

**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

**STAFF'S OBJECTION TO LATE-FILED EXHIBIT 29**

COMES NOW the Staff of the Missouri Public Service Commission and, for its Objection to Late-Filed Exhibit 29, states to the Missouri Public Service Commission as follows:

1. On May 15, 2002 – the same day that reply briefs were due in this case – Applicant Environmental Utilities, LLC filed its Late Filed Exhibit of Attorney’s Fees Herein Incurred. Applicant has cited no authority for filing this exhibit so far out of time.

2. If this exhibit is admitted into evidence, the other parties will be deprived of their opportunity to cross-examine the Applicant about these fees. Furthermore, the information that is provided in this document is not relevant to any issue in this case. The Commission should overrule the Applicant’s request that this exhibit be admitted into evidence.

3. The substantive portion of Applicant’s pleading to proffer this exhibit (which has been designated as Exhibit 29) reads in full as follows:

COMES NOW the Applicant and submits to the Commission its Late Filed Exhibit consisting of 19 pages containing an itemization of attorney’s fees herein incurred totaling to \$16,316.58 as described in the Surrebuttal Testimony of Debra J. Williams, page 4, admitted into evidence herein as Exhibit 2.

As is obvious, this pleading cites no authority for this late filing.

### **This Pleading Violates the Provisions of the Commission's Rules**

4. Applicant's pleading and Exhibit 29 amount to an attempt to supplement the prefiled surrebuttal testimony of its only witness, Debra J. Williams. However, Rule 4 CSR 240-2.130 (8) provides, in part, that: "No party shall be permitted to supplement prefiled prepared direct, rebuttal or surrebuttal testimony unless ordered by the presiding officer or the commission." The regulatory law judge in this case has not permitted the filing of this supplemental testimony. Accordingly, Exhibit 29 should not be admitted into evidence.

5. Rule 4 CSR 240-2.110 (8) specifies the procedure that must be followed when evidence is submitted to the Commission after the conclusion of the hearing. It provides, in full, as follows:

- (8) A party may request that the commission reopen a case for the taking of additional evidence if the request is made after the hearing has been concluded, but before briefs have been filed or oral argument presented, or before a decision has been issued in the absence of briefs or argument. Such a request shall be made by filing with the secretary of the commission a petition to reopen the record for the taking of additional evidence in accordance with these rules, and serving the petition on all other parties. The petition shall specify the facts which allegedly constitute grounds in justification, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. The petition shall also contain a brief statement of the proposed additional evidence and an explanation as to why this evidence was not offered during the hearing.

Applicant has failed to comply with almost any part of this rule.

6. The Applicant did not file this pleading "before briefs have been filed," as required by the first sentence of the rule, but filed it on the very deadline for filing the last brief in the case.<sup>1</sup> Nor did the Applicant "request that the commission reopen [the] case for the taking of additional evidence." The pleading is thus contrary to the provisions of the first sentence of the rule, in two respects. If this exhibit is admitted, it would thwart the Staff's opportunity to challenge the

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<sup>1</sup> In fact, the copy that counsel for the Staff received was physically attached to the back of Applicant's Reply Brief.

proffered exhibit by cross-examination or by argument in briefs. It would thus defeat the very purpose for this rule.

7. The second sentence of the rule requires that the applicant make its request by “filing ... a petition to reopen the record for the taking of additional evidence in accordance with these rules.” Applicant’s pleading cannot fairly be described as a “petition to reopen the record,” and it certainly was not filed “in accordance with these rules.” It is therefore contrary to the provisions of the second sentence of this rule, also.

8. Furthermore, Applicant’s brief pleading makes no attempt to “specify the facts which allegedly constitute grounds in justification.” It is therefore also contrary to the provisions of the third sentence of this rule.

9. Finally, although Applicant’s pleading did contain a statement of the additional evidence (or rather, actually attached it), it did not include “an explanation as to why this evidence was not offered during the hearing.” The pleading is therefore also contrary to the provisions of the fourth sentence of this rule.

#### **Applicant Cites no Authority for this Late Filing**

10. Applicant has made no attempt to explain how it has complied with the provisions of 4 CSR 240-2.110 (8) or to explain why it has failed to do so, or to offer any other authority for tendering Exhibit 29 at this late date. Applicant only said that the itemization was “described in the Surrebuttal Testimony of Debra J. Williams, Page 4, admitted into evidence herein as Exhibit 2.” The testimony referred to reads as follows:

Q. Are you also asking that the costs of obtaining the certificate of convenience and necessity be included in rate base?

