

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 9th day of May, 2012.

In the Matter of the Joint Application of Valley Woods)
Water Company, Inc. and Valley Woods Utility, LLC) **File No. WM-2012-0288**
for Authority of Valley Woods Water Company, Inc.)
to Sell Certain Assets to Valley Woods Utility, LLC)

**ORDER APPROVING TRANSFER OF ASSETS AND GRANTING
CERTIFICATE OF CONVENIENCE AND NECESSITY**

Issue Date: May 9, 2012

Effective Date: May 18, 2012

Background

On March 7, 2012, Valley Woods Water Company, Inc. ("Valley Woods") and Valley Woods Utility, L.L.C. ("VWU"), filed a joint application seeking authority for Valley Woods to sell certain assets to VWU. Valley Woods is a regulated water and sewer company providing water and sewer service to approximately 40 customers in and around the City of Highlandville, in Christian County, Missouri. VWU is not currently subject to the jurisdiction of the Commission, but will be acquiring assets that will be subject to the Commission's jurisdiction. In order to approve the transfer of assets to VWU, the Commission will also need to determine if VWU satisfies the requirements for granting it a certificate of convenience and necessity ("CCN").

The Commission issued notice, added VWU as a party, and set a deadline for intervention requests. No person or entity intervened, and no party requested an evidentiary hearing.

On April 20, 2012, the Commission's Staff filed its recommendation to approve the transfer of assets and to grant VWU a CCN subject to certain conditions. No party opposed Staff's recommendation and VWU affirmatively agreed to the conditions.

Legal Standard to Approve a Transfer of Assets

Section 393.190, RSMo 2000, which governs the transfer of assets, does not set forth a standard or test for the Commission's approval of the proposed transfer. However, when reviewing Section 393.190's predecessor, i.e. Section 5195, RSMo 1929, the Missouri Supreme Court determined that the standard for Commission approval of transactions pursuant to this statute is the "not detrimental to the public interest" standard.¹

As the court explained:

The state of Maryland has an identical statute with ours, and the Supreme Court of that state in the case of *Electric Public Utilities Co. v. Public Service Commission*, 154 Md. 445, 140 A. 840, loc. cit. 844, said: "To prevent injury to the public, in the clashing of private interest with the public good in the operation of public utilities, is one of the most important functions of Public Service Commissions. It is not their province to insist that the public shall be benefited, as a condition to change of ownership, but their duty is to see that no such change shall be made as would work to the public detriment. 'In the public interest,' in such cases, can reasonably mean no more than 'not detrimental to the public.'"²

No Missouri court has deviated from this ruling in terms of it being the proper standard to apply for applications filed pursuant to Section 393.190, and this standard is further cemented by the Commission's own rules, which require an applicant for such authority to state in its application "[t]he reason the proposed sale [or transfer] of the assets is not

¹ *State ex rel. City of St. Louis v. Public Service Comm'n of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934). See also *State of Missouri ex rel. Ag Processing, Inc., v Public Service Commission of the State of Missouri and Aquila, Inc., f/k/a Utilicorp United, Inc.*, 2003 WL 1906385*6 (Mo. App. 2003) (overruled on other grounds).

² *City of St. Louis*, 73 S.W.2d at 400.

detrimental to the public interest.”³ When applying this standard, “[t]he Commission may not withhold its approval of the disposition of assets unless it can be shown that such disposition is detrimental to the public interest.”⁴

The Missouri Court of Appeals has stated of Section 393.190: “The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.”⁵ “To that end, the Commission has previously considered such factors as the applicant’s experience in the utility industry; the applicant’s history of service difficulties; the applicant’s general financial health and ability to absorb the proposed transaction; and the applicant’s ability to operate the assets safely and efficiently.”⁶

In considering whether or not the proposed transaction is likely to be detrimental to the public interest, the Commission notes that its duty is to ensure that VWU will provide safe and adequate service to their customers at just and reasonable rates. A detriment, then, is any direct or indirect effect of the transaction that tends to make the provision of water and sewer service less safe or less adequate, or which tends to make rates less just

³ Commission Rule 4 CSR 240-3.310(1)(D).

