

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

In the matter of the application of Bilyeu )  
Water Co., LLC for a certificate of con- )  
venience and necessity authorizing it )  
to construct, install, operate and main- )  
tain a water system and to supply and )  
render water service to the public lo- )  
cated in and around an unincorporated )  
area in Christian County, Missouri. )

**Case No. WA-2007-0270**

**STAFF'S SECOND REPORT AND RECOMMENDATION**

COMES NOW the Staff of the Missouri Public Service Commission, by and through the Commission's General Counsel, and hereby submits its Second Report and Recommendation as ordered by the Commission on May 2, 2007, stating as follows:

**1.) When did Bilyeu begin billing for its water service?**

August 1996. Originally, the charge was a flat fee of \$12 per customer per month. In November 2002, the company changed the rate to \$12 per customer per month minimum, which includes the first 1,000 gallons, plus \$1.80 for each additional 1,000 gallons used.

**2.) Whether customer notice was issued when Bilyeu began billing for service.**

A Company representative asserts that customer notice was given when the Company began charging for service in 1996, but cannot locate a copy of the notice. Customers were also notified of the November 2002 change in rates, and a copy of that notice is attached hereto as Appendix A.

**3.) Whether customer notice was issued when Bilyeu sought certification with the Commission.**

No notice was given by the Company, nor was it directed to do so by the Commission. The Company did, however, inform its customers of a name change by a letter dated April 25, 2007, a copy of which is attached hereto as Appendix B.

**4.) How customer notice was issued or if it was issued. (Staff shall also file a copy of that notice, if any was issued.)**

See response to Question 3.

**5.) When did the Staff become aware that Bilyeu is billing its customers?**

June 2006.

**6.) When did Bilyeu become a public utility, as defined in Section 386.020(42), and therefore subject to the jurisdiction of the Commission?**

Briefly put, it is not clear whether Bilyeu has ever become a public utility under Missouri law.

Under Missouri law, the term "[p]ublic utility" includes "every . . . water corporation . . . and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter."<sup>1</sup> The definition of "[w]ater corporation," in turn, "includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees, or receivers appointed by any court whatsoever, owning, operating, controlling or managing

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<sup>1</sup> Section 386.020(42), RSMo Supp. 2006.

any plant or property, dam or water supply, canal, or power station, distributing or selling for distribution, or selling or supplying for gain any water."<sup>2</sup> The definition of "sewer corporation" is substantially similar.<sup>3</sup> The Missouri Court of Appeals has held that a not-for-profit corporation that supplied water service to the residents of two subdivisions was a water corporation and thus a public utility.<sup>4</sup> As for the statute's requirement that water services be supplied for "gain," the Court of Appeals held that "gain" is equivalent to "compensation."<sup>5</sup> Because Bilyeu operates water plant and sells water services for gain, it is within the intendments of § 386.020(58), RSMo Supp. 2006.

However, there is an additional element that must be met to make a public utility; one that does not appear in the statute, but which was read into the statute by the Supreme Court of Missouri.<sup>6</sup> The essential and defining characteristic of a public utility is that its service and property have been devoted to the public use.<sup>7</sup> As the Missouri Supreme Court stated, "State regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly

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<sup>2</sup> *Id.*, at (58).

<sup>3</sup> *Id.*, at (48). Sewer services are not at issue in this case because each customer uses an individual, on-site septic system.

<sup>4</sup> *Osage Water Co. v. Miller County Water Authority, Inc.*, 950 S.W.2d 569, 574-75 (Mo. App., S.D. 1997).

<sup>5</sup> *Id.*, at 574.

<sup>6</sup> *State ex rel M.O. Danciger and Company v. Public Service Commission*, 275 Mo. 483, 494, 205 S.W. 36, 40 (banc 1918): "While the definitions quoted . . . express therein no word of public use, or necessity, that the sale of electricity be to the public, it is apparent that the words "for public use" are to be understood and to be read therein"; *and see Khulusi v. Southwestern Bell Yellow Pages*, 916 S.W.2d 227, 232 (Mo. App., W.D. 1995).

<sup>7</sup> *Danciger, supra*, 275 Mo. at 496, 205 S.W. at 40; *Khulusi, supra*, 916 S.W.2d at 232.

dependent upon the devotion of private property to a public use."<sup>8</sup> There are three elements that must be found to support the determination that an entity is a public utility. First, there is the provision of some essential service by use of the requisite facilities.<sup>9</sup> This element is not at issue in this case – Bilyeu owns and operates a water system by which it provides water services to the residents of the subdivision. Second, the utility service must be provided "for gain."<sup>10</sup> Bilyeu bills and collects for its water service. Third, the service must be offered to the general public.<sup>11</sup>

Does Bilyeu serve the general public? This case differs from the *Osage Water* case in one very important, perhaps determinative, respect. In the latter case, the Miller County Water Authority provided water service to customers other than the residents of the two subdivisions at issue in *Osage County*. Bilyeu, on the other hand, serves only the residents of a single development. While the Miller County Water Authority clearly held itself out as serving the public, it is not clear whether Bilyeu has done so.

