

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 20th day of December, 2007.

In the Matter of EMC of St. Charles County, LLC)
for a Certificate of Convenience and Necessity)
Authorizing it to Participate in the Ownership,)
Operation, Maintenance, Removal, Replacement,)
Control and Management of a Sewer System in)
St. Charles County, Missouri)

Case No. SA-2007-0373

**ORDER GRANTING CERTIFICATE OF
CONVENIENCE AND NECESSITY**

Issue Date December 20, 2007

Effective Date: December 30, 2007

On April 7, 2007, EMC of St. Charles County, LLC filed an application as described in the above caption. EMC is a Missouri company, and is a wholly-owned subsidiary of Environmental Management Corporation. The parent company is a Missouri corporation with over twenty-five years of experience in managing water and wastewater systems.

Applicant seeks to provide sewer service to a new development, Jaxson Estates, which is not currently being served. The area is owned by Triad Development Company of O'Fallon, Missouri. There are no residents in the proposed service area and, as it is undeveloped, the only alternative for treating sewage at this development is to construct a new treatment facility. With its application, EMC submitted a map and legal description of the service area, an engineering report, proposed rates and an estimate of the number of customers, revenues and expenses for the first three years of operation.

Jaxson Estates

Jaxson Estates is located north of I-70 on highway 61 just north of route W. The area for development consists of three projects, including 231 single-family homes, 101 multi-family units and 139,950 sq-ft of commercial buildings. The developments will proceed in stages with the multi-family unit development beginning in 2009 and the commercial development beginning in 2014.

Staff Memorandum

On November 2, the Staff of the Commission filed its memorandum recommending approval of the application subject to the following conditions:

- The utility will exercise all practical efficiencies of scale and economy, such as but not limited to, combined monthly billing for sewer and water service. The water service remains unregulated through the homeowners' association and services are to be contractually provided by an affiliate of the utility.
- The utility will maintain accurate and timely records, including time cards, for all employees performing tasks for the regulated sewer company. All possible employee time sharing between the sewer and water operations, as well as operation elsewhere in the vicinity of this service area, should be considered in an effort to reduce costs.
- Within three months of the connection of the 100th house, or three years following the effective date of the order in this case, whichever occurs first, the utility will file an informal rate case under the Commission's established procedures. This case will address the appropriate expenses and rates for service, as well as a capital cost recovery mechanism.
- All facilities provided by the developer, in accordance with the application in the case, shall be offset by recording a contribution that will be later offset by utility payments to the developer through a future cost recovery mechanism.
- A signed operating agreement, consistent with an example that was provided to the Auditing Staff, between EMC and Environmental Management Corporation, will be executed prior to the time the utility begins providing service. This agreement will contain a written provision that allows the Staff of the Missouri Public Service Commission to have access to EMC's books and records to determine the reasonableness of the costs charged to EMC St. Charles.

- A written signed agreement will be executed between EMC and any affiliate that provides service or charges costs to the utility. The agreement will contain a written provision that allows the Staff of the Missouri Public Service Commission to have access to the books and records of the affiliate to determine the reasonableness of the costs charged to the utility.

Staff further explains that:

The developer is providing the original financing of the sewage treatment plant. . . EMC has a confidential agreement with the developer to take ownership of the sewage treatment plant, and pay a capital recovery cost on a monthly per customers basis.

Staff goes on to state that of the 400 projected residential equivalent customer units, at a suggested \$30 flat rate, EMC will experience operating losses until approximately 110 to 120 have sold. Staff believes this will occur by the fourth year of development.

With regard to the confidential contract with the developer, Staff believes that the Commission will not be bound for any ratemaking purposes. Additionally, Staff will recommend for future ratemaking that the total of any capital recovery amounts paid by EMC to the developer that exceed the net plant balance not be included in rate base. Staff also recommends that upon connecting its 100th customer, EMC be ordered to immediately file a rate case. Finally, Staff states that the Department of Natural Resources has stated that EMC is adequately operating other facilities with which it is involved.

The Office of the Public Counsel Concerns

The Office of the Public Counsel filed a response to Staff's recommendation, expressing concerns, which are set out below.

Unknown, Confidential Contract between Developer and EMC

OPC points out that it "appears that the confidential contract has not been reduced to [writing] . . . and the terms of condition for payments and operation is undefined and in doubt." OPC's concern is that the contract has the potential to cause significant problems

in rate cases. Further, because the developer is unregulated, the Staff will have no opportunity to audit the developer's books to determine whether the cost of design and development were reasonable. Finally, there is no statement of whether the utility payments to the developer will come from money collected by EMC, its parent or future ratepayers.

