

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



In the Matter of the Application of Osage )  
Water Company for Permission, Approval, and a )  
Certificate of Convenience and Necessity )  
Authorizing It to Construct, Install, Own, )  
Operate, Control, Manage and Maintain a Water )  
and Sewer System for the Public Located in an )  
Unincorporated Portion of Camden County, )  
Missouri, Known as Eagle Woods. )

Case No. WA-99-437

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**REPORT AND ORDER**

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**Issue Date: February 10, 2000**

**Effective Date: February 23, 2000**

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Case No. WA-99-437

**APPEARANCES**

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Shannon Cook, Assistant Public Counsel, P.O. Box 7800, Jefferson City,  
Missouri 65102, for the Office of the Public Counsel.

Keith R. Krueger, Deputy General Counsel, Missouri Public Service  
Commission, P.O. Box 360, Jefferson City, Missouri 65102, for the Staff  
of the Missouri Public Service Commission.

**REGULATORY LAW JUDGE:** Bill Hopkins, Senior Regulatory Law Judge

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## **REPORT AND ORDER**

### **I. Procedural History**

On April 5, 1999, Osage Water Company (Osage) filed an application pursuant to Section 393.170, RSMo 1994<sup>1</sup>, requesting that the Missouri Public Service Commission (Commission) grant it a certificate of convenience and necessity to construct, install, own, operate, control, manage and maintain a water and sewer system for the public located in an unincorporated portion of Camden County known as Eagle Woods.

On April 12, 1999, the Commission issued an order and notice of application, directing interested parties to file applications to intervene no later than April 29, 1999. On April 28, 1999, the City of Osage Beach (City) filed a timely application to intervene and also filed motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 3, 1999, Osage filed its response to the application to intervene by the City, stating that it opposed the intervention of the City and also filed a response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to

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<sup>1</sup> All references herein to sections of the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 1994.

establish a new procedural schedule in the consolidated cases, and for expedited treatment. On May 5, 1999, the City filed its replies to Osage's responses to the City's motions. On May 10, 1999, the Staff of the Commission (Staff) filed its response to the application to intervene filed by the City and also filed its response to the motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment.

On May 10, 1999, Osage filed its response to a motion to compel filed by the City. However, the official case filings do not reflect such a motion by the City being filed.

The City's application to intervene was granted by order of the Commission entered on May 11, 1999, which order also set a prehearing conference for June 11, 1999, which was held as scheduled. The order also denied the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, and instead set a deadline for the parties to file a procedural schedule no later than June 21, 1999. On May 14, 1999, the City filed its application for a rehearing on the order denying consolidation. On May 17, 1999, Staff filed its motion to reconsider the order denying the motion to reconsider

(sic) and a "motion to compel<sup>2</sup>." On May 26, 1999, Osage filed its response to the motion for rehearing by City and to the motion to reconsider by Staff. On June 21, 1999, Office of the Public Counsel (Public Counsel) filed its clarification of its position, stating that it had decided to oppose Osage's application.

On June 22, 1999, the Commission entered its order denying the City's application for rehearing filed on May 14, 1999, and also denying the Staff's response to the City's motions to consolidate this case with case number SA-99-268, to cancel the procedural schedule in SA-99-268, to set a prehearing conference to establish a new procedural schedule in the consolidated cases, and for expedited treatment, filed on May 10, 1999, and Staff's motion to reconsider order denying motion to reconsider (sic) and motion to compel, filed on May 17, 1999.

On June 23, 1999, Osage filed a motion to establish a procedural schedule. Osage stated that all parties agreed on the procedural schedule set forth. On June 24, 1999, the Commission entered its order adopting procedural schedule which, *inter alia*, set an evidentiary hearing for December 2 and 3, 1999. The Commission filed a notice of correction of the order adopting procedural schedule on June 30, 1999, which corrected a date for rebuttal testimony to be filed. On August 12, 1999, the Commission entered its order scheduling a local public hearing for September 16, 1999, which was held as scheduled.

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<sup>2</sup> Although the caption of the motion filed by Staff indicated that it was, *inter alia*, a "motion to compel," there was nothing in the body of the motion which consisted of a motion to compel.

On November 1, 1999, Staff filed its proposed list of issues, order of witnesses, and order of cross-examination, which Staff stated that all parties agreed upon. On the same date, both Staff and City each filed its statement of position on the issues. Osage filed its statement of position on November 5, 1999. Included in that statement was also an objection by Osage to that part of Staff's proposed list of issues, order of witnesses, and order of cross-examination which indicated that Public Counsel possibly intended to call unidentified "public witnesses." On November 19, 1999, the Commission entered its order partially granting Osage's objection to public witnesses. The Commission ordered that the objection to the proposed order of witnesses filed by Osage was granted insofar as to prohibit the introduction of the testimony of any witness which did not comply with applicable rules of the Commission or statutes of the State of Missouri.

