

**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 Sewer System for the Public)
Located in Unincorporated Portions of Camden)
County, Missouri, Golden Glade Subdivision.)**

Case No. SA-99-268

REPORT AND ORDER

Issue Date:

October 14, 1999

Effective Date:

October 26, 1999

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OF THE STATE OF MISSOURI

In the Matter of the Application of Osage Water)
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Manage and Maintain a Sewer System for the Public)
Located in Unincorporated Portions of Camden)
County, Missouri, Golden Glade Subdivision.)

APPEARANCES

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Sunrise Beach, Missouri 65079, for Osage Water Company.

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Avenue, P.O. Box 456, Jefferson City, Missouri, 65101, for City of Osage
Beach.

Shannon Cook, Assistant Public Counsel, P.O. Box 7800, Jefferson City,
Missouri 65102, for the Office of the Public Counsel.

Keith R. Krueger, Deputy General Counsel, Missouri Public Service
Commission, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff
of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Bill Hopkins, Senior Regulatory Law Judge**

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REPORT AND ORDER

I. Procedural History

On December 11, 1998, Osage Water Company (Osage) filed an application with the Missouri Public Service Commission (Commission), requesting the issuance of a certificate of convenience and necessity to construct, install, own, operate, control, manage, and maintain a sewer system for the public in unincorporated portions of Camden County, Missouri, known as Golden Glade Subdivision (proposed service area).

Because of an error by Osage in captioning the case, it was assigned case number WA-99-268. On December 17, 1998, Osage moved to change the caption of the case to reflect that Osage was seeking approval to provide sewer service only, not water service, and to correct the case designation to read SA-99-268 instead of WA-99-268. The Commission granted that motion on December 24, 1998.

On December 15, 1998, the Commission issued an order and notice of application, directing interested parties to file applications to intervene no later than January 14, 1999. On January 12, 1999, the City of Osage Beach (City) filed a timely application to intervene. On January 22, 1999, Osage filed its response to the application to intervene by the City, stating that it opposed the intervention of the City. The City's application to intervene was granted by order of the Commission entered on January 22, 1999, which order also set a prehearing conference for March 1, 1999, and a deadline for the parties to file a procedural schedule no later than March 11, 1999. On January 28, 1999,

the Commission denied Osage's motion to deny the application to intervene by the City.

On February 3, 1999, Osage filed a motion to reconsider the order granting the application to intervene by the City. The Staff of the Missouri Public Service Commission (Staff) filed a response to Osage's motion on February 10, 1999, and the City filed a response to the same motion on February 16, 1999. The motion by Osage to reconsider the order granting the application to intervene by the City was denied on the record during the prehearing conference on March 1, 1999.

Osage filed its motion to establish a procedural schedule on March 11, 1999. On March 18, 1999, the Commission entered its order adopting a procedural schedule. Osage filed its direct testimony on March 17, 1999. On April 28, 1999, Osage filed its response to the first and second set of data requests by the City. On the same day, the City filed its motion to consolidate cases, motion to cancel procedural schedule, motion to set prehearing conference to establish a new procedural schedule in the consolidated cases, and motion for expedited treatment.

On April 30, 1999, the City filed its motion to compel answers to data requests and to reschedule the filing of rebuttal testimony. Osage filed its response to the motions filed by the City to consolidate cases, cancel the procedural schedule, set a prehearing conference to establish a new procedural schedule and for expedited treatment on May 6, 1999. The Staff filed its response to the same motion by City on May 10, 1999. On May 11, 1999, the Commission denied the motion to consolidate

and the motion to compel and also granted the City until no later than May 21, 1999, to file its rebuttal testimony. On May 17, 1999, the Staff filed its motion to reconsider the order denying the motion by the City to reconsider and motion to compel. The Staff filed its rebuttal testimony on May 21, 1999. On May 21, 1999, the City filed the rebuttal testimony of two witnesses. On May 26, 1999, Osage filed its response to the City's motion for rehearing and Staff's motion to reconsider. The Staff filed its surrebuttal testimony on June 8, 1999. On June 8, 1999, Osage filed its surrebuttal testimony.