Unknown Affiliate Contracts

OPC is also concerned about "other affiliates who will provide service or charge costs to the utility." OPC points out that there are no written agreements between EMC and the affiliates nor a requirement that these contracts be viewed and approved by the Commission. Further, OPC warns that there is no indication of whether payment to any affiliate will ultimately come from money collected by EMC, its parent or future ratepayers.

Unknown Control of Developer

In this regard, OPC is concerned that because of the confidential agreement between the developer and EMC, the developer will have an unknown amount of control over the sewer treatment system.

Depreciation

OPC is concerned that depreciation accrual will begin at the time utility service begins without a clear indication of how that depreciation is to be included in the \$30/month rate.

EMC's Uncertain Financial Capability

OPC is concerned that Staff's statement that EMC "may" be supported financially by its parent leaves EMC's financial ability uncertain. Further, the lack of a written agreement

between EMC and its parent gives no assurance that EMC has the financial capability to provide safe and adequate service.

EMC's Reply to Public Counsel's Response

EMC first points out that although OPC has expressed concerns in this matter, it has not requested a hearing nor objected to a grant of a certificate. With regard to OPC's concerns surrounding the confidential contract between EMC and the developer, EMC points out that the contract has been filed with the Commission and is available to all parties.

With regard to OPC concerns of "unknown affiliate contracts", EMC states that there are no indications or plans for any affiliate, other than the parent company, to provide service to EMC. EMC points out that the root of OPC's concerns stems from a condition suggested by Staff that a written agreement be executed between EMC and any affiliate that provides service or charges costs to the utility.

Addressing OPC's concerns surrounding the start-up nature of EMC, EMC states that it does not know how to avoid risks associated with a start-up operation. However, EMC points out that its parent company has over 25 years of experience in managing water and wastewater systems. Further, EMC notes that its parent is part of the BOC Group, a global solutions provider serving over two million customers in over 50 countries.

Conclusions

Although OPC has made its concerns known, it has not requested a hearing in this matter. Additionally, its concerns have been squarely addressed by Staff filing the agreement between EMC and its parent and by EMC's response to OPC's concerns.

During discussions of this matter in an open Agenda session held on December 13, 2007, the Commission expressed concerns about the dual responsibility of the sewer system; EMC's ownership of the sewer treatment facility while the Homeowner's Association operates the sewage collection system. In response to Commission concerns, EMC filed a supplement to its application with relevant attachments. Through its supplement, EMC explains that it and the developer, Triad, have amended their agreements to require EMC to own and operate both the treatment facility as well as the sewer collection system.

Section 393.170.3, RSMo 2000, authorizes the Commission to approve an application for a certificate to operate a sewer utility if it determines that such certificate is "necessary and convenient for the public service." In the 1994 *Tartan Energy*¹ case, this Commission recognized five criteria that should be considered when making that determination:

- There must be a need for the service;
- The applicant must be qualified to provide the service
- The applicant must have the financial ability to provide the service;
- The applicant's proposal must be economically feasible;
- The service must promote the public interest.

Staff concludes in its Memorandum that EMC's application satisfies the *Tartan Energy* criteria. Based on the application and Staff's recommendation and memorandum, the Commission will approve EMC's application with the following conditions:

- EMC will need to have a tariff approved by the Commission prior to providing service.

¹*In re Tartan Energy Company*, 3 Mo. P.S.C. 3d 173, 177 (1994).

- The utility will exercise all practical efficiencies of scale and economy, such as but not limited to, combined monthly billing for sewer and water service. The water service remains unregulated through the homeowners' association and services are to be contractually provided by an affiliate of the utility.
- The utility will maintain accurate and timely records, including time cards, for all employees performing tasks for the regulated sewer company. All possible employee time sharing between the sewer and water operations, as well as operation elsewhere in the vicinity of this service area, should be considered in an effort to reduce costs.
- Within three months of the connection of the 100th house, or three years following the effective date of the order in this case, whichever occurs first, the utility will file an informal rate case under the Commission's established procedures. This case will address the appropriate expenses and rates for service, as well as a capital cost recovery mechanism.
- All facilities provided by the developer, in accordance with the application in the case, shall be offset by recording a contribution that will be later offset by utility payments to the developer through a future cost recovery mechanism.
- A signed operating agreement, consistent with an example that was provided to the Auditing Staff, between EMC and Environmental Management Corporation, will be executed prior to the time the utility begins providing service. This agreement will contain a written provision that allows the Staff of the Missouri Public Service Commission to have access to EMC's books and records to determine the reasonableness of the costs charged to EMC St. Charles.
- A written signed agreement will be executed between EMC and any affiliate that provides service or charges costs to the utility. The agreement will contain a written provision that allows the Staff of the Missouri Public Service Commission to have access to the books and records of the affiliate to determine the reasonableness of the costs charged to the utility.

