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October 25, 2001

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

*WO-2002-206*

Re: Proposed Acquisition of Missouri-American Water Company and American Water Works Company by the German Corporation RWE AG.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **MOTION TO REVIEW PROPOSED ACQUISITION OF MISSOURI-AMERICAN WATER COMPANY AND AMERICAN WATER WORKS COMPANY, BY RWE AG, A GERMAN CORPORATION**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "M. Ruth O'Neill".

M. Ruth O'Neill  
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

FILED<sup>3</sup>

OCT 25 2001

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

Missouri Public  
Service Commission

In the Matter of the Proposed Acquisition )  
of Missouri-American Water Company )  
and American Water Works Company by )  
the German Corporation RWE AG. )

Case No. 60-2002-206

**MOTION TO REVIEW PROPOSED ACQUISITION OF MISSOURI-  
AMERICAN WATER COMPANY AND AMERICAN WATER WORKS  
COMPANY, BY RWE AG, A GERMAN CORPORATION**

COMES NOW, the Office of the Public Counsel (Public Counsel), and respectfully moves the Missouri Public Service Commission (Commission) to review the proposed acquisition of Missouri-American Water Company (MAWC) and its parent company, American Water Works Company (AWK) by the German Corporation, RWE AG. Specifically, Public Counsel requests that the Commission conduct a review to determine whether the proposed acquisition would be detrimental to the public interest of the citizens of the State of Missouri, and if so, whether there are any conditions which may be imposed to alleviate such detriment. This motion is made pursuant to a number of provisions of Missouri law, including §§386.250.3, 386.330, 393.130, 393.140, and 393.190 RSMo (2000). This motion is made because this Commission must determine that the acquisition of a Missouri-regulated public utility by a European corporation will not be detrimental to the public interest before such transaction can occur.

The proposed transaction, if allowed to go forward without modification, would significantly change the corporate structure of the Company, which ultimately provides Missouri customers with water service in the MAWC service territories. Rather than a national, U.S. investor-owned holding company being the ultimate parent company of Missouri-American, the ownership interest will be even farther removed from the

regulatory power of this Commission. Two more corporate layers, based in two different foreign countries, will stand between the Company's Missouri customers and the owners of the corporation. The interests of those owners will be vastly different in scope, and the importance of ensuring that Missouri customers receive safe and adequate service at just and reasonable rates will significantly diminish as this multi-national, multi-utility corporation evaluates the disparate interests and needs of its utility customers.

Public Counsel has received letters and telephone calls regarding this proposed transaction from customers and from members of the state legislature. All of these contacts expressed concern regarding the possible transfers of the largest Commission-regulated water company in Missouri to a corporation based in Germany. These contacts reinforce Public Counsel's concerns regarding this proposed transaction.

#### **SUGGESTIONS IN SUPPORT OF THE MOTION**

1. Missouri-American Water Company (MAWC) is a wholly owned subsidiary of American Water Works Company (AWK), a Delaware Corporation with its headquarters in Voorhees, New Jersey. MAWC is water utility regulated by the Commission. AWK is the largest investor-owned water company in the United States. AWK provides water and wastewater services to communities in 23 states. AWK is publicly traded on the NYSE. MAWC is not publicly traded, and is wholly owned by AWK.

2. RWE AG is a German corporation, with its headquarters in Essen, Germany. RWE AG is a holding company which is primarily in the business of operating utilities, including electricity, gas, water and recycling, and water and wastewater services. RWE

AG has operations worldwide. Currently, RWE AG is the third-largest water company in the world. RWE AG is publicly traded in Germany and Switzerland. RWE AG operates on a worldwide scale.

3. RWE AG operates many of its water and wastewater subsidiaries through its wholly-owned subsidiary, Thames Water (Thames), which is headquartered in London, U.K. Thames operates water and wastewater operations in 44 countries, including the UK, Germany, Australia, Chile, China, Indonesia, Malaysia, Puerto Rico, Thailand, Turkey, Croatia, Hungary, and the United States. Thames is not publicly traded.

