

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 located in unincorporated )  
portions of Camden County, Missouri )  
(Golden Glade Subdivision). )

Osage Water Company has appeared before the Commission frequently, and has had various operating problems, numerous customer complaints, inadequate record keeping, and is in a financially tenuous position. The management of Osage has recently changed, however. William P. Mitchell, who formerly handled Osage's day-to-day affairs, has been replaced by

Debra Williams, who will also handle the day-to-day affairs of Applicant Environmental Utilities. Under the management of Ms. Williams, Osage's operations have improved.

The Commission applies five tests, known as the *Tartan Energy* criteria, in determining whether to grant a certificate of convenience and necessity to an applicant. Those criteria are: there must be a need for service, the applicant must be qualified, the applicant must have the financial ability to provide service, the proposal must be economically feasible, and granting the certificate must be in the public interest.

The evidence in this case clearly shows that the Applicant satisfies four of the *Tartan Energy* criteria. The critical question in this case is whether the proposal is economically feasible. There are only about eight residences in Golden Glade at the present time, and the subdivision only includes about 50 lots. The residents there will be obligated to obtain water service from a central water supply system, but there is no guarantee that they will do so, and the present residents already have their own individual wells. The success of Applicant's proposal will therefore depend upon the Applicant providing water at wholesale to Osage Water Company for use at Eagle Woods Subdivision.

The Applicant has not yet entered into a contract to sell water to Osage Water Company. If it does enter into such a contract, its proposal will be economically feasible, and the application should be granted; if it does not enter into such a contract, the proposal will not be economically feasible, and the application should be rejected.

The Staff submits that the public interest will best be served if the Commission grants a certificate of convenience and necessity to the Applicant, but only after the Applicant presents to the Commission an executed contract for the sale of water to Osage Water Company.

### **The Legal Standard for Granting Certificates of Authority**

The legal standard for granting certificates of convenience and necessity is well-established. The Commission articulated the five criteria in *Re Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554, 561 (1991), and discussed them at length in *Application of Tartan Energy Company*, 3 Mo. P.S.C. 3d 173.

The *Tartan Energy* criteria are: (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. The parties all agree that these standard criteria apply, and they identified them as the first five issues on the List of Issues that they filed in this case.

### **The *Tartan Energy* Criteria**

*Need for Service.* There are about eight homes in the Golden Glade Subdivision now, and they are all presently served by individually owned wells. There is, however, very little dispute that there is a need for water service (Tr. 331, lines 7-9), and that it would be preferable to serve these residents through a central water system (Tr. 396, line 20 – Tr. 397, line 6).

There is some question as to whether this central water system should be the regulated system operated by the Applicant or an unregulated system operated by some other entity, such as the Golden Glade Homeowners Association or the developer. The covenants and restrictions of the Golden Glade Subdivision require residents to connect to a central water system, and provide that the developers, Mr. and Mrs. Williams, will control the operation of the homeowners association until substantially all of the lots in the subdivision are sold. Thus, for the foreseeable future, Mr. and Mrs. Williams will control the water system, regardless of

whether the Commission approves the application in this case. (Tr. 409, line 21 – Tr. 410, line 11). If the application is granted, the residents of Golden Glade Subdivision would enjoy the additional advantage of receiving these water services from a regulated company.

*Applicant's Qualifications.* The principals of Environmental Utilities, Greg and Debra Williams, have been active in the management of another Commission-regulated water and sewer company, Osage Water Company for about ten years. Osage has experienced various problems with the Commission in regard to the quality of service it provides, its failure to file timely annual reports, and failure to maintain its financial records in accordance with NARUC's Uniform System of Accounts, as demonstrated by the evidence presented by intervenor Hancock Construction Company in this case.

There has been a recent change in the management of Osage, however, and the Staff has noted improvement in Osage's operations. William P. Mitchell was in charge of the day-to-day operation of Osage until July 7, 2001, when Debra Williams assumed those duties. It would appear that the improvement in Osage's operations results from Ms. Williams's efforts. Ms. Williams is also serving in the same capacity for Environmental Utilities, and Staff witness James M. Russo observed that the record keeping for Environmental Utilities is improved. It is reasonable to conclude that Applicant's compliance with Commission requirements will be better than that of Osage.

Mr. Mitchell did, however, provide significant technical skills to Osage, and was Osage's only certified water plant operator. Mr. Mitchell's departure from Osage, and his unavailability to Applicant, left the Applicant without a certified operator. However, during the pendency of this case, an employee of the Applicant has obtained a license as a certified operator, and this is no longer a concern.