On June 16, 1999, the City filed its motion for sanctions against Osage for failure to answer data requests. The motion is rendered moot by this report and order. All the parties on June 11, 1999, filed a hearing memorandum. On June 22, 1999, the Commission entered its order denying reconsideration of the Commission's May 11, 1999, order. On June 25, 1999, Osage filed its response to the City's motion for sanctions. The City, on June 28, 1999, filed its reply to the response by Osage to the City's motion for sanctions.

An evidentiary hearing was held June 17 and 18, 1999. All the parties were represented. On July 6, 1999, the Commission entered its order adopting briefing schedule and on July 7, 1999, entered a notice correcting the order adopting a briefing schedule, ordering, *inter alia*, that initial briefs should be filed no later than July 22, 1999, and reply briefs should be filed no later than August 12, 1999.

At the hearing, Exhibit Number 12 was reserved for a copy of any Department of Natural Resources (DNR) violations by Osage, which was

filed July 22, 1999, and Exhibit Number 13 was reserved for a copy of any (DNR) violations by the City, which was filed July 14, 1999. All of the late-filed exhibits are received and made a part of the record of this matter.

II. Issues

The authority for the issuance by the Commission of a certificate of convenience and necessity to provide sewer service is contained in Section 393.170 RSMo¹. Subsection 1 of that statute states in part, "...No...sewer corporation shall begin construction of a...sewer system without first having obtained the permission and approval of the commission." Subsection 3 of that statute states in part, "The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such..." convenience and necessity exists.

The courts have held that "necessity," as used in the term "convenience and necessity," does not mean essential or absolutely indispensable, but rather that an additional service would be an improvement justifying the cost and that the inconvenience to the public occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. See State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147, 154 (Mo. App. 1980); State ex rel. Intercon Gas v. Public Service Commission, 848 S.W.2d 593, 597

¹ All further statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.

(Mo. App. W.D. 1993) (Intercon), and State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219 (Mo. App. 1973).

In Re Tartan Energy, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994) (Tartan Energy Company case), articulated the legal standard to be met by an applicant for a certificate of convenience and necessity: (1) there must be a need for the service; (2) the applicant must be qualified to provide the 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. See also Re Intercon Gas, Inc., 30 Mo. P.S.C.(N.S.) 554, 561 (June 28, 1991); State ex rel. Intercon Gas v. Public Service Commission, loc. cit. This standard has also been historically applied to sewer certificate cases. See Re M.P.B. Inc., 28 Mo. P.S.C. (N.S.) 55, 73 (November 15, 1985).

As discussed below, the Commission has determined that Osage has met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity. For the reasons stated herein, the Commission will grant Osage's application for a certificate of public convenience and necessity.

III. Discussion

A. Osage Water Company Proposal

Osage is a Missouri corporation duly organized and existing under the laws of the State of Missouri with its principal office and place of business located at Highway 54 West, Osage Beach, Missouri 65065. It is

a public utility proposing to render sewer service to the public under the jurisdiction of the Commission in the proposed service area. In its application, Osage stated that it currently holds two certificates of authority issued by the Commission in case numbers WA-97-110 (Cimmarron Bay) and WA-98-36 (Cedar Glen).

The proposed service area is legally described as Golden Glade Subdivision, which consists of all of the Southeast Quarter of the Southeast Quarter, and parts of the Northeast Quarter of the Southeast Quarter, and the Southwest Quarter of the Southeast Quarter of Section 6, Township 39 North, Range 16 West, County of Camden, State of Missouri. Osage's engineering witness, William P. Mitchell (Mitchell), testified that Golden Glade is a new development project owned by an owner of and the attorney for Osage. The project is located on Lake Road KK-33 near Tan-Tar-A Resort in Camden County, Missouri. The project will eventually contain about 100 lots; 13 lots have been laid out in the first phase.

