BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of Missouri-American Water Company for an Accounting Order Concerning MAWC's Lead Service Line Replacement Program.	**)** **)** **)** **)**	**File No. WU-2017-0296**

INITIAL POSTHEARING BRIEF OF MIDWEST ENERGY CONSUMERS' GROUP

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COME NOW the Midwest Energy Consumers' Group ("MECG"), pursuant to the Commission's July 11, 2017 *Order Setting Procedural Schedule* and hereby submits its Initial Post-Hearing Brief. In this brief, MECG addresses the request by Missouri American Water Company ("MAWC") for the issuance of an Accounting Authority Order ("AAO") allowing MAWC to defer costs associated with MAWC's replacement of customer-owned lead service lines.

As detailed in this brief, MECG does not oppose MAWC's AAO request. Given the very early stage of the replacement program, the costs to be deferred are still relatively small. That said, MECG does oppose the continuation of the replacement program in its current form. As the evidence demonstrates, the lead service line replacement program was implemented unilaterally by MAWC without any input from customers or the Commission. Given MAWC's failure to seek input from other stakeholders, it is not surprising that the replacement program is inherently flawed, violates numerous tariff provisions, and does not meet the interests of all of MAWC's customers. Therefore, in conjunction with its approval of the deferral of the costs that have been incurred to date, the Commission should order the implementation of a collaborative process to establish a lead service line replacement program that better

meets the needs of MAWC's customers. In its testimony, OPC has set forth the parameters of a collaborative process that should allow for the completion of a lead service line replacement program in a manner that is in the public interest.

In addition, the Commission should attach three conditions to the issuance of an Accounting Authority Order. First, MAWC should be allowed to book carrying costs no greater than the cost of short-term debt. Second, any costs that are incurred should be maintained in the district in which the service line replacement was incurred. Third, any costs should be maintained in the customer class that was the beneficiary of the replaced service line.

I. THE SITUATION

At one time, lead was a common material used not only for the water utility's distribution main, but also for the customer's service line off of the distribution main and feeding the home. As MAWC points out, "[t]he installation of lead pipe for water service lines dates back 50 to 100+ years."[1]

Recently, concerns have arisen among some that lead service lines constitute a health hazard. "Lead is a naturally occurring metal that is harmful if inhaled or swallowed, particularly to children and pregnant women."[2] Such concerns have been heightened by events in Flint, Michigan. Given this, there is a growing movement to replace customers' lead service lines.

The concern with lead service lines and the need to replace those lines is not universally accepted. In fact, the EPA has not provided absolute guidelines regarding lead concentration in drinking water.

[1] Exhibit 1, page 6.
[2] *Id.*

Q. What amount of lead in drinking water poses an urgent health risk – the kind of threat that should cause consumers to immediately stop their home's water for drinking and cooking?

A. It is not clear there is an amount, as this question was posed by reporters at USA TODAY to the EPA with its response as follows:

> At this time, EPA has not provided a broader guidance regarding a lead concentration that would trigger a do-no-drink order.

Today, if a given water system is found to be in violation of the LCR there is no requirement for notification to customers to stop drinking the water, only advice on ways to reduce exposure.[3]

Despite the lack of clarity on the lead service line problem, MAWC unilaterally instituted a service line replacement program and, despite the fact that the service line is customer property, assumed that the costs of its replacement program should be recovered from all customers instead of the beneficiary customer.

II. MAWC'S PREMATURE RESPONSE

In response to the drinking water concerns raised as a result of the Flint, Michigan scare, the EPA attempted to impose an obligation on the water utility to replace both utility-owned and privately-owned portions of the lead service line. Contrary to MAWC's position today, the American Water Works Association sued to prevent any legal obligation for the water utility to replace the customer portion of the service line.

> Initially the LCR required the replacement of the entire lead pipe, both the utility-owned and privately-owned sections. But requiring water utilities to remove privately-owned lead service lines raised constitutional and legal issues in terms of private property and eminent domain. A 1994 challenge in the DC Circuit Court by the American Water Works Association ("AWWA") limited the EPA's jurisdiction to just the public portion of the service line. The Court opinion stated.
>
> > The AWWC (American Water Works Association) challenges. . . the EPA's inclusion of water lines owned by others in the definition of distribution facilities under the 'control' of a public water system, and thus

[3] Exhibit 15, page 9 (citing to Young, A. (2016) How much lead in water poses an imminent threat? *USA Today*.

