

**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’S SUPPLEMENTAL 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 Supplemental Brief Regarding Water Supply Agreement Between Environmental Utilities, L.L.C. (“EU” or “Company”) and Osage Water Company (“OWC”) states:

Introduction

The Commission determined in its Order of June 27, 2002, that the public interest would be served by EU obtaining a certificate of convenience and necessity to provide water service to the Golden Glade subdivision. However, one element of EU’s proposal was not yet satisfied: EU’s proposal required additional arrangements to insure EU’s economically feasibility.¹ Economic feasibility, in this case, means that EU must have a sufficient number of customers such that the rates approved by the Commission will be sufficient to pay for the infrastructure and provide EU with a sufficient cash flow to maintain safe and adequate service to its

¹ Report and Order, June 27, 2002, pages 27-28.

customers. The Commission found that EU could acquire this customer base by selling water wholesale to OWC, which serves the Eagle Woods subdivision.² The Commission, therefore, placed the condition upon EU that it must enter into a legally binding contract with OWC to provide wholesale water to the Eagle Woods subdivision.³

The language of the modified contract between EU and OWC, attached to Applicant's Reply Brief Regarding Water Supply Agreement,⁴ meets the requirements of the Commission for a wholesale water contract. It should be noted that the second "whereas" paragraph of the agreement will need to reflect EU's certificate status at the time the agreement is entered into and must reflect the fact that the agreement to purchase water will take effect upon the effective date of the Commission's approval of EU's certificate application. The agreement must also reflect the actual date the parties enter into the agreement.

The only remaining issue at this time is whether OWC has the legal capacity to enter into the modified wholesale water agreement. The Staff's position throughout this proceeding has been that the Williams' Well, which currently serves Eagle Woods,⁵ is the best arrangement as a source of water for the Eagle Woods subdivision.⁶

OWC's Corporate Status

OWC's corporate status is administratively dissolved for failure to file an annual report.⁷

As An Administratively Dissolved Corporation, OWC Can Not Legally Enter Into The Modified Water Supply Agreement

² Report and Order, June 27, 2002, pages 13-14.

³ *Id.* pages 27-28.

⁴ Filed November 14, 2002.

⁵ Transcript p. 618, lines 3-18.

⁶ Transcript p. 615, lines 18-19; Transcript p. 619, lines 2-5.

⁷ Direct Testimony of Dale W. Johansen Regarding the Water Supply Agreement, January 2003, p. 3, lines 4-13.

EU and OWC entered into their original Water Supply Agreement (“Original Agreement”) on September 1, 2002, before OWC was administratively dissolved.⁸ The Commission has not approved the Original Agreement and the company has proposed a modified agreement to the Commission “Modified Agreement.”⁹ The Modified Agreement contains the three changes based on Staff’s recommendations, plus a fourth change: 1) addition of a provision to bind successors and assigns to the Agreement; 2) addition of a provision for adjustment of the rate charged for water in accordance with the ratemaking procedure of the Commission; 3) change in the term of the agreement from one that can be terminated by either party at any time with six months notice, to one that binds the parties for a period of at least five years; and 4) addition of a “whereas” clause which references the Original Agreement.

At common law, valid modification of a contract constitutes making of a new contract.¹⁰ Therefore, in order to modify the Original Agreement, EU and OWC must execute a new agreement. However, OWC is not authorized at this time to execute the Modified Agreement. Pursuant to Section 351.486(3) RSMo 2000, an administratively dissolved corporation 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. The revisions to the Original Agreement constitute material changes and a new long-term obligation on behalf of OWC for a minimum of five years.

EU argues in its Reply Brief Regarding Water Supply Agreement that the proposed changes are not really changes, and therefore, entering into the Modified Agreement does not exceed the scope of authority held by an administratively dissolved corporation. EU argues that

⁸ EU’s Notice of Water Supply Agreement, filed September 11, 2002.

⁹ Appendix A to Staff’s Initial Brief, filed November 4, 2002.

¹⁰ *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.

the first and second revisions are implicit in the Original Agreement and are not actually revisions.¹¹ EU argues that the third change is “implicit” in Missouri law because of a certificated water corporation’s obligation to provide service. However, the courts characterize it differently: a provision in a contract is *superceded* by a tariff,¹² or *void* when in conflict with the tariff.¹³ Nevertheless, EU rebuts its own argument that an indefinite term of the contract is implicit when EU points out that it believes OWC obviously “has the alternative of constructing its own water supply source, or of purchasing water elsewhere.”¹⁴ At a rate for water that is higher than OWC can currently charge its own customers,¹⁵ OWC will be exploring its alternatives.

The absence of the first three provisions from the Original Agreement (a fixed rate, no clause to bind successors and assigns, and the ability to terminate the agreement upon six months notice at any time and for any reason) simply shows that EU and OWC were not thinking long-term. Clearly, the first three revisions are material changes to the obligations of the parties under the Original Agreement. According to the Original Agreement, OWC or EU could have given the other party six months notice to terminate the agreement, and the agreement could have already terminated as of March 2, 2003. Staff and OPC agreed that the first three revisions would be necessary so the contract would bind the parties for a period that would reasonably insure EU’s opportunity to become an economically viable service provider.

¹¹ Applicant’s Reply Brief Regarding Water Supply Agreement, filed November 14, 2002, pp. 5-6.

