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FILED

NOV 20 2001

Missouri Public
Service Commission

November 20, 2001

Mr. Dale Hardy Roberts, Secretary
Public Service Commission
Governor Office Building
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102-0360

**Re: In the Matter of the Proposed Acquisition of American Water Works Company
Case No. WO-2002-206**

Dear Mr. Roberts:

On behalf of Missouri-American Water Company, American Water Works Company, Inc. and RWE AG, enclosed for filing in the above-referenced case please find an original and eight (8) copies of Joint Suggestions in Opposition to Motion of the Office of Public Counsel to Review Proposed Acquisition of American Water Works Company by RWE AG. A copy has also been hand-delivered to the Office of the Public Counsel this date.

Thank you for your assistance with this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:

Paul A. Boudreau

PAB/aw
Enclosures
cc: M. Ruth O'Neill
Cliff Snodgrass
James Mauze'

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

In the Matter of the Proposed Acquisition)
of American Water Works Company by) Case No. WO-2002-206
the German Corporation RWE AG.)

FILED²
NOV 20 2001
Missouri Public
Service Commission

**JOINT SUGGESTIONS IN OPPOSITION TO MOTION OF THE
OFFICE OF PUBLIC COUNSEL TO REVIEW PROPOSED
ACQUISITION OF AMERICAN WATER WORKS COMPANY BY RWE AG**

COME NOW Missouri-American Water Company ("MAWC"), American Water Works Company, Inc. ("AWW") and RWE AG ("RWE") and offer the following Suggestions in Opposition to Motion of the Office of Public Counsel ("OPC") to review the proposed acquisition of AWW by RWE. In support thereof, MAWC, AWW and RWE state as follows:

1. On October 25, 2001, OPC filed a Motion to Review Proposed Acquisition of Missouri-American Water Company and American Water Works Company by RWE AG, a German Corporation (hereinafter, the "Motion"). OPC contends, generally, that the proposed transaction involves the sale of a Missouri regulated water corporation and, consequently, the Commission has the jurisdiction to determine whether the proposed transaction would be detrimental to the public interest. OPC suggests that the Commission assert jurisdiction pursuant to general statutory language contained, variously, in §§386.250.3, 386.330, 393.140 and 393.190 RSMo. 2000.

2. The transaction to which OPC makes reference in its Motion is an agreement pursuant to which RWE will purchase and acquire all of the outstanding shares of AWW which will then be merged with an acquisition subsidiary of RWE (hereinafter, the "Transaction"). AWW will be the surviving corporation. MAWC is a wholly-owned subsidiary of AWW. OPC's defective legal argument is premised on this fact. As will be demonstrated herein,

OPC's theory is nothing new. In fact, it has been rejected by the Commission on numerous occasions. It should once again be rejected.

3. AWW is a Delaware corporation. Through its operating subsidiaries, AWW provides water service to more than ten million (10,000,000) people in twenty-three (23) states, including the State of Missouri. AWW does not itself provide water service to the public in the State of Missouri and, consequently, is not a public utility which is subject to the Commission's jurisdiction, supervision or control. This is evidenced by the fact that AWW holds no Certificate of Convenience or Necessity from this Commission, nor is it authorized to do business in Missouri as a foreign corporation.

4. AWW has three operating utility subsidiaries in the State of Missouri – MAWC, St. Louis County Water Company d/b/a Missouri-American Water Company ("County Water"), and Jefferson City Water Works Company ("JCWWC"). Collectively, MAWC, County Water and JCWWC are engaged in the business of furnishing water service to the public in the cities of St. Joseph, Joplin, Warrensburg, Brunswick, Mexico and Jefferson City, Missouri, and in St. Louis, Platte and St. Charles counties.¹ MAWC is a Missouri corporation with its principal office and place of business at 535 N. New Ballas Road in St. Louis, Missouri. MAWC is a "water corporation" and a "public utility" as those terms are defined in §386.020 RSMo. 2000 and, as such, is subject to the supervision of the Commission as

¹ OPC's Motion makes no reference to County Water or JCWWC and, consequently, MAWC's suggestions will likewise omit further reference to either entity except to note that the Commission in its September 27, 2001, Order Approving Stipulation and Agreement in Case No. WM-2001-309 authorized the merger of County Water and JCWWC with and into MAWC. That transaction has not yet closed, however, MAWC anticipates that the merger will take place on or before December 31, 2001.

provided by law. MAWC is not a party to any stock purchase, acquisition or exchange agreement with respect to the Transaction.

5. RWE is Germany's fifth largest industrial corporation. It is a leading international utility company, having core businesses in providing electricity, natural gas, water and wastewater management services. RWE has one hundred seventy-two thousand (172,000) employees worldwide. RWE does not directly or indirectly provide water service to the public in the State of Missouri. Consequently, it is not a public utility which is subject to the Commission's jurisdiction, supervision or control. This is evidenced by the fact that RWE holds no Certificate of Convenience or Necessity from the Commission, nor is it authorized to do business in Missouri as a foreign corporation.