In its application and feasibility study, Osage proposed a recirculating sand filter system which will be constructed in treatment modules designed to serve approximately 30 single family homes each. Each resident in the subdivision would be connected to a septic tank, and each septic tank would be connected to a gravity effluent collection sewer which would transmit the effluent to the sand filter. All this would be done with an initial investment of \$500 per customer, according to Osage.

B. Is there a need for service?

In the Hearing Memorandum filed on June 11, 1999 (Memorandum), Osage, Staff, City, and the Office of the Public Counsel (OPC) all agreed that there was a public need for sanitary sewer service in the proposed service area. Thus, there is no issue as to this criteria.

C. Is Osage qualified to provide the service?

In the Memorandum, Osage stated that it was qualified to provide sewer service to the public in the Golden Glade Subdivision. Staff, City and OPC all agreed that Osage was not qualified to provide sewer service to the public in the Golden Glade Subdivision.

In the *Tartan Energy Company* case, the Commission, when referring to deciding the question of whether a company was qualified to provide a utility service, stated that "The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers," citing *Intercon*. There are no competing suppliers in the proposed service area, thus the Commission is required only to analyze the qualifications of Osage.

Osage presented evidence as to its experience in the water and sewer utility industry along with its technical experience and knowledge regarding engineering and safety. Osage also showed that it had the ability to properly construct and operate a sewer system for the proposed service area. This evidence was substantial and unrefuted.

Mitchell testified extensively concerning Osage's qualifications. Mitchell stated that he had been with Osage since 1987 when it was originally formed by his parents and him to provide regulated water utility service in the Lake of the Ozarks area. Mitchell stated that he was a member of the Board of Directors of Osage and participated in all meetings that affected the policies and management of Osage, and that he is involved in the day-to-day operations of Osage.

Osage has both an existing water tariff and an existing sewer tariff on file with and approved by the Commission. A rate case is to be filed before the Commission in the fall of 1999. Osage therefore has the necessary tariffs on file with the Commission under which it will provide sewer service in the proposed service area.

Mitchell noted that Osage had recently received authority from the Commission to expand its water service in 1992 in case number WA-92-141 (Sunrise Beach), in 1994 in case number WA-94-132 (part of the City of Osage Beach and part of Camden County), and in 1998 in cases number WA-97-110 (Chelsea Rose) and WA-98-36 (Cedar Glen). Osage was also authorized to provide sewer utility service in cases number WA-97-110 (Cimmarron Bay) and WA-98-36 (Cedar Glen).

Mitchell testified that Osage's president is an attorney whose practice includes real estate, taxation, and public utilities; the attorney is also the developer of the property within the proposed service area. Mitchell said that Osage has one or two employees who perform construction of new systems, service connections, and repair of existing lines and systems, and Osage owns a mini-excavator and a bobcat

for use in new construction and repairs. Mitchell testified that he was the vice-president of operations for Osage and that he is the principal of Jackson Engineering and Water Laboratory Company. Mitchell stated that he holds a Class A license, the highest type of license available, from the Missouri Department of Natural Resources (MDNR) for both water and wastewater. Osage therefore possesses the necessary technical expertise with which to operate not only the physical facilities needed for the proposed service area, but also the necessary general overhead and support staff required to conduct its water and sewer utility operations.

Mitchell said that Osage has an operation contract with both Jackson Engineering and Water Laboratory Company under the terms of which those companies provide regular operation, maintenance, and testing of all of Osage's water supplies and sewage treatment facilities. The two companies also provide basic office operations for Osage, including secretarial support, telephone, meter reading, and billing.

