

**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 REPLY 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 Reply Brief Regarding Water Supply Agreement Between Environmental Utilities, L.L.C. (“EU”) and Osage Water Company (“OWC”) states:

**Staff’s Response to OPC’s Initial Brief**

In its Report and Order of June 27, 2001, the Commission granted EU a certificate of convenience and necessity upon a number of conditions. The primary remaining condition to be met is for “ Environmental Utilities to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water’s customers in the Eagle Woods subdivision before granting a certificate.” In its Initial Brief regarding the water supply agreement, the Office of the Public Counsel (“OPC”) concurs that the primary purpose of the agreement is that, due to the small number of customers in the Golden Glade proposed service territory, EU’s proposed service would only be economically feasible if EU could sell water on a wholesale basis to OWC

for the purpose of servicing Osage customers in the Eagle Woods Territory. Yet, OPC's arguments against the agreement go beyond the terms of the agreement and its recognized purpose. OPC asserts that the revised water supply agreement does not meet the requirements of the Report and Order in this case in that it represents an imprudent business decision by OWC. OPC also explains the apparent conflict of interests between the owners of, and in the management of, OWC and EU.

Although the Staff certainly shares the concerns expressed in OPC's brief, the Commission has already considered many of these concerns and determined that the public interest is served by issuing EU a certificate under certain conditions. Whether OWC negotiated "arms-length" with EU, or whether the agreement is in the best interest of OWC's customers, is not a question for the Commission at this juncture. The issue at this juncture is only whether the revised water supply agreement serves the purpose of contributing to the economic feasibility of EU's service proposal. The terms of the revised water supply agreement do in fact serve that purpose.

Arguably, the Commission might reason that the agreement is not sustainable by OWC because the water rate is too high under the circumstances,<sup>1</sup> and therefore, the agreement will not contribute to the economic feasibility of EU's proposed service. However the Staff submits, again, that the scope of the question before the Commission regarding the water supply agreement must be limited to the question of whether EU has fulfilled its obligation "to establish arrangements to sell wholesale water to Osage Water Company for the use of Osage Water's

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<sup>1</sup> EU charges OWC its tariffed rate for water, but per the terms of the agreement, OWC is still responsible for the cost of billing, collection, customer response, meter reading, distribution system maintenance, lost water and flushing. These responsibilities are generally performed in consideration of the tariffed rate, but according to the proposed water supply agreement, OWC will still perform these responsibilities.

customers in the Eagle Woods subdivision... .”<sup>2</sup> If the Commission determines that EU has negotiated such an agreement in EU’s interest, EU and OWC validly execute such an agreement by persons authorized to sign on behalf of EU and OWC, and file it with the Commission, then the Commission must find that the condition regarding a water supply agreement has been met.

### **Staff’s Response to Hancock Construction Company’s Initial Brief**

In its Brief, the Hancock Construction Company asks the Commission to find “that this wholesale contract is not in “arms length” transaction. As the Staff discusses in response to OWC’s initial brief, the question for the Commission’s determination is whether EU has provided the Commission with language for an agreement with OWC to sell water, on a wholesale basis, to OWC to serve Eagle Woods. The questions are not before the Commission of whether OWC is capable of negotiating at arms-length with EU, whether OWC is capable of enforcing the agreement, or whether the agreement will “hasten the demise of OWC.”<sup>3</sup>

In its Brief, the Hancock Construction Company asks the Commission to find that approval of the water supply agreement “should not be allowed pending the outcome of WC 2003-0134...”<sup>4</sup> The Staff believes that any concern over the outcome of the Staff’s complaint case against OWC for appointment of a receiver is addressed by the provision in the revised water supply agreement that binds the “successors and assigns” of the parties to the agreement.

Under the heading “[I]s the applicant’s proposal economically feasible,” the Hancock Construction Company provides a discussion of eight “factual issues.” The Commission already determined in its Report and Order of June 27, 2002, that EU’s proposal was economically

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<sup>2</sup> Commission’s Report and Order of June 27, 2001, at page 28.

<sup>3</sup> Hancock Initial Brief at page 8.

<sup>4</sup> Hancock Initial Brief at page 3.

feasible, upon the condition (among others) that EU provides the Commission with a valid water supply agreement with OWC for service to Eagle Woods.

The Hancock Construction Company asserts in its initial brief that EU has not obtained the required construction permit and permit to dispense from the Department of Natural Resources (“DNR”). This issue was addressed at the hearing and in the Commission’s Order. Staff witnesses Dale Johansen and Jim Merciel testified at the hearing that the necessary construction permits from DNR for water systems serving Golden Glade were obtained.<sup>5</sup> DNR has given OWC temporary approval to interconnect its system with the Golden Glade Well under the condition that water testing is conducted. To Staff’s knowledge, either EU or Greg Williams applied for the necessary permit to dispense, and DNR is ready to issue a permit to dispense to the appropriate party after EU is granted its certificate of convenience and necessity.

The Staff believes that OWC may still be required by DNR to acquire a separate permit to dispense to provide service under the revised water supply agreement.

### **Staff’s Response to Applicant’s Initial Brief**

In its Initial Brief Regarding Water Supply Agreement, Applicant asks the Commission for an award of its attorney’s fees and expenses incurred in this matter. The Commission does not have authority to award attorney’s fees in this matter

### **FURTHER ISSUE**

In its Initial Brief, the Staff intended to note the second “whereas” paragraph of the revised water supply agreement must be changed to accurately reflect EU’s certificate application status at the time the agreement is executed.

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<sup>5</sup> Transcript page 414, lines 9-11, page 316, lines 17-25; Report and Order of June 27, 2002 page 17.

## **NEW DEVELOPMENTS**

This morning the Staff received a facsimile transmittal, attached hereto as *Appendix A*, which was faxed over the holiday weekend to the Staff by Ron Westenhaver of Summit Investment, L.L.C. The correspondence appears to be an attempt by OWC to return the water and sewer systems serving Eagle Woods Subdivision to the Eagle Woods Homeowner's Association, Inc., and to quit claim the sewerline and waterline easements serving the Eagle Woods Subdivision to Eagle Woods Homeowner's Association, Inc. The correspondence also expresses OWC's intent to terminate the operation and maintenance of said water and sewer lines and effluent lift stations associated therewith. OWC has not sought Commission approval for any of these transactions or for the termination of services.

The Staff has not had time to investigate this situation or to determine the possible ramifications regarding the revised water supply agreement. Therefore, the Staff recommends that the Commission not approve the water supply agreement or grant EU's application for a certificate of convenience and necessity until the parties are able to further advise the Commission of any effect these new developments may have on the revised water supply agreement.

**WHEREFORE**, the Staff requests that the Commission not approve the revised water supply agreement or grant EU's application for a certificate of convenience and necessity until the parties further advise the Commission of any effect the new developments may have on the revised water supply agreement. If and when the Commission should determine to go forward with approval of the revised water supply agreement, the Staff requests the Commission to

approve the language of the revised water supply agreement, attached as *Appendix A* to Staff's Initial Brief, with an amendment to the second "whereas" paragraph to accurately reflect the status of EU's certificate application status at the time the agreement is executed. The Staff further requests that the Commission approve the revised water supply agreement only after OWC reinstates its corporate status and EU has executed and filed with the Commission the agreement signed by persons authorized to sign on behalf of OWC and EU.

Respectfully submitted,

DANA K. JOYCE  
General Counsel

**/s/ Victoria L. Kizito**

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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 12<sup>th</sup> day of November 2002.

**/s/ Victoria L. Kizito**

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