

**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 RECOMMENDATION

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”) by
and through counsel, and for its Recommendation states:

Procedural History:

1. On June 27, the Missouri Public Service Commission (“Commission”) issued its Report and Order in this case, granting a certificate of convenience and necessity for Environmental Utilities, LLC (“EU”) to provide water service to the Golden Glade subdivision. As a condition to granting the certificate, the Commission required Environmental Utilities to establish arrangements to provide wholesale water to Osage Water Company (“OWC”) for the use of OWC’s customers in the Eagle Woods subdivision that meet the approval of the Commission.
2. On September 12, 2002, the Commission issued its Order Directing Filing, directing the Staff to file its recommendation by September 20, 2002,

regarding whether the Water Supply Agreement filed by Environmental Utilities, LLC on September 11, 2002 satisfies the requirements for issuance of a certificate of convenience and necessity established in the Commission's Report and Order of June 27, 2002. The Commission also asks for direction from the parties regarding whether Osage Water has filed articles of dissolution. If so, the Commission asks whether an administratively dissolved corporation is capable of entering into the supply agreement submitted by EU.

3. On August 30, 2002, Environmental Utilities filed its Water Tariff. The Staff has reviewed the tariff and will include in this recommendation its conclusions regarding the tariff, so that the Commission may consider Staff's recommendation regarding EU's tariffs along with EU's Water Supply Agreement.
4. In reference to the Staff's analysis of and recommendations regarding the Water Supply Agreement, the Staff provides the following analysis regarding the effect of the current status of OWC as a corporation on the validity of the Water Supply Agreement as executed by OWC and EU, and of the validity of any modification of the agreement that may be necessary to meet the requirements of the Commission's order of June 27, 2002.

OWC's Status as a Corporation:

On September 4, 2002, pursuant to Section 351.486 RSMo 2000, the Secretary of State issued its determination of Administrative Dissolution or Revocation for a For-Profit Corporation of OWC for failing to file a correct annual report with the Secretary of State. (Attached as *Appendix B.*) OWC's application did not contain a franchise tax

report as required. OWC's annual report was deficient in that it did not include a franchise tax report for 2001.

Missouri law regarding administrative dissolution of corporations is set out in sections 351.484 *et seq.* RSMo 2000.¹ A corporation administratively dissolved may apply to the secretary of state for reinstatement. RSMo. §351.488(1). If the secretary of state determines that the application is correct and complete, the secretary of state shall cancel the certificate of dissolution and prepare a certificate of reinstatement. RSMo. §351.488(2). When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred. RSMo. §351.488(3). If the corporation does not correct each ground for dissolution within sixty days after service of the notice is perfected, the secretary of state shall dissolve the corporation by signing a certificate of dissolution. RSMo. §351.486(2). A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs and notify claimants. RSMo. §351.486(3).

As of September 20, 2002, OWC has not filed articles of dissolution with the secretary of state. In practical terms, OWC has four options at this point with regard to its corporate status:

1. OWC may apply before November 4, 2002, for reinstatement,
2. OWC may apply before November 4, 2002 to accept the administrative dissolution effective as of September 4, 2002,
3. OWC may apply before November 4, 2002, for reinstatement of the corporation and then voluntarily file articles of dissolution, or
4. OWC may simply wait and allow the corporation to be involuntarily dissolved.

¹ All references to the Missouri Revised Statutes are to RSMo. 2000.

The Staff has received information that, at the time Debra Williams filed OWC's registration report with the secretary of state, she did not have adequate financial information for 2001 to submit the required franchise tax report. Only OWC can say whether it will be able to obtain the financial information in time to apply for reinstatement of its corporate status, or whether it has enough financial information from 2001 so that it can submit an estimated franchise tax report that may be satisfactory to the secretary of state.

The Water Supply Agreement was signed between EU and OWC on September 1, 2002, before OWC was administratively dissolved, so the agreement's validity is not affected by the administrative dissolution of the company. However, the Commission may determine, as Staff recommends herein, that the Water Supply Agreement requires revision. The Commission asked whether an administratively dissolved corporation is capable of entering into a supply agreement. At common law, valid modification of a contract constitutes making of a new contract,² and pursuant to 351.486(3) RSMo., OWC, in its presently administratively dissolved state, cannot carry on any business except that necessary to wind up and liquidate its business and affairs and notify claimants. Therefore, if OWC execute a new water supply agreement, it would only be valid if OWC successfully meets the requirements for reinstatement of the corporation within sixty days of its notice of administrative dissolution, or by November 4, 2002.

² *E.A.U., Inc. v. R. Webbe Corp.*, 794 S.W.2d 679 (Mo. App. E.D. 1990). The new contract must also be supported by new consideration. *Id.*

Staff's Recommendation:

5. In the attached Memorandum, which is labeled *Appendix A*, Staff recommends that the Commission find that the Wholesale Water Supply Agreement between EU and OWC is not adequate to meet the requirements of the Commission's Report and Order of June 27, 2002.
6. In the attached Memorandum, Staff further recommends that the Commission not approve the tariff at this time. Staff recommends that the Commission consider suspending the tariff until November 30, 2002, in order to allow time for OWC to reinstate its corporate status and for EU and OWC to finalize and submit a satisfactory revised wholesale water supply agreement.
7. The Staff recommends further that, If EU fails to submit an acceptable revised wholesale water supply agreement in time for the tariff to be approved and become effective by November 30, 2002, that at that time the tariff be rejected, and further that this case be closed with no Certificate being issued to EU.

WHEREFORE, the Staff recommends that the tariff not be approved at this time. However, the Staff recommends that the Commission consider suspending the tariff until November 30, 2002, in order to allow time for OWC to reinstate its corporate status and for EU and OWC to finalize and submit a satisfactory revised wholesale water supply agreement. If EU fails to submit an acceptable revised wholesale water supply agreement in time for the tariff to be approved and become effective by November 30, 2002, the Staff recommends that at that time the tariff be rejected, and further that this case be closed with no Certificate being issued to EU.

Respectfully submitted,

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/s/ Victoria L. Kizito

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, electronically mailed or hand-delivered to all counsel of record this 20th day of September 2002.

/s/ Victoria L. Kizito