⁴ *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

⁵ *Id.*

⁶ See *In the Matter of the Application of Central Jefferson County Utilities, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Jefferson County Public Sewer District and in Connection Therewith, Certain Other Related Transactions*, Case No. SO-2007-0071, et al, Report and Order issued February 8, 2007; *In Re the Matter of the Joint Petition of Frimel Water System, Inc. and Lake Lorraine Property Owners' Association for Authority for Frimel Water System, Inc., to Transfer Its Assets and Cease Operations*, Case No. WM-2006-0459 (Report and Order issued November 7, 2006, 2006 WL 3371567 (Mo. P.S.C.)); See also *In the Matter of the Joint Application of Missouri Gas Energy, et al.*, Case No. GM-94-252 (Report and Order, issued October 12, 1994), 3 Mo. P.S.C. 3rd216, 220. See also *State ex rel. City of St. Louis v. Public Service Commission of Missouri*, 73 S.W.2d 393, 400 (Mo. banc 1934); *State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz*, 596 S.W.2d 466, 468 (Mo. App. 1980).

or less reasonable.⁷ The presence of detriments, thus defined, is not conclusive to the Commission's ultimate decision because detriments can be offset by attendant benefits.⁸ The mere fact that a proposed transaction is not the least cost alternative or will cause rates to increase is not detrimental to the public interest where the transaction will confer a benefit of equal or greater value or remedy a deficiency that threatens the safety or adequacy of the service.⁹

Legal Standard to Grant a CCN

“The legislature has seen fit to vest the Public Service Commission with exclusive authority to allocate the territory in which a particular utility may render service, by providing that the Commission shall pass upon the question of the public necessity and convenience for any new or additional company to begin business anywhere in the state, or for an established company to enter new territory.”¹⁰ The governing statute for the grant of a certificate of convenience and necessity for the allocation of service territory for the provision of natural gas service is Section 393.170, RSMo 2000. Section 393.170 provides:

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water

⁷ *In the Matter of the Application of Union Electric Company, d/b/a AmerenUE, for an Order Authorizing the Sale, Transfer and Assignment of Certain Assets, Real Estate, Leased Property, Easements and Contractual Agreements to Central Illinois Public Service Company, d/b/a AmerenCIPS, and, in Connection Therewith, Certain Other Related Transactions*, Case No. EO-2004-0108. See also *In the Matter of the Joint Application of Great Plains Energy Incorporated, Kansas City Power & Light Company, and Aquila, Inc., for Approval of the Merger of Aquila, Inc., with a Subsidiary of Great Plains Energy Incorporated and for Other Related Relief*, Case No. EM-2007-0374, Report and Order, issued July 1, 2008.

⁸ *Id.*

⁹ *Id.*

¹⁰ *State ex rel. Doniphan Tel. Co. v. Pub. Serv. Comm'n*, 377 S.W.2d 469, 474 (Mo. App. 1964); *State ex rel. City of Sikeston v. Pub. Serv. Comm'n of Missouri*, 82 S.W.2d 105, 110 (Mo. 1935); *Pub. Serv. Comm'n v. Kansas City Power & Light Co.*, 31 S.W.2d 67, 69-70 (Mo. banc 1930); *State ex rel. Harline v. Pub. Serv. Comm'n*, Mo. App., 343 S.W.2d 177, 182 (Mo. App. 1960).

system or sewer 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.

Section 393.170.3 authorizes the Commission to grant a certificate of convenience and necessity when it determines, after due hearing, that the proposed project is "necessary or convenient for the public service."¹¹ The term "necessity" does not mean "essential" or "absolutely indispensable," but rather that the proposed project "would be an improvement justifying its cost,"¹² and that the inconvenience to the public occasioned by lack of the proposed service is great enough to amount to a necessity.¹³ It is within the

¹¹ Section 393.170; *St. ex rel. Intercon Gas, Inc. v. Public Service Commission*, 848 S.W.2d 593, 597 (Mo. App. 1993); *State ex rel. Webb Tri-State Gas Co. v. Public Service Commission*, 452 S.W.2d 586, 588 (Mo. App. 1970); *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.)

¹² *Id.*; *Intercon Gas, Inc.*, 848 S.W.2d at 597; *State ex rel. Beaufort Transfer Co. v. Clark*, 504 S.W.2d 216, 219 (Mo. App. 1973).

¹³ *Id. Beaufort Transfer Co.*, 504 S.W.2d at 219; *State ex rel. Transport Delivery Service v. Burton*, 317 S.W.2d 661 (Mo. App. 1958).

