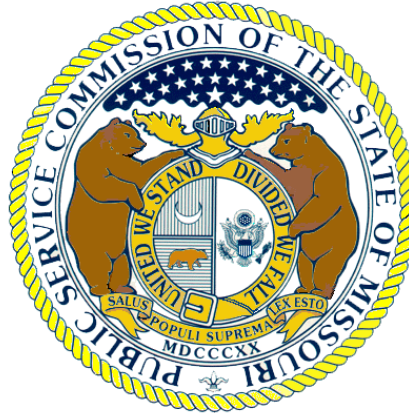


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

SECOND REPORT AND ORDER

Issue Date: April 10, 2003

Effective Date: April 20, 2003

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Water System for the Public Located in Unincorporated)
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Subdivision).)

APPEARANCES

Gregory D. Williams, Attorney at Law, Highway 5 at 5-33, Post Office Box 431, Sunrise Beach, Missouri 65079, for Environmental Utilities, LLC.

M. Ruth O'Neill, Legal Counsel, Office of the Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel and the public.

Victoria Kizito, Assistant General Counsel, and **Keith R. Krueger**, Deputy Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Morris L. Woodruff**

SECOND REPORT AND ORDER

SUMMARY

Environmental Utilities, LLC, applied for a certificate of convenience and necessity authorizing it to provide water service to a developing subdivision in Camden County, Missouri. The Commission approved that application in a Report and Order issued on June 27, 2002 but indicated that a certificate would not be issued until Environmental Utilities formalized arrangements to provide wholesale water to an adjoining subdivision. In

this Second Report and Order, the Commission finds that Environmental Utilities has made the necessary arrangements and issues the appropriate certificate. The Commission also approves the operating tariff submitted by Environmental Utilities.

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 Commission in making this decision has considered the positions and arguments of all of the parties. 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.

Procedural History

On August 6, 2001, Environmental Utilities, LLC, filed an application for a certificate of convenience and necessity to construct and operate a water system to serve the Golden Glade subdivision in an unincorporated portion of Camden County, Missouri. In a Report and Order issued on June 27, 2002, the Commission approved Environmental Utilities' application. However, that Report and Order indicated that the Commission would not issue a certificate to Environmental Utilities until it proved to the Commission's satisfaction that it had made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water's customers in the adjoining Eagle Woods subdivision.

On September 1, 2002, Environmental Utilities issued a tariff that would establish rules for the provision of service in the requested service area. That tariff carried an effective date of October 1, 2002. Thereafter, on September 11, Environmental Utilities

filed a Notice of Water Supply Agreement. Along with that notice, Environmental Utilities filed a Water Supply Agreement between Osage Water and Environmental Utilities. That agreement indicates that it was executed on September 1, 2002, and was signed by William P. Mitchell as president of Osage Water.

On September 12, the Commission issued an order directing its Staff to file a recommendation regarding whether the Water Supply Agreement submitted by Environmental Utilities satisfied the requirements for issuance of a certificate established in the Commission's June 27, 2002 Report and Order. The Commission directed Staff to file its recommendation no later than September 20, and directed any other parties wishing to make a recommendation do so by the same date.

Staff filed its recommendation on September 20, and the Office of the Public Counsel and Hancock Construction Company also filed timely recommendations. All three parties argued that the supply agreement did not satisfy the requirements of the June 27, 2002 Report and Order.

On September 24, the Commission issued an order suspending Environmental Utilities' tariff until January 29, 2003, and scheduling a prehearing conference. At the prehearing conference, held on October 9, the parties agreed that the issues before the Commission were legal rather than factual and that a further hearing was not necessary. The parties instead proposed a briefing schedule to permit them to present the legal issues to the Commission for determination.

The Commission adopted the proposed briefing schedule on October 16, 2002, and the parties filed initial and reply briefs in November 2002. After reviewing the parties' briefs, the Commission issued an order finding that additional evidence was necessary before the

Commission could make a decision about Environmental Utilities' compliance with the June 27, 2002 Report and Order. The Commission scheduled an additional hearing on February 19, 2003, and gave the parties the opportunity to file additional testimony. At the same time, the Commission further suspended Environmental Utilities' tariff until July 29, 2003.

The additional hearing was held on February 19. Staff and Public Counsel offered testimony. Environmental Utilities did not present any additional testimony but did appear and participate at the hearing. Staff, Public Counsel, and Environmental Utilities filed additional briefs after the hearing. Hancock Construction did not appear for the hearing and did not file an additional brief.

The Wholesale Water Agreement

In its June 27, 2002 Report and Order the Commission found that Environmental Utilities should be certified to provide regulated water service to the Golden Glade subdivision. However, the Commission also found that the Golden Glade subdivision would not, by itself, provide Environmental Utilities with enough customers to be financially viable. The Report and Order, however, recognized another potential source of customers for Environmental Utilities; the neighboring Eagle Woods subdivision, which receives regulated water service from Osage Water. The Commission found that Environmental Utilities would be financially viable only if it was able to make formal arrangements to sell wholesale water to Osage Water for resale to the residents of Eagle Woods.

In its Report and Order of June 27, 2002, the Commission directed that it would not issue the certificate of convenience and necessity that it had granted to Environmental Utilities until Environmental Utilities "files a pleading proving to the satisfaction of the

Commission that it has made arrangements to provide wholesale water to Osage Water Company for the use of Osage Water Company's customers in Eagle Woods."¹ The Commission did not specify any particular means by which Environmental Utilities should make those arrangements. Environmental Utilities chose to meet that requirement by entering into a contract with Osage Water.

The contract between Osage Water and Environmental Utilities was executed on September 1, 2002, and was signed for Osage Water by William P. Mitchell, president of that company. Debra J. Williams signed as manager for Environmental Utilities. At that time, Osage Water was still a corporation in good standing. However, on September 4, Osage Water's corporate existence was dissolved by the Missouri Secretary of State for failure to comply with the Secretary of State's requirements. Osage Water is still administratively dissolved.

The Commission's Staff, and other parties, argued that the September 1 contract was inadequate because it (a) does not contain a provision to bind successors and assigns to the agreement, (b) does not contain a provision for adjustment of the rate charged for water in accordance with the ratemaking procedure of the Commission, and (c) does not bind the parties to the contract for a period of at least five years.² Staff's initial brief regarding the water supply agreement indicates that at a prehearing conference on October 9, in response to these arguments, Environmental Utilities provided the other parties with a copy of a draft of a modified water supply agreement that responded to the criticisms of Staff. Staff attached a copy of this draft to its initial brief, and also attached it to the proposed procedural schedule it filed on October 15. Staff indicated that this modified

¹ Report and Order, Ordered Paragraph 1, Page 29.

² Staff's Initial Brief Regarding Water Supply Agreement, Page 3

agreement would satisfy its objections to the contract. However, Staff argued that while the modified agreement would be acceptable, Osage Water could not enter into such an agreement because it has been administratively dissolved by the Missouri Secretary of State.

Significantly, Environmental Utilities has never offered this modified water supply agreement to the Commission as proof that it has satisfied the Commission's requirement that it make arrangements to provide wholesale water to Osage Water. Indeed while the copy of the agreement provided by Staff is signed, the record does not clearly indicate whether this modified contract has, in fact, been executed by the parties. Instead of relying on the modified contract, Environmental Utilities argues that the proposed modifications to the agreement that it presented to the other parties at the October prehearing conference are merely cosmetic changes. According to Environmental Utilities, the original September 1 contract is adequate to meet the Commission's requirements.³

Staff responds that the September contract is inadequate for three reasons. First, Staff points out that the contract does not contain a provision to bind successors and assigns to the agreement. Staff contends that such a provision should be added to the contract. However, as Environmental Utilities points out, contract rights are generally assignable unless there is a provision in the contract restricting its assignability, or the assignment would violate some statutory provision.⁴ The contract between Osage Water and Environmental Utilities does not contain any provision limiting its assignability and there is no provision of statute that would restrict its assignment. Therefore, there is

³ See. Applicant's Reply Brief Regarding Water Supply Agreement.

⁴ 6 Am. Jur. 2d *Assignments* §17.

nothing to prevent the assignment of the contract by either Osage Water or Environmental Utilities to another entity. As a result, the revision proposed by Staff is unnecessary.

Staff's second concern is that the September 1 contract does not contain a provision that would allow for the modification of the rates paid for water to match any future rate changes ordered by the Commission. Staff indicates that the rate established in the contract is consistent with the tariff that Environmental Utilities has proposed. However, it argues the contract should also contain a provision providing for the adjustment of the rate to match any rate changes ordered by the Commission in a future rate case. Staff argues that if such a provision is not added to the contract, Environmental Utilities could be locked into a contract with inadequate rates.

Environmental Utilities cites a 1912 case, State ex rel. St. Joseph Water Co. v. Geiger,⁵ for the proposition that the Commission has the authority to modify the rates set out in a contract simply by establishing a new rate for Environmental Utilities. From this, Environmental Utilities argues that the modification proposed by Staff is unnecessary. Unfortunately for Environmental Utilities' argument, the holding in the Geiger case was specifically overruled a few years later in State ex rel. St. Joseph Water Co. v. Eastin et al.⁶ In that case the Missouri Supreme Court rejected its previous holding and found instead that a regulatory change could not be used to invalidate an otherwise valid private contract between a water utility and its customer. Thus, Staff is correct that the contract could continue to bind Environmental Utilities and Osage Water after a rate change.

However, the binding effect of the contract is important only if Staff's third objection to the September 1 contract is valid. Staff argues that the contract should be for a term of

⁵ 154 S.W. 486, 246 Mo. 74 (1912), cert dismissed 235 U.S. 694, 35 S.Ct. 208, 59 L.Ed. 430, (1914).

⁶ 192 S.W. 1006, 270 Mo. 193 (1917).

at least five years so that Environmental Utilities will be assured of a long-term source of revenue. The five-year term requirement is entirely a creation of Staff. The Commission's June 27, 2002 Report and Order does not include any such requirement. Paragraph 8 of the September 1 contract simply provides that the contract will continue in force until either party terminates it, "without cause, upon six (6) months written notice to the other." Obviously, if either party can terminate the contract with six months' notice, there is no reason to be concerned that Environmental Utilities will be bound to a particular rate.

While the fact that the contract can be easily terminated eliminates Staff's second concern, it does not resolve Staff's third concern. A short-term contract that can be canceled with six months' notice does not ensure Environmental Utilities of a long-term source of revenue. However, this concern is alleviated by the fact that Osage Water has no other practical source of water for its customers in the Eagle Woods subdivision.⁷

Osage Water intends to utilize Environmental Utilities' well to provide water service to its customers. Indeed, the well was originally built for that purpose and the customers in Eagle Woods are currently receiving water from that well. However, since the current owners of the well, Greg and Debra Williams, as individuals, do not have a certificate of convenience and necessity to provide that water, they are not being paid for the water that is flowing from the well.⁸ Even if Osage Water were to decide to terminate the contract or, more likely, it were to cease to do business, Osage Water, or whatever entity is providing water to the customers in Eagle Woods will have no practical choice but to obtain water from Environmental Utilities' well. Therefore, Environmental Utilities will continue to receive

⁷ See. Testimony of Dale Johansen, Transcript pages 618-620.

⁸ Transcript page 618, Lines 13-18.

revenue from the sale of that water, meaning that the term of the formal contract between Environmental Utilities and Osage Water is of little practical importance.

The contract that Environmental Utilities and Osage Water executed on September 1, 2002, is a valid contract for the purchase and delivery of water to Osage Water's customers in Eagle Woods. It establishes the price that Osage Water will pay for that water and it sets the terms by which that water will be supplied. The changes suggested by Staff might improve the contract in some respects but the changes are not necessary to satisfy the conditions established by the Commission for the issuance of a certificate of convenience and necessity to Environmental Utilities.

Since the September 1, 2002 Water Supply Agreement was executed at a time when Osage Water's corporate existence was not in question, the Commission does not need to address the issue of whether Osage Water would have the legal authority to enter into a revised contract after its corporate existence was dissolved.

Conditions Proposed by Public Counsel

In its brief filed on March 12, Public Counsel reluctantly concluded that the Commission should issue a certificate of convenience and necessity to Environmental Utilities. However, Public Counsel proposed three conditions that it recommended that the Commission impose before issuing such a certificate. First, Environmental Utilities, as manager of Osage Water, should be required to take such steps as are within its authority to correct the corporate status of Osage Water within 30 days of the effective date of this order. Second, as long as Environmental Utilities is the manager of Osage Water, Environmental Utilities should be forbidden to institute any collection proceeding, or take any action under the contract to stop providing water to Osage Water until it comes before

the Commission and shows cause that the manager of Osage Water has not acted in bad faith by withholding payment for water service. Third, that within ten days after the effective date of this order, Environmental Utilities should be required to file documentation with the Commission establishing that Greg and Debra Williams have transferred ownership of the Golden Glade well to Environmental Utilities.

All of Public Counsel's proposed conditions relate to the convoluted relationship between Environmental Utilities, its owners, Greg and Debra Williams, and Osage Water. That relationship was explained in the June 27, 2002 Report and Order and will not be further addressed. The first two conditions also relate to a fact that has been developed in other related cases, but which has not been established by any evidence in this case. That fact is that Environmental Utilities is currently serving as manager of Osage Water as a result of a management contract between the two companies.

