

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-3847
E-MAIL: JKRBSE@AOL.COM

DEAN L. COOPER
MARK G. ANDERSON
TIMOTHY T. STEWART
GREGORY C. MITCHELL
RACHEL M. CRAIG
BRIAN T. MCCARTNEY
DALE T. SMITH

OF COUNSEL
RICHARD T. CIOTTONI

June 1, 2000

FILED²

JUN 2 2000

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

**RE: Missouri-American Water Company - Consolidated Case Nos. WR-2000-281
and SR-2000-282**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced proceeding please find an original and eight copies of MAWC's Motion to Strike Testimony and Motion for Summary Determination. Please stamp the enclosed extra copy "filed" and return same to me.

Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:

Dean Cooper
Dean L. Cooper *lykg*

DLC/rhg
Enclosures

cc: Office of the Public Counsel
Mr. Keith Krueger
Ms. Shannon Cook
Ms. Diana M. Vuylsteke
Mr. Karl Zobrist
Mr. Leland Curtis
Mr. Brent Stewart
Mr. James Duetsch

Mr. Joseph Moreland
Mr. Stu Conrad
Mr. Louis Leonatti
Mr. Jim Fischer

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

FILED³
JUN 02 2000

*Missouri Public
Service Commission*

In the Matter of Missouri-American)	
Water Company's Tariff Sheets Designed)	
to Implement General Rate Increases for)	Case No. WR-2000-281
Water and Sewer Service provided to)	Case No. SR-2000-282
Customers in the Missouri Service Area)	
of the Company.)	

**MOTION TO STRIKE TESTIMONY
AND MOTION FOR SUMMARY DETERMINATION**

COMES NOW Missouri-American Water Company ("MAWC" or "Company") and, for its Motion to Strike Testimony and Motion for Summary Determination, states to the Missouri Public Service Commission ("Commission") as follows:

1. On April 3, 2000, the Office of the Public Counsel ("OPC") filed the Direct Testimony of Ted L. Bidy. Mr. Bidy from page 4, line 15 through page 26, line 12 discusses his recommendation that only \$36,307,591 of MAWC's costs associated with the St. Joseph treatment plant and related facilities be included in rates. This proposed disallowance is based upon his opinion that MAWC's decision to construct the St. Joseph treatment plant and related facilities was not prudent after "examining the prudence and reasonableness" of MAWC's decision. (Bidy Dir., p. 4) Mr. Bidy further reduces the amount to be included in rates by \$7,098,134 based on a "used and useful" rationale. Additionally, the Direct Testimony of OPC witness Russell Trippensee, filed the same day, discusses his proposed regulatory treatment of the "used and useful" rationale. This testimony begins on page 15, line 1 and continues through page 19, line 10.

2. Also on April 3, 2000, AG Processing Inc., Friskies Petcare and Wire Rope Corporation of America Inc. ("St. Joseph Industrials") filed the Direct Testimony of Ernest Harwig and Charles D. Morris. Mr. Morris alleges that MAWC's decision to construct the St. Joseph

175

treatment plant and related facilities was neither “necessary nor prudent.” (Morris Dir., p. 16) This discussion begins on page 5, line 17 and ends on page 24, line 13. Mr. Harwig discusses revenue requirement calculations for St. Joseph based on Mr. Morris’ recommendation beginning on page 2, line 1 and ending on page 4, line 18.

3. On May 25, 2000, OPC filed the Surrebuttal Testimony of Mr. Biddy. Mr. Biddy further discussed his proposed plant disallowance beginning on page 1, line 11 and continuing through page 25, line 21.

4. Also on May 25, 2000, the St. Joseph Industrials filed the Surrebuttal Testimony of Mr. Morris. Mr. Morris further discussed his opinion concerning the construction decision made by MAWC beginning on page 2, line 1 and continuing through page 12, line 9.

**COMMISSION HAS PREVIOUSLY DECIDED THE
REASONABLENESS OF CONSTRUCTION**

5. In *Re the Application of Missouri American Water Company for a Certificate of Convenience and Necessity to Lease, Operate, Control, Manage and Maintain a New Source of Supply in Andrew County, Missouri*, Case No. WA-97-46 (Issued October 9, 1997), MAWC filed an application with the Commission requesting a certificate of convenience and necessity for property in Andrew County, Missouri, for the purpose of providing additional water supply to the St. Joseph, Missouri service area. MAWC also proposed the construction of a new treatment facility and lines to transport the raw water from the adjacent water field to the new facility. Notice was issued by the Commission. The OPC was a party to this case and AG Processing, Inc. was granted status as a participant without intervention.

6. In the Hearing Memorandum, several “settled issues” were presented to the Commission by the parties. One of these was stated as follows:

That there is a need to replace and/or improve the existing source of supply and treatment facilities; and/or construct a new source of supply and treatment facilities; and/or secure a new independent source of supply in order to provide safe, adequate and reliable water service.

7. After a review of many alternatives in Case No. WA-97-46 the Commission found that, *“based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new ground water source of supply and treatment of a remote site, is a reasonable alternative.”* (emphasis added) The Commission reserved the right to examine the “prudence of the actual costs incurred and the management of construction of the proposed project.”

8. The Commission made these findings in 1997, prior to the start of construction. The Commission previously has stated that it will not rely on hindsight and that it “will assess management decisions at the time they are made and ask the question, ‘Given all the surrounding circumstances existing at the time, did management use due diligence to address all relevant factors and information known or available to it when it assessed the situation?’” *Re: Union Electric Company (Callaway Nuclear Plant)*, 27 Mo.PSC (N.S.) 183, 194 (1985).

9. Thus, Case No. WA-97-46 was the appropriate time to address MAWC’s decision and at that time the Commission found that the St. Joseph treatment plant and related facilities was a “reasonable alternative.” Additionally, the St. Joseph treatment plant and related facilities has been the subject of two financing cases since the completion of Case No. WA-97-46. (*See In re Missouri-American Water Company*, WF-99-69 (November 12, 1998) (the Commission approved financing for “the construction of the new St. Joseph treatment plant, well field, and associated lines, and to allow it to retire existing short-term debt.”); *See also In re Missouri-American Water Company*, WF-2000-383 (February 17, 2000)).

PARTIES ARE ESTOPPED FROM TAKING INCONSISTENT POSITIONS

10. The OPC and the St. Joseph Industrials should be equitably estopped from asserting in this case that the decision of MAWC to construct a new treatment plant and related facilities was not prudent and/or necessary as all were either participants in Case No. WA-97-46 or had constructive notice through the Order and Notice issued in that case.

11. As stated above, in Commission Case No. WA-97-46, the OPC agreed with MAWC “[t]hat there is a need to replace and/or improve the existing source of supply and treatment facilities; and/or construct a new source of supply and treatment facilities; and/or secure a new independent source of supply in order to provide safe, adequate and reliable water service.” Report and Order, Case No. WA-97-46.

12. During the course of the hearing, the OPC did not recommend the rehabilitation of the existing plant and generally agreed with MAWC’s capacity projections. AG Processing, Inc. remained silent. The Commission thereafter agreed that building the new treatment plant was a reasonable alternative. In light of its findings, the Commission granted the requested certificate of convenience and necessity for the purpose of operating a well field and transportation pipeline to connect to the new treatment plant.

13. In reliance on the Commission’s decision, the OPC’s testimony, and the silence of others, MAWC proceeded to construct the new treatment plant with adjoining well field and transportation pipelines. Now, in the present general rate case, these parties argue that constructing the new water supply plant was not prudent and/or necessary, and, therefore the full cost of the new plant should not be included in MAWC’s rate base.

14. The elements of equitable estoppel are as follows: “(1) an admission, statement or act inconsistent with a claim later sued upon; (2) action by the other party on the faith of such conduct;

and (3) injury to the other party if the first party is allowed to contradict or repudiate its original admission, statement, or act.” *Lick Creek Sewer Systems, Inc. v. Bank of Bourbon*, 747 S.W.2d 317, 324 (Mo. Ct. App. S.D. 1988).

15. In Case No. WA-97-46, the OPC recognized the need for improvements in the water supply system in St. Joseph, Missouri. The OPC’s testimony provided no better alternative in meeting that need than to build the proposed new plant. The St. Joseph Industrials were silent at such time and offered no alternative. Based on the testimony, and/or lack thereof, and the Commission’s Report and Order in Case No. WA-97-46, MAWC made the decision to build the St. Joseph treatment plant and related facilities. If the OPC or the St. Joseph Industrials had suggested other, better, alternatives to fill the needs in St. Joseph at the time the decision was being made, then MAWC would have had the opportunity to pursue a different alternative. These parties did not do so. MAWC had no reason to believe that they would change their position at a later date.

16. As such, MAWC incurred various costs in constructing the new plant totaling approximately \$70 million. For these parties to come in now and argue that the construction of the new plant was imprudent, would constitute an injustice to MAWC. The OPC and the St. Joseph Industrials should be estopped from asserting that the building of the new plant was imprudent and/or unnecessary.

COMMISSION IS ESTOPPED FROM RELITIGATING THIS ISSUE

17. The general rule is that the doctrine of equitable estoppel is not applicable against a governmental entity, such as the Commission itself. *See State ex re. Capital City Water Co. v. Missouri Public Service Commission*, 850 S.W.2d 903, 910 (Mo. Ct. App. W.D. 1993). However, an exception applies when the circumstances are exceptional—where justice or the prevention of a manifest injustice requires its application. *Id.* Such is the situation in this case.

18. The Commission in Case No. WA-97-46 specifically stated:

However, based on the extensive evidence presented, the Commission finds that the proposed project, consisting of the facilities for a new groundwater source of supply and treatment at a remote site, is a reasonable alternative . . . The Commission finds that issuance of that certificate to be in the best interest of the public.

See Report and Order, Case No. WA-97-46. As such, the Commission granted a certificate of convenience and necessity to MAWC for the construction of the new facilities.

19. As previously indicated, the elements necessary to warrant application of the estoppel doctrine are: (1) an admission or statement inconsistent with a later claim; (2) reliance by a third party; and (3) injury to the third party if the first party is allowed to repudiate such statement. *See Lick Creek*, 747 S.W.2d at 324. All of those elements exist in the present situation. The Commission in Case No. WA-97-46 found that the project was a reasonable alternative and that the issuance of a certificate of convenience and necessity to build the new system was in the best interest of the public.

20. In reliance on these findings by the Commission, MAWC constructed the St. Joseph treatment plant and related facilities and has expended approximately \$70 million in this effort. The Company's reliance on the Commission's findings was certainly reasonable. All parties agreed that improvements to MAWC's water supply system in the St. Joseph, Missouri area were necessary. The Commission found that the alternative chosen was reasonable and in the best interest of the public. *See* Report and Order, Case No. WA-97-46. For the Commission to potentially hold that MAWC's actions were imprudent and/or unnecessary, and that MAWC will not be able to include the cost of the new facilities in rate base, constitutes manifest injustice. As such, the Commission should make a summary determination in favor of MAWC finding that the prudence of alternative chosen has already been determined.

**PARTIES MAY NOT MAKE COLLATERAL ATTACK ON PRIOR
COMMISSION ORDER**

21. Section 386.550, RSMo states that “In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive.” In *State ex rel., Ozark Border v. Public Service Commission, et al.*, 924 S.W.2d 597 (Mo.App. 1996), the Missouri Court of Appeals for the Western District described the effect of this provision as follows:

This statute is indicative of the law's desire that judgments be final. *State ex rel. Harline, v. Pub. Serv. Comm'n*, 343 S.W.2d 177, 184 (Mo. App. 1960). A judgment of a court having jurisdiction cannot be impeached collaterally. *Id.* This statutory provision makes a decision of the Commission immune to collateral attack.