Commission's discretion to determine when the evidence indicates the public interest would be served by the award of the certificate.¹⁴

While Section 386.170 speaks to the Commission's authority to grant a CCN for the construction of facilities to provide natural gas service, it offers little statutory guidance as to specific criteria that must be satisfied prior to the grant of such certificates. In fact, pursuant to Section 393.170.3, the Commission may impose the conditions it deems reasonable and necessary for the grant of a CCN. The Commission has articulated the filing requirements for water and sewer utility CCNs in Commission Rules 4 CSR 240-3.305 and 3.600, and the specific criteria to be used when evaluating CCN applications are as follows: (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.¹⁵

Analysis

Section 393.190, governing the transfer of assets, does not require a hearing prior to the Commission rendering a decision. While Section 393.170, governing the grant of a CCN, contemplates a Commission decision following "due hearing," the term "hearing"

¹⁴ *In the Matter of the Application of Southern Missouri Gas Company, L.P., d/b/a Southern Missouri Natural Gas, for a Certificate of Public Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage, and Maintain a Natural Gas Distribution System to Provide Gas Service in Lebanon, Missouri*, Case Number GA-2007-0212, et al., 2007 WL 2428951 (Mo. P.S.C.); *Intercon Gas, supra*, quoting *St. ex rel. Ozark Electric Coop. v. Public Service Commission*, 527 S.W.2d 390, 392 (Mo. App. 1975).

¹⁵ *In the Matter of RDG Development, LLC for a Certificate of Convenience and Necessity Authorizing it to Own, Operate, Maintain, Control and Manage a Sewer System in Callaway County, Missouri*, File Number SA-2010-0096, 2009 WL 5069710 (Mo. P.S.C. 2009); *In re Central Jefferson County Utilities, Inc.*, File Number SO-2007-0071, 2007 WL 824040, 7-8 (Mo. P.S.C. 2007); *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991); *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, 3 Mo. P.S.C. 3d 173, 1994 WL 762882, *3 (Mo. P.S.C. 1994). These factors are sometimes referred to as the "Tartan Factors."

“presupposes a proceeding before a competent tribunal for the *trial of issues* between *adversary parties*, the presentation and the consideration of proofs and arguments, and determinative action by the tribunal with respect to the issues ... ‘Hearing’ involves an *opposite party*; ... it contemplates a listening to facts and evidence for the sake of *adjudication* ... The term has been held synonymous with ‘opportunity to be heard’.”¹⁶ The requirement for a hearing was met in this matter when the opportunity for a hearing was provided and no party requested the opportunity to present evidence.¹⁷ Ultimately, Valley Woods’ and VWU’s application did not result in a contested case proceeding.

The factors the Commission considers for approving a transfer of assets and granting a CCN are virtually identical. Based upon Staff’s verified *Memorandum* the Commission finds: (1) the customers currently being served by Valley Woods need water and sewer service and after the transfer is complete VWU will continue providing those services; (2) VWU has adequate technical and managerial qualifications to operate the water and sewer systems; (3) VWU has the financial capacity to continue providing the water and sewer services; (4); the proposed transfer of assets is economically feasible; and (5) providing safe and adequate water and sewer services to these customers serves the public interest.

Additionally, Valley Woods is current on its annual assessments and with the filing of its annual reports. There are also no current violations or issues with the Department of Natural Resources that need immediate correction, and there are no deficiencies with respect to the water system. With respect to the sewer system, Valley Woods has had

¹⁶ *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Comm'n of State of Mo.*, 776 S.W.2d 494, 495-496 (Mo. App. 1989).

¹⁷ *Id.*

some minor effluent monitoring issues in the past, which can be resolved by monitoring and reporting on a going forward basis by VWU.¹⁸

Decision

Because this is a non-contested case, the Commission acts on discretion or on evidence that is not formally adduced and preserved.¹⁹ There is no evidentiary record.²⁰ Consequently, the Commission bases its decision on the parties' verified filings. Having found that the factors for approving a transfer of assets and granting a CCN have been satisfied, and having found that it is in the public interest for VWU to provide the water and sewer service to the customers currently being served by Valley Woods, the Commission finds that the public interest standards for approving a transfer of assets and granting a CCN have also been satisfied. Consequently, based on the Commission's independent and impartial review of the verified filings, the Commission will approve the transfer of assets and grant VWU a CCN.

In Valley Woods' most recent rate cases for its water and sewer operations, the Staff's Engineering and Management Services Unit ("EMSU") made a number of recommendations to Valley Woods, which were implemented and brought Valley Woods into conformance with Missouri Commission Rules, specifically 4 CSR 240-13 (Chapter 13). Since many of the recommendations involve day-to-day corporate operations and are of an

¹⁸ By the terms of the current discharge permit, this treatment facility will need to meet limits for ammonia beginning January 1, 2015. VWU will be required to state how the facility will meet the new limits by July 1, 2012. If treatment facility modifications will be necessary to meet the new ammonia limits, by the terms of the permit, VWU will need to submit construction plans for such modifications to DNR by that date. Any resulting changes in plant investment will be examined by Staff in a future rate case filed by VWU.

¹⁹ *State ex rel. Public Counsel v. Public Service Comm'n*, 210 S.W.3d 344, 353-355 (Mo. App. 2006).

²⁰ *Id.* The competent and substantial evidence standard of Article V, Section 18, does not apply to administrative cases in which a hearing is not required by law." *Id.*

ongoing nature, Staff recommends that VWU be ordered to continue implementing Staff's prior recommendations. Staff has included those recommendations as conditions for approving the transfer of assets. Because VWU has agreed to accept Staff's recommended conditions, and because the Commission finds these conditions to be in the public interest, the Commission will incorporate those conditions into the ordered paragraphs below.

THE COMMISSION ORDERS THAT:

1. The joint application for the sale and transfer of assets filed by Valley Woods Water Company, Inc. ("Valley Woods") and Valley Woods Utility, L.L.C. ("VWU"), is approved subject to the following conditions:

- a.) Valley Woods shall transfer all of its books and records including, but not limited to, the purchase orders, invoices, contracts and agreements relating to the Valley Woods operations, drawings and blue prints of the water and sewer systems, plant records, operations records, and expense records and all customer billing records to VWU upon the closing of the transfer of assets.
- b.) VWU shall adopt the Schedule of Rates, Rules and Regulations (Tariffs) that are currently on file and approved for Valley Woods for both water service and sewer service.
- c.) VWU shall file tariff adoption notices for each tariff it adopts, as well as revised index sheets to reflect the existence of the adoption notices, similar to the draft tariff sheets for the water and sewer tariffs attached to Staff's *Memorandum* as Attachments C and D. A copy of Staff's *Memorandum* shall be attached to this order as Attachment A.
- d.) VWU shall file the adoption notice tariff sheets, and revised index sheets, as 30-day tariff filings, within five days after closing of the transfer of assets.
- e.) VWU shall adopt the individual plant-in-service, depreciation reserve and contributions in aid of construction ("CIAC") account balances utilized by the Commission's Audit Staff valued as of March 31, 2012, for purposes of determining the appropriate rate base in this proceeding. These values shall be used as a

starting point for plant-in-service, depreciation reserve and CIAC for the Valley Woods systems to be recorded in the books and records of VWU.

- f.) VWU shall maintain and retain proper plant in service, depreciation reserve, cost of removal, salvage, and CIAC records on a going forward basis.
- g.) VWU shall not recover any acquisition adjustment or acquisition premium in relation to this action.
- h.) VWU is authorized, upon closing of the transfer, to provide water and sewer service under the existing tariffs of Valley Woods on an interim basis until the effective date of the new tariff sheets.
- i.) VWU shall use the schedule of depreciation rates set out in Attachments A and B to Staff's *Memorandum*, which were prescribed by the Commission and used by Valley Woods, from the date of the transfer of assets forward, unless changed by any future order of the Commission.
- j.) VWU shall maintain utility plant records and all customer account records as acquired from VWU, and keep all books and records, including plant property records, in accordance with the Uniform System of Accounts as described in Staff's *Memorandum*.
- k.) VWU shall continue implementation of all recommendations made by EMSU Staff during the context of the most recent Valley Woods water and sewer rate cases, Case Nos. WR-2010-0139 and SR-2010-0140.

2. On the effective date of VWU's new tariff sheets, the Certificate of Convenience and Necessity granted to Valley Woods for the provision of water and sewer service shall be canceled.

3. On the effective date of VWU's new tariff sheets, VWU is granted a Certificate of Convenience and Necessity for the provision of water and sewer service for the service areas described in the transfer of assets application and in Staff's *Memorandum* and recommendation.

4. Nothing in this order constitutes a finding that would preclude the Commission from considering the ratemaking treatment to be afforded any matters, including future expenditures, by VWU in any later proceeding.

5. This order shall become effective on May 18, 2012.

BY THE COMMISSION

(S E A L)

A handwritten signature in black ink, appearing to read 'S. Reed', is positioned above the printed name of the Secretary.

Steven C. Reed
Secretary

Gunn, Chm., Jarrett and Kenney, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge