission finds no reason to doubt Osage's long term prospects. While poor management can quickly sink any small company, the evidence indicates Osage's management is competent to operate a water utility, and its future prospects are no more suspect than those of other small water companies regulated by the Commission.

Osage has recently settled a lawsuit brought by a former principal of the business, and resolved the questions about its potential liability to him. As a result, its financial future is considerably clearer, and brighter, than it was before the settlement. The Commission finds that there is no competent evidence concerning Osage's long-term financial viability that would warrant denial of its application.

Conclusions of Law

The Missouri Public Service Commission has arrived at the following conclusions of law:

Osage is a public utility engaged in the provision of water service to the general public in the state of Missouri and, as such, is subject to the general jurisdiction of the Missouri Public Service Commission pursuant to Chapters 386 and 393, RSMo 1994.

Specifically, the application for a certificate of convenience and necessity is controlled by Section 393.170(3), which states:

The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

The Commission finds that granting Osage a certificate is necessary and convenient for the public service.

IT IS THEREFORE ORDERED:

1. That the application of Osage Water Company for a certificate of convenience and necessity to construct, install, own, operate,

control, and manage a water system in the Parkview Bay condominium development is granted.

2. That the certificate of convenience and necessity referenced in ordered paragraph 1 shall become effective simultaneous with the effective date of the tariff sheets required to be filed and approved pursuant to ordered paragraph 3.

3. That Osage Water Company shall file with the Commission tariff sheets modifying its water service to reflect the additional service area granted herein.

4. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

6. That the Complaint filed by the Osage Beach Fire Protection District is dismissed.

7. That this order shall become effective on August 20, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., and Drainer, CC., concur
and certify compliance with the
provisions of Section 536.080, RSMo 1994
Schemenauer, C., dissents
Crumpton and Murray, CC., absent

Dated at Jefferson City, Missouri,
on the 10th day of August, 1999.