The Applicant proposes to serve the Golden Glade Subdivision from a well that is currently owned by Greg and Debra Williams. Mr. and Mrs. Williams obtained the necessary construction permits from the MDNR, the well is completed, and it is operating successfully.

The MDNR has not yet issued a permit to dispense. This is not a cause for alarm, however, because the MDNR will not issue a permit to dispense until the Commission issues its certificate of convenience and necessity. If the Commission approves Applicant's application, it should require that the Applicant obtain a permit to dispense before providing service to the residents of Golden Glade Subdivision.

*Applicant's Financial Ability to Provide Service.* The principal investment that the Applicant will have to make is the purchase of the well. Mr. and Mrs. Williams have constructed and paid for the well, and if the application is approved, they will provide it to the Applicant in exchange for equity. Staff witness James A. Merciel, Jr. testified that although the well has been completed, he does still have concerns about Applicant's ongoing financial needs. (Tr. 277, line 16 – Tr. 238, line 3.) Staff witness Russo also testified that he is not aware of any additional financing that the Applicant requires at this time. (Tr. 260, lines 6-13.)

*Economic Feasibility of Applicant's Proposal.* At the present time, there are only about eight residences in the Golden Glade Subdivision. They are obliged to connect to a central water supply system, but they are presently served by their own individual wells, and there is no assurance that all, or any, of them will actually take service from the Applicant, as they will be required to do if the Commission approves this application.

It is obvious that Applicant's proposal is not economically feasible if only eight customers hook up to the water supply system. In fact, there is no evidence that the proposal

would be economically feasible even if all of the people who eventually buy lots in Golden Glade hook up to Applicant's system.

Osage Water Company, an affiliate of Environmental Utilities, presently holds a certificate of service for Eagle Woods Subdivision, which is adjacent to Golden Glade. However, Osage needs a source of water supply in order to properly serve its customers in the Eagle Woods Subdivision. If the Commission approves this application, Mr. and Mrs. Williams, the owners of Environmental Utilities, propose to sell the well and equipment to Applicant, which will then enter into a contract with Osage Water Company, to provide the water supply to Eagle Woods Subdivision. If that takes place, and if all customers in Golden Glade hook up to Applicant's system, the Applicant's proposal will be economically feasible when Golden Glade is fully developed. But even if all of these events take place, the Applicant's proposal is still a "shoestring" proposition, according to Staff witness Merciel. Mr. Merciel said: "If they get all of the customers that they are proposing, it's still kind of a tight situation." (Tr. 363, line 21 – Tr. 364, line 12.)

The water system in Golden Glade has been interconnected with the water system at Eagle Woods. (Tr. 381, line 23 – Tr. 382, line 10.) But there is still no formal agreement for Applicant to sell water to Osage for use at Eagle Woods; nor has the Applicant submitted a proposed contract or letter of intent concerning such sales. (Tr. 300; Tr. 356; Tr. 403.)

As noted before, there is no assurance that the customers in Golden Glade will hook up to Applicant's system, and this proposal is not economically feasible unless the Applicant is able to sell water to Osage. The Staff submits that this proposal will not be economically feasible unless there is a contract for wholesale service to Osage Water Company. (Tr. 398, line 12 – Tr. 399, line 15; Tr. 481, line 23 – Tr. 482, line 18.)

The lack of a wholesale contract, or even a proposed contract or letter of intent, is very much a concern to the Staff. (Tr. 332; Tr. 396; Tr. 404.) The Applicant has stipulated on the record that it would agree to make the granting of a certificate of convenience and necessity conditional upon the execution of a wholesale contract with Osage Water Company. (Tr. 299, line 20 – Tr. 300, line 18.)

The execution of a wholesale contract with Osage Water Company is essential for the success of Applicant's venture, and Applicant has agreed to accept this as a condition of the approval of a certificate of convenience and necessity. Without such a condition, Applicant's proposal will not be economically feasible, and the *Tartan Energy* criteria will not be met. The Commission should require, as a condition of approving this application, that the Applicant furnish proof that it has executed a wholesale contract with Osage Water Company for service at Eagle Woods.

*The Public Interest.* In its discussion of this criterion in *Tartan Energy*, the Commission stated as follows:

The requirement that an applicant's proposal promote the public interest is in essence a conclusory finding as there is no specific definition of what constitutes the public interest. Generally speaking, positive findings with respect to the other four standards will in most instances support a finding that an application for a certificate of convenience and necessity will promote the public interest.

Accordingly, the Staff has historically taken the position that an applicant satisfying the first four criteria also satisfies the public interest criterion.

