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January 23, 2002

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

FILED³

JAN 23 2002

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

**Missouri Public
Service Commission**

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Motion to Compel Applicants to Respond to Data Requests of the Office of the Public Counsel**. 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**

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.)	

**MOTION TO COMPEL APPLICANTS TO RESPOND TO DATA REQUESTS
OF THE OFFICE OF THE PUBLIC COUNSEL**

COMES NOW, the Office of the Public Counsel, and respectfully moves the Missouri Public Service Commission to Order Missouri-American Water Company, et al (the Applicants)¹, to provide meaningful responses to Data Requests 1001 through 1009 submitted by Public Counsel on December 20, 2001. This Motion is made pursuant to 4 CSR 240-2.090, because the Applicants have refused to provide the requested data and have no valid grounds for objecting to Public Counsel's data requests. Indeed, the Applicants have not formally objected to the data requests.

Rather, on December 31, 2001, the Applicants' attorney faxed a letter to Public Counsel which, while stating that it was "to the extent necessary, an objection on behalf of " the Applicants, nonetheless proposed a "release of the information which is the subject of the referenced data requests" in a manner which thwarted the purpose of Public Counsel's inquiry. The Commission should compel the Company to provide the information sought through the data requests in the usual and customary fashion. This information is necessary in order for Public Counsel to effectively carry out its

¹ As of December 31, 2001, the Joint Applicants have completed their merger, and are now collectively "Missouri-American Water Company."

responsibility to the public and the Commission as required by §§ 386.700 and 386.710 RSMo 2000.

SUGGESTIONS IN SUPPORT OF THE MOTION TO COMPEL

1. On December 10, 2001, the Applicants filed an Application for an Accounting Authority Order with the Commission. That Applicants seek to defer costs incurred related to certain **unnamed** expenses that have or will be incurred in connection with new **unidentified** procedures and updates of **unidentified** existing procedures and installation of **unidentified** facilities "to further safeguard their water plant and systems in light of the events of September 11, 2001."

2. The Applicants specifically sought an order which would include both grant an AAO for an undisclosed amount, **and** state:

"b) That the Commission intends that rates established in the Companies' next general rate case will include, among other things, treatment of the Companies' prudently incurred costs pertaining to security of water plant, as described above, and, if amortized, an amortization of the Companies' prudently incurred costs deferred pursuant to this AAO, over a period of time ending no later than three years after rates become effective in the Companies' next rate case." (Application, p. 7.)

3. The Applicants failed to provide any information whatsoever in the Application regarding the nature of the actions taken or planned, or the amounts of expenditures incurred or expected to be incurred, or any other information which would justify granting an Accounting Authority Order.

A. Public Counsel sought to conduct discovery in this case according to the Commission's procedural rules, but has been rebuffed without just cause.

4. In an effort to ascertain whether the actions taken or planned by the Applicants to correct unsafe conditions (or conditions which no longer appeared to be completely safe in light of the national tragedy of September 11) concerning any of the Applicants' water plant or operations rise to the extraordinary level of expense which would justify an AAO, Public Counsel sought discovery from the Applicants. Public Counsel submitted data requests 1001-1009, which are attached to this motion. These data requests were submitted in compliance with 4 CSR 240-2.090. Well over 20 days have passed since the data requests were submitted, yet Applicants have failed to provide the requested information. Applicants have refused to provide the information requested, except under unduly and unfairly restrictive conditions which should not be imposed on the Office of the Public Counsel. **For the record, Public Counsel does not oppose the designation of highly confidential or proprietary information as such in connection with this proceeding.** Therefore, there is absolutely no reason for the Applicants to refuse to provide the requested information to Public Counsel.

5. The crux of the issue in this case is the Applicants sudden reluctance to provide information to Public Counsel in a manner consistent with Commission procedural practice, without any justification whatsoever for this reluctance. The Applicants seek to place the undue burden on the small Public Counsel's office of travelling to the company office to look at, but not obtain copies of, information. The Applicants seek to limit the notes that Public Counsel can take regarding such information. There has been no claim that the information is too voluminous to be sent to Public Counsel. There has been no claim the Public Counsel is not trustworthy enough to receive this information in a manner consistent with regular practice before the Commission. Public Counsel is

willing to treat appropriate information as proprietary or highly confidential, as those terms are defined in 4 CSR 240-2.085 and in the existing protective order. Yet the Applicants stubbornly refuse to comply with established discovery practices without any justification outside the invocation of the phrase "September 11."

