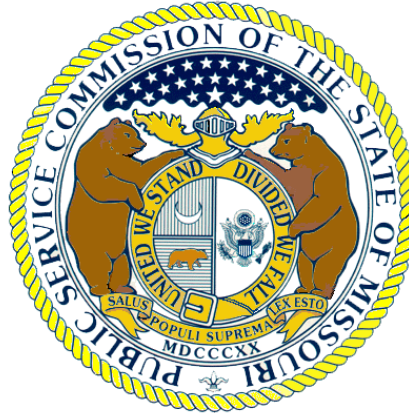


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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).)

Case No. WA-2002-65

REPORT AND ORDER

Issue Date: June 27, 2002

Effective Date: July 7, 2002

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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) **Case No. WA-2002-65**
Water System for the Public Located in Unincorporated)
Portions of Camden County, Missouri (Golden Glade)
Subdivision).)

APPEARANCES

Gregory D. Williams, Attorney at Law, Highway 5 at 5-33, Post Office Box 431, Sunrise Beach, Missouri 65079, for Environmental Utilities, LLC.

Thomas E. Loraine, Attorney at Law, Loraine and Associates, 4075 Highway 54, Suite 300, Osage Beach, Missouri 65065, for Hancock Construction Company.

M. Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Victoria Kizito, Assistant General Counsel, and **Keith R. Krueger**, Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Morris L. Woodruff**

REPORT AND ORDER

SUMMARY

Environmental Utilities, LLC, has applied for a certificate of convenience and necessity authorizing it to provide water service to a developing subdivision in Camden County, Missouri. The Commission concludes that Environmental Utilities' application

should be granted, but only after it has established to the Commission's satisfaction the arrangements it has made to provide wholesale water to Osage Water Company for the use of Osage Water's customers in the Eagle Woods subdivision.

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 Commission in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

On August 6, 2001, Environmental Utilities, LLC, filed an application for a certificate of convenience and necessity to construct and operate a water system to serve the Golden Glade subdivision in an unincorporated portion of Camden County, Missouri. In response to the application, the Commission, on August 13, issued an order directing that notice of the application be sent to the County Commission of Camden County, to the Missouri Department of Natural Resources, to the members of the General Assembly who represent Camden County, and to the newspapers that serve Camden County. The Commission directed that any proper persons wishing to intervene should file an application to intervene no later than September 4, 2001.

No party requested to intervene before September 4. However, on August 29, the Office of the Public Counsel, which by statute is a party to all cases before the

Commission¹, requested a hearing. On September 5, the Commission issued an order scheduling a prehearing conference and directing the parties to file a proposed procedural schedule no later than September 26. A prehearing conference was held on September 19 and, on September 26, the parties filed a proposed procedural schedule that requested a hearing on December 14, 2001. The Commission established a procedural schedule in an order issued on October 4. The requested hearing date was not available on the Commission's calendar so the hearing was scheduled for January 7, 2002.

On November 1, 2001, Hancock Construction Company filed an application to intervene out of time. No party indicated any opposition to Hancock's request to intervene within the ten days allowed by the Commission's procedural rule,² and on November 16, the Commission issued an order permitting Hancock to intervene out of time.

On November 21, Environmental Utilities filed a pleading indicating its opposition to Hancock's intervention. Environmental Utilities indicated that Hancock had failed to serve a copy of its Application to Intervene on Environmental Utilities and that as a result, Environmental Utilities did not become aware of Hancock's Application until it was placed on the Commission's agenda on November 15. Thereafter, on November 26, Environmental Utilities filed a Motion to Set Aside Order Granting Application of Hancock Construction Company to Intervene Out of Time.

At a prehearing conference held on November 26, 2001, counsel for Hancock indicated that its Application to Intervene had not been properly served on either Environmental Utilities, Staff, or Public Counsel.³ On December 6, the Commission issued

¹ Section 386.710, RSMo 2000

² 4 CSR 240-2.080(15)

³ Transcript, Pages 13-24.

an order that granted Environmental Utilities' request for reconsideration of the order granting Hancock's request to intervene. However, upon reconsideration, the Commission again granted Hancock's application to intervene out of time.

On December 12, 2001, the Staff, acting on behalf of all the parties, filed a proposed list of issues to be considered by the Commission. Along with the agreed-upon list of issues, Staff also submitted a list of additional issues proposed by Hancock. On December 19, Staff and Public Counsel filed statements indicating their positions on the issues. Environmental Utilities filed its position statement on December 21. Hancock did not file a position statement.

The hearing commenced on January 7, 2002, but was not completed on that date. After requesting conflict dates from counsel for all parties, the Commission, on January 14, issued an order scheduling a second day of hearings on March 4, 2002. On January 23, Hancock filed a motion asking that the second day of hearings be rescheduled because its witnesses would not be available on March 4. On February 14, the Commission rescheduled the second day of hearing for March 25, 2002.

The hearing reconvened on March 25, 2002, and was completed on that date. Initial Briefs and Proposed Findings of Fact and Conclusions of Law were filed on April 30, 2002, and Reply Briefs were filed on May 14, 2002.

