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January 30, 2002

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

Re: Missouri-American Water Company
Case No. WO-2002-273

FILED
JAN 30 2002
Missouri Public
Service Commission

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Response to Motion to Modify Protective Order and Request for Evidentiary Hearing at Which the Applicants Shall Present Evidence in Support of Its Proposed Modifications and at Which the Staff and Public Counsel Shall Have an Opportunity for Cross-Examination**. Please "file" stamp the extra-enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

M. Ruth O'Neill
Assistant Public Counsel

MRO:jb

cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
JAN 30 2002
Missouri Public
Service Commission

In the Matter of the Joint Application of Missouri-)
American Water Company, St. Louis County Water)
Company, d/b/a Missouri-American Water Company,)
and Jefferson City Water Works, d/b/a Missouri-) Case No. WO-2002-273
American Water Company, for an Accounting)
Authority Order Relating To Security Costs.)

**RESPONSE TO MOTION TO MODIFY PROTECTIVE ORDER AND REQUEST
FOR EVIDENTIARY HEARING AT WHICH THE APPLICANTS SHALL
PRESENT EVIDENCE IN SUPPORT OF ITS PROPOSED MODIFICATIONS
AND AT WHICH THE STAFF AND PUBLIC COUNSEL SHALL HAVE AN
OPPORTUNITY FOR CROSS-EXAMINATION**

COMES NOW, the Office of the Public Counsel and respectfully responds to Missouri-American Water Company et al's (MAWC's) Motion to Modify the Protective Order in this case. Public Counsel would not object to including, within the definition of "highly confidential" in the protective order, the following proposed language in this particular case:

"(6) materials, documents, strategies and other information related to actual or planned modifications of the company's methods of ensuring physical security of its public utility facilities"

However, Public Counsel strenuously objects to all of the other proposals for modifying the protective order which MAWC proposes in its motion.

Public Counsel submits that the provisions of §386.480 RSMo (2000) make these requests unnecessary. That section provides that:

"The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor."

Public Counsel specifically objects to MAWC's proposed modifications which (1) limit Public Counsel's and Staff's access to the documentation which supports—or refutes—MAWC's request for an AAO; (2) request that the Commission order Staff and Public Counsel employees to submit to a criminal history check as a condition to doing their jobs in this case, and (3) require all persons with access to the information sought be United States citizens.

These three requests are alarmist, frivolous, without foundation and contrary to both the Commissions' regulatory oversight responsibilities and Public Counsel's statutory mandate to protect Missouri consumers. The suggestion in the Motion to Modify that the employees of the Commission staff and the Office of the Public Counsel are not to be trusted is insulting, unprofessional and scurrilous. The requirement that Public Counsel travel to St. Louis to view this information is unduly restrictive, and creates a hardship on the small Public Counsel office in this time of budget cutbacks. There is no rational basis for the proposals of a criminal background check, or of limiting access to information to United States citizens. In the United States of America, legal residents are still presumed not to be traitors, and, indeed, are presumed to be innocent of unlawful behavior. Public Counsel therefore opposes the Motion to Modify, except to the extent stated above. If MAWC believes it has information which would justify these extraordinary restrictions, Public Counsel moves for an evidentiary hearing at which MAWC can present witnesses and testimony in support of these restrictions, and afford Public Counsel and the Staff the opportunity for cross-examination.

SUGGESTIONS IN SUPPORT OF THE MOTION

1. On December 20, 2001, Public Counsel submitted nine data requests to MAWC, asking for documentation in support of its December 10, 2001, request for an Accounting Authority Order (AAO) related to alleged "security" issues. MAWC refused to provide that information through the normal discovery channels. Instead, MAWK seeks, unfairly and without cause, to limit Public Counsel's access to the information in violation of § 386.480 RSMo (2000).

2. Public Counsel suggests that the Commission does not have the authority to micromanage the operations of the Office of the Public Counsel by imposing the requested background checks and dictating which staff members can work on this case. Even if the Commission has such authority, there is no showing that the restrictions proposed by the Applicants, that public counsel and staff employees submit to "criminal history checks by the Missouri State Highway Patrol" and be "citizens of the United States" would enhance security.

3. The Motion to Modify contains absolutely no information from which this Commission could discern that any employee of the Commission Staff or Office of the Public Counsel should be barred from meaningful access to information necessary to investigating the **Applicant's** request for special accounting treatment. MAWC has presented no information to support its claim that the general protections given to "highly confidential" information in proceedings before the Commission would be in adequate to protect this information.

4. The Motion contains no information from which this Commission could discern that proposed modifications (b) and (c) at p. 8 of the Motion are necessary to

protect the public. Rather, it appears that MAWC has made these proposals for two reasons: (1) to vex, annoy and harass opposing litigants and (2) to delay the time in which MAWC must provide any information whatsoever in support of the AAO request, thereby lessening the time frame in which Public Counsel and the Staff can analyze the information on which the AAO request is based. Neither is a valid reason for the Commission to summarily dispense with substantive and procedural rules designed to afford the opposing parties the opportunity to meaningfully test the claims of the monopoly water utility. Public Counsel therefore respectfully requests that the Commission either summarily deny the Motion to Modify, or set this matter for an evidentiary hearing, held pursuant to the Commission's procedures for taking highly confidential testimony, and require MAWC to present evidence in support of the Motion to Modify and provide Public Counsel and the Commission Staff with the opportunity for cross-examination.

I. MAWC failed to present sufficient justification to restrict Public Counsel's and Staff's access to information, which it must provide to the Commission in order to establish that an AAO should be granted.

5. MAWC provided no legal justification for asking the Commission to deviate from the usual procedure for the handling of the discovery of confidential information between public utility monopolies, the Staff and Public Counsel. The request seems particularly odd when juxtaposed against MAWC's burden of proof in this case. Section 386.430 RSMo (2000) provides that in all proceedings before the Commission

"the burden of proof shall be upon the party...seeking to set aside any determination, requirement, direction or order of said commission to show by clear and satisfactory evidence that the determination, requirement, direction or order complained of is unreasonable or unlawful."

By requesting an AAO, MAWC seeks an exemption from the Commission's requirements regarding regulatory accounting practices. To justify this request, MAWC must produce sufficient evidence to meet its burden of proof.

6. MAWC seeks an AAO to allow it to defer recognizing costs in the period in which they occur. An AAO is special device

"by which the Commission gives authorization to a utility to account for a cost in a different manner than called for by the Uniform System of Accounts.... This deferral allows the utility the opportunity to seek recovery of the capitalized costs in a subsequent rate proceeding." In re Application of United Water Missouri, Inc., Mo. PSC Case No. WA-98-187 (Slip Op. at p. 6.)

7. At the evidentiary hearing in this case, MAWC must prove that the expense to be deferred is "extraordinary, unusual and unique and not recurring." In the Matter of Missouri Public Service, 1 MPSC 3d 200, 205 (1991). MAWC cannot meet this burden of proof without providing specific information to the Commission which meets these criteria.

8. Public Counsel and Staff have the right to cross-examine MAWC's witnesses. 4 CSR 240-2.130.3. Pursuant to Commission practice, all parties must pre-file witness testimony. 4 CSR 240-2.130.6. Additionally, "Direct testimony shall include all testimony and exhibits asserting and explaining the party's entire case-in-chief." 4 CSR 240-2.130.7(A). The data requests currently outstanding in this case relate directly to the Applicant's anticipated case-in-chief, and the underlying documentation in support of such case. Public Counsel and Staff are entitled to the same access to this information as the Commission itself. § 386.480 RSMo. Public Counsel employees are held criminally

liable if they disclose information obtained while working on cases before the Commission.

9. MAWC does not suggest that the employees of the Staff and Public Counsel are not sufficiently trustworthy to have access to highly confidential information. MAWC admits that "the danger in this instance is not so much that there will be an intentional provision of information to unauthorized persons. The danger lies in the ...risk of unintentional release." (Motion at p. 6). Public Counsel submits that the "risk of unintentional release" in this case is certainly no greater than the risk in any other case, and is substantially less. Public Counsel is sensitive to the concerns that the Applicants set forth. However, asking this Commission to impose restrictions inconsistent with the Public Counsel's statutory right to access this information, without any evidence that these restrictions are necessary, is an arrogant conceit which has no place in the Missouri regulatory environment.

10. Although re-evaluating the security needs and capabilities of public utilities is appropriate in today's environment, MAWC's suggestion that this Commission impose the type of restrictions on access utilized by the nuclear power industry lacks merit. In Missouri, Public Counsel has had much greater access to nuclear power facilities of regulated utilities than MAWC proposes be given to documents in this case. Nuclear power facilities are more likely than water facilities to be a target of any type of sabotage.

11. The American Water Works Association (AWWA), in a press release dated October 18, 2001, stated that it "joins U.S. Environmental Protection Agency Administrator Christine Todd Whitman in assuring the public that the nation's drinking water is safe and highly unlikely to be compromised in the event of a terrorist attack."

AWWA is an organization that represents America's water treatment utilities and drinking water professionals. While additional security measures may be needed, there is no reason that an unlikely event will become more likely if Public Counsel is given its regular, statutorily authorized access to this confidential information.

12. MAWC's reliance on the language of a resolution of the National Association of Regulatory Utility Commissioners (NARUC) is misplaced. The NARUC resolution regarding security measures does NOT suggest that Commissions restrict their staffs or consumer advocate offices such as Public Counsel from meaningful access to information regarding proposed security measures. The recommendations in that resolution relate to the access of *the public* to information, not the access of Commissions and Public Counsel. The restrictions recommended in the NARUC resolution mirror the Commission's current procedures for handling highly confidential information. In fact, the resolution states "WHEREAS, certain expenditures may be incurred for specific security measures which may be highly sensitive, thereby necessitating confidential treatment by both the utility and the Public Utility Commission." Designating the information sought in this matter as highly confidential will accomplish the purpose intended by NARUC. Therefore, there is no need for the onerous additional restrictions proposed by MAWC.

II. The Commission does not have the statutory authority to direct that employees of the Office of the Public Counsel undergo criminal history checks for the benefit of the MAWC, or to direct Public Counsel's decisions of which employees should be allowed to work on a particular case.

13. Despite the irony that a company being purchased by a German multinational corporation (RWE) would require that only U.S. citizens who pass a "criminal history check" by the Missouri Highway Patrol have access to the information at issue,

the Commission has no authority for including either restriction in the protective order in this case. To the extent that the Commission's statutory jurisdiction does not preclude such an order, there is no rational reason to impose such an order.

14. Ordering criminal background checks would violate Staff and Public Counsel employees' constitutional right to privacy; consequently, a governmental order directing such checks and disclosing the results to MAWC would be unconstitutional. The Fourteenth Amendment states, "nor shall any State deprive any person of . . . liberty . . . without due process of law, nor deny any person within its jurisdiction equal protection of the laws." U.S. Const. Amend. XIV, § 1. In Roe v. Wade, the Supreme Court announced that a constitutional "right of privacy . . . [is] founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 153 (1973). In Zablocki v. Redhail, 434 U.S. 374 (1978), the Court reaffirmed "the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause." 410 U.S., at 384.

The U. S. Supreme Court held that constitutionally protected privacy rights include an individual's "interest in avoiding disclosure of personal matters" in Whalen v. Roe, 429 U.S. 589, 599 (1977); *see also* Nixon v. Administrator of Gen. Services, 433 U.S. 425, 457(1977). Employees of the Commission Staff and the Office of the Public Counsel have a legitimate expectation of privacy in the information which MAWC is asking the Commission to order as the price of admission to information MAWC must provide to the Commission.

15. Release of criminal history information was discussed in U.S. Dept. of Justice v. Reporters Committee, 489 U.S. 749 (1989). In that case, the U.S. Supreme Court held disclosure of a person's criminal history to a third party was prohibited and

exempted from the requirements of the Freedom of Information Act (FOIA). The Court held that disclosing records or information compiled for law enforcement purposes "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 489 U.S., at 756. In the Reporters Committee case, the Court noted that "that most States deny the general public access to their criminal-history summaries." 489 U.S., at 767. See, §§ 43.500 through 43.545 RSMo (2000) and §§ 610.100 through 610.120 RSMo. For example:

(1) Section 43.507 RSMo provides that criminal history information can be released only pursuant to "written agreements reasonably designed to ensure the security and confidentiality of the information and protection of the privacy interests of the individual...[and that] prior to such information being made available, information that uniquely identifies the individual shall be deleted."

(2) Section 43.530 RSMo imposes a fee for obtaining the information of "not more than five dollars." The Missouri State Highway Patrol charges \$5 for each criminal history check it runs. MAWC has not addressed who will be responsible for paying such fee if the Commission modifies the protective order in this manner.

(3) Section 610.105 RSMo prohibits the disclosure of arrest records where the accusation was not followed by conviction.

16. Even if the Commission finds it has jurisdiction to order a criminal background check, it should not authorize this breach of protected privacy rights. In assessing whether a specific category of information is constitutionally protected, this court "must consider, (1) if the party asserting the right has a legitimate expectation of privacy [in that information], (2) if disclosure serves a compelling state interest, and (3) if

disclosure can be made in the least intrusive manner." Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981). A Commission order to undergo and disclose the results of a criminal history check would fail this test.

17. Employees have a reasonable expectation of privacy in the existence or nonexistence of a criminal "history." NO compelling state interest would be served by requiring Staff and Public Counsel employees to undergo this invasive check, or by providing the results to MAWC. A request that the criminal background check be made by the Missouri highway patrol would be ineffective. The Highway Patrol could only list convictions, if any, within the state courts of Missouri. If some nefarious individual has indeed infiltrated the Staff or Public Counsel with a "rap sheet" from another state, the requested check will not reveal that history. Further, there is nothing in the requested modifications to the protective order which would authorize MAWC to refuse to provide data request responses to an employee of Staff or Public Counsel based upon information revealed by the Highway Patrol. There is no rational basis for ordering a criminal background check as part of the protective order.

18. MAWC's proposed requirement that persons who receive access to "highly confidential" information be United States citizens also exceeds the Commission's jurisdiction. There is no rational basis, let alone a compelling interest, for such a discriminatory requirement. MAWC has presented no evidence that would demonstrate that U.S. citizens pose no threat to the security of their facilities, or that all non-citizens do pose a threat. If MAWC has a specific reason to object to a specific employee, they are free to voice that objection to the parties and the Commission. Assuming there is a

factual basis for that concern other than ethnic profiling, protective measures can be taken. Absent a specific concern, however, this request is completely devoid of merit.

19. The Public Counsel does not limit employment to persons who are United States citizens. Indeed, to do so could very well violate state and federal laws prohibiting employment discrimination on the basis of national origin. Public Counsel is a small office, currently staffed with only 15 employees. Virtually the entire office staff may be involved in a major case before the Commission. Public Counsel submits that neither MAWC nor the Commission has the right to dictate which employees will be assigned to a case. To do so would be analogous to the Commission taking over the "general management" of a utility company. See, State ex rel. Public Service Commission v. Bonaker, 906 S.W.2d 896 (Mo. App. 1985). Ordering this provision would unduly burden Public Counsel's ability to perform its statutory function.

CONCLUSION

While Public Counsel is sensitive to the fact that the current protective order is vague regarding whether the information sought by Public Counsel is "highly confidential" or "proprietary", the vast majority of modifications sought by MAWC in its Motion to Modify the Protective Order are unduly burdensome, and bear no rational relationship between the abridgment of the rights of Public Counsel and Staff employees and the protection of the information at issue.

Public Counsel is willing to agree to modify the definition of "highly confidential" in this case, with the language:

"(6) materials, documents, strategies and other information related to actual or planned modifications of the company's methods of ensuring physical security of its public utility facilities."

However, the restrictions on access, and the burdensome procedures requested as a condition to the restricted access must be rejected.

WHEREFORE, Public Counsel respectfully requests that the Commission ADD the above paragraph (6) to the definition of "highly confidential" in the Protective Order, and to DENY all other requests for modification. In the alternative, Public Counsel respectfully requests the Commission hold an evidentiary hearing, pursuant to the Commission's procedures for taking highly confidential testimony, and require MAWC to present evidence in support of the Motion to Modify and provide Public Counsel and the Commission Staff with the opportunity for cross-examination.

Respectfully submitted,

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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 30th day of January 2002:

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