

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

In the Matter of Carl R. Mills Trust for a)
Certificate of Convenience and Necessity)
Authorizing it to Install, Own, Acquire,)
Construct, Operate, Control, Manage and)
Maintain Water Systems in Carriage Oaks)
Estates)

File No. WA-2018-0370

STAFF'S INITIAL BRIEF

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Missouri Public Service Commission**

July 15, 2019

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COMES NOW the Staff of the Missouri Public Service Commission (Staff),
by and through counsel, and for its *Initial Brief* states herein as follows:

Introduction

On June 7, 2018, the Carl R. Mills Trust filed an Application with the Missouri Public Service Commission (“Commission”) requesting a Certificate of Convenience and Necessity (“CCN”) to operate, control, manage and maintain a water system in the Carriage Oaks Estates Subdivision in Stone County, Missouri.¹ An Amended Application was filed on October 2, 2018, with Mr. Carl R. Mills, individually, as the Applicant. On June 8, 2018, the Commission issued an *Order Directing Notice and Setting Intervention Deadline* allowing interested persons wishing to intervene until June 29, 2018, to file a motion to intervene in this matter. On June 29, 2018, Derald Morgan, Rick and Cindy Graver, William and Gloria Phipps, and David Lott (“Intervenors”) filed an *Application to Intervene*. Intervenors’ *Application to Intervene* was granted on July 10, 2018.

On October 11, 2018, Staff filed its *Recommendation*; Intervenors filed *Suggestions in Opposition* to Staff’s Recommendation on October 22, 2018. The

¹ The Commission’s Report and Order in Case WC-2017-0037 ordered Mr. Mills to file an Application for a CCN. Commission Ex. 2 at page 15, ¶ 2 (“Carl Mills shall apply to the Missouri Public Service Commission for a Certificate of Convenience and Necessity.”).

Intervenors filed a request for evidentiary hearing on November 13, 2018. The Parties' Joint Stipulation of Agreed Upon Facts was filed on April 16, 2019.

Pursuant to Intervenors' request for an evidentiary hearing, and after two continuances, the Commission convened an evidentiary hearing on the CCN Application on June 24, 2019. Four (4) witnesses testified and the Commission received 17 exhibits. By verbal order of the Regulatory Law Judge at the end of the hearing, initial briefs were scheduled to be filed by July 15, 2019.

Issues

The Parties submitted the following issues for determination by the Commission:²

1. Does the evidence establish that the water system in Carriage Oaks Estates for which Carl R. Mills is seeking a certificate of convenience and necessity (CCN) is "necessary or convenient for the public service" within the meaning of that phrase in section 393.170, RSMo.?
2. If the Commission grants Mr. Mills a CCN, what conditions, if any, should the Commission deem to be reasonable and necessary, and impose?

Argument

- I. Does the evidence establish that the water system in Carriage Oaks Estates for which Carl R. Mills is seeking a certificate of convenience and necessity (CCN) is "necessary or convenient for the public service" within the meaning of that phrase in section 393.170, RSMo.?**

The evidence establishes that the water system in Carriage Oaks Estates, for which Carl R. Mills is seeking a certificate of convenience and necessity, is "necessary or convenient for the public service" within the meaning of that phrase in Section 393.170, RSMo.

² *Joint List of Issues, List and Order of Witnesses, Order of Opening Statements and Order of Cross-Examination*, filed April 16, 2019, EFIS Item No. 30.

Legal Standard
Section 393.170 and Tartan Criteria

Section 393.170, RSMo., provides:³

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system, other than an energy generation unit that has a capacity of one megawatt or less, 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.

Missouri case law provides further detail on the meaning of “necessary or convenient”. “Operating as a public utility requires the Commission's prior permission and approval. Such permission and approval depend on whether the proposed service ‘is required by the public convenience and necessity [;]’ and ‘necessary or convenient for the public service [.]’”⁴ “‘Necessary’ and ‘necessity’ relate to the regulation of competition, cost justification, and safe and adequate service.”⁵ “The term ‘necessity’ does not mean ‘essential’ or ‘absolutely indispensable,’ but that an additional service would be an

³ MO. REV. ANN. STAT. § 393.170.

⁴ *In the Matter of Entergy Arkansas, Inc.’s Notification of Internal Restructuring or Alternative Application for Approval of Restructuring & Related Relief*, No. EO-2018-0169, 2018 WL 2364616, at *3 (Apr. 12, 2018) (citations omitted).

⁵ *Id.*

improvement justifying its cost.”⁶ “[I]t 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.”⁷ “On finding convenience and necessity, the Commission embodies its permission and approval in a certificate, which the regulations call a certificate of convenience and necessity.”⁸

Furthermore, although not required as a matter of law, the Commission has traditionally analyzed CCN applications utilizing the “Tartan Criteria”:⁹ (1) Need for Service, (2) Applicant’s Qualifications, (3) Applicant’s Financial Ability, (4) Economic Feasibility of Proposal, and (5) Promotion of the Public Interest.¹⁰

⁶ *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm’n of Missouri*, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993) (citations omitted).

⁷ *Id.* at 597-98 (citations omitted).

⁸ *In the Matter of Entergy Arkansas*, 2018 WL 2364616 at *3 (citations omitted).

⁹ *In Re Tartan Energy Co., L.C.*, No. GA-94-127, 1994 WL 762882 (Sept. 16, 1994).

¹⁰ Further description of “public interest” is included in *In the Matter of the Joint Application of Stoddard Cty. Sewer Co., Inc., R.D. Sewer Co., L.L.C. & the Staff of the Missouri Pub. Serv. Comm’n for an Order Authorizing Stoddard Cty. Sewer Co., Inc. to Transfer Its Assets to R.D. Sewer Co., L.L.C., & for an Interim Rate Increase*:

The public interest is a matter of policy to be determined by the Commission. It is within the discretion of the Commission to determine when the evidence indicates the public interest would be served. Determining what is in the interest of the public is a balancing process. In making such a determination, the total interests of the public served must be assessed. This means that some of the public may suffer adverse consequences for the total public interest. Individual rights are subservient to the rights of the public. The “public interest” necessarily must include the interests of both the ratepaying public and the investing public. In fact, the Commission notes that the Missouri Supreme Court has previously held that the Commission must consider the interests of the investing public and that failure to do so would deny them a right important to the ownership of property. However, as noted, the rights of individual groups are subservient to the rights of the public in general.

No. SO-2008-0289, 2008 WL 4724833, at *52 (Oct. 23, 2008) (citations omitted).

Tartan Criteria

Staff reviewed the Application based on the five factors the Commission listed in *In Re Tartan Energy*¹¹ and concluded that the Application met the criteria; each criterion is discussed in more detail below.

(1) Need

The Parties agree that there is a need for the service, as stated in the *Joint Stipulation of Agreed Upon Facts* filed on April 16, 2019.¹² Further, Staff determined the service is needed, as existing residential customers have, and possible future residential customers will have, a desire and need for water service.¹³ Mr. Mills, through one or more affiliated entities, presently operates an existing water system that is utilized to provide such service, and no other water systems are readily available.¹⁴

(2) Applicant's Qualifications

The Applicant is qualified to provide water service, as Mr. Mills has provided safe and adequate water service for this service area in past years.¹⁵ Mr. Mills, as the developer of the subdivision, has been providing water service to the subdivision since its development in approximately 1999¹⁶ and is sufficiently qualified through experience to provide the service.¹⁷ To the extent there have been operational service issues raised by the Intervenors during the pendency of this case, Staff reiterates its encouragement of

¹¹ Additional testimony regarding the factors was received at the evidentiary hearing.

¹² Commission Ex. 1, *Joint Stipulation of Agreed Upon Facts* ¶ 14 ("There is a need for the service.").

¹³ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5.

¹⁴ *Id.*

¹⁵ Commission Ex. 2 at 15 ("The record does not demonstrate any abuse by Carl Mills in regard to rates or safety. Carl Mills developed a subdivision and provided water and sewer services to the subdivision. He offered these services at cost for a period of time and appeared to provide safe service to the subdivision.").

¹⁶ Mills Ex. 1, Mills Direct Testimony, 4:3-5.

¹⁷ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5.

Mr. Mills to utilize a contract operator for day-to-day system operations, as suggested by the Intervenors in their counsel's opening statement.¹⁸

(3) Applicant's Financial Ability

Applicant has the financial ability to provide water service. Staff's observation of current operations indicates that upgrades and repairs that have required financial resources appear to have been adequate in the past.¹⁹ Additionally, Mr. Mills has primarily used personal financial resources to address upgrades and repairs.²⁰

(4) Economic Feasibility of Proposal

Mr. Mills' proposal to own and operate the water system serving Carriage Oaks subdivision is economically feasible, based on an observation that operations presently appear to support current expenses.²¹ Further, in the course of Staff's review of the Application, Staff developed recommended quarterly rates to be charged based upon an estimate of water utility plant-in-service, an estimated depreciation reserve.²² However, if expenses associated with rate base are actually included in rates, then a rate base

¹⁸ Ex. 101, Merciel Rebuttal Testimony, 7:6-15; 8:6-8; see also Hrg. Tr. Vol. 2, 39:20-24 ("As Staff pointed out, we would also request that a third-party operator be required to manage day-to-day operations of the water system so that Mr. Mills is not the one responsible for those day-to-day operations.").

¹⁹ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5.

²⁰ *Id.*; see also Mills Ex. 1, Mills Direct Testimony 9:3-6 ("...I paid for the entire installation of the water system within Carriage Oaks Estates when it was constructed in 1999. I also paid for the subsequent upgrade to the water system entirely out of my own pocket.").

²¹ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5.

²² Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 3.

capacity adjustment similar to Staff's proposal²³ would be necessary.²⁴ Staff also analyzed the operating expenses of the system²⁵ in developing its recommended quarterly rate.²⁶ With these rates in place, the Applicant's proposal is economically feasible.

(5) Promotion of the Public Interest

"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."²⁷ "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."²⁸

²³ Per Staff's Recommendation and Memorandum, filed October 11, 2018:

Mr. Mills sent Staff invoices for the cost of the storage tank and high-service pumping system constructed in 2015. Records for the cost of plant-in-service constructed during the beginning of the subdivision development, almost 20 years ago, were not provided to Staff. Using this information, some of the information stated in the Application and Amended Application, and its own judgement, Staff created an estimate of water utility plant-in-service, along with an estimated depreciation reserve. Further, this water system was apparently constructed with the intention of providing service to a total of approximately 55 customers in all three development phases []. However, since there are only seven customers at present, Staff proposes applying a capacity adjustment as the small fraction of the total customer potential should not be required to pay for the entire capital cost of the water system. Staff's estimated rate case and the capacity adjustment are shown on Attachment C [of Staff's Memorandum.]

Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 3.

²⁴ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5.

²⁵ Per Staff's Recommendation and Memorandum, filed October 11, 2018:

Staff obtained information for some operating expenses from Mr. Mills, and also calculated or estimated certain operating expenses on a pro-forma basis, to reflect expenses Applicant is likely to incur as a regulated water utility.

Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 3.

²⁶ In Ex. 100, Rebuttal Testimony of Amanda C. McMellen, Staff recommended the implementation of a quarterly flat rate of \$271.42. However, as stated later in this Brief, should the Commission determine that utilization of a contact operator for day-to-day system operations is a reasonable and necessary condition, Staff recommends a flat quarterly rate of \$289.68.

²⁷ *In Re Tartan Energy Co., L.C.*, No. GA-94-127, 1994 WL 762882 at *11 (Sept. 16, 1994).

²⁸ *Id.*; see also *supra* Note 10.

Based on the foregoing, Staff concludes that there is a need for the service, the applicant is qualified to provide the service, the applicant has the financial ability to provide the service, the proposal is economically feasible, and thus, the granting of the Application for CCN will promote the public interest.²⁹

II. If the Commission grants Mr. Mills a CCN, what conditions, if any, should the Commission deem to be reasonable and necessary, and impose?

Staff recommends that the Commission grant Mr. Mills a CCN and, pursuant to Section 393.170.3, RSMo.,³⁰ impose reasonable and necessary conditions as set forth in Exhibit 101, James Merciel's Rebuttal Testimony Schedule JAM-r3, and as set out below. Staff notes that it added two (2) conditions in Mr. Merciel's Rebuttal Testimony to address Intervenor concerns regarding water testing. Additionally, Staff reiterates its encouragement of Mr. Mills to utilize a contract operator for day-to-day system operations, as suggested by the Intervenors in their counsel's opening statement.³¹ Should the Commission determine that utilization of a contract operator for day-to-day system operations is a reasonable and necessary condition, Staff recommends a flat quarterly rate of \$289.68³² based on estimates provided by the Company.

As stated in its Rebuttal Testimony, Staff's recommendations and suggested conditions are:

²⁹ Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation* at 5 ("For the reasons outlined through this Memorandum...Staff asserts that Mr. Mills' request for a CCN serves the public interest. Staff concludes that the points regarding TMF capacities and the Tartan Energy criteria are all met for this case.").

³⁰ MO. REV. ANN. STAT. § 393.170.3 ("The commission may by its order impose such conditions as it may deem reasonable and necessary.").

³¹ Ex. 101, Merciel Rebuttal Testimony, 7:6-15; 8:6-8; see also Hrg. Tr. Vol. 2, 39:20-24 ("As Staff pointed out, we would also request that a third-party operator be required to manage day-to-day operations of the water system so that Mr. Mills is not the one responsible for those day-to-day operations.").

³² Ex. 102; see also Hrg. Tr. Vol. 2, 157:8-158:23.

- (1) Grant Mr. Mills' Application for a CCN,
- (2) Approve the water service area depicted by the map metes and bounds description included with Staff's Memorandum as Attachments A and B,
- (3) Approve a quarterly flat rate for water service of \$271.42,³³ and impose the following reasonable and necessary conditions:
 - (4) Require Mr. Mills, as a regulated water utility, to follow all applicable requirements pertaining to regulated water companies;
 - (5) Require Mr. Mills, as a regulated water utility, to create and keep financial books and records for plant-in-service, revenues, and operating expenses (including invoices) in accordance with the NARUC Uniform System of Accounts;
 - (6) Require Mr. Mills to, going forward, keep and make available for audit and review all invoices and documents pertaining to the capital costs of constructing and installing the water utility assets;
 - (7) Approve depreciation rates for water utility plant accounts as described and shown on Staff's Attachment E: Schedule of Depreciation Rates for Water Plant;³⁴
 - (8) Require Mr. Mills to submit a complete tariff for water service, as a thirty (30) day filing, within ten (10) days after the effective date of approval of a CCN by the Commission;
 - (9) Require Mr. Mills, as the regulated water utility, to submit information in this case file indicating he owns pertinent water utility real estate, and has access and

³³ Ex. 100, Rebuttal Testimony of Amanda C. McMellen, 4:1-2; *see also* Attachment D-1 to Ex. 100, Rebuttal Testimony of Amanda C. McMellen. This amount represents the flat quarterly rate calculated by Staff if Mr. Mills *does not* enter into an Operations/Management Contract with a third party. Should the Commission order Mr. Mills to utilize such an arrangement, the quarterly amount calculated by Staff is \$289.68. Ex. 102; *see also* Hrg. Tr. Vol. 2, 157:8-158:23.

³⁴ Staff's Attachment E is attached to Ex. 100, Appendix A to the Rebuttal Testimony of Amanda C. McMellen, *Staff Recommendation*.

control of water-related utility easements throughout the service area, within thirty (30) days after the effective date of approval of a CCN by the Commission;

(10) Extend the requirement for Mr. Mills to submit a rate case before the Commission upon issuance of a CCN, as ordered in the Commission's *Report and Order* issued in WC-2017-0037, to submitting a rate case one year after the effective date of the issuance of a CCN in this case;

(11) Make no finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters in any later proceeding;

(12) Require Mr. Mills to distribute to all customers an informational brochure detailing the rights and responsibilities of the utility and its customers regarding its water service, consistent with the requirements of Commission Rule 4 CSR 240-13, within thirty (30) days after the effective date of approval of a CCN by the Commission;

(13) Require Mr. Mills to provide to the Customer Experience Department Staff a sample of three (3) bills from the first billing cycle after the effective date of approval of a CCN by the Commission;

(14) Require Mr. Mills to file notice in this case once Staff recommendations Nos. 12-13 above have been completed;

(15) Require Mr. Mills to take water samples for laboratory analysis at least twice per year at approximately six month intervals for bacterial contamination, chlorine residual and iron content, such sample to begin within thirty (30) days of the effective date of a CCN issued by the Commission;³⁵ and,

³⁵ This recommended condition was added to those stated in the *Staff Recommendation* in response to suggested water quality issues raised by the Intervenors. Ex. 101, Merciel Rebuttal Testimony, 2:15-3:3.

(16) Require Mr. Mills to report the twice-annual water testing results to customers at least annually, beginning within 240 days after the effective date of a CCN issued by the Commission.³⁶

Conclusion

Staff recommends that the Commission grant Mr. Mills a CCN and, pursuant to Section 393.170.3, RSMo., impose reasonable and necessary conditions as set forth in Exhibit 101, James Merciel's Rebuttal Testimony Schedule JAM-r3.

WHEREFORE, Staff respectfully submits its *Initial Brief* in the above-captioned matter.

Respectfully submitted,

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³⁶ This recommended condition was added to those stated in the *Staff Recommendation* in response to suggested water quality issues raised by the Intervenors. Ex. 101, Merciel Rebuttal Testimony, 2:15-3:3.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and/or counsel of record on this 15th day of July, 2019.

/s/ Alexandra L. Klaus