The first condition proposed by Public Counsel can be easily dismissed because there is no reason to believe that Environmental Utilities, as manager of Osage Water, would have any authority to correct the corporate status of Osage Water. The second condition is not so easily dismissed. Public Counsel is concerned that Environmental Utilities, as manager of Osage Water, could refuse to pay Environmental Utilities, as water supplier. Environmental Utilities, as water supplier, could then use its failure to pay itself as the basis for a collection or, eventually, a foreclosure action against Osage Water.

The Commission will not formally impose the condition requested by Public Counsel because the procedure it would require would be unwieldy and because it is based on facts not in evidence in this case. But the Commission will remind all parties that it will continue

to regulate both Environmental Utilities and Osage Water and that it will not tolerate any questionable dealings that would harm either company.

The Commission will adopt Public Counsel's third condition. In its June 27, 2002 Report and Order, the Commission found that the well that Environmental Utilities will own was designed to provide service to Osage Water's customers in Eagle Woods. However, it was constructed, and paid for by Greg and Debra Williams, the owners of Environmental Utilities as individuals, and they refused to convey it to Osage Water when that company was unable to pay them for the cost of constructing the well. Greg and Debra Williams have promised to convey the well to Environmental Utilities after that entity receives a certificate of convenience and necessity. The Commission will hold them to that promise.

Environmental Utilities' Tariff

In its Recommendation and Memorandum filed on September 20, 2002, Staff indicated that the tariff Environmental Utilities filed was adequate and could be approved. Staff recommended against approval of the tariff at that time only because of its concerns about Osage Water's corporate status and the adequacy of the contract between Environmental Utilities and Osage Water. Neither Staff, nor any other party has expressed any other concern about the tariff. In this report and order, the Commission concludes that Environmental Utilities has satisfied the requirements set out in the June 27, 2002 Report and Order and will issue a certificate to Environmental Utilities. In these circumstances, the Commission will also approve Environmental Utilities' tariff.

CONCLUSIONS OF LAW

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

Environmental Utilities is a Missouri Limited Liability Company. Upon the issuance and effectiveness of the Certificate of Convenience and Necessity that it was previously granted, it will be a public utility and a water corporation as those terms are defined in Section 386.020(42) and (58), RSMo 2000. As such, Environmental Utilities will be subject to the Commission's jurisdiction pursuant to Section 386.250(3), RSMo 2000.

Section 393.170, RSMo 2000, gives the Commission the authority to grant a certificate of convenience and necessity to a water corporation. Section 393.170(3), RSMo 2000, gives the Commission authority to impose any condition or conditions on that certificate that it deems reasonable and necessary.

The Commission granted a certificate of convenience and necessity to Environmental Utilities to provide water service to the Golden Glade subdivision in its Report and Order issued on June 27, 2002. However, the Commission ordered that the certificate would not be issued, and would not be effective, until Environmental Utilities filed a pleading proving to the satisfaction of the Commission that it has made arrangements to provide wholesale water to Osage Water for the use of Osage Water's customers in the Eagle Woods subdivision. Environmental Utilities has now satisfied that precondition and the previously granted certificate will be issued and may take effect.

DECISION

After applying the facts as it has found them to its conclusions of law, the Commission has reached the following decisions:

1. That Environmental Utilities has established to the Commission's satisfaction that Environmental Utilities has made arrangements to sell wholesale water to Osage Water for the use of Osage Water's customers in the Eagle Woods subdivision.

2. That the tariff submitted by Environmental Utilities should be approved.

IT IS THEREFORE ORDERED:

1. That the certificate of convenience and necessity to provide water service to the Golden Glade subdivision granted to Environmental Utilities, LLC in the Commission's June 27, 2002 Report and Order is issued and shall become effective on the effective date of this report and order.

2. That the tariff issued by Environmental Utilities, LLC on September 1, 2002, and assigned tariff number JW-2003-0238, is approved to become effective on April 20, 2003. The tariff approved is:

P.S.C. MO No. 1

3. That not later than April 30, 2003, Environmental Utilities, LLC shall file documentation in this case file establishing that Greg and Debra Williams have transferred ownership of the well in the Golden Glade subdivision to Environmental Utilities, LLC.

4. That this Report and Order shall become effective on April 20, 2003.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Simmons, Ch., Lumpe and Forbis, CC., concur
and certify compliance with the provisions of
Section 536.080, RSMo 2000.
Gaw, C., not participating
Murray, C., absent

Dated at Jefferson City, Missouri,
on this 10th day of April, 2003.