On November 9, 1999, the Commission issued a notice changing the dates for the evidentiary hearing to December 1 and 2, 1999. On November 16, 1999, Staff, City and Public Counsel filed a joint motion to strike portions of the prepared testimony of William P. Mitchell (Mitchell), Osage's engineering witness. On November 24, 1999, Public Counsel filed its statement of position and its motion for leave to file its statement of position out of time.

On November 29, 1999, the Commission filed its notice of official notice, stating that it had taken official notice of Osage's 1998 annual report.

An evidentiary hearing was held on December 1 and 2, 1999. All the parties were represented. On December 17, 1999, the Commission entered its order adopting a briefing schedule. Also on December 17, 1999, the Commission filed its notice regarding motions and notice of ex parte contact. The notice stated, *inter alia*, that at the evidentiary hearing, the joint motion to strike portions of the prepared surrebuttal testimony of Mitchell was denied on the record. The motion filed by Public Counsel for leave to file its statement of position out of time was granted on the record. Also at that hearing, the Commission notified the parties of an ex parte contact made with the Commission on November 30, 1999, by way of a letter sent from and signed by Linda Hulett.

At the hearing, the Commission also took official notice of the following: Department of Natural Resources rule 10 CSR 20.610, a copy of the recorded restrictions on Eagle Woods subdivision, small water company rate cases (2000-345 and 2000-346), and Section 644.141, RSMo. At the hearing, Exhibit Number 9 was reserved for accounting documents, Exhibit Number 11 was reserved for copies of restrictions on Eagle Woods, and Exhibit Number 12 was reserved for a copy of a Department of Natural Resources sewer construction permit. All of the late-filed exhibits were filed by Osage on December 15, 1999, and are received and made a part of the record of this matter.

## II. Issues

The following list of issues was taken from Staff's proposed list of issues and the *Tartan Energy Company Case*.



In Re Tartan Energy, 3 Mo.P.S.C.3d 173, 177 (Sept. 16, 1994) (*Tartan Energy Company Case*), articulated the legal standard to be met by an applicant 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 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. See also Re Intercon Gas, Inc., 30 Mo. P.S.C.(N.S.) 554, 561 (June 28, 1991); State ex rel. Intercon Gas v. Public Service Commission, *loc. cit.* This standard has also been historically applied to water and sewer certificate cases. See Re M.P.B. Inc., 28 Mo. P.S.C. (N.S.) 55, 73 (November 15, 1985).

Although one or more of the parties attempted to inject the issue of whether or not an alternative provider could possibly be more economical or efficient than Osage, nowhere is there any statutory authority for the Commission to consider such an issue. In addition, there is no requirement established in the *Tartan Energy Company Case* that an applicant for a certificate of convenience and necessity to construct and maintain a water and sewer system must first exhaust all other possible methods of meeting the public need prior to requesting authorization to provide utility service. If the law were otherwise, this would tend to relegate the Commission to being a forum of "last choice" for providing a solution to the public's need for utility service.

Again, in case number SA-99-28, In the Matter of the Application of Osage Water Company for Permission, Approval, and a Certificate of Convenience and Necessity Authorizing It to Construct, Install, Own, Operate, Control, Manage and Maintain a Sewer System for the Public Located in Unincorporated Portions of Camden County, Missouri, Golden Glade Subdivision, the Commission stated that:

. . . [T]here is no other company, private or public, which is ready, willing and able to furnish sewer service to the proposed service area. For instance, the City [of Osage Beach] tried to inject an irrelevant issue into the proceedings by alleging that it was going to serve Golden Glade.

The Commission can reach no other conclusion than that the consideration of possible alternative suppliers is also irrelevant here.

The authority for the issuance by the Commission of a certificate of convenience and necessity to provide water and sewer service is contained in Section 393.170, RSMo. Subsection 1 of that statute states in part, that no ". . . water corporation or sewer corporation shall begin construction of . . . a water system or sewer system without first having obtained the permission and approval of the commission." Subsection 3 of that statute states in part, "The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction . . . is necessary or convenient for the public service."