In this case, however, an issue has been raised that does not neatly fit into any of the other four criteria. That is the question of whether the public interest is better served by approving this application, so that the provider of water services, Environmental Utilities, will be regulated by the Commission.

It would appear that in the case of Golden Glade Subdivision, the same people – Greg and Debra Williams – will control the water system, in any case. If the application is approved, the Applicant will be the provider, and will be subject to Commission regulation. If the application is not approved, the homeowners association will operate the water system, but it will not be subject to Commission regulation. (Tr. 357, lines 3-8.)

The OPC, which represents the public in this case, maintains that the public interest is better served if the residents of Golden Glade are served by a regulated company. Staff witness Merciel testified that the Missouri Department of Natural Resources (“MDNR”) does not find the operation of water systems by homeowners associations to be preferable, because of the difficulty in obtaining competent, dedicated management. (Tr. 334, lines 16-15.) But he also testified that the Staff would not mind if a homeowners association would operate the system (Tr. 335, lines 1-11), and he acknowledged that operation by the homeowners association in this particular case would be a disservice to the public, since the developers (Mr. and Mrs. Williams) are really the ones that are running the association, which is not “set up the way a homeowners association should be.” (Tr. 311, lines 15-22.)

On balance, the evidence in this case does not compel the Commission to reject the application, because it is not contrary to the public interest.

### **Other Agreed-Upon Contested Issues**

Amount of Investment to Include in Rate Base. The actual amount that Mr. and Mrs. Williams have invested in the well, which would become part of the Applicant’s rate base if the application is granted, can be readily ascertained, according to Staff witness Russo. He said he believes the number is \$69,160, and testified that the Staff could come up with an accurate final figure within a reasonable short time – 60 days or less. (Tr. 268, lines 7-19.)



The Applicant, however, argues that an additional 10% should be added on to the actual costs, to enable it to recover a “general contractor’s fee.” This request should be rejected. Staff witness Russo said he would not object to including personnel or management costs in the cost of the well, if it is properly documented, but he opposes the use of a flat 10% fee. (Tr. 258, line 25 – Tr. 259, line 18.) See also the testimony of Staff witness Merciel. (Tr. 359, lines 8-25.) This fee is an “add-on charge basically,” and the Applicant has not identified the expenditures that would justify including this sum in the rate base, for recovery from the ratepayers. (Tr. 253, line 17 – Tr. 254, line 14.) Mr. Russo was not aware of any other case in which the Commission had granted a similar request, and the Applicant has cited none.

Should Conditions be Imposed on the Applicant? As the foregoing discussion makes clear, the Staff’s primary concern in this case involves *Tartan Energy* criterion number 4: Is the Applicant’s proposal economically feasible? It is obvious that the Applicant cannot succeed by serving only the eight present residents of Golden Glade Subdivision, who already own their own wells, and who may or may not connect to Applicant’s system. And even if Golden Glade is fully developed and all residents there do connect to Applicant’s system, the proposal is not economically feasible. The success of this proposal therefore depends upon the Applicant selling water at wholesale to Osage Water Company for delivery to the residents of Eagle Woods, and upon the sharing of equipment, to reduce the Applicants’ costs of operation.

The Applicant has not yet provided a signed contract to sell water to Osage Water Company, or to share equipment with them; nor has it provided even a proposed contract. The public interest will not be served if the Commission grants a certificate of convenience and necessity to Applicant without first seeing such agreements. Once certificates are granted, they are difficult to revoke. The Commission should therefore require, as a condition of *issuing the*

*certificate* that the Applicant first provide it with a signed contract with Osage Water Company, by the terms of which Osage agrees to purchase water for service to Eagle Woods Subdivision for a term of five years or more. The Commission should also require that the Applicant enter an agreement with Osage for the sharing of equipment, including the Bobcat and the mini-excavator. Finally, the Commission's order should require the Applicant to obtain from the MDNR a permit to dispense before it begins providing water service to the Golden Glade Subdivision.

*Should Any Proposed Tariffs be Withdrawn?* Staff witness Merciel identified a dozen tariff sheets that should be modified in one way or another. (Merciel Rebuttal, Ex. 7, p. 5, line 16 – p. 10, line 11.) Most of Mr. Merciel's suggested changes are minor, and can probably be worked out informally through negotiations between the Staff, the Office of the Public Counsel, and the Applicant. (Merciel Rebuttal, Ex. 7, p. 8, lines 2-5.)

One of the tariff sheets does merit special attention, however. The Applicant has proposed a flat rate of \$28.61 per month for unmetered customers. The Staff submits that that rate is too high, and needs to be reduced.