¹² May Department Stores Co. v. Union Electric Light & Power Co., et al., 107 S.W.2d 41, 57 (1937). State ex rel. Missouri Gas & Electric Service Co. v. Trimble, et al., 271 S.W. 43 (1925). The Geiger case cited on page 5 of Applicant’s Reply Brief Regarding Water Supply Agreement cannot be relied upon. The court in May, cited above, states that rates established by the Commission supercede contracts without specific adjudication by the Commission upon any contract. May at 57.

¹³ State ex rel. Missouri Gas & Electric Service Co. v. Trimble, et al., 271 S.W. 43, 61 (1925).

¹⁴ *Id.* at p. 2.

¹⁵ Recommendation of the Office of the Public Counsel to Reject Proposed Agreement and Response to Motion Filed By Hancock Construction Company, pp. 3-4.

Over six months have passed since OWC failed to meet its corporate obligations to the state. EU provided the Commission with no facts regarding its corporate status in response to the Commission's order of December 19, 2003. There is no basis for the Commission to conclude that OWC will obtain, or even that it will seek to obtain, reinstatement. The PSC has no power to remedy OWC's failure.

EU also argues in its Reply Brief Regarding Water Supply Agreement that a water supply agreement is necessary and essential to OWC's provision of water utility service and therefore OWC is authorized, even as an administratively dissolved company to enter into. As discussed above, the Revised Agreement goes far beyond what OWC might argue is necessary or essential to meet its obligation to provide water and sewer service to its customers while it is only authorized to wind up and liquidate its business and affairs and notify claimants. The Revised Agreement is designed to allow a fledgling company to establish economic viability.

Red Herring Arguments

The Staff anticipates that EU may offer several arguments to lead the Commission astray from the real issue in this case:

- 1. EU may assert that the Commission has a duty to provide OWC with access to a state-approved well.¹⁶**

The Commission has no such duty.

Further, EU asserted that OWC has alternatives available to it: "[o]bviously OWC has the alternative of constructing its own water supply source, or of purchasing water elsewhere."¹⁷

¹⁶ Transcript. p. 610, lines 8-22.

¹⁷ Applicant's Reply Brief Regarding Water Supply Agreement, November 4, 2002, page 2.

OWC presently obtains water from the so-called Williams' Well, owned by the Williams.¹⁸ EU also points out that it has provided the Commission with no factual information from which the Commission could determine what the cost-effective alternatives to the Agreement are.¹⁹

2. EU may assert that OWC has the authority to enter into contracts to meet its obligation to continue to provide water service to its certificated customers despite the administrative dissolution statute.

The Staff agrees that, despite the restrictions imposed by the law of administrative dissolution, a public utility has a continuing obligation to provide water service to its certificated area.²⁰ Even when a utility applies to the Commission to cease providing service, the Commission has held that the utility must continue service for a reasonable amount of time in which effected customers could make alternative arrangements for water service.²¹ While no case law sets out the obligations of a public utility to continue service after it has been administratively dissolved, the Commission cannot sensibly put its stamp of approval on a contract that, for OWC is considered the winding up of its affairs, and for EU establishes the Company's opportunity to obtain long-term economic feasibility.

3. EU may assert that the original Water Supply Agreement²² meets the Commission's condition that EU enter into a wholesale water agreement with OWC.

As Staff argued earlier on page 4 of this brief and in its Staff Recommendation,²³ material changes to the Agreement are necessary to ensure the long-term duration of the Agreement.

¹⁸ Transcript. p. 618, lines 7-15.

¹⁹ Applicant's Reply Brief Regarding Water Supply Agreement, November 14, 2002, p. 2.

²⁰ Transcript p. 609, lines 16-21.

²¹ Carpenter et al. v. Johnston, et al., 2 Mo. P.S.C. (N.S) 63 (1949).

²² EU's Notice of Water Supply Agreement, filed September 11, 2002.

4. “Evidence”

EU had the opportunity to present evidence in the current phase of this proceeding. Yet, EU choose not to do so. To the extent EU bases its arguments on the legal conclusions testified to, over the objections of the Staff, by Staff’s expert witness on issues clearly beyond the expert’s expertise, the Commission should give the arguments the minimal weight they are due.

WHEREFORE, the Staff requests that the Commission: 1) approve the language of the Water Supply Agreement, attached as *Appendix A* to Staff’s Initial Brief, with the following amendments: a) the second “whereas” paragraph must accurately reflect the status of EU’s certificate application status; b) the obligation to purchase water shall take effect upon the effective date of the Commission’s approval of EU’s certificate application; and c) the Revised Agreement must reflect the actual date the parties enter into the agreement; 2) that the Commission not find that EU has not satisfied the condition of a water supply agreement until EU shows the Commission that OWC has reinstated its corporate status and that EU has executed and filed with the Commission the agreement signed by persons authorized to sign on behalf of OWC and EU; 3) that EU shall have met the foregoing requirement by July 29, 2003, the date to which EU’s tariff is suspended;²⁴ and 4) if EU cannot meet the foregoing requirement by July 29, 2003, that the Commission deny EU’s application for a certificate of convenience and necessity.

²³ Staff Recommendation, filed September 20, 2002, pp. 2-4.

²⁴ Order Finding that Additional Factual Issues Must Be Addressed, Ordering the Parties to Submit Testimony, Scheduling Hearing, and Further Suspending Tariff, December 19, 2002.

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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 12th day of March 2003.

/s/ Victoria L. Kizito