Osage currently owns two sewage treatment facilities of the same recirculating sand filter design as that proposed for the Golden Glade service area, and one of those is of the extended aeration type. Mitchell stated that he had experience operating both kinds of systems as well as numerous other sewage treatment systems, including forty or more recirculating sand filters. Mitchell testified regarding the history, workings and development of recirculating sand filters, including the fact that MDNR has been promoting the use of that technology.

Mitchell's testimony at the hearing 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 sewer system.

D. Does Osage have the financial ability to provide the service?

In the Memorandum, Osage stated that it had the financial ability to provide the sewer service. Staff and OPC both agreed that they had no position since Staff had not received annual reports² from Osage or other information sufficient to form an opinion. The City stated that Osage did not have the financial ability to provide the service.

The feasibility study that Osage filed with its Application in this case revealed all the financial information the Commission needs to know. Osage has one paragraph on how the proposed service will be financed:

The Golden Glade sewer systems will be paid for and contributed by the Developer, and the Company will rebate to the Developer the sum of \$500.00 per residential dwelling if, as, and when connected to the sewer system, up to the actual cost of construction of the sewage treatment facility. The Developer is willing to accept said payments in either cash, preferred stock or long term debentures previously authorized by the Commission. Therefore, no additional capital appears to be necessary for the acquisition of this system.

² The Commission takes official notice that annual reports for 1997 and 1998 have since been filed by Osage.

Mitchell stated that Osage will only make an investment of \$500 for each new home in the proposed service area. Since this will probably occur over several years, Osage will not have to come up with a substantial amount of money at any particular time. Thus, the proposed financing plan for the project leaves the risk of the failure of the development with the project developer rather than requiring a high dollar investment by Osage. Mitchell stated that Osage's monthly revenues range from \$8000 to \$12,000 on the current customer base which should provide enough revenue to handle this development. In addition to that, Mitchell stated that the developer owned the proposed service area free and clear of liens.

Mitchell testified that Osage's revenues for the first five months of 1999 were 167% of revenues for the same period in 1998, i.e., that the 1999 revenues matched and increased by 67% the revenues of 1998. Mitchell stated that the MDNR recently approved Osage to receive a \$421,000 loan on another project. This does not directly relate to the financial ability of Osage to develop the facilities for the proposed service area, but it does show that Osage's financial condition is sound. Staff witness Martin Hummel (Hummel) stated that Osage's application showed the financial ability of Osage to provide the proposed service.

The Commission agrees with Mitchell that, simply put, there are no financial ability issues raised by the Application in this case.

Osage has the burden of proof to demonstrate its financial ability and has presented sufficient evidence on that issue; the

Commission must therefore conclude that Osage has demonstrated its financial qualifications.

E. Is Osage's proposal economically feasible?

In the Memorandum, Osage stated that its proposal was economically feasible. Staff, OPC, and City all agreed that Osage's proposal was not economically feasible.

Osage prepared and attached a feasibility study to its Application, which calculated the anticipated financial impact on Osage of the extension of sewer service to Golden Glade. Included in the feasibility study was an estimate of revenues and expenses for a five-year period. This study showed that Osage's proposal is economically feasible at Osage's current tariff rate.

Osage presented testimony showing that the feasibility study was based on an extensive rate evaluation performed in case number SA-94-54 (parts of the Villages of Sunrise Beach and Laurie; part of Camden County). That case included an in-depth estimation of the cost of the operation of recirculating sand filter sewage systems. The proposed rate for Golden Glade, according to Osage, represents the best estimate available of the actual cost of service, including a return on capital.

The *Tartan Energy Company* case requires the Commission to analyze the economic feasibility of a proposal by asking whether the risk of the failure of the development lies with the investors or the ratepayers. The proposal in this case directly shifts the burden to Osage's investors by limiting Osage's investment to \$500 per customer, regardless of the

actual cost of the systems, and by requiring that those customers be placed in service before the investment is made by Osage. If Osage has underestimated the economic feasibility of the project, the loss will be borne by Osage and the project developer (i.e., the investors) and not by Osage's ratepayers.

