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November 12, 2002

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

**FILED**<sup>3</sup>  
NOV 14 2002

ATTN: Filing Desk

Re: Environmental Utilities, LLC  
WA-2002-65

**Missouri Public  
Service Commission**

Dear Judge Roberts:

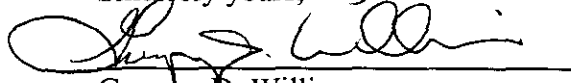
Please find enclosed for filing in the above referenced matter the original and 8 copies of the following:

1. Applicant's Reply Brief Regarding Water Supply Agreement.

A copy of the same has been mailed this date to all counsel of record.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely yours,

  
Gregory D. Williams

**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

**FILED<sup>3</sup>**

NOV 14 2002

**APPLICANT'S REPLY BRIEF  
REGARDING WATER SUPPLY AGREEMENT**

Missouri Public  
Service Commission

COMES NOW Environmental Utilities, LLC and pursuant to the Commission's Order herein  
submits the following for its Reply Brief regarding the Water Supply Agreement between  
Environmental Utilities, LLC and Osage Water Company.

**FACTUAL ISSUES**

The parties herein agreed at the Pre-Hearing Conference held herein on this issue on October 9,  
2002 that there are no factual issues regarding the Water Supply Agreement, as the document  
submitted is a contract, the terms of which speak for itself.

Notwithstanding the agreement of the parties that there are no factual issues, factual issues have  
been raised in the Initial Brief filed herein by the Office of Public Counsel and Intervenor  
Hancock Construction. While Applicant maintains that raising factual issues in a brief is not a  
proper manner in which to present evidence to the Commission and objects to the inclusion of  
factual issues in said briefs in light of the agreement of the parties at the pre-hearing conference,  
a brief response to each factual issue will be set forth herein.

1. Staff includes in its brief a reference to testimony in Case WC-2003-0134. Testimony in that  
case is not part of the record in this case, nor did Staff request that the record herein be re-  
opened to take additional testimony, nor did Staff provide a citation to the transcript in that  
case which would allow the Commission to determine whether the reference to said  
testimony in Staff's brief is accurate, nor is there any indication that the testimony referred to

was intended to relate to any issue in this case, or that it is a full and complete analysis of the situation described therein or an explanation of the impact of the corporate status of OWC on the Water Supply Agreement at issue in this case. In short, Staff has attempted to inject factual matters into this proceeding without complying with the procedural requirements of law in order to do so. The Commission should reject this improperly submitted and inadequately documented testimony from its consideration in this matter.

2. OPC submits that proposed agreement is a “retail” water contract rather than a “wholesale” water contract. OPC does not base this factual assertion on any facts set forth in the record in this case, but simply makes this assertion in its brief. In fact, the proposed agreement provides that “Osage Water Company does hereby agree to purchase water from Environmental Utilities, LLC ... for distribution and resale to customers of Osage Water Company located in its KK Service Area ...” By its terms, an agreement to sell water for resale to others is a wholesale agreement, rather than a retail agreement. Retail water service by Environmental Utilities is governed by its proposed tariff, rather than by the Water Supply Agreement.
3. OPC asserts that the Water Supply Agreement represents an “imprudent business decision by Osage Water.” This assertion is also unsupported by any reference to facts in the record of this case. Exactly why it would be imprudent for Osage Water Company to contract for a supply of water to sell to its customers is not explained in OPC’s brief. Obviously OWC has the alternative of constructing its own water supply source, or of purchasing water elsewhere. The record does not contain any factual information from which this Commission could determine that it would be more cost effective to exercise either of these alternatives. OPC’s unsupported assertion of imprudence is without merit based upon the record in this case.

4. "OPC is concerned about the water supply agreements for shutting off water to the subdivision if Osage does not timely pay the water bill to Environmental." OPC appears to have a problem with the Commission's regulations allowing, and requiring, disconnect of customers for non-payment of their water bills. The Contract provides "In the event that any bill for service is not paid in a timely manner in accordance with the Utility Billing Practices of the Missouri Public Service Commission, Env. Util. may discontinue the provision of water service ..." Exactly why OPC is concerned about Environmental Utilities conducting its business with OWC in the manner required by the Commission is unclear, but OPC's concern does not appear to be a legitimate basis for rejecting the Water Supply Agreement.
5. "Public Counsel also believes that Osage may not be able to bill its customers enough to cover the cost for the water being pumped to Eagle Woods if meters are not installed and read." There is no evidence in the record in this case which would support such a belief by OPC, nor is there anything about the proposed contract which is unreasonable or unfair. OWC has agreed to purchase water, and Env. Util. has agreed to sell it, based upon volume taken. The contract is not dependent upon OWC's retail rate, which may be adjusted by the Commission at any time, and from time to time, to reflect actual costs incurred, including, presumably, the cost of water purchased for resale.
6. Intervenor Hancock attaches to its initial brief a letter dated August 27, 2002. The letter does not appear in the record in this case, as the evidentiary hearing was completed and the record closed long before the letter was even written. As such, the letter is not part of the record in this case, and may not be considered as evidence herein.
7. Intervenor Hancock has an entire section of its Brief under the heading of "IV Factual." Therein, Intervenor makes numerous factual assertions not supported by a reference to the