The Applicant

Environmental Utilities is a recently formed Missouri Limited Liability Company. It does not yet provide any regulated services to the public. While Environmental Utilities does not currently provide regulated service to the public, it is inextricably linked, if not legally, then certainly factually, to an existing regulated water and sewer utility company,

Osage Water Company. One of the owners of Environmental Utilities, its attorney, Gregory W. Williams, is a shareholder of Osage Water Company. The other owner of Environmental Utilities is Debra J. Williams, wife of Greg Williams. Debra Williams is not a shareholder in Osage Water Company, but she is currently serving as a director and as the manager of Osage Water Company.⁴

Environmental Utilities' application seeks authority to provide water service to the Golden Glade subdivision, located in the Lake of the Ozarks area. Golden Glade is a new development that is not currently served by a regulated utility. Greg and Debra Williams, the owners of Environmental Utilities, are also the owners of the Golden Glade development.

The Golden Glade subdivision is designed to contain approximately 100 lots.⁵ Currently the development contains 11 single-family houses and 19 vacant lots. Six of the existing houses are currently served by shared single-family wells. All other houses are served by the central water system. The subdivision restrictions for the development require that all houses be connected to the central water system, and prohibit the use of single-family wells.⁶

A central water system for Golden Glade already exists. It was constructed by Greg and Debra Williams, acting as the developers of the subdivision. If Environmental Utilities' application is approved, Greg and Debra Williams intend to convey the water system to Environmental Utilities as a contribution in aid of construction,⁷ at a total cost of

⁴ Williams Direct, Exhibit 1, Page 2.

⁵ Williams Direct, Exhibit 1, Page 14.

⁶ Williams Direct, Exhibit 1, Pages 10-11.

⁷ Williams Direct, Exhibit 1, Page 16.

\$11,139.82.⁸ In addition, Greg and Debra Williams have constructed a water well with which to provide water for the water distribution system for Golden Glade. Debra Williams testified that the total cost of the water well was \$76,115.48. That amount includes a general contractors fee of ten percent to Greg and Debra Williams that Environmental Utilities requests be included in its rate base.⁹

If Environmental Utilities' application is approved, Greg and Debra Williams will sell that water well to Environmental Utilities. If Environmental Utilities' application is not approved, Greg and Debra Williams intend to retain ownership of the water well and the water system and lease them to the Golden Glade Land Owners Association, Inc.¹⁰ The homeowners association would then be responsible for operating and maintaining the water system.

The Golden Glade Land Owners Association is a not-for-profit homeowners association that is established in the Declaration of Restrictions for the Golden Glade Subdivision. Section III of Declaration of Restrictions provides for the formation of the homeowners association. That section also indicates that the developers, meaning Greg and Debra Williams, are entitled to 66-2/3 percent of all votes in the homeowners association until the earliest of the following events: all lots in the development are sold; January 1, 2010; or the developers voluntarily relinquish the right to control those votes.¹¹ In effect, that means that Greg and Debra Williams, as developers, will control the water

⁸ Williams Surrebuttal, Exhibit 2, Page 3.

⁹ Williams Direct, Exhibit 1, Page 16.

¹⁰ Williams Direct, Exhibit 1, Page 12.

¹¹ Declaration of Restrictions for Golden Glade Subdivision, Exhibit 13. See *also*, Transcript, Pages 78-82.

distribution system for the Golden Glade subdivision through their control over the homeowners association, if that control is not exercised by Environmental Utilities.

The Relationship of Environmental Utilities to Osage Water

As previously indicated, Environmental Utilities is closely linked to Osage Water Company, so it is necessary to have some understanding of the history and current condition of Osage Water Company. Osage Water provides regulated water and sewer service in various locations in the Lake of the Ozarks area. Osage Water is currently certificated to provide sewer service to the Golden Glade subdivision. It also holds a certificate to provide sewer and water service to the Eagle Woods subdivision, which adjoins Golden Glade.

Greg Williams became involved with Osage Water in 1991, serving as president of that company from 1996-2000.¹² Debra Williams has been a director of Osage Water since 1996.¹³ The other primary shareholder of Osage Water is William P. (Pat) Mitchell. In addition, David Hancock, owner of Hancock Construction, a party in this case, served as vice-president of Osage Water from 1992 to 1996,¹⁴ and still owns some preferred stock in Osage Water.¹⁵ Hancock also holds a \$240,000 debenture issued by Osage Water in settlement of a lawsuit in 1998.¹⁶

Before July 7, 2001, Pat Mitchell had general control of the day-to-day operations of Osage Water. On that date, Mitchell turned over the financial records of Osage Water to

¹² Transcript, Page 70, Lines 3-6.

¹³ Williams Direct, Exhibit 1, Page 2. See *a/so*, Transcript, Page 69, Lines 1-3.

¹⁴ Williams Surrebuttal, Exhibit 2, Page 14.

¹⁵ Transcript, Page 578, Lines 19-20.

¹⁶ Transcript, Page 101, Lines 5-8, 22-25.

Mr. and Mrs. Williams by leaving them in boxes on their doorstep.¹⁷ Thereafter, Debra Williams took over as manager of Osage Water. Mitchell continues to serve as president of Osage Water.