In *Danciger*, the lead case, the Missouri Supreme Court determined that a brewery company that generated electricity for its own purposes and sold the excess current to some of its neighbors – perhaps one-third of the inhabitants of Weston, Missouri -- was not a public utility because it had never devoted its

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<sup>8</sup> *Danciger, supra*, 275 Mo. at 496, 205 S.W. at 40.

<sup>9</sup> Section 386.020, (42), (48) and (58), RSMo Supp. 2006.

<sup>10</sup> *Id.* Subsection (58) refers to "distributing or selling for distribution, or selling or supplying for gain any water" (emphasis added).

<sup>11</sup> *Danciger, supra*, 275 Mo. at 494, 205 S.W. at 40.

property to public use by holding itself out as willing to serve the general public.<sup>12</sup> In *Khulusi*, likewise, the Western District determined that an affiliate of a telephone company, which published the Yellow Pages directory, was not a public utility because its activities were not the provision of telecommunications services under Section 386.020, RSMo, and because it published advertisements in the directory as a matter of private contract and not as a public service.<sup>13</sup>

The answer, therefore, is that it is not clear whether Bilyeu has ever become a public utility. We can measure the date on which the developers of the subdivision began to charge for water service, but does that action in itself mean that the system then became a "public utility?" We know the date on which Bilyeu was issued a certificate of organization by the Secretary of State (September 12, 2006), and according to its articles of organization we know that its purpose is ". . . to own and operate a water company . . . ." However, do these facts establish that Bilyeu's owners have dedicated their private property to the public service? Bilyeu's owners are the developers of the subdivision that the company serves. Like the brewery in *Danciger*, the water service provided by Bilyeu does not exist for its own sake but was created and is maintained to further its owners' primary business, which is the construction and sale of homes within the subdivision.

If the Commission grants the requested CCN, Bilyeu will certainly be a public utility from the date the CCN becomes effective. The public interest favors

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<sup>12</sup> *Danciger, supra*, 275 Mo. at 495-96; 205 S.W. at 40.

<sup>13</sup> *Khulusi, supra*, 916 S.W.2d at 232.

the grant of the requested CCN because the customers would thereby gain those extra protections that PSC regulation confers.

**7.) Whether Bilyeu violated Section 393.170 by constructing and operating a water system without having first obtained authority from the Commission in the form of a Certificate of Public Convenience and Necessity?**

The brief answer is that Bilyeu did not violate § 393.170, RSMo 2000, by building or operating its water system without first having obtained a CNN from this Commission.

Section 393.170, RSMo 2000, provides:

1. No . . . water corporation . . . shall begin construction of a . . . water system . . . without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the corporation, showing that it has received the required consent of the proper municipal authorities.

3. 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.

It is abundantly clear that Bilyeu or its predecessors could not have violated the cited section by originally building its water system because

§ 393.170.1 applies, by its plain terms, only to a *water corporation*. As explained above in response to Question 6, it is not clear that Bilyeu is a water corporation even now; certainly, it was not one when it first constructed the system (the system was constructed sometime prior to 1992) or for the years thereafter when it gave its service away, *gratis*. The system was built by a developer, not by a water corporation, to support and further the business of selling homes.

Subdivision 2 of § 393.170, RSMo 2000, likewise applies only to a *water corporation*. For the same reasons already discussed, this subdivision cannot apply to Bilyeu. The third subdivision applies to the PSC and the CCN's it grants, not to the CCN applicant.

**8.) Whether the Commission should initiate a complaint action and seek penalties against Bilyeu, if Bilyeu is in violation of Section 393.170.**

As stated in the response to Question 7, when Bilyeu constructed its facilities and started providing service it was not in violation of § 393.170, RSMo 2000, and penalties thus do not lie.

WHEREFORE, having fully responded to the questions posed by the Commission, Staff prays that the Commission will accept its Second Report and grant the requested Certificate, as well as such other and further relief as seems just in the circumstances.

Respectfully submitted,

s/ Kevin A. Thompson  
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**Certificate of Service**

I hereby certify that a true and correct copy of the foregoing was served, either electronically or by hand delivery or by First Class United States Mail, postage prepaid, on this **15th day of May, 2007**, to the parties of record as set out on the official Service List maintained by the Data Center of the Missouri Public Service Commission for this case.

s/ Kevin A. Thompson \_\_\_\_\_