22. The provision was similarly treated as follows in *State ex rel. Licata, Inc. v. Public Service Commission, et al.*, 829 S.W.2d 515 (Mo. App. 1992):

In *State ex rel. State Highway Com'n v. Conrad*, 310 S.W.2d 871, 876[4] (Mo. 1958), the court stated that it had so frequently been held that orders of the PSC are not subject to collateral attack that the court was not required to elaborate on the effect and meaning of §§ 386.550. In that case the court refused to entertain a collateral attack on an order of the Commission which had apportioned the costs of constructing a railroad crossing. The court held that §§ 386.510 provides the sole method of obtaining review of any final order of the commission. If a statutory review of an order of the Commission is not successful, the order becomes final and cannot be attacked in a collateral proceeding.

23. Commission Case No. WA-97-46 was fully litigated in 1997 and the Commission's decision became a final order of the Commission. Any attack in this case on the Commission's finding that construction of a “new groundwater source of supply and treatment at a remote site is a reasonable alternative” constitutes an improper collateral attack and is violative of Section 386.550, RSMo. The Commission should therefore issue its summary determination in favor of MAWC as to the prudence of MAWC's decision to construct the St. Joseph treatment plant and related facilities.

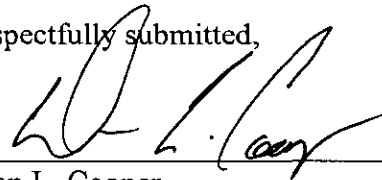
24. This having been said, while the Commission has determined the reasonableness, or

prudence, of MAWC's decision to construct the St. Joseph treatment plant and related facilities, it has clearly left for itself the question of the prudence of the actual costs incurred and the management of construction of the proposed project. It is these subjects which are properly relevant to this rate case.

WHEREFORE, MAWC respectfully moves the Commission to issue its order:

- a) Striking the identified portions of the direct testimony of Ted L. Biddy, Russell Trippensee, Charles D. Morris and Ernest Harwig;
- b) Summarily determining that MAWC's decision to construct the St. Joseph treatment plant and related facilities has been determined to be prudent and that what remains is the question of the prudence of the actual costs incurred and the management of construction of the project; and,
- c) Granting such further relief as it shall find to be reasonable and just.

Respectfully submitted,



Dean L. Cooper MBE#36592
William R. England, III MBE#23975
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
573/635-7166 (phone)
573/635-0427 (facsimile)
dcooper@brydonlaw.com (e-mail)
ATTORNEYS FOR MISSOURI-AMERICAN
WATER COMPANY

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 1st day of June, 2000, to the following:

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

Mr. Louis J. Leonatti
Leonatti & Baker, P.C.
P.O. Box 758
Mexico, Missouri 65265

Mr. James M. Fischer
Attorney at Law
101 West McCarty, Suite 215
Jefferson City, Missouri 65101

Mr. Leland B. Curtis
Curtis, Oetting, et al.
130 S. Bemiston, Suite 200
Clayton, Missouri 63105

Ms. Shannon Cook
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Mr. Charles Brent Stewart
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, Missouri 65201

Mr. James B. Duetsch
Blitz, Bargette & Duetsch
308 E. High, Suite 301
Jefferson City, MO 65101

Mr. Karl Zobrist
Blackwell Sanders, et al.
P. O. Box 419777
Kansas City, MO 64141-9777

Mr. Joseph W. Moreland
Blake & Uhlig, P.A.
2500 Holmes Road
Kansas City, Missouri 64108

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, Missouri 64111

Ms. Diana M. Vuylsteke
Bryan Cave LLP
One Metropolitan Sqr., Suite 3600
211 N/ Broadway
St. Louis, MO 63102-2750