record in this case. The parties agreed at the pre-hearing conference held herein that there are no factual issues to be considered by the Commission in making its determination as to whether the Water Supply Agreement complies with the requirements of the Commission's Order herein. The Commission should disregard the portions of Intervenor's Brief under the heading "IV Factual."

## **LEGAL ISSUES**

### **STAFF ISSUES**

Staff's sole legal argument in its brief is that OWC as an administratively dissolved corporation is not capable of executing the modified Water Supply Agreement under the limitations of Section 351.486(3), RSMo. Staff concedes that OWC was capable of executing the original Water Supply Agreement. It therefore is appropriate to consider what revisions were made between the original and the revised agreements, and to examine whether any of those revisions would exceed the authority of OWC while operating as an administratively dissolved corporation. For the convenience of the Commission, a "marked up" copy of the revised agreement is attached hereto within which the revisions have been underlined. The revisions are as follows:

- a. A "whereas" clause has been added which references the original agreement.
- b. A sentence was added to paragraph 1 which clarifies that the rate charged under the agreement may be modified by the ratemaking procedure of the Missouri Public Service Commission.

- c. The term of the agreement in Paragraph 8 was amended from an indefinite term terminable on 6 months notice to a term of at least 5 years, and terminable thereafter on 6 months notice.
- d. Paragraph 9 was added to clarify that the agreement is assignable by either party.

#### WHEREAS CLAUSE

Clearly the addition of a "whereas" clause to the revised agreement does not exceed OWC's capacity to act under Section 351.486(3).

#### POWER OF COMMISSION TO MODIFY RATE

The addition of a paragraph which states that the rate charged may be modified by action of this Commission simply restates the Law of the State of Missouri. Missouri Case Law States:

"In the absence of legislative action prescribing such rates, private parties may fix them by contract, and the rates so agreed upon will be upheld. However, rates so fixed by private contract remain in force only so long as the legislative body having authority in the premises refrains from the exercise of its powers. When public rates are established by law, rates fixed by private contract must yield. "State ex rel. St. Joseph Water co. v. Geiger 154 S.W. 486, 246 Mo. 74 (1913) certiorari dismissed 35 S.Ct. 208, 235 U.S. 695, 59 L.Ed. 430.

The original agreement was drafted under Missouri Law, and the power of the Commission to adjust the rate charged for wholesale water supply was implicit in the original agreement. The revised agreement simply expressly states what was implicit in the original agreement.

#### TERM OF AGREEMENT

The original agreement was for an indefinite term, terminable on six months written notice. The modified agreement provides for a minimum term of five years, after which the agreement continues indefinitely, terminable on six months written notice. The difference between the two agreements is that the parties have agreed not to terminate their obligations there under during

the first five years of the term of the agreement. Since the obligation of OWC to provide water utility service continues as a matter of Missouri Law under Section 393.130 notwithstanding an administrative dissolution, it appears implicit in Missouri Law that a water corporation may enter into such contractual arrangements during its continued corporate existence as may be necessary to carry out its obligation to provide water utility service. The modification of an existing contract of an indefinite term to reflect that the contract will not be terminated for a minimum period, which contract is necessary and essential to the provision of water utility service, would not appear to exceed the scope of authority held by an administratively dissolved water utility company under Missouri Law.

#### ASSIGNABILITY

Finally, As a matter of law any agreement is assignable, unless it expressly states that performance there under may not be assigned by one party or the other, or both. "In contract with the earlier law the modern view is emphatically to the effect that ordinarily rights are assignable." Contracts, P. 640, Calimari & Perillo (West Pub., 1970). The addition of paragraph 9 expressly stating that the agreement inures to the respective parties successors and assigns again only expressly states what was implicit in the original agreement.

#### OPC'S LEGAL ARGUMENTS

If OPC has raised any legal arguments in its Brief, they are not readily apparent to the Applicant herein.