By all accounts, Osage Water is currently in very poor financial condition and is unable to obtain additional financing.¹⁸ It still owes a substantial sum to David Hancock on the debenture he holds.¹⁹ At a shareholder meeting on January 8, 2002, Osage Water resolved to sell portions of its water and sewer systems to Greg Williams and Pat Mitchell as individuals in exchange for cancellation of debts for services owed to those shareholders.²⁰ Those transactions have not yet come before the Commission for approval.

As previously indicated, Osage Water has a certificate of authority to provide water to the Eagle Woods subdivision. When Osage Water received that certificate, it represented that it would provide water to Eagle Woods by means of a well to be drilled at a location within the Golden Glade subdivision.²¹ That well was drilled, but it was paid for by Greg and Debra Williams as individuals, rather than by Osage Water as a corporate entity. Greg and Debra Williams now want to disassociate themselves from Osage Water. Osage Water does not have enough money to pay Greg and Debra Williams for the well and they are not willing to give it to Osage Water.²² Thus, Greg and Debra Williams have

¹⁷ Transcript, Pages 221-222 and Exhibit 19.

¹⁸ Transcript Page 220.

¹⁹ Hancock Rebuttal, Exhibit 9, Schedule 7.

²⁰ Exhibit 28.

²¹ Hummel Rebuttal, Exhibit 5, Page 4, Lines 6-14.

²² Transcript, Page 144.

formed Environmental Utilities for the purpose of operating the new well and providing service to their Golden Glade subdivision.

That leaves the problem of how to provide water service to the Eagle Woods subdivision. As indicated, the well in Golden Glade was originally intended to provide water to Eagle Woods. Environmental Utilities proposes to solve that problem by supplying water from its well to Osage Water on a wholesale basis. Osage Water would then distribute the water to its retail customers in Eagle Woods.²³ At some future time, Environmental Utilities may also provide water from its well to the Harbour Ridge subdivision, which also adjoins Golden Glade.²⁴

The Tartan Energy Standard

As explained more fully in the Commission's conclusions of law, the Commission applies what is known as the Tartan Energy standard when it determines whether to grant a utility's application for a certificate of service authority. That standard contains five criteria, which will be examined in turn.

1. There must be a need for the proposed service.

There clearly is a need for a central water system to serve the Golden Glade subdivision. That subdivision is a large residential development that may someday contain 100 homes. Most of those homes will not have any source of water unless a central water distribution system is developed. Furthermore, the Declarations of Restrictions for Golden Glade Subdivision requires homeowners in the development to connect to the central water system.²⁵ James A. Merciel, a Utility Regulatory Engineering Supervisor in the Water and

²³ Williams Direct, Page 13.

²⁴ Williams Direct, Page 13.

²⁵ Exhibit 13, VI Land Use Restrictions, Section 28.

Sewer Department of the Staff of the Commission, testified that he agreed that there was a need for water service in Golden Glade.²⁶ While some parties questioned whether it was appropriate for Environmental Utilities to provide that water service, no party raised serious doubts about the need for the service.

2. The applicant must be qualified to provide the proposed service.

Greg and Debra Williams have been engaged in the water business for about ten years through their involvement in Osage Water.²⁷ In most circumstances, Greg and Debra Williams' involvement with a regulated water utility would enhance their qualifications to operate Environmental Utilities. However, their involvement with Osage Water does not necessarily speak well for Greg and Debra Williams.

Unfortunately, Osage Water has not always complied with the Commission's regulatory requirements. A great deal of evidence was presented to establish that Osage Water has not complied with the Commission's record keeping requirements. Osage Water has not filed annual reports for 2000 and 2001²⁸ and those reports are now delinquent. It filed its 1999 annual report some eighteen months late and when it was filed it was not complete. Osage Water has also failed to keep its books in compliance with NARUC accounting standards as required by the Commission.

This failure makes it difficult for the Commission to properly oversee the operations of the utility. Dale Johansen, Manager of the Water and Sewer Department for the Commission, testified that if a utility's books and records are not maintained in accordance with NARUC standards, the Staff's accountants must go out and reconstruct a company's

²⁶ Transcript, Page 331, Lines 7-9.

²⁷ Transcript, Pages 93-94, Lines 21-25, 1.

²⁸ Transcript, Page 96-97, Lines 22-25, 1-2.

books and records to determine what a company may be allowed to recover in its rates for expenses and investments.²⁹ Johansen described Osage Water's history of record keeping in compliance with NARUC standards as "dismal."³⁰

Hancock Construction offered testimony that made many other accusations of mismanagement and misconduct against Greg Williams and the management of Osage Water.³¹ However, that testimony consists largely of hearsay and speculation. The Commission does not find it to be credible.

Nevertheless, Osage Water's long-standing problems in complying with the Commission's record keeping requirements are a matter of concern for the Commission. That concern is alleviated somewhat by the fact that until July of 2001, Pat Mitchell was directly responsible for Osage Water's record keeping. Mr. Mitchell will not be keeping the books for Environmental Utilities and is no longer responsible for Osage Water's record keeping. Debra Williams now maintains the records for Osage Water and will have that responsibility for Environmental Utilities.

James Russo, a Regulatory Auditor for the Commission, testified that he has reviewed the financial records maintained by Debra Williams regarding the water well at Golden Glade and found them to be sufficient to meet the requirements of the Commission.³² Russo also testified that office operations at Osage Water have improved

²⁹ Transcript, Page 421, Lines 4-11.