A. Yes. Those costs should be included as rate base under account 302.

Q. What is the amount of those costs?

A. Since this case involves a contested proceeding, it will not be possible to give the total amount of those costs until this proceedings (*sic*) is concluded, and therefore I request leave to file an accounting for those costs as a late filed exhibit with the final brief submitted to the Commission.

11. Although Ms. Williams did make this request for leave to file an accounting for these costs as a late-filed exhibit, to the best of Staff's knowledge, the Commission has never granted such leave, and the Applicant has made no formal request for such leave. The Staff has perused the transcript and the case file and found no ruling granting leave to file this exhibit late. If there has been such a ruling, the burden should be upon the Applicant to cite to the record, rather than requiring the Staff and other parties to comb through the record in search of authority for the late filing.

**Exhibit 29 is not Relevant, because this is not a Rate Case**

12. The Applicant will not be harmed in any way by the exclusion of Exhibit 29, because the information in the exhibit is not relevant to the ultimate issue in this case. In this case, the Applicant is seeking a certificate of convenience and necessity. The questions for the Commission are therefore whether the Applicant has satisfied the five criteria that were announced in the *Tartan Energy* case.<sup>2</sup> Those criteria include: whether there is a need for service; whether the Applicant is qualified; whether the project is economically feasible; whether the Applicant has the financial ability to carry out the project; and whether granting a certificate is in the public interest.

13. The amount to include in rate base is not relevant to any of the five *Tartan Energy* criteria. It is, instead, relevant to a rate case. But this is not a rate case. The contents of the Commission's order in this case will not depend, to any extent, upon the amount of Mr. Williams's attorney fee that may properly be included in Applicant's rate base.

14. The parties did identify rate base as an issue in the in the List of Issues that they filed in this case. They stated Issue 6 as follows: “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?” However, the parties gave scant attention to the issue of attorney fees during the hearing and in their briefs.

15. The Applicant only said, in its Initial Brief, that Staff estimated the legal expenses at \$17,280, and that: “... the Commission should approve the costs as presented by the Applicant *and audited by Staff* as the approved initial rate base for the Company, *subject of course to review of the actual legal expenses incurred.*” The Applicant did not address the issue of attorney fees in its Reply Brief, and none of the other parties addressed it in either of their briefs.

16. The Staff has not had an opportunity to audit these legal expenses, and has not had the opportunity to conduct a meaningful review of the legal expenses incurred. The Commission does not need to determine, in this case, how much legal expense ought to be included in rate base, and the exhibit is therefore irrelevant and should be excluded.

**Some Charges on Exhibit 29 are not Properly Classified as Legal Expense**

17. The Staff has, nonetheless, briefly reviewed the charges that are included in Exhibit 29. Based upon this preliminary review, the Staff believes that some of the charges shown are not properly classified as attorney fees, but are in reality charges for the kind of services that are typically provided by the management of a company, instead of by outside counsel.

18. The Staff’s preliminary conclusion, based only upon a review of Exhibit 29 is that about \$5,000 of those charges was for services that should be provided by management, and that about \$11,200 of the charges were actually for legal services. Of course, it is very difficult to fairly evaluate these charges without the opportunity for cross-examination and argument. In

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<sup>2</sup> *Application of Tartan Energy Company*, 3 Mo. P.S.C. 3d 173.

addition, no evidence has been provided to enable the Staff to evaluate the reasonableness of the number of the number of hours of legal services billed or of the billing rate therefor.

19. The Staff further notes that Exhibit 29 is hearsay, and should also be excluded for that reason. The author of Exhibit 29 is nowhere identified. The exhibit consists exclusively of a 19-page printout, which is not signed by anyone, and which appears to be a “Daily Report” prepared by Gregory D. Williams, and there is no indication that the exhibit was prepared under oath. Gregory D. Williams is not a witness in this case. There is no indication, anywhere in the document, that Applicant’s only witness, Debra J. Williams, had anything to do with the preparation of this exhibit. Thus, although the Staff would want to cross-examine Applicant’s witness about this document, it is not even clear who that person may be.

**WHEREFORE**, the Staff objects to the admission of Applicant’s late-filed Exhibit 29 and moves that the Commission overrule the Applicant’s request that the exhibit be admitted into evidence in this case.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

**/s/ Keith R. Krueger**

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## **Certificate of Service**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record this 28th day of May 2002.

**/s/ Keith R. Krueger**

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Keith R. Krueger