

**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)	Case No. WA-2002-65
System for the Public Located in)	
Unincorporated Portions of Camden)	
County, Missouri (Golden Glade)	
Subdivision))	

**STAFF’S INITIAL BRIEF
REGARDING WATER SUPPLY AGREEMENT
BETWEEN ENVIRONMENTAL UTILITIES, L.L.C. AND OSAGE WATER COMPANY**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), by and through counsel, and for its Initial Brief Regarding Water Supply Agreement Between Environmental Utilities, L.L.C. and Osage Water Company states:

PROCEDURAL HISTORY

1. On June 27, 2002 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 EU to establish arrangements, which meet the approval of the Commission, to provide wholesale water to Osage Water Company (“OWC”) for the use of OWC’s customers in the Eagle Woods subdivision.
2. Pursuant to the Commission’s *Report and Order*, EU filed its Water Supply Agreement on September 11, 2002.

3. On September 12, 2002, the Commission issued its *Order Directing Filing*, directing the Staff, and any other party wishing to do so, to file a recommendation by September 20, 2002, regarding whether EU's Water Supply Agreement with OWC satisfies the requirements for issuance of a certificate of convenience and necessity, as established in the Commission's Report and Order of June 27, 2002.

4. The Staff, the Office of the Public Counsel and Hancock Construction Company filed pleadings recommending that the Commission not approve the Water Supply Agreement.

5. On September 24, 2002, the Commission issued its *Order Suspending Tariff, Scheduling a Prehearing Conference, and Directing the Parties to File a Proposed Procedural Schedule*.

6. On September 27, 2002, in response to a motion by the Office of the Public Counsel, the Commission issued its *Order Rescheduling Prehearing Conference*, in which it rescheduled the prehearing conference for October 9, 2002.

7. On October 9, 2002, a prehearing conference was held in this case. At the prehearing conference, Greg Williams, on behalf of EU, presented to the parties a copy of a modified water supply agreement.

8. On October 15, 2002, Staff filed a proposed procedural schedule in which Staff stated that the parties agreed that further testimony regarding the Water Supply Agreement is not necessary.

9. On October 16, 2002, the Commission issued its *Order Adopting Briefing Schedule*, stating that the parties' Initial Briefs are due on or before November 4, 2002.

ARGUMENT

In its Recommendation, filed on September 20, 2002, the Staff stated that it had three specific concerns with the Water Supply Agreement (Agreement), that EU filed on September 11, 2002, with regard to the Agreement's purpose of contributing to the economic feasibility of EU:

A. The Agreement does not contain a provision to bind successors and assigns to the Agreement.

B. The Agreement does not contain a provision for adjustment of the rate charged for water in accordance with the ratemaking procedure of the Commission

C. The Agreement does not bind the parties to the contract for a period of at least five years.

At the prehearing conference on October 9, 2002, Greg Williams, counsel for EU, provided the parties a copy of a draft of a modified water supply agreement, attached hereto as "Appendix A." The draft of the modified water supply agreement contains provisions addressing the Staff's three concerns listed above. Therefore, the Staff believes that the language of the modified water supply agreement does meet the requirements of the Commission's *Report and Order* of June 27, 2002, that EU make arrangements to provide wholesale water to Osage Water Company for the use of Osage Water Company's customers in Eagle Woods.

Corporate Status

Due to OWC's status as an administratively dissolved corporation, a question still remains as to the ability of OWC to enter in such an agreement. OWC was administratively dissolved by order of the Secretary of State as of September 4, 2002 for failing to file a correct

annual report to the Secretary of State.¹ Section 351.486(3) RSMo 2000 provides that 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 under section 351.476 and notify claimants under sections 351.478 and 351.482... .”

Mr. Williams, counsel for EU in the instant case, and a principal shareholder of OWC, testified in the currently pending case WC-2003-0134 (a complaint case against OWC), that he believes the Secretary of State issued its declaration of administrative dissolution of OWC in error because the Secretary of State erroneously believed that OWC was required to file a franchise tax report and failed to do so. Mr. Williams testified that he is making efforts resolve this matter and have OWC reinstated. Regarding this matter, the Staff does not concede that OWC does not need to file a franchise tax report.

Additionally, Section 351.484(4) RSMo 2000, provides that the Secretary of State may administratively dissolve a company if it does not notify the secretary of state within thirty days that its registered agent has resigned. Mr. Williams submitted his resignation as OWC’s registered agent to OWC’s president on September 3, 2002. Mr. Williams did not, however, notify the Secretary of State of his resignation as registered agent before OWC was administratively dissolved, and the Secretary of State does not accept any filings or notices from a company while it is administratively dissolved.

Finally, EU and OWC entered into their original Water Supply Agreement on September 1, 2002, before OWC was administratively dissolved. At common law, valid modification of a contract constitutes making of a new contract.² Therefore, in order to modify the previous

¹ A copy of the Order of the Secretary of State is attached as *Appendix A* to the *Staff’s Proposed Procedural Schedule*, filed September 20, 2002.

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

Agreement, EU and OWC must newly execute the modified agreement. In order for OWC to execute the modified water supply agreement, OWC's corporate status must be reinstated and the agreement must be signed by OWC by a person authorized to sign on behalf of OWC.³ The Commission should not find that EU has satisfied the condition, set out in the Commission's *Report and Order* of June 27, 2002, that EU establish arrangements to sell wholesale water to OWC for OWC's Eagle Woods customers, until OWC has been reinstated and the modified water supply agreement is signed by a person authorized to sign on behalf of OWC.

WHEREFORE, the Staff requests that the Commission approve the language of the draft of the modified water supply agreement as attached in *Appendix A*. The Staff requests that the Commission not grant EU's certificate of convenience and necessity until OWC is reinstated and EU has executed and filed with the Commission a valid water supply agreement with OWC.

Respectfully submitted,

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³ Staff incorrectly stated in its pleading attached to its recommendation, filed September 20, 2002, that OWC had only until November 4, 2002 to reinstate its corporate status.

Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or e-mailed to all counsel of record this 4th day of November 2002.
