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March 7, 2000

**VIA HAND DELIVERY**

Mr. Dale Hardy Roberts  
Executive Secretary  
Missouri Public Service Commission  
Truman State Office Building, Room 530  
P.O. Box 360  
Jefferson City, MO 65102-0360

**FILED<sup>2</sup>**  
MAR 07 2000  
Missouri Public  
Service Commission

RE: Missouri-American Water Company  
PSC Case No.: WR-2000-281, et al.

Dear Mr. Roberts:

Enclosed please find the original and fourteen (14) conformed copies of (1) Application for Rehearing of Order of March 3, 2000 and (2) Joint Response in Partial Opposition to Joint Motion to Modify Procedural Schedule to be filed in the above case. Additional copies of these pleadings are enclosed which I request you please mark as filed and return to me.

Sincerely,

*James B. Deutsch*  
James B. Deutsch

JBD:krw

Enclosures

STATE OF MISSOURI  
MISSOURI PUBLIC SERVICE COMMISSION

FILED<sup>2</sup>

MAR 07 2000

Missouri Public  
Service Commission

In the Matter of Missouri-American )  
Water Company's Tariff Sheets De- )  
signed to Implement General Rate )  
Increases for Water and Sewer Ser- )  
vice provided to Customers in the )  
Missouri Service Area of the Compa- )  
ny )

WR-2000-281  
SR-2000-282  
(Consolidated)

JOINT RESPONSE IN PARTIAL OPPOSITION TO JOINT MOTION  
TO MODIFY PROCEDURAL SCHEDULE

COME NOW INTERVENORS AG PROCESSING INC, A COOPERATIVE ("AGP"), FRISKIES PETCARE, A DIVISION OF NESTLE USA ("Friskies") and WIRE ROPE CORPORATION OF AMERICA INC. ("Wire Rope"), ST. CHARLES COUNTY, MISSOURI ("St. Charles County"), the CITY OF ST. PETERS, MISSOURI ("St. Peters"), the CITY OF WARRENSBURG, MISSOURI ("Warrensburg"), HAWKER ENERGY PRODUCTS, INC., ("Hawker"), HARMON INDUSTRIES INC. ("Harmon"), STAHL SPECIALTY COMPANY ("Stahl"), SWISHER MOWER AND MACHINE CO. ("Swisher"), CENTRAL MISSOURI STATE UNIVERSITY ("CMSU"), the CITY OF O'FALLON, MISSOURI ("O'Fallon"), the CITY OF WELDON SPRING, MISSOURI ("Weldon Spring"), and the CITY OF JOPLIN, MISSOURI ("Joplin"), all by their respective counsel of record in this proceeding, and, with one exception, oppose the Joint Motion to Modify Procedural Schedule filed herein on or about February 24, 2000 and with respect thereto state:

1. On February 22, 2000, Missouri-American Water Company (MAWC), Staff and Public Counsel (hereinafter "Joint Movants") submitted a non-unanimous Stipulation and Agreement.

2. On March 1, 2000, these intervenors filed an Objection and Request for Hearing with respect to all issues in the case. That objection stated:

. . . pursuant to 4 CSR 240-2.115(1), (2) and (3) [they] do hereby *REQUEST A HEARING ON ALL ISSUES IN THE CASE*, all PURSUANT TO THE PROCEDURAL SCHEDULE PREVIOUSLY ORDERED BY THE COMMISSION IN THIS PROCEEDING.

Objection and Request for Hearing, March 1, 2000, pp. 1-2  
(*italicized emphasis added*).

3. On February 24, 2000, Joint Movants submitted their Joint Motion to Modify Procedural Schedule ("Joint Motion") whereby Joint Movants requested an "expedited" procedural schedule from that previously ordered by the Commission in its Order of December 27, 1999 (as corrected by Order of December 28, 1999), if "one (or more) of the parties to this case does request a hearing on the Stipulation . . . ."