³⁰ Transcript, Page 423, Lines 2-7.

³¹ See, Hancock Rebuttal, Exhibit 9, Cochran Rebuttal, Exhibit 10, and Cochran Surrebuttal, Exhibit 11.

³² Transcript, Page 257, Lines 1-15.

since Debra Williams began managing the company in July 2001, particularly in the area of dealing with customer complaints.³³

Staff initially was concerned that Environmental Utilities did not have a licensed operator in place to operate the water system. However, while the application has been pending, Environmental Utilities has acquired the services of a licensed operator. As a result, Staff is no longer concerned about the availability of a licensed operator.³⁴

While the Commission continues to have some concerns, the evidence presented to the Commission indicates that Greg and Debra Williams are qualified to operate Environmental Utilities as a water utility.

3. The Applicant must have the financial ability to provide the service.

The greatest financial requirement facing Environmental Utilities is the cost of procuring a supply of water and delivering the water to its customers. The well and delivery system that will be used to provide water to Golden Glade is in place and has been paid for by Greg and Debra Williams. That fact was confirmed by Staff's witness, James Russo.³⁵ Russo also confirmed that Environmental Utilities has no need for additional financing at this time.³⁶ Staff does, however, continue to have some concerns about the ability of Environmental Utilities to obtain financing if it becomes necessary to make repairs to the water system.³⁷ That would, of course, be a concern with any small utility and neither Staff, nor any other party raised any specific concerns about Environmental Utilities' financial

³³ Transcript, Pages 257-258.

³⁴ Transcript, Page 331, Lines 10-20.

³⁵ Transcript, Page 253, Lines 3-12.

³⁶ Transcript, Page 260, Lines 6-13.

³⁷ Transcript, Page 277-278, Lines 16-25, 1-7.

ability to provide water service to Golden Glade. With the well and delivery system in place, there is no reason to doubt Environmental Utilities financial ability to provide the water service it proposes to provide.

4. The Applicant's proposal must be economically feasible.

Economic feasibility requires more than that the well and delivery system be paid for and in place. It also requires that the proposed water system be economically viable in the longer term. Environmental Utilities presented a feasibility study as part of its application. In its feasibility study, Environmental Utilities assumed that all residents of Golden Glade will connect with the central water system. The study also assumed that Environmental Utilities would cooperate with Osage Water in the sharing of equipment and personnel, thereby reducing its cost of operations. Most importantly, the study assumes that Environmental Utilities will enter into an arrangement with Osage Water to provide water to Osage Water's retail customers in Eagle Woods.

James Merciel, witness for the Staff, testified that Environmental Utilities' operation would be economically viable if it is able to provide services to the anticipated number of customers, including those customers of Osage Water living in Eagle Woods.³⁸ However, Staff indicates that the operation would not be economically viable unless Environmental Utilities is able to provide water on a wholesale basis for Osage Water's customers in Eagle Woods. For that reason, Staff proposes that the Commission require Environmental Utilities to provide proof of the existence of such a wholesale arrangement before it grants Environmental Utilities its requested certificate.

³⁸ Merciel Rebuttal, Exhibit 7, Page 5, Lines 18-22. See also, Transcript, Page 399, Lines 10-15.

If such a wholesale arrangement is established, Environmental Utilities' proposed water system will be economically feasible.

5. The service must promote the public interest.

Generally, the Commission has taken the view that a finding that an applicant has satisfied the first four criteria of the Tartan Energy standard will lead to a conclusion that the applicant has also satisfied the public interest.³⁹ In this case, the parties have indicated another means by which this application will impact the public interest. As previously indicated, if Environmental Utilities' application for a certificate is not approved, Greg and Debra Williams intend to retain ownership of the water well and lease it to the Golden Glade homeowners association, which would then operate the system. James Merciel, witness for the Staff, indicated that homeowners associations generally are not preferred as operators of water systems because they have a hard time finding people willing to take on the difficult and thankless task of serving as a director, responsible for managing the water system. As a result, homeowners associations are not run as well as they should be.⁴⁰

In this particular case, there is another problem with allowing the homeowners association to operate the water system. As the developers of the subdivision, Greg and Debra Williams currently have nearly total control over the homeowners association and will likely continue to exercise that control until all the lots in the development are sold or until 2010. That means that even if Environmental Utilities' application is denied, Greg and Debra Williams will operate the water system for Golden Glade. They would, however, do so without any regulatory oversight from this Commission.

³⁹ In the Matter of the Application of Tartan Energy Company, 3 Mo. P.S.C. 3d 173, 189 (1994)

⁴⁰ Transcript, Page 334, Lines 16-25.

Aside from the residents of Golden Glade who would not receive regulated water service, a decision denying Environmental Utilities' application would also have a deleterious impact on the residents of Eagle Woods. If the Golden Glade water well is operated by the Golden Glade homeowners association, there would be no means by which the homeowners association could legally supply water to Eagle Woods, unless the homeowners association becomes a certificated utility, subject to regulation by the Commission. Therefore, the residents of Eagle Woods, who are served by Osage Water, would have no means to receive a supply of water.

