

**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,)	<u>Case No. WA-2002-65</u>
Manage and Maintain a Water System for the Public)	
Located in Unincorporated Portions of Camden)	
County, Missouri (Golden Glade).)	

**BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL RE: THE PROPOSED
WATER SUPPLY AGREEMENT BETWEEN ENVIRONMENTAL UTILITIES,
L.L.C. AND OSAGE WATER COMPANY**

COMES NOW, the Office of the Public Counsel (Public Counsel), and respectfully submits this brief to the Missouri Public Service Commission (Commission) on the issue of whether the Commission should approve the proposed water supply agreement (proposed agreement) between Environmental Utilities, L.L.C. and Osage Water Company. Public Counsel respectfully suggests that the Commission should approve the **modified** version of the proposed agreement, subject to certain conditions, but only if the commission is satisfied that one of the following two circumstances exist:

(1) Osage Water Company has resolved its issues with the Missouri Secretary of State, and is currently a corporation in good standing, or

(2) the Commission believes that Osage Water Company's owners, officers or directors who participated in the drafting of the agreement can be held personally liable for performing the agreement, pursuant to their fiduciary duty to Osage Water Company, and

(3) Greg and Debra Williams have transferred their ownership interest in the Golden Glad well to Environmental Utilities, L. L. C.

However, if the Commission finds that these criteria have not been satisfied, the Commission should reject the proposed agreement. In support of this recommendation, Public Counsel states the following:

I. Osage Water Company continues to have an obligation to serve its customers.

Osage Water Company (Osage) is an administratively dissolved corporation. This status continued through the time of the evidentiary hearing before this Commission on February 19, 2003. However, evidence was also presented at that hearing that Osage's status as being administratively dissolved did not relieve it of its obligations to provide safe and adequate service to the company's customers. [Tr. Feb. 17, 2003, at p. 609.] Evidence was also introduced that Osage needed access to a public water supply in order to serve its customers in the Eagle Woods subdivision. [Tr. at 610.] Evidence was also presented that the current method of supply was not sufficient to provide safe and adequate service. [Tr. at 610.]

Although Sec. 351.476 RSMo (2000) provides that an administratively dissolved corporation "may not carry on any business except that appropriate to wind up and liquidate its business affairs..." an administrative dissolution does not destroy a company's corporate existence. *Reben v. Wilson*, 861 S.W.2d 171,

176 (Mo. App. E.D. 1993). Therefore Osage Water Company, as an entity certificated to provide water and sewer service, continues to exist.

A utility which holds a certificate of convenience and necessity from the Missouri Public Service Commission has a legal obligation to provide safe and adequate service to its customers. See, Sec. 393.140 RSMo. It appears from the record in this case that Environmental Utilities LLC (EU), the applicant, is willing to provide a public water supply to Osage. If the Commission approves the water supply agreement, EU will be able to lawfully sell water to Eagle Woods from the well that Greg and Debbie Williams will transfer to EU. These sales will make EU more economically viable than would otherwise be the case. Therefore, EU presumably would have an economic interest in performing the contract. The issue is whether Osage would perform its obligations under the contract. This depends on who is ultimately responsible if Osage should decline to pay EU for the water it buys.

II. Environmental Utilities LLC and Osage's customers can probably enforce the water agreement against Osage's corporate officers and managers, even if Osage does not correct its dissolved status.

While Osage continues to have a duty to serve its customers, its ability to do so has been constrained due to Osage's own actions. Osage was administratively dissolved by the Missouri Secretary of State as of September 4, 2002, for failure to file an annual report. [Feb. 19, 2003, Ex. 1, Dir. of Johansen, at p. 3.] As an administratively dissolved company, Osage may not lawfully engage in business matters other than those "winding up" activities exempted by

Sec. 351.476 RSMo. This means that, at best, allowing Osage to enter into a contract is a risky proposition for the Commission. However, administrative dissolution is not the same as actual destruction of the company as an entity.