6. Through its London-based Thames Water subsidiary, RWE provides water and wastewater services to approximately forty-three million (43,000,000) customers, making it the third largest water company worldwide. In the United Kingdom ("UK"), Thames Water is the leading supplier of water and wastewater services. In addition to the UK, Thames Water also delivers water services to customers in North and South America, Asia Pacific, Eastern Europe and the Mediterranean. In the United States, Thames Water operates the Westfield, New Jersey based water company E-Town Corporation which supplies water to approximately one million (1,000,000) people in New Jersey through its operating subsidiaries.

7. On September 17, 2001, AWW announced the Transaction. Attached hereto as Appendix 1 is a diagram illustrating the corporate structure that will result as a consequence of the Transaction.

8. The Transaction does not contemplate a statutory merger or consolidation involving MAWC, nor does it contemplate the operational integration of MAWC's operations

with, or into, any other water company's operations. When the Transaction is closed, MAWC will retain its separate corporate existence and it will remain a wholly-owned subsidiary of AWW. MAWC will continue to provide water service to its Missouri customers without interruption. The Transaction will be transparent to the customers of MAWC and will not result in any change to the rates or terms and conditions of service with respect to any customer now served by MAWC.

9. The Transaction will have no effect or impact on this Commission's authority or ability to supervise and examine the rates or services of MAWC, nor to examine its general condition, capitalization, certificates or franchises, nor will it in any way terminate or obviate any affirmative obligations to the Commission to which MAWC is currently subject.

10. The Transaction does not call for MAWC to sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchises, facilities or system, necessary or useful in the performance of its duties to the public. Finally, as noted above, the Transaction does not call for MAWC to merge or consolidate its lines or system, or franchises, or any part thereof, with any other corporation, person or public utility, by any means, whether direct or indirect.

11. The Transaction is one solely between AWW, the unregulated parent company of MAWC, and RWE. Consequently, the Transaction is not subject to the provisions of §393.190, RSMo. 2000 governing mergers involving water corporations or acquisitions of stock by or of water corporations. As noted in paragraph 3, *supra*, AWW is not a "water corporation"; thus, the transaction does not involve a merger of a water utility regulated by the Commission with any other corporation. Likewise, the transaction does not involve the

acquisition by a water corporation of the stock of a same or similar business by any means, whether direct or indirect.

12. This case is factually and legally indistinguishable from the circumstances confronted by the Commission in March of 1999 when it considered an identical request by OPC in the context of the merger of AWW with National Enterprises, Inc. ("NEI"), the unregulated parent company of County Water. In that case, OPC requested that the Commission assert jurisdiction over the proposed merger of AWW and NEI arguing, as it does in this case, that the acquisition and merger by AWW of NEI was a *de facto* merger or acquisition of MAWC and County Water. The Commission docketed OPC's motion as Case No. WM-99-224. After oral argument before the Commission on March 2, 1999, the Commission concluded the transaction was not one over which it had jurisdiction. It stated as follows:

"The Commission determines there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent companies even though they may own Missouri-regulated utilities. The Commission's past approach to mergers of this type has been the proper one and will be followed here."

The Commission denied OPC's motion. A copy of the Commission's Report and Order in Case No. WM-99-224 is attached hereto as Appendix 2 and incorporated herein by reference.

13. One of the previous cases to which the Commission was making reference was its Report and Order in Case No. TM-99-76. Again, in that case, OPC had filed a motion with the Commission to open a docket to consider the then-pending merger of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech"). SBC was the unregulated parent company of Southwestern Bell Telephone Company ("SWBT"). In that case, OPC asserted that the Commission should assert jurisdiction over the proposed merger

alleging, generally, that it was in the public interest for the Commission to do so. After oral argument held September 30, 1998, the Commission denied OPC's motion. The Commission stated as follows in its Order:

"The Commission determines there is nothing in the statutes that confers jurisdiction to examine a merger of two unregulated parent corporations even though they may own Missouri-regulated telecommunications companies. The Commission's past approach to mergers of this type has been a proper one, and will be followed here."

A copy of the Commission's Report and Order in Case No. TM-99-76 is attached hereto as Appendix 3 and incorporated by reference.

14. As noted by the Commission, its resolution of Case Nos. TM-99-76 and WM-99-224 was consistent with a line of decisions in which the Commission has determined it does not have jurisdiction over mergers or acquisitions involving unregulated parent companies of Missouri utilities. Attached hereto, marked Appendix 4 and incorporated herein by reference for all purposes, is a tabulation of references to similar Commission decisions.

15. OPC's reference in paragraph 12 of its Motion to the recently concluded Gateway Pipeline Company case (Case No. GM-2001-585) is factually distinguishable from the case at hand. As the Commission will recall, that case involved the sale by UtiliCorp United Inc. ("UtiliCorp") of UtiliCorp Pipeline Systems, Inc. ("UPL"), the unregulated parent company Missouri Pipeline Company ("MPC") and Missouri Gas Company ("MGC"). In that case, the Commission rejected the parallel to the SBC/Ameritech and AWW/NEI merger decisions on the limited grounds that UtiliCorp, the parent company of UPL, was a regulated Missouri utility. Consequently, the Commission likened the sale of UPL stock to a sale by UtiliCorp of regulated assets; that is, the MPC and MGC subsidiaries. In this case, no Missouri

regulated company owns the stock of AWW, so the Gateway decision carries no significance with respect to the facts at hand.