Of course, as Hancock Construction points out, these complications could be avoided if Osage Water owned and operated the water well and if it were Osage Water, not Environmental Utilities, that was applying for a certificate to supply water to the residents of Golden Glade. However, Osage Water has not applied for such authority and the evidence indicates that it is unlikely to make such an application in the future. Certainly, the Commission has no authority to order Osage Water to apply for a certificate, nor can the Commission order Greg and Debra Williams to give the water well that they constructed with their own money to Osage Water. The Commission must choose from the alternatives available to it.

Under the circumstances, granting the certificate requested by Environmental Utilities will promote the public interest.

Other Contested Issues:

What is the Amount of the Investment in the Water Plant and Certificate Costs that will be Included in the Applicant's Rate Base if the Certificate is Granted?

Environmental Utilities requests that the Commission decide in this case the amount that will be included in Environmental Utilities' rate base for the purpose of establishing rates. Environmental Utilities argues that its rate base should include a total cost of \$76,115.48 for construction of the water well. It also argues that organizational costs of \$605 should be included in rate base under Account 301, and that the itemized legal expenses incurred in this proceeding be allowed in rate base under Account 302.⁴¹

Staff and Public Counsel do not object to the Commission making a determination in this case about the inclusion of various items in rate base. They do, however, object to the inclusion of a ten percent contractor's fee as part of the cost of construction of the water well and they do dispute the amounts that Environmental Utilities would include as legal fees relating to this proceeding.

The Commission concludes that it is not appropriate to consider rate base in this case. The purpose of this case is solely to consider Environmental Utilities' application for a certificate of convenience and necessity. The determination of the amounts to be included in rate base is properly an issue for a rate case where the Commission can consider all evidence regarding the rates that Environmental Utilities will be permitted to charge its customers. The Commission will make no determinations regarding rates or rate base in this case.

⁴¹ Williams Surrebuttal, Exhibit 2, Pages 3-4. Environmental Utilities offered a post-hearing exhibit itemizing the legal expenses it incurred in this proceeding. However, on June 11, the Commission sustained various objections to the admission of that exhibit and it was not admitted into evidence.

If a Certificate is Granted, Should Conditions be Imposed on the Applicant?

Both Staff and Public Counsel suggest that certain conditions be imposed upon any certificate granted to Environmental Utilities. Staff initially requested that the Commission impose five conditions on the granting of a certificate to Environmental Utilities. Staff would require Environmental Utilities to (1) show that it has obtained the services of a licensed operator that meets the applicable Missouri Department of Natural Resources (MDNR) requirements, (2) show that it has entered into an agreement to provide wholesale water service to Osage Water for its Eagle Woods service area, (3) show that the facilities necessary to serve Osage Water as a wholesale customer have been installed, (4) show that all necessary MDNR permits or approvals related to the construction of the supply and distribution system have been received, and (5) show that Environmental Utilities has applied for the required MDNR permit to dispense.⁴²

At the hearing, Staff witness, Dale Johansen, testified that Environmental Utilities has met all of those conditions, except the requirement for a wholesale sales agreement with Osage Water.⁴³ Johansen also indicated that he was not aware of the status of Environmental Utilities' application to the MDNR for a permit to dispense. However, later in the hearing, Staff witness Martin Hummel conceded that Environmental Utilities could not obtain a permit to dispense from MDNR until after it had a certificate from this Commission.⁴⁴ There is no reason to believe that Environmental Utilities will not apply for a permit to dispense when it is appropriate to do so.

⁴² Transcript, Page 415, Lines 1-17.

⁴³ Transcript, Pages 415-416, Lines 19-25, 1-14.

⁴⁴ Transcript, Page 550, Lines 8-17.

In addition to the conditions recommended by Staff, Public Counsel also proposed various conditions to be imposed on Environmental Utilities. In her rebuttal testimony, Public Counsel's witness, Kimberly Bolin, recommended that the Commission impose the following conditions before granting a certificate:

1. Create a separate customer advances account.
2. Create a separate contributions in aid of construction (CIAC) account.
3. Record plant on balance sheet at original cost based on MPSC-approved USOA guidelines.
4. Record accumulated depreciation reserve associated with MPSC original cost plant balances on balance sheet.
5. Create a plant held for future use account.
6. Create separate revenue sub-accounts within the income water billing account for each class of water customer (i.e. wholesale, residential, and commercial).
7. Create separate revenue account to record miscellaneous or other revenues.
8. Develop a continuing property records system to control and monitor tangible properties.
9. Develop a cost allocation system based on reasonable standards to distribute shared or common costs among the Williams' various businesses and companies.
10. Develop a log sheet to track, charge, and record personal use of company owned equipment by employees and owners and use of company owned equipment by other entities.
11. Develop a log to track, charge, and record time spent working for Environmental Utilities, Osage Water Company, and any other entity.

12. Balances for Account 301, Organization and Account 302, Franchises and Consents must be reviewed by Staff and Public Counsel before the certificate can be granted.⁴⁵

Public Counsel also proposed additional conditions that would be imposed upon Environmental Utilities after it received its certificate. Those conditions are as follows:

1. Track all costs for every capital project. This recommendation inherently includes the premise that Environmental Utilities should develop criteria (threshold dollar levels and qualitative job standards) in accordance with the Uniform System of Accounts to determine whether a cost is to be recorded as an expense item or whether it requires capitalization.