While an administratively dissolved corporation may not lawfully engage in business other than winding up, it is not uncommon, in practice, for such a corporation to carry on with its business interests. “When this occurs, not all actions are voided. Instead, many actions are upheld, but the officers may become personally liable for any of those actions. ” Sec. 351.476.3 RSMo; *Mesler v. Director of Revenue*, 983 S.W.2d 605 (Mo App. E.D. 1999). Osage currently has at least one director, William P. Mitchell. In addition, other remedies may be pursued in the event of breach. For example, a Missouri court upheld a finding of personal liability for unpaid unemployment insurance contributions against the president of an administratively dissolved corporation in *Asaro v. Division of Employment Security of Missouri*, 32 S.W.3d 623 (Mo. App. W.D. 2000).

An administratively dissolved corporation may be sued by serving its registered agent. *Mabin Construction Company, Inc. v. Historic Contractors, Inc. et .al*, 851 S.W.2d 98 (Mo. App. W.D. 1993). Missouri law also provides that if a judgment is obtained against a company with insufficient assets to pay the judgment, a court may order the execution of the judgment against the shareholders, in proportion to their ownership, under conditions set out in Sec. 351.280 RSMo.

Whether the proposed contract between EU and Osage would be valid should be analyzed in reference to Sec. 351.327 RSMo. This statute is intended to “not only to provide against the voiding or voidability of a contract or transaction, but rather to set forth as well the substantive law on the methods by which a conflict transaction may be regularized to become an arms length transaction.” Sec. 351.327.4. RSMo. Under 351.327.1 the mere fact that an owner, officer or director of a corporation is also an owner, operator or director of another corporation does not make a transaction void or voidable as long as there is full disclosure, approval of the majority of disinterested directors, shareholders or officers, and the “contract or transaction is fair to the corporation.” Sec. 351.327.1(3) RSMo. Assuming that all of these criteria are met, the contract may be valid despite the fact that EU members hold ownership interests, and other positions, in regard to Osage.

If the contract is valid, it should be enforceable. The limitations of corporate liability will not be available to persons acting on behalf of Osage while the corporate status is “dissolved.” Rather, as discussed above, those actors are liable in their personal capacity. Therefore, if Osage defaults on the contract, its officers would be personally liable to EU for payment. Of course, on the other hand, if Osage reinstates its corporate status, the officers would no longer be personally liable for the company’s obligations. Either way, customers will have the opportunity to enforce their right to receive service from Osage, and their right to receive EU water from Osage pursuant to the agreement, whether in an action against the corporation or against its directors a remedy for non-

compliance exists. Likewise, if Osage should fail to pay EU for water, EU could institute an action against Osage. Of course, since EU currently manages all operations for Osage, issues of self-dealing should be of concern to the Commission if EU, as manager of Osage, does not pay EU for the water. The impact of this potential problem could be lessened by a condition in the certificate that requires EU to come to the Commission and show cause why it has not transferred the necessary funds from Osage to itself before any collection action by EU against Osage may commence, as long as EU is acting as a manager of Osage.

CONCLUSION AND RECOMMENDATION

Although Public Counsel remains concerned over Osage's failure to correct its corporate status from administratively dissolved to active in good standing, it appears that, with considerable effort, the Commission could craft conditions which would make the proposed water supply agreement palatable. If so inclined, the Commission could impose the following conditions on accepting the contract, which would follow the certificate of convenience and necessity:

1. EU, as manager of Osage, shall take such steps as are within its authority to correct the corporate status of Osage Water Company within 30 days of the effective date of the Report and Order.

2. EU, as long as it is the manager of Osage, shall not institute any collection proceeding, or take any action under the contract to terminate providing water service to Osage, until it first comes before the Commission and

shows cause that the manager of Osage has not acted in bad faith by withholding payment for water service.

3. Within 10 days of the effective date of this Report and Order, Environmental Utilities, L. L. C. shall file documentation with the Commission proving that Greg and Debra Williams have transferred ownership of the Golden Glade well to Environmental Utilities, L. L. C.

WHEREFORE, subject to the above conditions, Public Counsel hereby withdraws its previous objections to approval of the proposed water supply agreement, and submits the matter to the Commission for its decision as to whether to approve the agreement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 12th day of March 2003:

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