Further, the Commission reminds the company that failure to comply with its regulatory obligations may result in the assessment of penalties against it. These regulatory obligations include, but are not limited to, the following:

- A) The obligation to file an annual report, as established by Section 393.140(6), RSMo 2000. Failure to comply with this obligation will subject the utility to a penalty of \$100 and an additional \$100 per day the violation continues. Chapter 3 of the

Commission's rules requires utilities to file annual reports on or before April 15 of each year.

B) The obligation to pay an annual assessment fee established by the Commission as required by Section 386.370, RSMo 2000. Because assessments are facilitated by order of the Commission, failure to comply with the order will subject the company to penalties ranging from \$100 to \$2,000 for each day of noncompliance pursuant to Section 386.570, RSMo 2000.

C) The obligation to provide safe and adequate service at just and reasonable rates, pursuant to Section 393.130, RSMo 2000.

D) The obligation to comply with all relevant state and federal laws and regulations, including, but not limited to, rules of this Commission, the Department of Natural Resources, and the Environmental Protection Agency.

E) The obligation to comply with orders issued by the Commission. If the company fails to comply, it is subject to penalties for noncompliance ranging from \$100 to \$2,000 per day of noncompliance pursuant to Section 386.570, RSMo 2000.

F) The obligation to keep the Commission informed of its current address and telephone number.

This certificate is granted conditioned upon the compliance of the company with all of these obligations.

Moreover, if the Commission finds, upon conducting a hearing, that the company fails to provide safe and adequate service, or has defaulted on any indebtedness, the Commission will petition the circuit court for an order attaching the assets, and placing the company under the control of a receiver, as permitted by Section 393.145, (Cum Supp.

2006). As a condition of granting this certificate, the company hereby consents to the appointment of a temporary receiver until such time as the circuit court grant or denies the petition for receivership.

The company is also placed on notice that Section 386.310.1, RSMo 2000, provides that the Commission can, without first holding a hearing, issue an order in any case, “in which the commission determines that the failure to do so would result in the likelihood of imminent threat of serious harm to life or property.”

Finally, the company is reminded that, as a corporation, its officers may not represent the company before the Commission. Instead, the corporation must be represented by an attorney licensed to practice law in Missouri.

IT IS ORDERED THAT:

1. EMC of St. Charles, LLC is granted a certificate of convenience and necessity to provide sewer service to Jaxson Estates in St. Charles County, Missouri.
2. EMC of St. Charles, LLC shall submit a new tariff for sewer service to be provided within the proposed service area.
3. The depreciation schedule recommended by the Staff of the Commission and attached to Staff’s Memorandum as Attachment 1 is approved and shall be used by EMC of St. Charles, LLC.
4. EMC of St. Charles, LLC shall submit, in this case file, copies of the required Department of Natural Resources construction and operating permits for the Jaxson Estates system within 15 days after DNR issues those permits.
5. EMC of St. Charles, LLC shall maintain its books and records in accordance with the Uniform System of Accounts, including maintaining accurate employee time cards

and records of affiliates' payroll and other expenses necessary in performing tasks for the regulated sewer company at actual cost, and properly accounting for plant cost and depreciation as discussed in the conditions suggested by the Staff of the Commission.

6. EMC of St. Charles, LLC shall file a rate case as set out in the conditions suggested by Staff and delineated in the body of this order.

7. EMC of St. Charles, LLC shall enter into operating agreements, or resource-sharing agreements, that are necessary and appropriate as recommended by the Staff of the Commission and set out in the body of this order.

8. Nothing in this order shall bind the Commission on any ratemaking issued in any rate proceeding.

9. In addition to those conditions suggested by Staff, EMC of St. Charles, LLC shall comply with all other conditions set out the body of this order.

10. This order shall become effective on December 30, 2007.

11. This case may be closed on December 31, 2007.

BY THE COMMISSION



Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur.
Clayton, C., dissents, with separate
dissenting opinion to follow.

Jones, Senior Regulatory Law Judge