Flat rates can be useful in certain situations, such as where a meter could be installed during the first month or two of service, or where the company has taken over the operation of facilities that are unmetered. (Tr. 385, line 19 – Tr. 386, line 7; Tr. 336, line 17 – Tr. 337, line 3.) However, meters should be utilized wherever possible. In cases where it is temporarily impossible to utilize meters, the rates for unmetered usage should be set lower than the rates for metered service, because it costs less to provide unmetered service than it does to provide metered service. (Tr. 335, line 20 – Tr. 336, line 11.) In addition, establishing the unmetered

rates at a level that is lower than the metered rates would provide an incentive to the Applicant to install meters wherever possible. (Tr. 387, lines 15-18.)

The Staff did not make a specific recommendation on the rate that should be applied to unmetered service. Mr. Merciel testified that it should probably be a few dollars less per month than the rate for metered service, and that the simplest way is to use the minimum charge. (Tr. 385, line 14 – Tr. 387, line 18.)

### **Intervenor's Proposed Additional Issues**

Intervenor Hancock Construction Company has designated four other issues that it believes should be included in the List of Issues for determination by the Commission in this case. The Staff submits that these four issues are not properly submitted to the Commission for decision in this case. They are not among the *Tartan Energy* criteria, which the Commission utilizes to determine whether an application for certificate of convenience and necessity should be granted. Nor does either of the other parties to this case believe that these issues are properly before the Commission in this case. Nonetheless, the Staff will briefly address each of these four issues.

*Have Assets been Transferred from Osage to Environmental Utilities?* There is no credible evidence to support the Intervenor's claim that Osage has transferred the Bobcat and the mini-excavator to Environmental Utilities. Staff witness Russo testified that he had reviewed documents concerning these two pieces of equipment. They revealed that Osage had leased this equipment from a leasing company, which subsequently repossessed them. The Company then sold the items to Mr. and Mrs. Williams, who now own them as their personal property. (Tr. 260, line 22 – Tr. 262, line 4.) The Intervenor was not able to contradict this evidence.

Will Granting a Certificate Impair the Ability of Osage to Pay its Valid Debts? The Intervenor has never clearly identified the mechanism through which the granting of a certificate to Environmental Utilities would impair the ability of Osage to pay its valid debts. If the certificate is granted, both Osage and Environmental Utilities would be regulated by the Commission. The Commission would require both companies to provide safe and adequate service and would establish just and reasonable rates for both companies. The companies would be separate, and each would be responsible for its own operations. The vague suggestion that granting a certificate to Environmental Utilities would somehow enable Mr. and Mrs. Williams to siphon assets from Osage to Applicant is simply unsupported. This claim should be rejected.

Will Osage be Harmed if Applicant is Allowed to Use its Assets? The Intervenor has never clearly explained why the sharing of equipment and office personnel will work to the detriment of Osage. It stands to reason that if the assets and personnel are more fully utilized, and the costs are properly allocated to the party utilizing them, the assets and personnel can be utilized more efficiently, and the cost per unit of use of service will be reduced. Osage will not be harmed if it allows Applicant to use its assets, and if costs are properly allocated between the parties.

Will Osage's Customers be Harmed if Osage Allows Applicant to Use its Assets? For the same reasons mentioned in the immediately preceding paragraph, Osage's customers will not be harmed if Osage allows Applicant to use its assets, and if costs are properly allocated between the parties.

### **Summary**

By the time the hearing in this case concluded, the Applicant had demonstrated that its application satisfied three of the *Tartan Energy* criteria: there is a need for water service to the

Golden Glade Subdivision; the Applicant is qualified to provide the service; and the Applicant has the financial ability to provide the service.

The critical question is whether the Applicant's proposal is economically feasible. The Staff submits that this proposal is economically feasible if, but only if, the Applicant enters into a wholesale agreement with Osage Water Company for use at Eagle Woods Subdivision, and for the sharing of equipment with Osage, to reduce its operating costs. If those conditions are met, the proposal is feasible. And since the first four *Tartan Energy* criteria will have been met, the fifth criteria, the public interest would also be met.

The Commission should therefore approve the application of Environmental Utilities, at such time as the Applicant provides to the Commission proof that it has executed a wholesale contract for water service to Eagle Woods, and for the sharing of equipment with Osage Water Company. The Commission should also require the Company to obtain from the MDNR a permit to dispense before it provides water service on a retail or wholesale basis.

**WHEREFORE,** the Staff prays that the Commission approve Application's application and issue a certificate of convenience and necessity at such time as the Applicant complies with the foregoing conditions.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

**/s/ Keith R. Krueger**

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### **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record this 30th day of April 2002.

**/s/ Keith R. Krueger**

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Keith R. Krueger