16. There is the suggestion throughout OPC's Motion that this transaction should be handled differently than the cases previously decided by the Commission because RWE is a German corporation. OPC suggests that foreign ownership of AWW is a fact which warrants closer scrutiny. On the contrary, foreign ownership of Missouri utilities is neither unprecedented nor has it been problematic.

17. In its Case No. WM-2000-318, the Commission considered a request that it decline jurisdiction over the acquisition by Lyonnaise American Holding, Inc. ("LAH") of the common stock of United Water Resources, Inc. ("UWR"). UMR was the ultimate parent company of United Water Missouri, Inc. , a water utility providing service in the State of Missouri. The parent company of LAH in that case was Suez Lyonnaise des Eaux, a corporation existing under the laws of the Republic of France. Consistent with its prior practice, the Commission again declined to assert jurisdiction over the transaction. In its Order Closing Case, a copy of which is attached hereto as Appendix 5, the Commission stated that it "agree[d] with Staff that the result reached here should be the same as in *American Water Works*," a reference to its decision in Case No. WM-99-224. Clearly, the prospect of foreign ownership has not been a disqualifying factor or problematic to the Commission.

18. It is worth noting that OPC's Motion cites no compelling legal authority for asserting jurisdiction over the Transaction. The reason for this omission is clear -- there is no legal authority for the relief requested. To the contrary, the law on this topic strongly supports the Commission's past policy in this regard. The Missouri Supreme Court in *State ex rel. City of St. Louis v. Public Service Commission*, 73 S.W.2d 393, 398 (Mo banc 1934) concluded that

a public utility's parent company does not do business in this state merely by virtue of its subsidiary's operations here.

"The title to the properties of the two operating companies is in the Laclede Gas Light Company and the Laclede Power & Light Company. Their respective officers and directors manage and direct the business of these respective companies. A stockholder in these two operating companies manages them and operates them insofar as he exercises his right in the election of their directors, and this is true even if the stockholder is a corporation. The fact that the [parent company] owns the controlling stock in these two operating companies and has the power to elect its board of directors, who in turn elect their officers, or remove them from the places already held, does not make [it] 'operate these properties' even if [it] 'to all intents and purposes acts the same as the majority of the stockholders in case of operating the property.' Nor does the fact that [the parent] and the two operating companies have interlocking directors and officers prove that [the parent] is doing business in this state."

The Commission has faithfully followed this legal guidance. In doing so, it has found that a company owning a majority of the stock of a gas corporation was not itself a gas corporation because the definition of the term did not include the concept of indirect ownership or operation of the gas plant. *Re Stern Brothers & Company*, 27 Mo.P.S.C. 337, 341-342 (1946). To the knowledge of the undersigned, the Commission has never attempted to assert jurisdiction over business practices of an unregulated utility holding company.

19. Even though the Commission has no statutory authority to approve or disapprove the transaction does not mean that it will have no opportunity to consider the effect, if any, of the Transaction on regulated operations of MAWC. The Commission will retain full authority to supervise and regulate the rates and terms and conditions of service of MAWC.

20. OPC's motion is a warmed-over version of contentions that have been considered previously by the Commission and expressly rejected on numerous occasions. For

the same reasons given in the AWW/NEI, SBC/Ameritech and the LAH/UWR merger cases, the Commission should deny OPC's motion in this instance as well.

WHEREFORE, if it please the Commission, MAWC, AWW and RWE request that they be permitted to present oral argument on the matters raised herein at the Commission's earliest convenience, and/or that the Commission deny OPC's Motion to review the Transaction for the reasons aforesaid.

Respectfully submitted,



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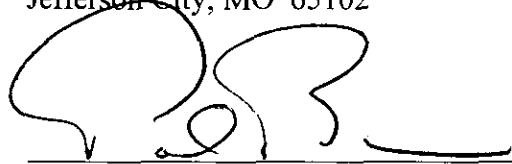
Attorneys for RWE AG

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered, on this 20th day of November, 2001, to:

Mr. Cliff Snodgrass
Deputy General Counsel
Missouri Public Service Commission
Governor Office Building
200 Madison Street
Jefferson City, MO 65102