#### HANCOCK'S LEGAL ARGUMENTS

Hancock's Brief does not contain a section identified as "Legal Arguments." Rather, it contains the "Factual" section referred to above, a "Position of Hancock" section, and a "Relief Sought by Hancock." As such, it is difficult to determine what legal arguments might support the "position

of Hancock” or the “Relief Sought by Hancock.” The “relief sought” is “that the Commission find that this wholesale contract is not in “arms length” transaction and should not be allowed pending the outcome of WC 2003-0134 to be appointed to operate OWC.” From this position statement one might reasonably conclude that Hancock agrees that the Water Supply Agreement is a “wholesale contract,” but does not believe it to be an “arms length transaction.” Exactly what portion of the agreement is objectionable is not clear, however, in Factual Issue #6 Hancock makes the statement that “Further, the contract’s paragraph 6 is an attempt to use OWC tariff generated funds to fix, repair and upgrade Gregory Williams’ Golden Glade Community Water System. This contract, using OWC tariff funds to improve and upgrade Gregory Williams’ Community Water System is an indication that this is not an “arms length” contract.” An examination of Paragraph 6 of the Contract reveals that it imposes on OWC an obligation to keep its water system within Eagle Woods in “good repair at all times” and makes it express that the water supply contemplated is “only for normal residential purposes to not more than fifty-three (53) homes in the Eagle Woods development.” The Contract further allows for termination of supply to Eagle Woods in the event that excessive leaks or other high volume usages occur which would disrupt Environmental Utilities ability to provide retail water service within Golden Glade. Exactly how the limitation on supply set forth in Paragraph 6 of the contract, both original and as revised, would render the agreement unfair to OWC is not clear from Hancock’s brief. There is nothing in paragraph 6 which would require OWC to use “OWC tariff funds to improve and upgrade Gregory Williams’ Community Water System” and Hancock presents no coherent explanation of this statement in its brief.

Finally, Hancock asserts in its brief that the Golden Glade Water System is a “community water system” under MDNR regulations and cannot supply water to more than 20 connections because



it is not a “public drinking water system.” Although this assertion is in the “Factual” section of Hancock’s Brief, it makes such a gross mis-statement of the MDNR Regulations that a response seems appropriate. 10 CSR 60-2.015 provides definitions pertaining to water systems under the jurisdiction of the Missouri Department of Natural Resources. 10 CSR 60-2.015(2) (C) (9) provides as follows:

9. Community water system. A public water system which serves at least fifteen (15) service connections and is operated on a year-round basis or regularly serves at least twenty-five (25) residents on a year-round basis.

Similarly, 10 CSR 60-2.016(2) (P) (4) provides as follows:

4. Public water system. A system for the provision to the public of piped water for human consumption, if the system has at least fifteen (15) service connections or regularly serves an average of at least twenty-five (26) individuals daily at least sixty (60) days out of the year. The system includes any collection, treatment, storage or distribution facilities used in connection with the system. A public water system is either a community water system or a noncommunity water system.

From these regulatory definitions one can only conclude that a “Community Water System” is a “Public Water System” under Missouri Law, because a community water system is included as one of the types of water systems which are regulated as a “public water system.” The Golden Glade water system is indisputably a “community water system” and a “public water system” under applicable MDNR regulations. The remainder of Hancock’s argument is predicated on an inaccurate characterization of the water system as not fitting within the definition of a public water system. Counsel for Hancock is either confused, or is deliberately trying to mislead the Commission regarding applicable and relevant Missouri Law. Hancock’s argument on this point should be ignored.

## **CONCLUSION**

Environmental Utilities, LLC has complied with the conditions set forth by this Commission in its Report and Order for the granting of a certificate of convenience and necessity. The

Commission should enter an Order finding that the company has satisfied its requirements, and holding that the certificate is in full force and effect. The Commission should further find that the objections to the Water Supply Agreement filed herein by Staff, OPC, and Hancock are and were without merit, and order them to pay the costs and expenses incurred by the Applicant in responding to said objections, including Applicant's attorney's fees, pursuant to Rules 55.03(b) and Rule 55.03(c).

WHEREFORE, Environmental Utilities, LLC prays for an Order of the Commission finding that the company has satisfied the conditions established by the Commission for the certificate of convenience and necessity to provide water utility service to Golden Glade Subdivision, and holding that said certificate is now in full force and effect, and for an award of its attorney's fees and expenses incurred in this matter.