Osage has the burden of proof to demonstrate the economic feasibility of this proposal and has presented sufficient evidence on that issue; the Commission must thus conclude that Osage has demonstrated that the proposal is economically feasible.

F. Does Osage's proposal promote the public interest?

In the Memorandum, Osage stated that its proposal was in the public interest. Staff, OPC, and City all agreed that Osage's proposal was not in the public interest.

Staff correctly pointed out that "...this case is not whether [Osage] or the City is the more qualified applicant in this case; the issue is whether [Osage] has satisfied the requirements of the *Tartan Energy Company* case." That case stands for the proposition that a positive finding for the first four standards will, in most cases, support a finding that granting an application for a certificate promotes the public interest.

Again, there is no other company, private or public, which is ready, willing and able to furnish sewer service to the proposed service area. For instance, the City tried to inject an irrelevant issue into the proceedings by alleging that it was going to serve Golden Glade. The

Commission questions this proposition since there are parts of the City itself which do not have City water service.

The only other alternative to granting Osage the certificate it requests is, obviously, to deny it. If that happened, then this sewer system would be turned over to a homeowners' association; there is no other entity available to provide sewer service to Golden Glade. The Commission is of the opinion that, in this instance, it is better to have a regulated investor-owned utility providing sewer service than an unregulated homeowners' association.

IV. Findings of Fact

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 positions and arguments of all of the parties have been considered by the Commission in making this decision. 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 omitted material was not dispositive of this decision.

1. The Commission finds that there is a need for sewer service in the proposed service area.
2. The Commission finds that Osage is qualified to provide the service.
3. The Commission finds that Osage has the financial ability to serve the proposed service area.

4. The Commission finds that Osage's proposal is economically feasible.

5. The Commission finds that Osage's proposal promotes the public interest.

V. Conclusions of Law

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

1. Osage is a public utility and a sewer corporation subject to the Commission's jurisdiction under section 386.250 RSMo, and section 393.170 RSMo.

2. There is a need for sewer service in the service area that Osage proposes to serve.

3. Osage is qualified to provide the proposed service.

4. Osage has the financial ability to provide the service.

5. Osage's proposal to serve the proposed service area is economically feasible.

6. Osage's proposal to serve the proposed service area will promote the public interest.

7. Osage's proposal satisfies all of the criteria enunciated in the *Tartan Energy Company* case as set forth above, and the certificate should be granted.

IT IS THEREFORE ORDERED:

1. That late-filed Exhibits 12 and 13 are hereby received into the record.

2. That any motions (including the motion filed on June 16, 1999, by the City of Osage Beach for sanctions against Osage Water Company) which have not been previously ruled upon, if any, are hereby denied.

3. That the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a sewer system for the public located in an unincorporated area of Camden County, Missouri, as more fully described in its Application, is hereby granted.

4. This Report and Order shall become effective on October 26, 1999.

5. That this case may be closed on October 27, 1999.

BY THE COMMISSION

(S E A L)



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Lumpe, Ch., Crumpton, and Drainer,
CC., concur;
Murray and Schemenauer, CC., dissent,
with separate dissenting opinions;
certify compliance with the provisions
of Section 536.080, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 14th day of October, 1999.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Osage)
Water Company for permission, approval)
and Certificate of Convenience and)
Necessity authorizing it to construct, own,)
operate, control, manage and maintain a)
sewer system for the public located in unin-)
corporated portions of Camden County,)
Missouri, Golden Glade Subdivision)

Case No. SA-99-268

DISSENTING OPINION OF COMMISSIONER CONNIE MURRAY

The Applicant, Osage Water Company (OWC), has not met the legal standard required for this Commission to grant a certificate of convenience and necessity. The standard articulated in In Re Tartan Energy, 3 Mo.P.S.C.3d 173 (Sept. 16, 1994) (Tartan) and historically followed by this Commission requires a finding of five elements, as set forth in the Report and Order herein. The burden of proving the existence of each of those five elements lies with OWC. Each element is essential. Absence of even one of the five elements should result in denial of the application.