> subject to the lead line replacement regulations. . . . We grant the AWWA's petition because the EPA failed to provide adequate notice that it might adopt a broad definition of control.
>
> As a result the LCR was revised in 2000 to allow for partial service line replacement, although utilities could offer homeowners the option of replacing their portion of the line at the homeowner's cost.[4]

Despite its opposition to the imposition of an obligation to replace the customer portion of any lead service line, MAWC suddenly decided that it wanted to accept such an obligation. Without any feedback from stakeholders, MAWC unilaterally initiated the replacement of the customer portion of lead service lines. Disconcerting is the fact that MAWC began replacing this customer-owned property without any charge to the customer. Instead, MAWC simply assumed that this incurred cost would be socialized to all of its ratepayers. Furthermore, MAWC assumed that it would profit through such actions by being allowed to earn a full return on such costs.

MAWC's actions to initiate the replacement of customer-owned lead service lines is further disconcerting in that MAWC's actions violated numerous provisions of its Commission-approved tariffs. For instance, PSC MO No. 13 Sheet No. R. 6-R7 defines "Service Line" and the scope of "Customer's Service Line". Tariff sheet PSC MO No. 13 Original Sheet No. R. 12, Rule 4.C then makes abundantly clear that "Any change in location and/or size of an existing service connection and / of service line requested by the customer shall be made at the Customer's expense."

The customer's responsibility for its portion of the service line is further clarified in the MAWC tariff. Tariff sheet PSC MO No. 13 Original Sheet No. R 12, Rule 4.I requires that "[f]or service at a new location, *a replacement service*, or additional service at an existing location, *applicant shall pay, in advance*, a service connection charge in accordance

[4] Exhibit 15, pages 12-13.

with approved tariff charges or as provided in these rules" (emphasis added). Furthermore, PSC MO No. 13 Original Sheet No. R. 12, Rule 4.J states, in part, "[t]he Customer's Water Service Line shall be installed by the Customer at that Customer's expense."

Customer responsibility for the maintenance of the service line is equally clear. PSC MO No. 13 1st Revised Sheet No. R 16, Rule 6.B specifically addresses "all new or replacement Water Service Lines". At B.2 of the same tariff sheet, the law requires that "the Customer shall be responsible for construction and maintenance of the Customer's water service line…". In addition, tariff sheet PSC MO No. 13 1st Revised Sheet No. R 17.F demands "[c]ustomers at their own expense shall make all changes in their Customer Water Service Line required by changes of grade relocation of mains, or other causes." On the same sheet paragraph H requires that "[r]epairs or maintenance necessary on the Customer Water Service Line or on any pipe or fixture in or upon the Customer's premise … **shall be the responsibility of the Customer**." (Emphasis added).

Despite the clarity of these provisions, and without seeking a waiver from its tariff requirements, MAWC unilaterally implemented a program that violated each of these tariff provisions. Now, without any explanation for these violations, MAWC audaciously asks that it be allowed to socialize the costs associated with these tariff violations.

The implications of a Commission order approving MAWC's actions and socializing the costs of such violations is staggering. Currently, the Commission recognizes a bright line between those actions that occur within the realm of the regulated monopoly and those that are addressed in the competitive marketplace. For instance, while currently precluded from providing maintenance to customer-owned gas furnaces and water heaters, gas utilities could suddenly leverage its regulated monopoly to venture into the competitive arena and start replacing such gas appliances. Still again, electric utilities could utilize its regulated business to start replacing customer-owned breaker boxes, outlets, lights and electric appliances.

Such an action by the Commission flies directly in the fact of a recent decision to limit the regulated utility's ability to offer electric vehicle charging stations and, instead, left the development of this service to the competitive environment. There, the Commission provided the following policy guidance which dictates that regulated utilities be precluded from venturing into the competitive marketplace. "

> Introducing a regulated entity such as KCPL into a competitive market creates the potential for inefficiencies as the negative consequences of any given risk are merely shifted to captive ratepayers.[5]
>
> This conclusion [that electric vehicle charging stations are not "electric plant] is further buttressed by an understanding of the Commission's organic act, the statutes establishing the Commission and its mission, which illuminate the fundamental difference between a monopoly and a business operating in a competitive economic environment.[6]

The policy considerations relied upon by the Commission in deciding that regulated utilities should not be allowed to recover the costs associated with ventures into the competitive marketplace are equally applicable here. In fact, these considerations dictate that, to the extent that MAWC seeks to venture into the competitive marketplace and replace customer-owned service lines,[7] this competitive venture should not be recovered from the captive utility customers.

Just as the Commission predicted in the KCPL electric vehicle charging station decision, MAWC's venture into this competitive market has resulted in risks that "are merely shifted to captive ratepayers." As MAWC witnesses readily admit, while ownership for the replaced service line would be transferred back to the customer, the

[5] *Report and Order*, Case No. ER-2016-0285, issued May 3, 2017, at page 43.
[6] *Id.* at page 45-46.
[7] It is unquestioned that the replacement of customer-owned service lines is a competitive industry. A quick review of the plumbing section of the yellow pages demonstrates that there are numerous plumbers competing for this work.

responsibility to fix that service line, in the event of future leaks, would remain with the utility and its captive customers.

Q. Does Missouri-American guarantee their contractors' work?

A. We would be the ones responsible to fix it if it went badly. Yes.

Q. So you would take care of it?

A. Yes.

Q. Even if you hire a contractor, he -- if he disappears, would your company have to take care of that service line that the customer owns?

A. First -- first line of defense, would be we'd go back to that contractor and have him fix it? Yes.

Q. And if he disappeared?

A. We're responsible to our customers.[8]

Problems with MAWC's unilaterally imposed go beyond the fact that its solution violates numerous tariff provisions and would impose a future "responsibility to fix"; MAWC's solution also assumed that all costs should be socialized despite the customer's financial ability to pay for replacement of the service line itself.

Attached to Staff's rebuttal testimony are invoices for 71 service lines replaced under MAWC's unilaterally implemented replacement program. Of those, 57 of the replacements have occurred in Clayton, Missouri. As indicated, MAWC has not charged the customer for such service line replacements, but instead has assumed that such costs should be recovered from its ratepayers. The disconcerting part is that these Clayton property owners are financially capable of replacing these service lines on their own. In

[8] Tr. 209-210.

fact, a quick review of property values readily indicates that many of these homes are worth in excess of $750,000.

Furthermore, because of the size of the lots in Clayton, the replaced service lines there are much longer than in other communities in MAWC's service area. Therefore, while the socialized cost for service line replacement in Mexico, Missouri is only $1,440, the socialized cost to replace a service line to a $750,000 home in Clayton is $9,900.[9]

Given these shortfalls with MAWC's unilaterally imposed replacement program, MECG urges the Commission to impose certain solutions as a condition to the grant of any Accounting Authority Order allowing the deferral of these replacement costs.

III. THE SOLUTION

Clearly, MAWC's solution, implemented without the input of any stakeholders, is faulty and should be modified. As a primary point, it should be recognized that, the water utility should be a facilitator instead of the actual solution to lead service line replacement concerns. Such a role is consistent with that envisioned by MAWC and other water utilities when it sued the EPA over its initial service line replacement rule.

As mentioned, there is an ongoing debate over the health risks associated with customer-owned lead service lines. With this in mind, the Commission should implement a collaborative process consistent with that outlined by the Office of the Public Counsel. Instead of considering the views of a few parties in this case, the collaborative process would provide an opportunity for input by numerous other parties including Department of Natural Resources; Department of Health and Social Services; and county / local health organizations.[10]

[9] Tr. 191-192.
[10] Tr. 267-268.

In addition, the collaborative process could consider the most cost-effective means of replacing these service lines including consideration of concentration of affected homes and age of service lines. In addition, the collaborative should consider potential solutions, both long and short term, including the use of lead water filters that are currently in place in other communities in Missouri.

Finally, the collaborative should consider the customer's ability to replace the service line on his own. As previously demonstrated, MAWC's tariffs clearly provide that ownership and responsibility of the customer service line is squarely on the customer. It strains logic that owners of $750,000 mansions in Clayton should be the recipient of a gift the cost of which is subsequently socialized and passed on to other customers. Clearly, while low-income customers are not the owners of such homes, they will be expected to shoulder a portion of the cost for these high-income gifts.

It is clear that MAWC does not have all the answers when it comes to understanding this concern. It should be equally apparent that MAWC does not have all the answers when it comes to solving this situation. Allowing for a dialogue on this matter is reflective of a Commission that is providing the proper leadership instead of simply rubber-stamping a utility short-sighted solution.

IV. ACCOUNTING AUTHORITY ORDER AND CONDITIONS

As initially indicated, MECG does not oppose the grant of an Accounting Authority Order for the deferral of costs under MAWC's unilaterally imposed service line replacement program. It should be recognized that MECG has compromised a great deal to reach this point. It is painful to think that a utility should be allowed to defer costs for a program that so clearly violates numerous tariff provisions. MAWC's approach to

this case is much like that of a young child – it is better to beg for forgiveness than to ask for permission. In much a similar fashion, MAWC never asked for permission for its program, but now begs for forgiveness for its obvious shortfalls and tariff violations.

Additionally, it is difficult for MECG to agree to the deferral of costs that were incurred for the benefit of numerous wealthy landowners (57 of 71 service line replacements documented in Staff's rebuttal testimony were associated with high income homes in Clayton, Missouri) and will result in additional costs being imposed on many customers with much less means to pay for such actions. For this reason, MECG insists that any ongoing program should include a financial needs test that allows for consideration of the customer's income.

In addition to the implementation of the OPC collaborative process, any authorization for an Accounting Authority Order should include three necessary conditions. ***First***, MAWC should not be allowed to profit from its obvious tariff violations or a community health concern. For this reason, the Commission should reject MAWC's request to include carrying costs at its full rate of return. MAWC readily admitted that it would follow through with a future program if carrying costs were reduced to the short term cost of debt.

Q. Would the company go forward with the lead service line replacement program if costs -- if the carrying cost is short-term debt?

A. If that's what the Commission orders, the company would -- would accept that.

Q. So would you still go ahead and go forward at that short-term debt cost?

A. Yes.[11]

Second, in any to prevent the creation of future **inter-district** subsidies, the Commission should order that MAWC maintain any deferred balances within the district in which the costs are incurred. It makes little sense that customers in Joplin be expected to shoulder the service line replacement costs for customers in St. Louis County and vice versa. Instead, replacement costs for customer-owner service line replacements should be maintained in the affected rate district.

Third, in a similar fashion, any deferred balanced associated with replacement of customer-owned service lines should be retained within the rate class affected. The record readily indicates that MAWC has already replaced customer-owned service lines for residential homes. It is possible that future replacements may involve schools, hospitals, nursing homes, commercial establishments and even industrial customers. To avoid the creation of **inter-class** subsidies, the costs for the replacement of residential service lines should be maintained in residential accounts and recovered from residential customers. Similarly, the costs for the replacement of commercial and industrial service lines should be maintained and collected from the appropriate customers.

V. CONCLUSION

As indicated, MECG does not oppose the Commission authorizing the deferral of MAWC's service line replacement program. As always, such a recommendation is subject to the caveat that the ratemaking treatment for such deferred amounts be addressed in a future rate case. In addition, the deferral authority should include several important conditions. First, deferral authority should be accompanied by the creation of a

[11] Tr. 157-158.

collaborative process such as that set forth by the Office of the Public Counsel. Second, any amounts deferred should include a carrying cost no greater than the utility's cost of short-term debt. Third, any costs deferred should be maintained in accounts associated with the district in question. Fourth, any costs deferred should be maintained in accounts associated with the affected class. In this way, replacement costs associated with residential customers are maintained in residential accounts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by email, facsimile or First Class United States Mail to all parties by their attorneys of record as provided by the Secretary of the Commission.

David L. Woodsmall

Dated: October 19, 2017