4. Joint Movants' Joint Motion should generally be denied for six good reasons:

a. First, the request for an expedited schedule should be rejected because these intervenors did not request a "hearing on the Stipulation" as was stated to be a predicate for their motion by Joint Movants. Rather, these parties have, as they are entitled pursuant to 4 CSR 240-2.115, requested a

hearing **on all issues in the case**. Thus, the condition precedent for the Joint Movants' request has not been met.<sup>1/</sup>

b. Second, these intervenors have been working with their experts in consideration of the procedural schedule previously ordered by the Commission. That schedule would direct that testimony with respect to revenue requirement be filed no later than March 20 and testimony on rate design be filed no later than March 23. The proposed "expedited schedule" would cut significantly into their ongoing preparation time and would require several additional rounds of testimony. Three parties may have come to an agreement regarding their view of an appropriate disposition of this case, but that does not alter that procedural schedule nor does it form a basis to deny to other parties the hearing on all issues of this case pursuant to the schedule previously directed by the Commission for that hearing and for the rounds of testimony leading up to that hearing.

c. Third, the "expedited" schedule proposed by Joint Applicants is characterized as being proffered with respect to the Stipulation and Agreement rather than with respect to the issues in this case. This is incorrect and in violation of the

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<sup>1/</sup>To put a finer point on it, these intervenors obviously oppose the non-unanimous stipulation and just as obviously question what possible rationale could support a resolution of the case on the basis proposed by the non-unanimous stipulation. Their March 1, 2000 Objection and Request for Hearing goes well beyond a mere request for a hearing on the non-unanimous stipulation and is a subsumption of their broader request for a hearing **on all issues in the case**.

Commission's own rules and governing Missouri law. Rule 4 CSR 240-2.115(2) clearly obligates the Commission to grant a hearing on the issue or issues that have been requested "in accordance with its rules of procedure." By tacit admission, the Joint Movants seek "expedited" consideration of **their** non-unanimous stipulation and agreement which would, by definition, constitute an exception to the Commission's "rules of procedure." Moreover, by attempting to "expedite" the procedure herein, the Joint Movants would deny these intervenors the time **already established by the Commission in prior orders** to prepare and submit their case which would be, once again, a clear departure from the Commission's own rules of procedure.

d. Fourth, the "expedited" procedure urged by the Joint Movants would be in clear violation of the Commission's own rules of procedure, namely 4 CSR 240-2.115, whereby the hearing is not to be "on the stipulation and agreement," but rather is to be on the issues for which the hearing was requested. 4 CSR 240-2.115(1). Further, Rule 4 CSR 240-2,115(2) states that where a hearing has been requested, "the commission *will* grant the hearing and *will* conduct the hearing in accordance with its rules of procedure." (Emphasis added). In this case, that hearing has been requested *on all issues in the case* and, pursuant to the Commission's own rules, the hearing is to be held *on all issues in the case*, not just on the proposed settlement stipulation.

e. Fifth, it appears to have been forgotten by the Joint Applicants, but the Procedural Schedule that was ordered by the Commission was the result of (and was one part of) a *unanimous stipulation* agreed upon at the prehearing conference. That Proposed Procedural Schedule and Motion for Additional Hearing Dates was filed with the Commission on December 23, 1999, and accurately represented that all the parties to the case joined to "submit their Proposed Procedural Schedule . . . ." Proposed Procedural Schedule and Motion for Additional Hearing Dates, p. 1. In addition, Paragraph 4 of that Proposal explicitly states:

4. The parties have agreed to recommend that the Commission modify the usual schedule for data requests as set forth in Paragraph 5 hereof, and that the Commission adopt the following procedural schedule in this case: [here follows the procedural schedule that was recommended and approved].

Proposed Procedural Schedule and Motion for Additional Hearing Dates, p. 2 (December 23, 1999). The document was signed by or with the authorization of all parties to the case. The present procedural schedule in this case was developed as part of an interrelated series of agreements including agreements to shorten the time for responses to data requests and additional hearing days. That unanimous agreement is not and should not be subject to unilateral modification without the concurrence of all the original signatory parties. To do so would deny non-acquiescing parties the benefit of the bargain that the Joint Movants have

heretofore enjoyed, would simply be unjust and unfair, and arguably violate non-acquiescing parties' due process rights.

f. Sixth, by proceeding with an "expedited" hearing and testimony procedure based on the non-unanimous stipulation and agreement, or by holding a "hearing on the non-unanimous stipulation and agreement," whether expedited or not, the Commission violates the admonition of the Missouri Court in *State ex rel. Fischer v. Public Service Commission*, 645 S.W. 39 (Mo. App. 1982) *cert. denied*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). A full and fair hearing must be held on all issues requested and at a meaningful time and in a meaningful manner and a limited hearing procedure focused on a non-unanimous stipulation and agreement does not meet that test. *Fischer*, *supra*, at 43. Absent unanimous agreement or acquiescence to the proposed stipulation, the stipulation becomes no more than a joint recommendation of the signatory parties representing their current position and should be taken with the case. *See, State ex rel. Kansas Power & Light Co. v. Public Service Commission*, 770 S.W.2d 740, 742 (Mo. App. 1989); *In re Missouri Public Service*, 2 MoPSC 3rd 221, 223 (1993); *In re Application of Empire District Electric Co.*, 1999 MoPSC Lexis 173, 179 (1999) (non-unanimous stipulation amounted to no more than an amendment of the applicants' application. "If [the legal requirements for a certificate] have not been met, then no certificates will be granted, no matter what some of the parties may have agreed upon

in the non-unanimous stipulation and agreement."); *In re ALLTEL Communications, Inc.*, 1999 MoPSC Lexis 84, 86 (1999) ("Because the non-unanimous stipulation and agreement was opposed by SWBT, the matter proceeded to a hearing on the merits as required by 4 C.S.R. 240-2.115(2)." (emphasis added)).

5. Further, it should be recalled that, as a result of the Commission's suspension order of October 28, 1999, this is a contested case as defined in Missouri law. The attempt at **non-unanimous** resolution of this contested case at a stage which precedes submission of the results of Staff's audit, and without even initial testimony from any parties to the case other than the utility, is without known precedent. While the Joint Movants may certainly be eager to advance the cause of their non-unanimous agreement, at base it remains nothing more than their agreement, which is actively opposed by other parties.

6. In other circumstances, a **unanimous** stipulation might have been submitted on the eve of hearing, the testimony would be submitted (and typically offered into the record as a part of the stipulation) and the Commission would at least have an opportunity to evaluate the terms and conditions of the proposed settlement against the testimony and stated positions of all the parties. In this case, however, no testimony **on the merits or issues in the case**, save that of the utility, has yet been submitted. There is no basis on which the Commission may rationally evaluate portions of the non-unanimous stipulation and



agreement against the results, for example, of the results of a **staff audit**, of an audit by Public Counsel, and by the positions of these parties as represented by testimony from their expert witnesses.<sup>2/</sup>

7. There is one portion of the Joint Motion that these parties do not oppose. In Paragraph 8 of their Joint Motion, Joint Movants request a modification of the existing procedural schedule to extend by two weeks the time within which Staff, Public Counsel and Intervenors might file their initial testimony so that direct testimony on issues other than rate design would be due no later than April 3, 2000 (instead of the present March 20) and that rate design testimony would be due no later than April 6, 2000 (instead of the present March 23). Although these intervenors do not agree with the rationale advanced for such extension by the Joint Movants (as stated above), they **do not oppose** such extension for the respective direct testimonies on the issues in the case, **provided that similar consideration of corresponding extensions for rebuttal testimony that these parties expect to need to develop and submit with respect on issues raised by Staff and Public Counsel which**

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<sup>2/</sup>For the information of the Commission, these parties intend not only the submission of testimony that would fall within the category of rate design testimony, but also intend, among other things, to submit testimony regarding the proper amount of rate base addition, if any, that should be granted to the utility and the prudence or lack thereof on the part of the utility in selecting among available and significantly less costly alternatives.

**they will see for the first time on April 3 and April 6, respectively.**

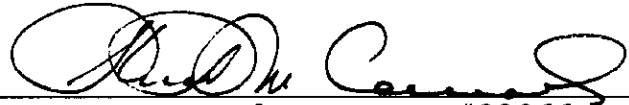
8. The initial procedural schedule was the result of extended discussion and negotiations at the early prehearing conference convened at the Commission's direction. During those discussions, one concern of these intervenors was that they have sufficient time to propound data requests on the usual twenty-day turnaround and develop a response to the position that was expected to be advanced by the Staff.

9. It would be inappropriate and unfair for the Joint Movants to successfully gain additional time for their testimony taking that time from the previously agreed (and ordered) allocation of response time negotiated by these parties in good faith through the prehearing scheduling compromise. Thus, while we have no objection to the additional time they propose, it should only be granted if there is a commensurate and proportional extension of time for the succeeding round of responsive testimony from these parties.

WHEREFORE, **except** with respect to Paragraph 8, these parties OPPOSE the Joint Motion to Modify Procedural Schedule and pray that the same be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed to the following persons:

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