The courts have held that "necessity," as used in the term "convenience and necessity," does not mean essential or absolutely indispensable, but rather that an additional service would be an

improvement justifying the cost and that the inconvenience to the public occasioned by the lack of a utility is so sufficiently great as to amount to a necessity. See State ex rel. Public Water Supply District No. 8 v. Public Service Commission, 600 S.W.2d 147, 154 (Mo. App. 1980); State ex rel. Intercon Gas v. Public Service Commission, 848 S.W.2d 593, 597 (Mo. App. W.D. 1993) (Intercon); and State ex rel. Beaufort Transfer Co. v. Clark, 504 S.W.2d 216, 219 (Mo. App. 1973).

As discussed below, the Commission has determined that Osage has met its burden of proof under the legal standards articulated by the Commission and the courts for the grant of a certificate of public convenience and necessity. For the reasons stated herein, the Commission will grant Osage's application for a certificate of public convenience and necessity.

### **III. Discussion**

#### **A. Osage Water Company Proposal**

Osage is a Missouri corporation duly organized and existing under the laws of the State of Missouri with its principal office and place of business located at Highway 54 West, Osage Beach, Missouri 65065. It is a public utility proposing to render water and sewer service to the public under the jurisdiction of the Commission in the proposed service area. In its application, Osage stated that it is currently certificated to provide water and sewer utility services to the public in various portions of Camden County, Missouri.

The proposed service area is legally described as all of Eagle Woods Subdivision and all of Eagle Woods Subdivision II, which consists of part of Section 7, Township 39 North, Range 16 West, County of Camden, State of Missouri. Osage stated that the service area consists of two new subdivisions located on Turkey Bend, which is an unincorporated portion of Camden County located on State Route KK, near Tan-Tar-A resort. Mitchell testified that the project is designed to contain 53 lots and, at present, around 12 lots have been improved and sold. Mitchell testified that the first phase consists of 25 lots, all of which are basically complete. The second phase consists of an additional 28 lots currently under construction by the developer, Mitchell stated.

In its application and feasibility study, Osage proposed a recirculating sand filter system which will be constructed in treatment modules designed to serve approximately 30 single family homes each. Each resident in the subdivision would be connected to a septic tank, and each septic tank would be connected to a gravity effluent collection sewer which would transmit the effluent to the sand filter. The current water system in Eagle Woods consists of two multi-family wells permitted to serve eight houses each. All this would be done with an initial investment of \$500 per customer for the sewer service and \$250 per customer for the water service, according to Osage.

#### **B. Is there a need for service?**

In their statements of position, Osage, City, and the Public Counsel all agreed that there was a public need for water service and sanitary

sewer service in the proposed service area. Staff, in its statement of position, did not address this issue. Instead, Staff stated that Osage ". . . has not demonstrated that there is a need for service that will not be adequately met by other providers, such as the City of Osage Beach or the homeowners association for the Eagle Woods Subdivision." As shown earlier, Osage is not required to demonstrate that there is a need for service that will not be adequately met by other providers.

All parties except Staff agreed on this issue. The Commission finds that there is a public need for water and sewer service in the proposed service area.

### **C. Is Osage qualified to provide the service?**

In their statements of position, Osage stated that it was qualified to provide water and sewer service to the public in the Eagle Woods Subdivision, while Staff, City and Public Counsel all agreed that Osage was not qualified to provide water and sewer service to the public in the Eagle Woods Subdivision.

In the *Tartan Energy Company Case*, the Commission, in reference to deciding the question of whether a company was qualified to provide a utility service, stated that "[t]he safety and adequacy of facilities are proper criteria in evaluating necessity and convenience as are the relative experience and reliability of competing suppliers," citing *Intercon*. There are no competing suppliers in the proposed service area, thus the Commission is required only to analyze the qualifications of Osage.

Osage presented evidence as to its experience in the water and sewer utility industry along with its technical experience and knowledge regarding engineering and safety. Osage also showed that it had the ability to properly construct and operate a water and sewer system for the proposed service area. This evidence was substantial and unrefuted.

Mitchell testified extensively concerning Osage's qualifications. He stated that he had been operating water and sewer utilities since 1981. Mitchell stated that he had been with Osage since 1987 when it was originally formed by his parents and him to provide regulated water utility service in the Lake of the Ozarks area. Mitchell stated that he was a member of the Board of Directors of Osage and participated in all meetings that affected the policies and management of Osage, and that he was involved in the day-to-day operations of Osage.

Mitchell testified that Osage's president is an attorney whose practice includes real estate, taxation, and public utilities. Mitchell said that Osage employs a construction foreman and various individuals from time to time as construction laborers for the purpose of performing construction of new water and sewer main extensions, service connections, and repairs to water and sewer lines and systems. Osage owns a mini-excavator and a bobcat for use in new construction and repairs. Mitchell testified that he was the vice-president of operations for Osage and that he was the principal of Jackson Engineering and Water Laboratory Company. Mitchell stated that he holds a Class A license, the highest type of license available, from the Missouri Department of Natural Resources (MDNR) for both water and wastewater. Osage therefore

possesses the necessary technical expertise with which to operate not only the physical facilities needed for the proposed service area, but also the necessary general overhead and support staff required to conduct its water and sewer utility operations.

Mitchell said that Osage has an operation contract with both Jackson Engineering and Water Laboratory Company under the terms of which those companies provide regular operation, maintenance, and testing of all of Osage's water supplies and sewage treatment facilities. The two companies also provide basic office operations for Osage, including secretarial support, telephone, meter reading, and billing.

Mitchell testified that Osage has both a water and sewer tariff on file with the Commission.

Mitchell stated that Osage currently operates six other water and sewer systems under the Commission's regulation: Osage Beach North (water), Osage Beach South (water), Chelsea Rose (water and sewer), Cimmarron Bay (water and sewer), Cedar Glen (water and sewer), Parkview Bay (water), and Golden Glade (sewer). Mitchell testified that Osage owns three sewage treatment facilities of the same recirculating sand filter design as that proposed for the Eagle Woods service area, and one of those is of the extended aeration type. Mitchell stated that he had experience operating both kinds of systems as well as numerous other sewage treatment systems. Mitchell testified regarding the history, workings and development of recirculating sand filters, including the fact that MDNR has been promoting the use of that technology. As far as water systems are concerned, Mitchell stated that Osage has also

constructed, owns, and operates several water systems, including large capacity public drinking water supplies. These systems, Mitchell maintained, serve both small subdivisions comparable to Eagle Woods, as well as large commercial districts, such as downtown Osage Beach.

Mitchell's testimony more than adequately displayed his knowledge of water and sewer systems, plus his knowledge of the operation of the equipment needed to run a water and sewer system. This experience is valuable to the operation of any water and sewer system. Osage and its principals have substantial knowledge regarding engineering, safety, and the technical ability and equipment to provide the service needed for the proposed water and sewer system.

Osage has the burden of proof to demonstrate that it is qualified to provide the service and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it is qualified to provide the service.

#### **D. Does Osage have the financial ability to provide the service?**

In their statements of position, Osage stated that it had the financial ability to provide the water and sewer service, while Staff, Public Counsel, and City all agreed that Osage did not have the financial ability to provide the service.

Osage is required to show that it has the financial ability to provide the proposed service. Both Osage's application and its testimony reflect that the project developer has and is willing to make contributions in aid of construction of either cash or water systems and



sewer collection systems; Osage need only provide the labor and equipment to assemble the necessary components for the sewage treatment plant, which is substantially complete. Osage does not require any additional capital beyond that offered by the project developer in order to have the financial ability to provide water and sewer utility service to Eagle Woods. The proposed capital structure for the project leaves the risk of the success of the development with the project developer, rather than requiring a level of investment by Osage that would not be supported by an established customer base.

Concerning the water system, Mitchell also stated that the Eagle Woods developer has agreed to contribute an existing well and distribution system to Osage, and to construct or pay the cost of construction of any distribution system expansions. Mitchell also pointed out that Osage has constructed public water systems similar to that proposed for Eagle Woods. For example, Osage constructed the water well at Shoney's Restaurant in its Osage Beach North service area in 1993, the water well at the Super 8 motel in 1995, the water well at Parkview Bay in 1997, and Osage is currently completing construction of a new water well at Chelsea Rose.

Osage has the burden of proof to demonstrate that it has the financial ability for completing this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that it has the financial ability for completing this proposal.

## **E. Is Osage's proposal economically feasible?**

In their statements of position, Osage stated that its proposal was economically feasible, while Staff, Public Counsel, and City all agreed that Osage's proposal was not economically feasible.

Osage prepared and attached a feasibility study to its Application, which calculated the anticipated financial impact on Osage of the extension of water and sewer service to Eagle Woods. Osage stated that it anticipated using its current sewer tariff rate of \$23.90 per customer per month for the service rate in the proposed service area. Also, Osage stated that it anticipated using its current metered water tariff rate of \$7.75 per customer per month, plus \$2.07 for each 1,000 gallons used in excess of 1,000 gallons per month for all new residences in Eagle Woods. Osage stated that the financial analysis in its feasibility study indicated that the proposed service is economically feasible at Osage's current tariff rates.

The proposal in this case places the principal burden on the subdivision developer, as he is contributing the bulk of the necessary capital in the form of cash and completed systems. Osage's shareholders also bear some risk as a result of Osage's injection of capital in the form of labor and equipment used to construct the sewage treatment facility. The feasibility study indicates a positive net marginal revenue should be derived from both the water and sewer systems, with a positive net cash flow generated after the payment of a return on invested capital. If Osage has underestimated the economic feasibility

of the project, the loss will be borne by Osage and the project developer (i.e., the investors) and not by Osage's ratepayers.

Osage has the burden of proof to demonstrate the economic feasibility of this proposal and has presented sufficient evidence on that issue; thus the Commission concludes that Osage has demonstrated that the proposal is economically feasible.

#### **F. Does Osage's proposal promote the public interest?**

In their statements of position, Osage stated that its proposal was in the public interest, while Staff, Public Counsel, and City all agreed that Osage's proposal was not in the public interest.

This case is not about whether Osage or the City is the more qualified applicant in this case; the issue is whether Osage has satisfied the requirements for a certificate as explained in the *Tartan Energy Company Case*. That case stands for the proposition that a positive finding for the first four standards will, in most cases, support a finding that granting an application for a certificate promotes the public interest.

Because there is a need for the service, because Osage is qualified to fill that need, and because its plan to fill that need appears feasible, the Commission concludes that granting Osage a certificate is in the public interest.

#### **IV. 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 positions and arguments of all of the parties have been considered by the Commission in making this decision. 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.

1. The Commission finds that there is a need for water and sewer service in the proposed service area.

2. The Commission finds that Osage is qualified to provide the service.

3. The Commission finds that Osage has the financial ability to serve the proposed service area.

4. The Commission finds that Osage's proposal is economically feasible.

5. The Commission finds that Osage's proposal promotes the public interest.

6. The Commission finds that granting Osage a certificate is necessary and convenient for the public service.

### V. Conclusions of Law

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

1. Osage is a public utility and a water and sewer corporation subject to the Commission's jurisdiction under Section 386.250, RSMo, and Section 393.170, RSMo.

2. The Commission has authority pursuant to Section 393.170, RSMo, to grant certificates of convenience and necessity.

**IT IS THEREFORE ORDERED:**

1. That late-filed Exhibits 9, 11, and 12 are hereby received into the record.

2. That the certificate of convenience and necessity referenced in ordered paragraph 7 shall become effective simultaneous with the effective date of the tariff sheets required to be filed and approved pursuant to ordered paragraph 3.

3. That Osage Water Company shall file with the Commission tariff sheets modifying its water and sewer service areas to reflect the additional service area granted herein.

4. That nothing in this order shall be considered a finding by the Commission of the reasonableness of the expenditures herein involved, nor of the value for ratemaking purposes of the properties herein involved, nor as an acquiescence in the value placed on said property.

5. That the Commission reserves the right to consider the ratemaking treatment to be afforded the properties herein involved, and the resulting cost of capital, in any later proceeding.

6. That any motions which have not been previously ruled upon, if any, are hereby denied.

7. That the Application filed by Osage Water Company for a certificate of public convenience and necessity authorizing Osage to construct, own, operate, control, manage, and maintain a water and sewer

system for the public located in an unincorporated area of Camden County, Missouri, as more fully described in its Application, is hereby granted.

8. This Report and Order shall become effective on February 23, 2000.

9. That this case may be closed on February 24, 2000.

**BY THE COMMISSION**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

**( S E A L )**

Lumpe, Ch., Crumpton, and Drainer, CC.,  
concur; Murray and Schemenauer, CC.,  
dissent; certify compliance with the  
provisions of Section 536.080, RSMo 1994.

Dated at Jefferson City, Missouri,  
on this 10th day of February, 2000.

Hopkins/Boyce

2-4  
Date Circulated

WA-99-437  
CASE NO.

SL p6, 9, 10, 11, 13  
Lumpe, Chair

(Signature)  
Crumpton, Commissioner

cm NO  
Murray, Commissioner

(Signature)  
Schemenauer, Commissioner

ed 7, 12, 15, 17, 18  
Drainer, Vice-Chair

2-10  
Agenda Date

Action taken: 3-2 AA

Must Vote Not Later Than \_\_\_\_\_

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

**I have compared the preceding copy with the original on file in this office and**

**I do hereby certify the same to be a true copy therefrom and the whole thereof.**

**WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 10<sup>th</sup> day of FEBRUARY 2000.**



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**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**