2. Record each journal entry entered in the financial records with a full description of the service and service provider, invoice number, payment check number, and amount. If an item is in an allocation, paid by an entity other than the utility, include a descriptive notation identifying as such.

3. The Company will ensure that service to condominium developments in the future will be predicated upon the installation of meters for each individual condominium unit in such developments.

4. Bills for services that the Company provides under contract management agreements in systems not regulated by the Commission will not be rendered under the name "Environmental Utilities".⁴⁶

⁴⁵ Bolin Rebuttal, Exhibit 3, Schedule KKB-2

⁴⁶ Bolin Rebuttal, Exhibit 3, Schedule KKB-3.

Staff concurred that the conditions proposed by Public Counsel in its rebuttal testimony would be appropriate.⁴⁷ Indeed, Environmental Utilities indicated at the hearing that it did not object to the inclusion of any of those conditions.⁴⁸

The Commission agrees that these conditions are reasonable. However, aside from the Staff's condition requiring Environmental Utilities to demonstrate that it has made arrangements to provide wholesale water to Osage Water for delivery to its customers in Eagle Woods, the Commission will not require Environmental Utilities to demonstrate compliance with those conditions before granting Environmental Utilities a certificate.

Public Counsel's conditions are useful in that they clearly set out the bookkeeping and accounting standards that the Commission will expect Environmental Utilities to meet after it begins operations. While Environmental Utilities can set up its books in a certain manner, there is really no way by which the Commission can determine whether the company will comply with those standards before it grants a certificate, and Environmental Utilities begins operation. Only then will it be possible to determine whether Environmental Utilities is actually keeping its books in an appropriate manner. Imposing those conditions as a requirement before granting a certificate would require the Commission to reopen this case for the taking of additional evidence about how Environmental Utilities has set up its accounting system. Such a requirement would merely delay the granting of a certificate, while not providing any real benefit for the public. For that reason, the Commission will require Environmental Utilities to comply with the conditions set out in Public Counsel's rebuttal testimony but will not require demonstration of that compliance before granting the requested certificate.

⁴⁷ Transcript, Page 414, Lines 22-25.

⁴⁸ Transcript, Page 249, Lines 14-22.

The Commission will, however, require Environmental Utilities to demonstrate compliance with one proposed condition before it grants the requested certificate of convenience and necessity. That single condition is that Environmental Utilities demonstrate that it has arranged to provide wholesale water to Osage Water for delivery to its customers in Eagle Woods.

The testimony of Staff's expert witnesses demonstrated that an arrangement whereby Environmental Utilities would provide wholesale water to Osage Water for the Eagle Woods development is essential to the long-term economic viability of Environmental Utilities. Without such a wholesale sales arrangement, Environmental Utilities would not be able to provide service to the limited number of available customers in Golden Glade at a reasonable rate and could become the owner of a non-viable small water system.⁴⁹

Environmental Utilities indicated in its application and repeatedly stated at hearing that it intends to enter into a wholesale arrangement for delivery of water to Osage Water. However, in its Reply Brief, Environmental Utilities, for the first time argues that its certificate should not be conditioned upon a requirement that it enter into a written agreement with Osage Water for provision of water. Given the uncertain future of Osage Water and the fact that Environmental Utilities cannot be an economically viable utility unless it provides wholesale water to Eagle Woods, it is imperative that Environmental Utilities establish that it will in fact be receiving the revenue associated with providing wholesale water to the customers of Osage Water in the Eagle Woods development. The Commission will need to be assured of that fact before it grants a certificate to Environmental Utilities. Therefore, Environmental Utilities will be required to file a pleading

⁴⁹ Merciel Rebuttal, Exhibit 7, Page 5, Lines 3-10.

providing evidence of the arrangements that it has made to provide wholesale water to Osage Water for the use of Osage Water's customers in Eagle Woods before the Commission will issue Environmental Utilities a certificate of convenience and necessity.

In addition to the conditions listed in its rebuttal testimony, Public Counsel proposed seven more conditions in its initial brief.⁵⁰ Environmental Utilities, in its reply brief, opposed each of those new conditions as an unwarranted intrusion into the management and day-to-day operation of the utility. The Commission agrees with Environmental Utilities. The evidence presented at the hearing does not provide a basis for the imposition of any of the additional conditions proposed in Public Counsel's Initial Brief.

Should Any Proposed Tariffs be Withdrawn?

As part of its application, Environmental Utilities filed a proposed tariff that it indicates was based on a model water tariff prepared by Staff.⁵¹ Staff witness, James Merciel, suggested several areas of the tariff that should be modified.⁵² However, he also indicated that if Environmental Utilities is granted a certificate, then he expected that the parties would be able to work out any differences regarding the tariffs. The only one of Mr. Merciel's suggestions that was specifically addressed at the hearing concerned Staff's contention that the flat rate proposed to be charged to unmetered customers was too high. Staff did not, however, indicate what the rate should be. Environmental Utilities replied that the unmetered rate needed to be high to discourage persons from making illegal, unauthorized connections to the system.

⁵⁰ Initial Brief of the Office of the Public Counsel, Pages 24-25.

⁵¹ Williams Surrebuttal, Exhibit 2, Page 7.

⁵² Merciel Rebuttal, Exhibit 7, Page 7, Line 17 to Page 10, Line 11.

This issue is not yet ripe for decision. The Commission cannot order Environmental Utilities to withdraw any proposed tariffs because no such tariff has yet been issued. While Environmental Utilities included a proposed tariff as part of its application, it has not actually issued a tariff in that the proposed tariff does not contain an issue date or an effective date. Therefore, any consideration of the proposed tariff attached to the application is premature. When Environmental Utilities has a certificate of convenience and necessity, it must issue a tariff before it can serve any customers. Staff and any other interested person will have an opportunity to review that tariff and may choose to file a motion asking the Commission to suspend that tariff. Until that time, the Commission will not make any decisions about Environmental Utilities' proposed tariff.

Hancock Construction Company's Proposed Issues

Hancock proposed four additional issues for consideration by the Commission. The other parties do not agree that these issues are appropriate for consideration in this case. The issues are as follows:

a. **Whether there has been a Transfer of Equipment and Systems from Osage Water Company to Environmental Utilities?**

Hancock contends that the water well located in the Golden Glade subdivision properly belongs to Osage Water because Osage Water proposed to build that well when it applied for, and was granted, a certificate of convenience and necessity to serve the Eagle Woods subdivision. However, the evidence established that Greg and Debra Williams constructed and paid for that well as individuals.⁵³ Therefore, the well does not belong to Osage Water.

⁵³ Transcript, Page 253, Lines 3-12, Page 256, Lines 21-25.

Hancock also contends that two pieces of equipment, a mini-excavator and a bobcat, were improperly transferred from Osage Water to Environmental Utilities. Debra Williams testified that that equipment once had been leased by Osage Water but had been repossessed. Greg and Debra Williams then purchased the equipment as individuals.⁵⁴ Staff's witness, James Russo, testified that he reviewed the Williams' documents relating to the equipment, and confirmed their account of how they came to possess the equipment.⁵⁵ Hancock did not present any evidence that would contradict the Williams' explanation. Therefore, the Commission concludes that there is no evidence to establish that any improper transfers of systems or equipment have occurred.

b. Whether Environmental Utilities and its Principals by Seeking a Certificate of Convenience and Necessity as requested in its Application will contribute to the non-profitability of Osage Water Company, thereby causing Osage Water Company to be less capable of paying its valid debts (Hancock Debenture) as authorized in prior rate cases?

Hancock's argument is premised on the idea that Osage Water should be allowed to provide water service to the Golden Glade subdivision. However, Osage Water has not applied for a certificate to provide such service and, given the current condition of Osage Water, it is unlikely that it will ever make such application. Any hypothetical lost opportunity for profit by Osage Water cannot be the basis for denying Environmental Utilities' application.

⁵⁴ Transcript, Pages 162-163, Lines 12-25, 1-11.

⁵⁵ Transcript, Pages 260-261, Lines 22-25, 1-17.

c. Whether Osage Water Company as a regulated utility has a public interest that is being harmed by allowing its assets to be used by a competing utility company?

Osage Water is not a party to this case and it is not in competition with Environmental Utilities. They will serve adjoining subdivision and will not compete for customers. There was no evidence presented by which the Commission could conclude that Environmental Utilities was improperly using any assets of Osage Water. Indeed, the evidence indicated that the sharing of assets by the two companies, when that use is properly allocated between the companies, will spread costs more broadly and can only benefit both companies.

d. Whether the customers of Osage Water Company are being properly served by allowing its assets to be used by a competing utility serving an adjacent area?

Again, Osage Water and Environmental Utilities are not competing utilities. As previously indicated, the sharing of assets may actually benefit the customers of both companies.

CONCLUSIONS OF LAW

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

Environmental Utilities is a Missouri Limited Liability Company. Upon the granting of its Application for a Certificate of Convenience and Necessity, it will be a public utility and a water corporation as those terms are defined in Section 386.020(42) and (58), RSMo 2000.

As such, Environmental Utilities will be subject to the Commission's jurisdiction pursuant to Section 386.250(3), RSMo 2000.

Section 393.170, RSMo 2000, gives the Commission the authority to grant a certificate of convenience and necessity to a water corporation. Section 393.170(3), RSMo 2000, gives the Commission authority to impose any condition or conditions on that certificate that it deems reasonable and necessary.

In considering the Commission's authority to grant a certificate of convenience and necessity, the Missouri Court of Appeals has indicated that:

[t]he PSC has authority to grant certificates of convenience and necessity when it is determined after due hearing that construction is "necessary or convenient for the public service." § 393.170.3. The term "necessity" does not mean "essential" or "absolutely indispensable", but that an additional service would be an improvement justifying its cost. State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219, (Mo. App. 1973). Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service. State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n, 600 S.W.2d 147, 154 (Mo.App.1980). The safety and adequacy of facilities are proper criteria in evaluating necessity and convenience, as are the relative experience and reliability of competing suppliers. State ex rel. Ozark Elec. Coop. v. Public Serv. Comm'n, 527 S.W.2d 390, 394 (Mo.App.1975). Furthermore, it 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. Id. at 392.⁵⁶

The criteria by which the Commission determines whether to approve an application for a certificate of convenience and necessity are set forth in In Re the Application of Tartan Energy Company.⁵⁷ The Tartan Energy criteria are also sometimes referred to as the

⁵⁶ State ex rel. Intercon Gas, Inc. v. Public Service Comm'n, 848 S.W.2d 593, 597-598 (Mo. App. W.D. 1993)

⁵⁷ 3 Mo. P.S.C. 3d 173 (1994).

Intercon criteria because they were first collected in In Re Intercon Gas, Inc.⁵⁸ Tartan Energy and Intercon indicate that the Commission will consider the following criteria when deciding whether to grant an application 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 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.”⁵⁹

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions regarding the issues identified by the parties:

1. There is a need for regulated water service in the Golden Glade development;
2. Environmental Utilities is qualified to provide the proposed service.
3. Environmental Utilities has the financial ability to provide the proposed service.
4. The service proposed by Environmental Utilities is economically feasible if Environmental Utilities is able to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water’s customers in the Eagle Woods subdivision.
5. The service proposed by Environmental Utilities will promote the public interest.

⁵⁸ 30 Mo. P.S.C. (N.S.) 554 (1991).

⁵⁹ In Re Tartan Energy, 3 Mo. P.S.C. 3d, 173, 177 (1994).

6. The Commission will make no determinations in this case regarding Environmental Utilities' rate base.

7. The Commission will require Environmental Utilities to adhere to the conditions recommended by Public Counsel in its rebuttal testimony, but it will not require Environmental Utilities to demonstrate compliance with those conditions before granting a certificate. The Commission will require Environmental Utilities to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water's customers in the Eagle Woods subdivision before granting a certificate.

8. The Commission will make no determinations in this case regarding any tariffs that Environmental Utilities may issue in the future.

9. There is no evidence to establish that there has been any improper transfers of systems or equipment between Osage Water Company and Environmental Utilities.

10. Any hypothetical lost opportunity for profit by Osage Water Company cannot be the basis for denying Environmental Utilities' application for a certificate of convenience and necessity.

11. The sharing of assets by Osage Water Company and Environmental Utilities, when costs are properly allocated between the companies, will benefit both companies.

12. The sharing of assets by Osage Water Company and Environmental Utilities, when costs are properly allocated between the companies, will benefit the customers of both companies.

IT IS THEREFORE ORDERED:

1. That Environmental Utilities, LLC, will be granted a certificate of convenience and necessity to provide water service to the Golden Glade subdivision, as requested in its

Application filed on August 6, 2001. Provided, however, that the certificate of convenience and necessity will not be issued, nor will it become effective until Environmental Utilities files a pleading proving to the satisfaction of the Commission that it has made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water Company's customers in Eagle Woods

2. That Environmental Utilities, LLC, shall comply with each of the following conditions in its operation under the certificate of convenience and necessity:

- a. Create a separate customer advances account;
- b. Create a separate contributions in aid of construction (CIAC) account;
- c. Record plant on balance sheet at original cost based on Missouri Public Service Commission approved Uniform System Of Accounts guidelines;
- d. Record accumulated depreciation reserve associated with Missouri Public Service Commission original cost plant balances on balance sheet;
- e. Create a plant held for future use account;
- f. Create separate revenue sub-accounts within the income water billing account for each class of water customer (i.e., wholesale, residential, and commercial);
- g. Create a separate revenue account to record miscellaneous or other revenues;
- h. Develop a continuing property records system to control and monitor tangible properties;
- i. Develop a cost allocation system based on reasonable standards to distribute shared or common costs among the Williams' various businesses and companies;

j. Develop a log sheet to track, charge, and record personal use of company owned equipment by employees and owners and use of company owned equipment by other entities;

k. Develop a log to track, charge, and record time spent working for Environmental Utilities, Osage Water Company, and any other entity;

l. Permit Staff and Public Counsel to review balances for Account 301, Organization and Account 302, Franchises and Consents;

m. Track all costs for every capital project. Develop criteria (threshold dollar levels and qualitative job standards) in accordance with the Uniform System of Accounts to determine whether a cost is to be recorded as an expense item or whether it requires capitalization;

n. Record each journal entry entered in the financial records with a full description of the service and service provider, invoice number, payment check number, and amount. If an item is in an allocation, paid by an entity other than the utility, include a descriptive notation identifying it as such;

o. Ensure that service to condominium developments in the future will be predicated upon the installation of meters for each individual condominium unit in such developments; and

p. Ensure that bills for services that the Company provides under contract management agreements in systems not regulated by the Commission will not be rendered under the name "Environmental Utilities".

3. That nothing in this order shall be considered a finding by the Commission of the value for ratemaking purposes of the transactions herein involved.

4. That the Commission reserves the right to consider any ratemaking treatment to be afforded the transactions herein involved in a later proceeding.

5. That this Report and Order shall become effective on July 7, 2002.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Simmons, Ch., Lumpe and Forbis, CC., concur;
Murray, C., dissents with dissenting opinion attached;
certify compliance with the provisions of
Section 536.080, RSMo 2000.
Gaw, C., not participating.

Dated at Jefferson City, Missouri,
on this 27th day of June, 2002.