



John B. Coffman
Acting Public Counsel

State of Missouri

Bob Holden
Governor

**Office of the Public
Counsel**

Governor Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri
65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <http://www.mo-opc.org>
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

September 20, 2002

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

FILED³

SEP 20 2002

**Re: Environmental Utilities, LLC
Case No. WA-2002-65**

Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Recommendation of the Office of the Public Counsel to Reject Proposed Agreement and Response to Motion Filed by Hancock Construction Company**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

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

FILED³

SEP 20 2002

Missouri Public
Service Commission

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

**RECOMMENDATION OF THE OFFICE OF THE PUBLIC COUNSEL TO
REJECT PROPOSED AGREEMENT AND RESPONSE TO MOTION FILED BY
HANCOCK CONSTRUCTION COMPANY**

COMES NOW, the Office of the Public Counsel (Public Counsel), pursuant to the Commission's Order Directing Filing in this case and presents its recommendation to the Missouri Public Service Commission (Commission) regarding the proposed Water Supply Agreement between Environmental Utilities, LLC (Environmental) and Osage Water Company (Osage). Upon review of the proposed agreement, Public Counsel respectfully recommends that the Commission reject the agreement because it does not satisfy the requirements which the Commission set forth for issuing a certificate of convenience and necessity in its Report and Order of June 27, 2002.

This pleading will also briefly address the "Hancock Construction Company's (Hancock) Response to the Notice of Environmental Utilities, LLC's Water Supply Agreement, Motion for Reconsideration and Motion for a Receiver" filed on or about September 18, 2002. Public Counsel understands Hancock's

frustration but believes that the Environmental Utilities certificate case is not the proper forum for addressing whether the Commission should seek a receivership of Osage. The possible appointment of a receiver for Osage Water is an issue which should be addressed in a different case.

Rather, the sole issue before the Commission **in this case** is whether Environmental Utilities has performed the required condition precedent to receiving a certificate of convenience and necessity. The Commission conditioned granting Environmental certificate to provide regulated water service in the Golden Glade subdivision, on obtaining an agreement to provide wholesale water service to Osage Water's Eagle Woods subdivision. Public Counsel submits that Environmental has not met that condition precedent, and that the Commission should decline to issue the certificate at this time.

SUGGESTIONS IN OPPOSITION TO THE PROPOSED AGREEMENT

1. A review of the wholesale agreement raises a number of questions which Public Counsel believes must be answered before the Commission approves any water supply contract between Osage and Environmental. First, does Osage Water have the ability to fulfill its obligations under the contract? Next, does Environmental have the ability to fulfill its obligations under the contract? Third, do the signatories to the contract have the authority to bind the companies to the agreement? Finally, is the contract detrimental to the public interest, that is, to the interest of the customers of Osage Water, especially those who live in the Eagle Woods subdivision?

A. Osage Water does not have the ability to fulfill its obligations under the water supply contract because the commodity charge it must pay to Environmental may exceed the retail price it may charge its Eagle Woods residential customers under its existing tariff.

2. The proposed agreement contains numbered paragraph (1) regarding the price of water under the wholesale agreement. Under the terms of this agreement Osage must pay \$44.25 per month PLUS \$3.8701/1,000 gallons of water over 2,000 gallons. This provision of the contract requires Osage to pay an excessive price for water.

3. Osage Water's most recent tariff on file with the Commission, (filed August 20, 2002) contains "Rate Schedule W-1. Schedule W-1 sets out the schedule of rates which Osage may charge its retail customers. W-1 provides that customers who receive service through a 5/8" meter (the standard meter size for residential customers) may be charged a monthly minimum charge of \$16.36 per month. If a meter has been installed, that charge includes both the customer charge and a commodity charge for 2,000 gallons of water. The tariff allows Osage to impose an additional commodity charge for metered water usage greater than 2,000 gallons, in the amount of \$3.8701 per 1,000 gallons.

4. Virtually all of Osage's customers in the Eagle Woods service territory are residential customers. Any residential customer who does not have a meter is charged at the monthly minimum rate for a 5/8" meter, according to information obtained from Commission Staff in the Water and Sewer Department. Osage cannot afford to pay more for water under a wholesale supply contract than it can

bill its customers for that same water. Therefore, Osage cannot perform its obligations under the proposed contract.

5. The agreement places Osage in the position of possibly paying more for water than it can charge its customers under its existing tariffs. For example, if the average monthly water usage per customer in Eagle Woods is 4,000 gallons, the commodity charge that Osage must pay for that water will be nearly \$15.48 per month. This leaves less than \$1 per month in water revenues per customer from this subdivision to cover all other expenses. If a customer uses more than 4,000 gallons in a month, Osage will be paying more for the water than it can charge the customer.

B. Public Counsel does not know whether Environmental can fulfill its obligations under the proposed contract.

6. At the evidentiary hearing in this case, Environmental presented evidence that it did not yet own the Golden Glade well. Rather, the evidence presented established that Greg and Debra Williams, who are the sole principals of Environmental, own the well as their private property. [Ex 1, Direct Testimony of Debra Williams, at pp. 4, 6.] The Williamses expressed their intent to transfer title to the well to Environmental upon the granting of a certificate. However, the record contains no information which suggests that the well has been conveyed to date. Only if Environmental owns the well can it fulfill its obligations under the contract.

C. Do the signatories to the contract have the authority to bind the companies to the agreement or to enforce the agreement?

7. The proposed agreement is signed by Debra Williams on behalf of Environmental and William "Pat" Mitchell on behalf of Osage. Debra Williams is a principal and manager of Environmental. She therefore probably has the authority to bind Environmental to the agreement. However, it is less clear whether Mr. Mitchell has the authority to bind Osage.

8. When Environmental applied for a certificate of convenience and necessity to provide water service to Golden Glade subdivision in August of 2001, it claimed that Osage was not applying for the certificate due to internal problems in the company. According to testimony previously presented in this case, Mr. Mitchell abandoned Osage Water Company in July 2001, and declined to participate further in managing the company. [Ex. 1, p. 3]. Now Environmental has presented the Commission with an agreement signed by Mr. Mitchell on behalf of Osage Water Company. This raises serious questions regarding who will be responsible for enforcing the water agreement on behalf of Osage, especially in view of other events which have occurred in the past few weeks.

9. On September 3, 2002, Greg and Debra Williams sent, via Fax, a copy of a signed statement to the Public Service Commission, which has been made available to Public Counsel. That document, which is addressed to William P. Mitchell, President, Osage Water Company, states:

"Please be advised that Gregory D. Williams does hereby resign as a director and as registered agent for Osage Water Company, and that Debra Williams hereby resigns as a director and as secretary for Osage Water Company."

The notice is signed by both Greg and Debra Williams." [Attachment 1.]

10. On or about August 15, 2002, Debra Williams, as trustee of a "Future Advance Deed of Trust" on property belonging to Osage, published her intent to sell the assets of Osage Water Company "on the court house steps" in Camden County. Ms. Williams claimed that Osage had defaulted on a promissory note executed in favor of her husband, Greg Williams. Neither Osage nor either Mr. or Ms. Williams had sought Commission approval to encumber the assets of Osage as security for this promissory note, as required by Sec. 393.200 RSMo (2000). As a result, any attempted transfer should be void and the parties to the attempted transfer may be criminally liable. See Sec. 393.220 RSMo. For this reason, the Commission sought and obtained a temporary injunction preventing this sale on September 10, 2003. [See, Camden County Circuit Court Case No. CV102-627CC.] Public Counsel is unaware of whether the Court has set a date for a permanent injunction hearing. In addition, it appears that Osage has been administratively dissolved. [Id., *Petition for Declaratory Judgment and Injunctive Relief*, at p. 4.] This information should be considered in determining whether Mr. Mitchell has the authority to bind Osage Water Company or the power to enforce an agreement on behalf of Osage.

D. The proposed agreement is detrimental to the public interest, that is, to the interest of the customers of Osage Water, especially those who live in the Eagle Woods subdivision.

11. Several provisions of this agreement are detrimental to the interests of the customers of Osage Water. These customers are "the public" which the

Commission must consider in determining whether to accept the proposed water supply agreement and grant a certificate. These customers will be harmed if Osage is required to comply with the terms of this agreement. In addition to the financial difficulty that this contract will create for Osage (see discussion at part A, *supra*) there are other provisions of the contract which Public Counsel concern believes are detrimental to the public interest.

12. Numbered paragraph (3) of the agreement provides that Environmental may "discontinue the provision of water service" to Osage "in the event that any bill for service is not paid in a timely manner in accordance" with the Commission's Utility Billing Practices. According to the terms of the agreement, water service will not be reinstated until "all sums due and owing from OWC to Env. Util. are paid in full, and a deposit for one (1) month's average usage by OWC is deposited with Env. Util." The provisions continues by stating that if "any bill remains unpaid for a period longer than sixty (60) days, Env. Util. may terminate this agreement upon ten (10) days written notice to OWC."

13. While in an arms' length transaction, these provisions may be perfectly acceptable, this proposed agreement is NOT an arms' length transaction. Although Debra Williams has resigned as Director and Secretary of Osage Water Company, there is nothing in the record to suggest that she has resigned as **manager** of Osage. It was while Debra was manager of Osage that Osage allegedly "defaulted" on the promissory note held by Greg Williams. This alleged "default" is the event which triggered Debra's decision to foreclose on Osage as trustee of the Future Advance Deed of Trust. Debra Williams has an ownership

interest in the well which will be supplying the water, presumably through her position as a principal of Environmental. The Commission should consider the possibility that she could induce a breach of the agreement on behalf of Osage in order to obtain more favorable contract terms for Environmental. Any agreement which this Commission approves should remove payment discretion from Debra Williams.

14. Numbered paragraph (4) contains another provision of the proposed agreement which is detrimental to the public interest. This paragraph places the burden of notifying Osage customers of any service interruptions or special handling orders regarding the water on Osage. Again, because it is unclear who is in charge at Osage, it is unclear whether Osage is able to perform this duty under the agreement.

15. Numbered paragraph (6) of the agreement presents similar troubling language in the context of the duty of Osage to keep its lines in repair, and providing for the discontinuance of service in the event of "excessive water leaks". This term is not defined in the agreement and is highly subjective. Again, this is not an arms' length transaction. The confusion regarding who is in charge at Osage, and who is responsible for performing its duties, creates a substantial risk of public detriment. In addition, the cost of water to Osage under the agreement leaves no funds available to make any necessary repairs.

16. Numbered paragraph (8) provides for the termination of the agreement, without cause, upon six months written notice. This is too short a period of time to allow Osage to obtain an alternative water supply.

17. The proposed agreement does not indicate whether the right to receive water is transferable in the event that Mr. Mitchell, who signed the agreement on behalf of Osage, refuses to resume his involvement with the company and its operations, or if the company is sold. This poses a potential detriment to the public interest as well.

18. The condition precedent to issuing a certificate of convenience and necessity to Environmental was that Environmental enter into a **wholesale** agreement to provide water service to Osage. The price for water under the proposed agreement is the price which Osage Water is allowed to charge **retail** customers with a 2" water main. Although Environmental does not yet have tariffs which are filed and effective, it is Public Counsel's understanding that the initial tariffs Environmental plans to file include a rate schedule similar to Osage's Rate Schedule W-1, which provides a schedule of **retail** rates. Because the "water supply agreement" is a retail agreement, rather than a wholesale agreement, it should be rejected by the Commission.

CONCLUSION

In her dissent from the Report and Order conditionally granting a certificate in this case, Commissioner Murray stated, "I am convinced, however, that today's decision will serve only the interests of the Applicant and the principals of OWC." The actions of the Applicants and the principals of Osage since the date of the Report and Order have shown her to be correct. The only condition precedent placed on Environmental at the time the Order issued was to

enter into a **wholesale** water agreement with Osage to provide water service to Eagle Woods subdivision. The agreement proposed is not a wholesale agreement from the perspective of Osage. It is a **retail** water agreement. The cost of the water under the contract is excessive given Osage's allowed rates under its current tariffs. Given the true identities of all natural persons involved in this transaction, it would be imprudent of this Commission to approve this agreement, as it would amount to pre-judging the prudence of Osage's acceptance of this agreement in the next rate case. The cost of the water supplied under this agreement will cause in a detriment to the public interest.

While all of Public Counsel's objections raise issues relevant to a discussion of a possible receivership for Osage Water, this certificate case is not the proper forum in which to make that decision.

WHEREFORE, for the reasons set forth above, Public Counsel respectfully asks this Commission to reject the proposed Water Supply Agreement and decline to issue a certificate of convenience and necessity to Environmental Utilities until after it submits a proper wholesale water agreement with Osage Water Company to this Commission, and receives Commission approval of that agreement.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 
M. Ruth O'Neill (#49456)
Assistant Public Counsel
P O Box 7800
Jefferson City, MO 65102
(573) 751-5565
(573) 751-5562 FAX
roneill@ded.state.mo.us

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 20th day of September 2002:

GENERAL COUNSEL

Missouri Public Service Commission
P O Box 360
Jefferson City, MO 65102

GREGORY D. WILLIAMS

Highway 5 at Lake Road 5-33
PO Box 431
Sunrise Beach MO 65079

PRESIDING COMMISSIONER

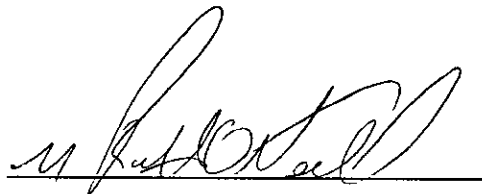
Camden County Courthouse
1 Court Circle
PO Box 960
Camdenton MO 65020

LORAIN & ASSOCIATES

Thomas E Loraine
4075 Highway 54
Suite 300
Osage Beach MO 65065

MISSOURI DEPARTMENT OF NATURAL RESOURCES

205 Jefferson Street
Jefferson City MO 65101



GREGORY D. WILLIAMS
ATTORNEY AT LAW
HIGHWAY 5 AT 5-33
P. O. BOX 431
SUNRISE BEACH, MO 65079

Received 9/3/02
W/S Dept.
[Signature]

573 / 374-8761

FAX 573 / 374-4432

September 3, 2002

Mr. William P. Mitchell
President
Osage Water Company

FAX: 346-0040

Re: Resignation of Officers and Directors

Dear Mr. Mitchell:

Please be advised that Gregory D. Williams does hereby resign as a director and as registered agent for Osage Water Company, and that Debra Williams hereby resigns as a director and as secretary of Osage Water Company.

Sincerely yours,

[Signature]
Gregory D. Williams

[Signature]
Debra J. Williams