While OWC has failed to satisfy the requirements of even one of the five elements necessary for the Commission to grant a certificate of convenience and necessity, this Opinion will focus primarily on the issues of qualification and financial capacity of OWC.

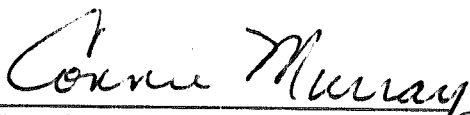
The requirement that an applicant be qualified to provide service is extremely important for protection of the public. An applicant should provide credible evidence of ability to design, construct and operate the facilities and manage the business properly. Compliance with

requirements of the Commission and other governmental agencies is one aspect of properly operating a sewer facility. OWC provided very little, if any, credible evidence of qualification to provide the service. Staff and the City of Osage Beach, on the other hand, presented substantial evidence that OWC has little experience in operating sewage treatment plants and that those it has operated have failed to provide adequate treatment. Staff's evidence was based upon OWC's existing water and sewer utility operations and history of the applicant's performance. Staff presented evidence of numerous violations of Missouri Department of Natural Resources requirements, as well as repeated failure of OWC to follow the requirements of this Commission. OWC has demonstrated a pattern of disregard for permitting and certification requirements and has failed to meet even the Commission's annual reporting requirements. Staff correctly points out that OWC "seems to regard the law as an annoying technicality that they [sic] should not have to comply with The conduct of the Company is part of a pattern of misconduct that the Commission should not countenance by the granting of a certificate of authority." Staff's Reply Brief, 6.7.

The record is also appallingly devoid of any evidence of financial ability. At the very least an applicant must provide credible evidence of existing financial condition and the impact of the proposed project upon the applicant's financial condition. OWC provided nothing more than bald allegations of financial qualification. Those allegations were supported by no evidence, not even the Commission-mandated annual reports for 1997 and 1998. The conclusion that OWC has met its burden to prove financial capability strains credulity.

The record, as a whole, speaks loudly that the public interest will not be served by granting this certificate.

Respectfully submitted,


Connie Murray, Commissioner

Dated at Jefferson City, Missouri,
on this 14 day of October, 1999.

**BEFORE THE PUBLIC SERVICE COMMISSION
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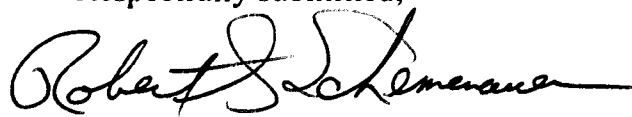
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Case No. SA-99-268

Dissenting Opinion of Commissioner Robert G. Schemenauer

I respectfully dissent from the majority opinion in this case. I have grave concerns regarding Osage Water Company's (OWC) financial integrity. The financial statements presented during this proceeding were so lacking in material representations and supporting detail that I cannot conclude, as the majority did, that OWC has the financial capability to serve the proposed service area.

Respectfully submitted,



Robert G. Schemenauer
Commissioner

**Dated at Jefferson City, Missouri,
on this 12th day of October, 1999.**

AL/Sec'y:

Harkin/Bryce

Date Circulated

CASE NO.

SA-99-268

10/13/14
Lump, Chair

[Signature]
Crumpton, Commissioner

in NO
Murray, Commissioner

NO see below
Schemenauer, Commissioner

10/4/14
Drainer, Vice-Chair

Agenda Date

10-13-14

Action taken:

3-2 AA

Advocates attached

Must Vote Not Later Than

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

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City,

Missouri, this 14th day of October, 1999.

Dale Hardy Roberts

Dale Hardy Roberts

Secretary/Chief Regulatory Law Judge