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(573) 374-8761

#### **CERTIFICATE OF SERVICE**

I, Gregory D. Williams, do hereby certify that a true copy of the foregoing was on this 4<sup>th</sup> day of November, 2002, mailed, postage prepaid, to the following:

M. Ruth O'Neill  
Office of Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

Keith Krueger  
General Counsel, Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

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

  
Gregory D. Williams

## WATER SUPPLY AGREEMENT

This Agreement is made and entered into this \_\_\_\_ day of September 2002 by and between Osage Water Company, a Missouri Corporation ("OWC"), and Environmental Utilities, LLC, a Missouri Limited Liability Company ("Env. Util.").

Whereas, OWC is authorized by the Missouri Public Service Commission to provide public water utility service in an area described in its Tariff as "Eagle Woods"; and

Whereas, Env. Util. is authorized by the Missouri Public Service Commission to provide public water utility service in an area described in its Tariff as "Golden Glade"; and

Whereas, OWC does not own a public drinking water supply with which to supply the needs of its customers for water utility service in with Eagle Woods; and

Whereas, Env. Util. owns a public drinking water supply in its "Golden Glade" service area and has sufficient capacity therein with which to supply the needs of OWC for water in Eagle Woods; and

Whereas, OWC and Env. Util. did heretofore enter into a Water Supply Agreement dated September 1, 2002 and desire to modify the terms and conditions thereof to provide as set forth herein.

Now, Therefore, in consideration of the mutual covenants and agreements contained herein, the parties do hereby covenant, contract, and agree as follows:

1. Osage Water Company does hereby agree to purchase water from Environmental Utilities, LLC, and Environmental Utilities, LLC does hereby agree to sell water to Osage Water Company for distribution and resale to customers of Osage Water Company located in its KK Service Area at the rate of \$44.25 per month minimum, plus metered usage greater than 2,000 gallons per month at the rate of \$3.8701 per 1,000 gallons of usage. The rate charged for water shall be subject adjustment in accordance with the ratemaking procedure of the Missouri Public Service Commission.
2. Env. Util. agrees to furnish said water on a "best efforts" basis and shall not be liable to OWC or its customers for any interruption or termination of service, other than the deliberate and intentional acts of its duly authorized agents or employees acting within the scope and course of their employment and at the direction of the Manager of Env. Util.
3. Env. Util. shall render its bills for water service to OWC at the same time and in the same manner as its bills for water service to retail customers or Env. Util. In the event that any bill for service is not paid in a timely manner in accordance with the Utility Billing Practices of the Missouri Public Service Commission, Env. Util. may discontinue the provision of water service until such time as 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. In the event that 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.
4. Env. Util. shall notify OWC of any planned disruption of service for non-emergency repairs or otherwise at least forty-eight (48) hours in advance thereof, and of any emergency repairs as soon as possible after the disruption of service occurs. Env. Util.

shall notify OWC of any boil orders required by applicable Missouri Law or Regulations with respect to said water supply immediately upon receipt of the same in the same manner as notice thereof is supplied to Env. Util.'s customers. OWC shall be responsible for all notices to OWC's customers in Eagle Woods.

5. It is contemplated under this agreement that water shall be supplied hereunder only to the Eagle Woods Service Area as that area exists on the date hereof and as described in OWC's Water Tariff in effect on the date hereof, and which is contemplated to include not more than fifty-three (53) single family homes. Any expansion of said service area by OWC or any change in the scope or plan of development therein to include more than fifty-three (53) single family homes shall require the prior consent and agreement of Env. Util. to continue to supply water to OWC, which consent may be withheld in the sole discretion of Env. Util.
6. It is contemplated under this agreement that OWC will maintain its water distribution system in good repair at all times and that water shall be supplied only for normal residential purposes to not more than fifty-three (53) homes in the Eagle Woods development. In the event that excessive water leaks or other high volume usages occur which would or could cause the inability of Env. Util. to supply water within its Golden Glade Service Area, Env. Util. may discontinue the provision of water to OWC until such time as said excessive water leaks are repaired, notwithstanding the agreement and undertaking by OWC hereunder to pay for all water taken from Env. Util., it being expressly acknowledged and agreed that Env. Util. is not required to furnish an unlimited supply of water to OWC under this agreement.
7. It is not contemplated that water will be supplied hereunder for fire protection purposes, and Env. Util. shall have no obligation as a result of this agreement to furnish water for such purposes.
8. This Agreement shall be for a term of five (5) years from the date of execution hereof, and thereafter may be terminated by either party hereto, without cause, upon six (6) months written notice to the other.
9. This Agreement shall inure to and be binding upon the parties hereto and their respective successors and assigns.

In witness whereof the parties have set their hands the day and year first above written.

OSAGE WATER COMPANY

ENVIRONMENTAL UTILITIES, LLC

\_\_\_\_\_  
William P. Mitchell, President

\_\_\_\_\_  
Debra J. Williams, Manager