4. On September 17, 2001, AWK and RWE AG announced that they had reached an agreement for RWE AG to acquire all outstanding shares of the stock of AWK. This announcement acknowledged that this transaction would have to be approved by the AWK shareholders and the various regulatory bodies which oversee the regulated utility operations of AWK subsidiaries, such as MAWC. (American Water Works Press Release, 9/17/01.) The Missouri Commission should carefully review the proposed transaction in the same manner that other regulatory bodies will conduct their review. Unlike any other regulatory body, however, the Missouri Commission must consider how the acquisition will affect Missouri customers.

5. If this transaction is allowed to be completed, the interests of Missouri customers, in relationship to the interests of the company as a whole, will be significantly diminished. Rather than competing only with sister subsidiaries in 22 other U.S. states for funds to implement necessary capital investments, MAWC will be forced to compete with water systems around the globe. Because the proposed purchase price includes a significant premium on the stock price of AWK stock, RWE AG will have strong

incentives to maximize the return on its equity in the system. RWE AG will have scant ties to MAWC's Missouri customers. Although RWE AG, through its Thames subsidiary, does currently have water operations in the U.S., those operations are limited to New Jersey and Puerto Rico. Neither RWE AG nor Thames is familiar with the Missouri regulatory environment.

6. Public Counsel suggests that the Commission has jurisdiction pursuant to §§386.250.3, 386.330, 393.140, and 393.190 RSMo (2000). Section 386.250.3 grants the Commission jurisdiction over "all water corporations, and to the land, property, dams, water supplies or power stations thereof and the operation of the same within this state."

7. Section 393.140 RSMo authorizes the Commission to exercise supervisory authority over water corporations. Section 393.140.12 requires the Commission to ascertain that when any water corporation conducts business outside the jurisdiction of the Commission, that such business be conducted so "that its operations are kept substantially separate and apart" from the business's regulated operations. This section further authorizes the Commission to "inquire as to, and prescribe the apportionment of, capitalization, earnings, debts and expenses to be borne by the ownership of the ...water corporation...as distinguished from such other business." Under the current ownership of MAWC, the Commission's Staff and Public Counsel must seek information from the AWK headquarters in Voorhees, NJ in order to determine whether common corporate costs are being properly allocated to MAWC. This inquiry includes, but is not limited to, costs incurred by MAWC for services provided by American Water Works Service Company, another subsidiary of AWK. This introduces a challenge in the process of obtaining complete and accurate information in rate cases, etc. Once AWK is sold to

RWE AG, however, the task of properly allocating joint and common corporate costs to MAWC will become more complicated. This must be done to protect Missouri customers from paying more than their "fair share" of these costs. The Missouri regulated operation should not be used to subsidize other aspects of AWK's business interests. The Commission has the duty to ensure that Missouri customers are not required to subsidize RWE AG operations in other US states, or in other countries.

8. Pursuant to §393.190 RSMo, all regulated utility companies in Missouri are required by law to seek Commission approval of a sale or other transfer of assets such as the transfer of assets proposed between AWK and RWE AG. Section 393.190(1) provides that "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 to do so."

9. Public Counsel submits that under Section 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. The Commission should take whatever steps are necessary to assure itself that, if the acquisition goes forward, RWE AG will operate MAWC in the manner of a "good corporate citizen."

10. Holding companies that acquire control of public utility companies that do business in Missouri under a certificate issued by the Commission should not be able to structure the corporate form of ownership in such a way as to defeat the Commission's

jurisdiction. In Re: Central Vermont Public Service Corporation, 84 PUR 4<sup>th</sup> 213 (FERC 1987), the Commission rejected the form of the transaction over the substance of the transaction to find jurisdiction:

“ the purposes behind the FPA may be frustrated were we to adhere to corporate form in reviewing the instant. . . transactions. In a recent proceeding involving a corporate merger and reorganization, we indicated that we are not bound to examine such transactions as they are presented and, furthermore, that our jurisdiction may not necessarily be avoided by [the] structuring [of] a transaction. . . .”

11. The FERC found it had jurisdiction in Re: Central Vermont Public Service Corporation, 84 PUR 4<sup>th</sup> 213 (FERC 1987) where 100% of the stock in the electric public utility was transferred to a newly created holding company. It reasoned that as a wholly-owned subsidiary of a holding company, the direct control of the public utility passed from the shareholders to the board of directors of the holding company. In this case, MAWC is already owned by a holding Company, AWK. If this transaction is approved, the control of the Missouri –regulated utility will be further removed from this state than ever before. Instead of being controlled by a board of directors in New Jersey, the Missouri operations of the Company will be filtered through New Jersey and London, from a board of directors which sits in Essen, Germany.

12. In Joint Application of Gateway Pipeline Company, et al., GM-2001-585 (2001), this Commission accepted jurisdiction over the proposed acquisition of two intrastate pipelines by an out of state company. At the time that the Commission accepted jurisdiction in that case, it noted that it would determine “whether the transaction is not detrimental to the public interest prior to its authorization pursuant to 4 CSR 240-2.060.”

(GM-2001-585, Order Accepting Jurisdiction, dated 5/24/2001.) Public Counsel suggests that this Commission should come to the same decision in this case.

13. This proposed acquisition is distinguishable from the case of Public Service Commission v. Union Pacific Railroad Company, 197 SW 39 (Mo banc 1917). In that case, the Commission refused jurisdiction in stock transfers of Missouri certificated telecommunications companies between holding companies incorporated in other states. The Union Pacific case involved the authority to govern the issuance of stock by a foreign corporation. The Court reasoned that since the state reserved the control of stock issued by domestic corporations to itself, it could regulate the issuance of stock by domestic railroad companies as a "special privilege" through Commission approval. But there was no grant of corporate authority from Missouri to foreign corporations and, thus, no basis to control stock issuance. The Court said it must look at the "mischief" to be prevented by the statute as a guide for Commission jurisdiction.

14. Stock issuance is not the issue in this transaction. This is sale of all outstanding stock for case which changes ownership and assigns the control and operation of a water company operating in Missouri to another corporate entity. The Commission is responsible under Section 393.190 to protect the consumer and assure safe and adequate water service at just and reasonable rates. Commission oversight is designed to provide scrutiny over water companies for the purpose of providing reasonable rates, security of the availability and the quality of service. The transfer of ownership and control of a water company operating in Missouri presents a potential for abuses that could be adverse to the public interest. The transfer of ownership of a regulated utility to a German holding company or from a holding company that is a



“citizen” of a sister state to a corporation that is a “citizen” of a foreign country is an event that falls within the purview of this Commission’s charge to protect the public right to safe and adequate utility service at just and reasonable rates. The Commission should act with foresight and a keen eye on the vital duty the General Assembly gave it to oversee public utilities in this state for the benefit of the public. “Regulation, to command respect from patron or utility owner, must be in the name of the overlord, the state, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service.” May Department Stores v. Union Electric Power and Light Co., 107 SW2d 41, 48 (Mo. 1937).

WHEREFORE, the proposed transaction involves the sale of a Missouri regulated water corporation. It is possible that the proposed transaction will result in a detriment to the public interest of the Missouri customers of the Missouri-regulated MAWC. Whether the Company can show that no detriment will occur as a result of this transaction is not currently known, nor is it currently known whether any such detriment can be overcome by imposing certain conditions on the transaction. These questions regarding the substantial rights of Missouri customers can only be answered, if at all, in the context of a proceeding before this Commission. This Commission has the authority to accept jurisdiction over this matter, pursuant to statute. For the forgoing reasons, it is respectfully requested that this Commission accept jurisdiction over this proposed transaction, establish a procedural schedule and conduct a hearing to determine whether the proposed transaction is detrimental to the public interest.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 25<sup>th</sup> day of October 2001:

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