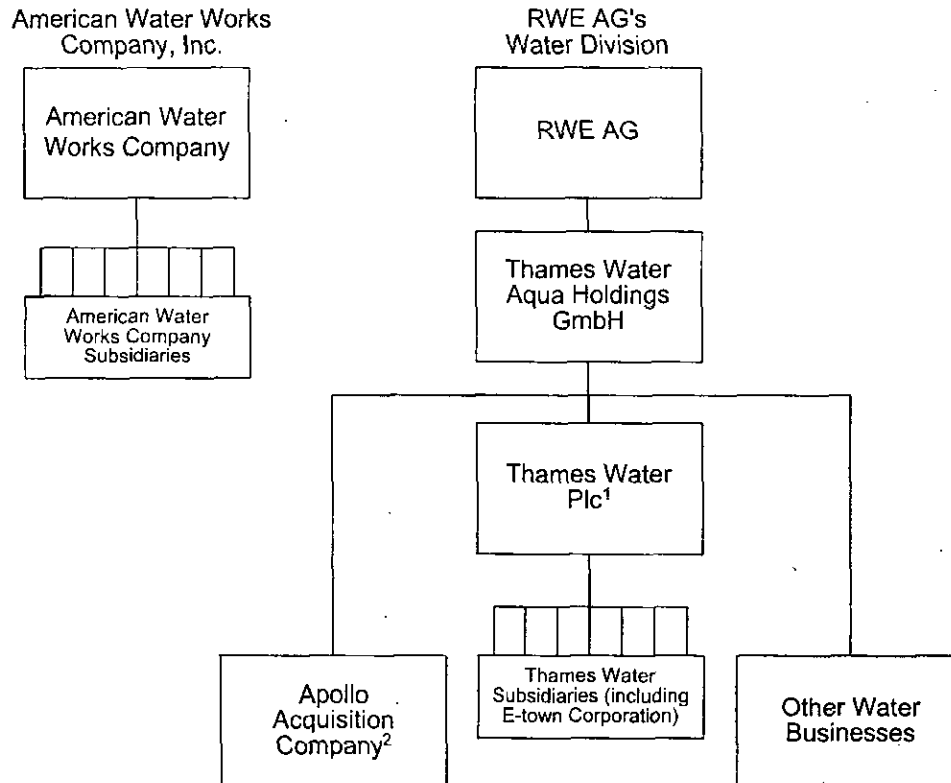
Ms. M. Ruth O'Neill
Office of the Public Counsel
Governor Office Building
200 Madison Street
Jefferson City, MO 65102

A handwritten signature in black ink, appearing to be 'PAB', written over a horizontal line.

Paul A. Boudreau

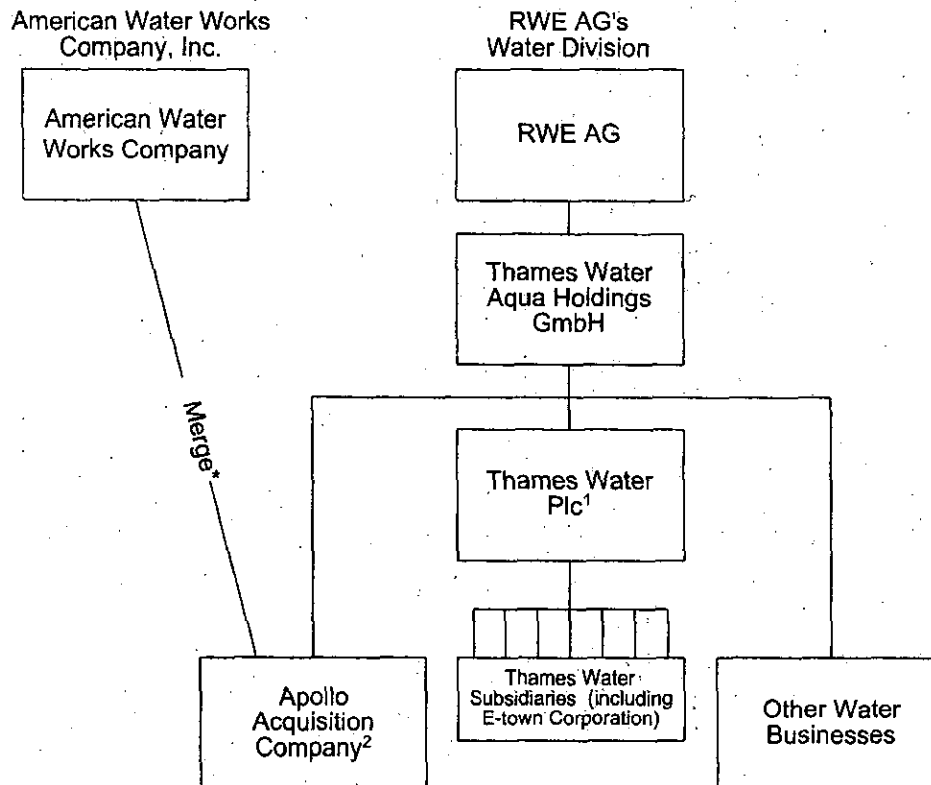
Diagram of Steps in Thames'/RWE's Acquisition of American Water Works Company

The Present Situation



1. Thames Water Plc operates (through its officers and employees) all of the water business of Thames Water Aqua Holdings GmbH's current and future subsidiaries, including American Water Works Company's utility subsidiaries upon completion of the merger.
2. Owned directly by Thames Water Aqua Holdings GmbH or by an intermediary holding company which will be owned directly by Thames Water Aqua Holdings GmbH.

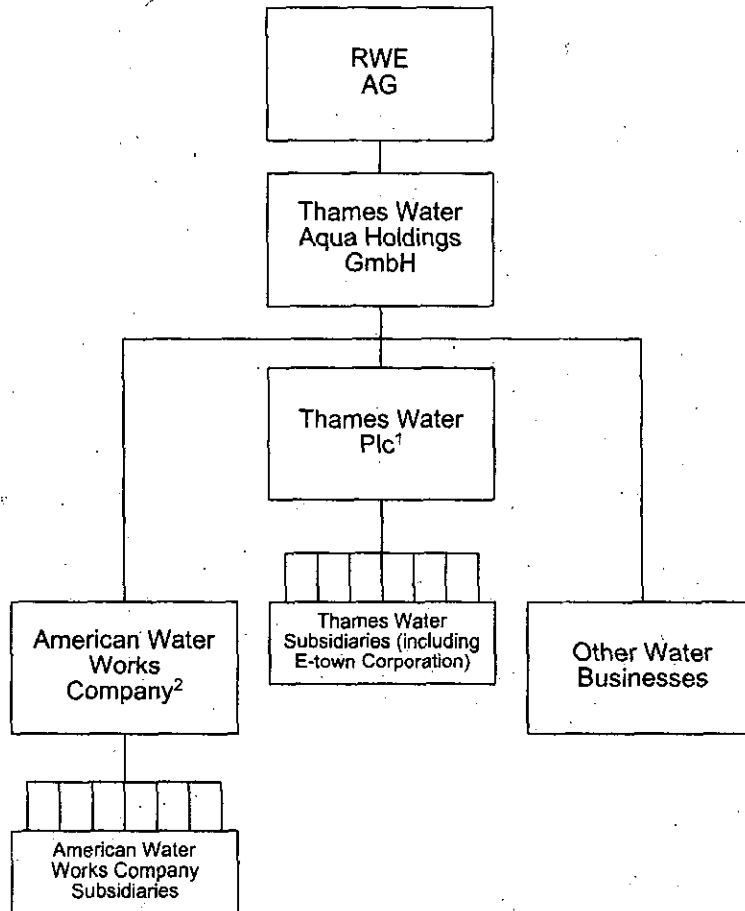
Merger



1. Thames Water Plc operates (through its officers and employees) all of the water business of Thames Water Aqua Holdings GmbH's current and future subsidiaries, including American Water Works Company's utility subsidiaries upon completion of the merger.
 2. Owned directly by Thames Water Aqua Holdings GmbH or by an intermediary holding company which will be owned directly by Thames Water Aqua Holdings GmbH.
- * Apollo acquisition Company merges into American Water Works Company. American Water Works Company is the surviving corporation. By operation of law, the assets and liabilities of each are combined in the surviving corporation, American Water Works Company. All property is held by American Water Works Company. Each outstanding share of common stock of American Water Works Company is converted into the right to receive the merger consideration, which is \$46 per share in cash.

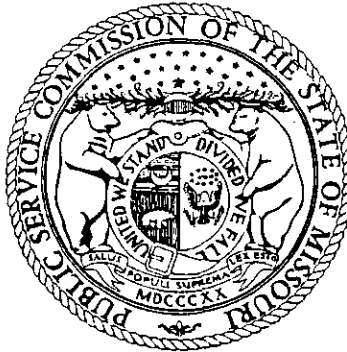
Post-Merger

RWE AG's Water Division



1. Thames Water Plc operates (through its officers and employees) all of the water business of Thames Water Aqua Holdings GmbH's current and future subsidiaries, including American Water Works Company's utility subsidiaries upon completion of the merger.
2. Owned directly by Thames Water Aqua Holdings GmbH or by an intermediary holding company which will be owned directly by Thames Water Aqua Holdings GmbH.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI



COPY

In the Matter of the Merger of)
American Water Works Company)
with National Enterprises, Inc.)
and the Indirect Acquisition by)
American Water Works Company of)
the Total Capital Stock of)
St. Louis County Water Company)

Case No. WM-99-224

REPORT AND ORDER

Issue Date: March 23, 1999

Effective Date: April 2, 1999

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Merger of)	
American Water Works Company)	
with National Enterprises, Inc.)	
and the Indirect Acquisition by)	<u>Case No. WM-99-224</u>
American Water Works Company of)	
the Total Capital Stock of)	
St. Louis County Water Company)	

APPEARANCES

Paul Boudreau, Attorney at Law, and W.R. England, III, Attorney at Law, Brydon Swearingen & England, P.C., P.O. Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Missouri-American Water Company.

James M. Fischer, Attorney at Law, James M. Fischer, P.C., 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County.

Richard T. Ciottone, Attorney at Law, 535 North New Ballas Road, St. Louis, Missouri 63141, for St. Louis County Water Company

Shannon Cook, Assistant Public Counsel, and John B. Coffman, Deputy Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

William K. Haas, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

DEPUTY CHIEF REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

REPORT AND ORDER

Procedural History

This case was opened to receive a Motion to Open a Docket filed by the Office of the Public Counsel (Public Counsel) on November 18, 1998. In that motion, Public Counsel requested that the Commission open a docket to consider the proposed merger of American Water Works Company (American Water) and National Enterprises, Inc. (National). American Water owns Missouri-American Water Company (MAWC), a Missouri corporation that operates as a regulated water utility in Missouri. National owns Continental Water Company (Continental), which in turns owns St. Louis County Water Company (SLCWC), a Missouri corporation that operates as a regulated water utility in Missouri. Pursuant to the agreement, American will acquire all of the common stock of National, and after the merger is effected, MAWC and Continental will be first-tier subsidiaries of American and SLCWC will be a second-tier subsidiary. Public Counsel noted that SLCWC and MAWC are the largest water utilities in Missouri. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that that the merger does not have anti-competitive results. Public Counsel believes that the Commission has jurisdiction pursuant to Sections 386.250(3), 386.330(1), and 393.190(1)¹.

¹All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated. At the oral argument, Public Counsel also argued that Section 393.190(2) gives the Commission jurisdiction.

On December 8, SLCWC and MAWC filed a joint response opposing Public Counsel's motion. The water companies assert that the merger is one of parent companies, and that the Commission does not have jurisdiction to review the merger. In essence, their argument was that, since each of the regulated companies will maintain its current corporate existence, the statutes cited by Public Counsel do not confer jurisdiction. Also on December 8, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted that the Commission should follow this practice now, and decline to assert jurisdiction. The Staff and the water companies urge the Commission to follow its recent decision in Case No. TM-99-76 in which the Commission declined to open a case to consider the proposed merger of Ameritech Corporation into SBC Delaware, Inc., a subsidiary of SBC Communications, Inc.

On December 7, 1998, Utility Workers of America Local 335, AFL-CIO (the Union) filed an Application to Intervene. On December 9, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County (the Water Districts) jointly filed an Application to Intervene.

On December 23, Public Counsel filed a pleading responding to the Staff and SLCWC and MAWC. By order dated February 4, 1999, the Commission set for oral argument the question of its jurisdiction.

Oral Argument

On March 2, Public Counsel, Staff, SLCWC and MAWC presented their arguments on the question of the Commission's jurisdiction². Public Counsel argued that 386.250(3) gives the Commission jurisdiction over all water corporations and their operations in Missouri. Public Counsel also argued that 393.190(2) gives the Commission the responsibility to oversee mergers and consolidations involving regulated water systems. Public Counsel interpreted the definition of water corporation to include parent companies of regulated water utilities. Public Counsel attempted to distinguish this case from TM-99-76 on the basis that there is no federal proceeding in which this merger will be examined.

Staff addressed each of the statutory sections that Public Counsel asserted give the Commission jurisdiction over this transaction. Staff stated that 386.330(1) deals with telecommunications companies and does not apply to water companies. Staff argued that 386.250(3) is merely a general grant of jurisdiction to regulate water corporations, and that neither of the entities involved in this transaction are water corporations. The last statutes cited by Public Counsel are 393.190(1) and (2) which provide that a water corporation must first obtain Commission approval prior to entering into a merger or consolidation, or transferring or mortgaging its works or system. Staff stated that the

² The Water Districts were represented by counsel, but did not participate. The Union was not represented by counsel.

instant transaction does not involve water corporations, so these statutes do not apply.

MAWC argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. Its arguments on the statutes were very similar to those advanced by Staff. MAWC also discussed a number of Missouri cases that it believed demonstrate that the Commission has no jurisdiction over the instant merger. MAWC compared this case with others the Commission has recently considered, including TM-99-76, and concluded that the Commission has been correct in its conclusion that it has no jurisdiction to examine mergers of non-regulated parent corporations even though they may own Missouri-regulated utility companies.

SLCWC adopted MAWC's arguments. SLCWC pointed out that when Continental was formed and acquired the stock of water corporations, Commission approval was sought and received, but that when National was formed as the parent of Continental, no Commission approval was sought.

Discussion

The Commission has reviewed the arguments of the parties, the cases and the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene will be denied.

IT IS THEREFORE ORDERED:


1. That the Motion to Open a Docket filed by the Office of the Public Counsel on November 18, 1998 is denied.

2. That the applications to intervene of Utility Workers of America Local 335, AFL-CIO, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County are denied.

3. That this order shall become effective on April 2, 1999.

4. That this case may be closed on April 3, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
and Drainer, CC., concur and
certify compliance with the
provisions of Section 536.080,
RSMo 1994.
Schemenauer, C., dissents with opinion

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Merger of American Water Works)
Company with National Enterprises, Inc. and the Indirect)
Acquisition by American Water Works Company of the)
Total Capital Stock of St. Louis County Water Company.)

Case No. WM-99-224

Dissenting Opinion of Commissioner Robert G. Schemenauer

I respectfully dissent with the majority opinion "that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies". The Commission is required by statute to review and approve or deny these types of transactions for the public good. I am not persuaded by Staff's argument that "the instant transaction does not involve water corporations, so these statutes", (386.250(3) and 393.190(1), "do not apply".

There is no clean or unfettered separation between the ownership of American Water Works Company, Inc. (AWW) and St. Louis County Water Company (County Water) after the merger. AWW has replaced National Enterprise, Inc. (NEI) as the owner of County Water. These two corporations have merged as recited in their Summary Description of Transaction and their testimony. Each "NEI common share issued and outstanding at the effective time of the merger ..." (which constitute 100% ownership of County Water), "will be canceled and converted ... to 15.5022106 shares of AWW common stock. All shares of AWW common stock issued and outstanding immediately prior to the effective time of the merger, taken together with AWW common stock issued in accordance with the merger agreement, will immediately thereafter constitute all of the issued and outstanding shares of the capital stock of the surviving corporation." This clearly shows the intent of the merger transaction is to assimilate the ownership of County Water into AWW. One share of AWW stock represents some ownership

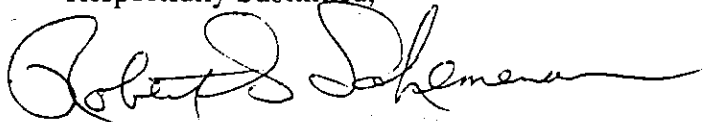
of County Water and there is no ownership of County Water by any other entity other than AWW.

A clear reading of 393.190(1), "No ... water corporation ... shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, **nor by any means, direct or indirect, merge or consolidate** such works or system, or franchises, or any part thereof, with any other corporation, person or public utility without having first secured from the commission an order authorizing it ...", requires a review of this transaction by the commission.

The drafters of this statute clearly foresaw the possible corporate manipulations that could circumvent the intent of this statute and therefore inserted such phrases as "**nor by any means, direct or indirect, merge or consolidate**" to prevent such corporate gerrymandering.

If this transaction is not a "direct" merger of a water company corporation with another corporation it surely is an "indirect" merger as contemplated by the statute. My opinion is that the Commission has erred in abdicating its responsibility to review and either approve or deny this merger. This abdication may set a fatal precedent that undermines the authority of future commissions to review similar transactions.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Robert G. Schemenauer", written in a cursive style.

Robert G. Schemenauer
Commissioner

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

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

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson
City,

Missouri, this 23RD day of MARCH, 1999.



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

to consider the proposed merger of SBC Communications, Inc. (SBC), SBC Delaware, Inc. (SBC Delaware), and Ameritech Corporation (Ameritech). Pursuant to the merger agreement, SBC Delaware, a wholly-owned subsidiary of SBC, will merge into Ameritech with Ameritech being the surviving entity. After the merger is effected, both Ameritech and Southwestern Bell Telephone Company (SWBT) will be first-tier subsidiaries of SBC. Public Counsel noted that SWBT is the largest local exchange company in Missouri, and asserted that Ameritech is certificated in Missouri as a competitive local exchange company. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that it provides positive benefits directly to consumers and that it promotes competition in Missouri's local telecommunications market. Public Counsel believed that the Commission has jurisdiction pursuant to Sections 386.250(2), 386.320, and 392.300¹.

On August 31, SWBT filed a response opposing Public Counsel's motion. SWBT asserted that the merger will have no impact on its operations or the services it provides in Missouri, and that the Commission does not have jurisdiction to review the merger. In essence, SWBT's argument was that since the merger will have no effect on SWBT's plant or the services it offers in Missouri, that the statutes cited by Public Counsel do not confer jurisdiction. Also on August 31, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted

¹ All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated.

that the Commission should follow this practice now, and decline to assert jurisdiction. On September 2, Public Counsel filed a pleading responding to the Staff and SWBT. By order dated September 8, the Commission set for oral argument the questions of jurisdiction and the content of its comments to the Federal Communications Commission (FCC).

On September 14, Sprint Communications Company L.P. (Sprint) filed an Application to Intervene and a Motion to Change Date of Oral Argument, and on September 15, Sprint filed suggestions supporting Public Counsel's position. On September 18, SWBT filed a pleading opposing Sprint's intervention. By order of September 23, the Commission denied Sprint's motion to change the date of oral argument and expressly reserved ruling on Sprint's intervention.

On September 25, McLeodUSA Telecommunications Services, Inc. (McLeod) filed an Application to Intervene. On September 29, Public Counsel filed additional suggestions in support of its position. On September 30, the Telecommunications Resellers Association filed an Application to Participate without Intervention, and comments generally supporting Public Counsel's position.

Oral Argument

On September 30, Public Counsel, Staff, and SWBT presented their arguments on the questions of the Commission's jurisdiction and the content of its comments to the FCC. Sprint and McLeod, although they had not been granted intervention, were allowed to address the issue of the contents of the Commission's comments to the FCC. The Telecommunications Resellers Association, although offered the opportunity at oral argument to address this issue, did not do so.

Public Counsel argued that 386.250 gives the Commission jurisdiction over all telecommunications facilities, telecommunication services, and telecommunications companies. Public Counsel also argued that 386.320.1 gives the Commission general supervision over all telephone corporations and telephone lines and the manner in which their lines and property are owned, leased, controlled or operated not only with respect to adequacy, security and accommodation offered by those services, but also with respect to their compliance with all provisions of law, orders, decisions of the Commission and charter and franchise requirements. Public Counsel noted that, pursuant to 386.610 and case law, Chapter 386 should be construed broadly with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities. Public Counsel argued that 392.185 sets out the framework that should guide the Commission's consideration of its jurisdiction, and stated that merging companies should not be able to structure the corporate form of mergers in such a way to defeat the Commission's jurisdiction.

Staff stated that 392.300 provides that a telecommunications company certificated in Missouri must first obtain Commission approval prior to entering into a merger or consolidation. Staff stated that, based upon its review of past Commission cases and actions, the SBC/Ameritech merger does not fall within the Commission's jurisdiction. Staff reiterated its belief that the FCC proceeding is the appropriate forum in which to examine the merger.

SWBT argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. SWBT stated that 386.250 makes no mention of mergers, and confers no jurisdiction on the

Commission over mergers. SWBT also claimed that Ameritech, SBC Communications, and SBC Delaware are not covered by this section, as none are telecommunications companies operating in this state or certificated by this Commission.

SWBT made the same arguments about 386.320, pointing out that this section gives the Commission general supervisory powers, and power to inspect property, books, and records of corporations subject to the Commission's jurisdiction.

SWBT then discussed 393.200, which it claimed gives the Commission explicit authority over mergers and thus controls and overrides any general authority given by the other two statutory sections. SWBT argued that this section also does not apply to the SBC/Ameritech merger. SWBT noted that the merger does not involve the sale, assignment, lease or transfer of franchises, facilities or systems of Missouri-regulated telecommunication companies, nor a merger or consolidation, direct or indirect, of the lines, systems or franchises of Missouri-regulated telecommunication companies.

SWBT also pointed, as did Staff, to the Commission's consistent treatment of mergers of this type, particularly the Commission's decision in Case No. TM-96-268². SWBT argued that the Commission's past treatment was appropriate, and should be followed in this merger.

SWBT argued that the decisions made with respect to this and similar mergers by regulatory commissions in other states should not control this Commission's determination of whether it has jurisdiction,

²In the Matter of the Joint Petition of Communications Central of Georgia, Inc. and Davel Communications Group, Inc. for Approval of Merger and Transfer of Control.

and that Public Counsel's citation of those decisions should not be relied upon. SWBT asserted that the statutes defining the jurisdiction over mergers of those other commissions are not identical to Missouri's.

Discussion

The Commission has reviewed the arguments of the parties, the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated telecommunications companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene, and the application to participate without intervention will be denied.

The Commission will not address, in this order, the suggestions presented at the oral argument about the Commission's comments to the FCC. The Commission appreciates the remarks of those entities that addressed this topic, and will bear them in mind as it deliberates what comments, if any, it should make to the FCC concerning this merger.

IT IS THEREFORE ORDERED:

1. That the Motion to Open a Docket, to Establish a Procedural Schedule, and to Hold a Hearing filed by the Office of the Public Counsel on August 21, 1998 is denied.

2. That the applications to intervene of Sprint Communications Company L.P. and McLeodUSA Telecommunications Services, Inc. are denied.

3. That the applications to participate without intervention of the Telecommunications Resellers Association is denied.

4. That this order shall become effective on October 20, 1998.

5. That this case may be closed on October 21, 1998.

BY THE COMMISSION

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray and Drainer, CC., concur.
Schemenauer, C., absent.

Dated at Jefferson City, Missouri,
on this 8th day of October, 1998.

OTHER DECISIONS OF THE COMMISSION

Voluntary Dismissal of Application, Case No. TM-98-168 [acquisition of the capital stock of MCI Communications Corp. by WorldCom, Inc.]

Order Dismissing Application and Closing Case, Case No. TM-98-153 [merger of telephone company with unregulated affiliate]

Order Regarding Jurisdiction and Dismissing Application, Case No. TM-98-268 [order declining jurisdiction in merger of unregulated parent company of telephone company]

Order Dismissing Application for Lack of Jurisdiction, Case No. TM-2000-85 [order declining jurisdiction over merger of unregulated parent companies of telecommunications companies]

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held at its office
in Jefferson City on the 7th
day of December, 1999.

In the Matter of the Application of United)
Water Missouri, Inc., for Authority for)
Lyonnaise American Holding, Inc., to Acquire) Case No. WM-2000-318
the Common Stock of United Water Resources,)
Inc., and, in Connection Therewith, to Enter)
into Certain Other Related Transactions.)

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ORDER CLOSING CASE

BRYDON SWEARENGEN,
& ENGLAND, P.C.

On November 4, 1999, United Water Missouri, Inc. (UWM), filed an application with the Commission seeking either a determination that the Commission is without jurisdiction or, in the alternative, authorization on an expedited basis, for Lyonnaise American Holding, Inc. (LAH), to acquire the outstanding shares of United Water Resources, Inc. (UWR). UWR is, according to the application, the parent and sole owner of United Waterworks, Inc. (UWI), which, in turn, is the parent and sole owner of UWM. According to the application, LAH, UWR and UWI are not regulated entities.

In its application, UWM requested an expedited determination. Therefore, on November 8, 1999, the Commission ordered the Staff of the Missouri Public Service Commission (Staff) to submit, within 10 days, either a pleading stating a date certain by which the Staff anticipates that it will be able to submit a memorandum concerning the proposed transaction or a memorandum of law stating Staff's opinion that the

Commission lacks jurisdiction over the proposed transaction. Staff filed its memorandum of law on November 18, 1999.

In its memorandum, Staff cites the Commission's Report and Order of March 23, 1999, in Case No. WM-99-224, In the Matter of the Merger of American Water Works Company with National Enterprises, Inc., and the Indirect Acquisition by American Water Works Company of the Total Capital Stock of St. Louis County Water Company. In that case, as in the present case, the non-regulated corporate parents of two regulated Missouri utilities proposed to merge. As is the case here, the merger was intended to have no effect upon the operations of the Missouri regulated utilities. The Office of the Public Counsel (Public Counsel) argued strenuously that the Commission had authority to review and approve the proposed merger. After oral argument, the Commission determined that it lacked jurisdiction and closed the case.

Staff urges the Commission to resolve the present case upon the example of American Water Works, *supra*. The interval allowed by Commission rule for response to Staff's memorandum has elapsed and no responses have been filed. The Commission agrees with Staff that the result reached here should be the same as in American Water Works. Therefore, because it lacks jurisdiction over the proposed transaction, the Commission will close this case.

IT IS THEREFORE ORDERED:

1. That this case shall be closed because the Commission lacks jurisdiction over the proposed transaction.

2. That this order shall become effective on December 17, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Drainer,
Murray and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge