

## **MEMORANDUM**

TO: Missouri Public Service Commission Official Case File  
Case No. WA-2002-65 - - - Environmental Utilities, LLC

FROM: Dale W. Johansen – Project Coordinator  
Water & Sewer Department  
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**/s/ Dale W. Johansen**                      **09/20/02**

Project Coordinator                      Date

**/s/ Victoria Kizito**                      **09/20/02**

General Counsel's Office              Date

SUBJECT: Staff Recommendation Regarding Wholesale  
Water Supply Agreement and Proposed Tariff

DATE: September 20, 2002

### **Background**

On June 27, 2002, the Commission issued its Report and Order in this case, in which it stated that Environmental Utilities, LLC (EU) ". . . will be granted a certificate of convenience and necessity to provide water service to the Golden Glade subdivision . . ." However, the Commission also stated that EU's certificate of convenience and necessity (Certificate) ". . . will not be issued, nor will it become effective 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 [the] Eagle Woods [subdivision]."

On August 30, 2002, EU submitted a proposed tariff as a result of the Commission's Report and Order. Upon being filed, EU's tariff was assigned Tariff Tracking No. JW-2003-0238.

On September 11, 2002, EU submitted a "Water Supply Agreement" (Agreement) under which it would supply water on a wholesale basis to Osage Water Company (OWC) for OWC's provision of retail service in its Eagle Woods service area. This Agreement is

**APPENDIX A**

intended to satisfy a condition for the issuance of a Certificate of Convenience and Necessity (Certificate) to EU, as stated in the Commission's Report and Order.

On September 12, 2002, the Commission issued an Order Directing Filing in this case, in which it directed the Staff to file its recommendation regarding the Agreement, and to address certain questions posed by the Commission regarding the corporate status of OWC. The Staff is filing this Memorandum in compliance with the Commission's Order Directing Filing. Though not specifically directed to do so, the Staff is also providing its recommendation regarding EU's proposed tariff as a part of this Memorandum, so that the Commission may consider Staff's recommendations regarding the tariff and the Agreement at the same time.

### **Staff's Review of the Tariff and the Agreement**

As noted at the beginning of this Memorandum, Staff members from the Accounting and Water & Sewer Departments participated in the Staff's review of the EU filings and related matters that are now at issue. All Staff participants, and their up-line supervisors, were provided the opportunity to review this Memorandum prior to it being filed. Jim Merciel of the Water & Sewer Department created the initial draft of this Memorandum and comments received from the reviewers were incorporated therein for the creation of this final version of the Memorandum.

### **Staff's Conclusions Regarding the Tariff**

Regarding EU's proposed tariff, the Staff believes it adequately addresses the concerns raised by the Staff in the testimony filed in this case, and thus that the tariff could be approved. The tariff bears an effective date of October 1, 2002.

### **Staff's Conclusions Regarding the Agreement**

Regarding the Agreement, the Staff has three specific areas of concern that lead to the conclusion that the Commission should determine that the Agreement is not adequate for purposes of this case. The Staff's concerns regarding the Agreement are as follows:

1. The Agreement has no provision for successors or assigns of either EU or OWC to be bound by or to the Agreement. As a result, if the assets of either party are transferred to another entity it appears the Agreement will cease. This is not practical because such a transfer of assets would not necessarily result in elimination of the need for the wholesale water supply arrangement. There is also no assurance that negotiations to continue the Agreement with a new entity would be successful.

2. Paragraph 1 of the Agreement specifies the rate of \$44.25 per month minimum charge, which would include 2,000 gallons of water, plus \$3.8701 per 1,000 gallons beyond the 2,000-gallon minimum. This rate is consistent with rates approved by the Commission's Report and Order for a customer of EU with a 2" water meter. While this rate is acceptable now, the staff believes that this paragraph should also provide for future rate changes that may be approved by the Commission. If such language is not included, then either EU could become locked into these rates, which could become inadequate at some future time, or the Agreement could be canceled by one of the parties based on outdated rates after some future rate case. There is no assurance that negotiations to revise the Agreement to include future Commission-approved rates would be successful.

3. Paragraph 8 of the Agreement provides that the Agreement may be terminated by either party, without cause, upon six (6) months notice. The Staff believes this is inadequate because EU's feasibility was premised upon wholesale service to OWC, but there is simply no assurance wholesale service would continue without a long term arrangement of some reasonable length of time, such as perhaps 5 years or more. As written, the Agreement could be terminated almost immediately after EU begins operation, defeating the purpose of this condition of certification.

On behalf of the Staff, Jim Merciel of the Water & Sewer Department contacted Greg Williams, one of the owners of EU, on September 13, 2002 and expressed the above-noted concerns to Mr. Williams. Mr. Williams stated that he would present the recommended changes to Pat Mitchell, a principal of OWC who is apparently the person who is signing contracts on behalf of OWC. Mr. Williams also indicated that, based on the effort needed to finalize the Agreement as filed, he was not sure if an agreement with the recommended changes would get signed. Based on this conversation, the Staff does not necessarily expect to see a revised wholesale agreement.

### **OWC's Corporate Status**

Regarding the current corporate status of OWC, the Staff has contacted the Missouri Secretary of State (SOS) and has been informed that OWC's current corporate status is listed as "DF - Administratively Dissolved for Failure to File an Annual Report", and that this status has an effective date of September 4, 2002. Additionally, the Staff has been informed that OWC has not filed articles of dissolution. Based on legal counsel's research, the Staff understands the following regarding this matter: (1) that OWC has sixty (60) days from the date of its administrative dissolution to file for reinstatement with the SOS; (2) that if OWC does not correct the grounds that lead to its administrative dissolution within the allowed sixty (60) days, the SOS will dissolve the company by signing a certificate of dissolution; (3) that until such time as OWC becomes reinstated, it technically does not have standing to enter into contracts, including a revision to the wholesale water supply

agreement with EU; and (4) that even though OWC's corporate existence still continues, it technically may carry on business only related to winding up its affairs and liquidating its business.

However, the Staff believes that from a practical standpoint a regulated utility that is operating and providing service to customers must continue providing such utility service, including entering into new contracts for the well being of its customers, even though it may be obligated to move toward closing its business under the provisions of corporate law. Unfortunately, due to the provisions of applicable corporate law, the Staff does not believe that it is appropriate to recommend that the Commission recognize any agreement that a utility enters while its corporate status is not in good standing. As a result, the Commission should not approve any revised Agreement between EU and OWC that the companies execute prior to OWC reinstating its corporate charter.

### **Staff's Recommendations**

Regarding the wholesale water supply agreement between EU and OWC, the Staff recommends that the Commission find that the current Agreement is not adequate to meet the requirements of the Commission's Report and Order.

Although the Staff believes that the tariff filed by EU is, in and of itself, acceptable and appropriate, if the Commission finds that the Agreement currently does not meet the requirements of the Report and Order, the Staff recommends that the tariff not be approved at this time. The basis for this recommendation is that EU has not met the requirement of entering into an acceptable wholesale water supply agreement with OWC, and therefore does not have a Certificate under which it could provide service by the terms of the tariff.

Additionally, however, the Staff recommends that the Commission consider suspending the tariff until November 30, 2002, in order to allow time for OWC to reinstate its corporate status and for EU and OWC to finalize and submit a satisfactory revised wholesale water supply agreement. If EU fails to submit an acceptable revised wholesale water supply agreement in time for the tariff to be approved and become effective by November 30, 2002, the Staff recommends that at that time the tariff be rejected, and further that this case be closed with no Certificate being issued to EU.