B. Public Counsel is legally entitled to obtain the information requested in Data Requests #1001 through #1009.

6. The Applicants seek to severely limit Public Counsel's access to the requested information in extremely unfair and unnecessary ways. Missouri law requires that the Applicants provide the requested information to Public Counsel in the same way that they must provide requested information to the Commission and its Staff. Additionally, Public Counsel is subject to the same criminal penalties for unlawful disclosure of confidential information. Section 386.480 restricts disclosure of information provided in the course of proceedings:

"No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection...shall be open to public inspection except on order of the commission or a commissioner in the course of a hearing or proceeding. 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." §386.480 RSMo (2000).

7. The information requested by Public Counsel in this case consists of (1) information which should have been contained in the Application but was not included, and (2) supporting documentation of the information that should have been included in the filed Application. Public Counsel seeks to discover what additional procedures have been or will be adopted to enhance security, and what additions to plant have been or will

be placed in service to enhance security. Public Counsel also seeks information regarding the costs of such plant and procedures, and whether the costs were one-time outlays or ongoing costs, as well as the service territory in which the enhancement occurred. These are inherently reasonable requests for information which the Applicants should have reasonably expected to be subjected to regulatory scrutiny when it requested this AAO. Public Counsel has made an earnest and good faith effort to resolve the discovery disputes before bringing these matters to the Commission's attention. Commission Rule 4 CSR 240-2.090(2) provides the method for obtaining information through the Commission's informal discovery process:

“...The party to whom data requests are presented shall answer the requests within twenty (20) days after receipt unless otherwise agreed to by the parties to the data requests. If the recipient objects to data requests or is unable to answer within twenty (20) days, the recipient will serve all of the objections or reasons for its inability to answer upon the requesting party within ten (10) days after receipt of the data requests....

As used in this rule, the term data request shall mean an informal written request for documents or information which may be transmitted directly between agents or employees of the commission, public counsel or other parties to a proceeding before the commission...”

8. When the Missouri Legislature created the Office of the Public Counsel to represent the public, it granted Public Counsel broad powers to audit and inspect the records of utilities regulated by the Commission. Those powers are granted in §386.450 RSMo. This section provides that “at the request of the public counsel and upon good cause shown by him the commission shall require” a utility company to produce “any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or at its option, verified copies in lieu

thereof, so that an examination thereof may be made by the public counsel..." Clearly the access granted to Public Counsel under this statute is meaningful access.

9. The Commission has previously recognized Public Counsel's basic power to conduct discovery even when the utility has no active case before the Commission. (See, Order Compelling Answers to Data Requests, Raytown Water Company, Case No. WO-94-192 (issued January 5, 1995); Order Granting Motion to Compel Response to Data Request, United Water Missouri, Inc. Application for AAO, Case No. WA-980187 (issued July 14, 1998). Public Counsel's authority to submit data requests is co-extensive with the Commission's. (See, In the Matter of 4 CSR 240-40.016 Proposed Rule—Gas Utilities, Marketing Affiliate Transactions, Case No. GX-99-445, at p. 3.)

10. Public Counsel and Staff customarily issue data requests during the preliminary investigation into an application by a utility company. Utility companies customarily provide information pursuant to those data requests by sending copies of the requested documentation to Public Counsel and Staff, or timely object to the DRs. Methods exist for handling sensitive information obtained through this discovery mechanism, and the Applicants are familiar with those methods.

C. The Applicants have refused to provide Public Counsel with meaningful access to the information requested, and sought to unfairly and unduly limit any potential access to the information by Public Counsel without lawful authority, and Public Counsel's good faith attempts to resolve this issue without Commission involvement have been unsuccessful.

11. Without any support in law or the protective order in this case, the Applicants demand that Public Counsel forgo obtaining copies of the information requested. Rather, they propose to make the requested materials available "at MAWC's premises and be reviewed only by attorneys for the OPC and such limited number of OPC personnel as

have a 'need-to-know.' **No copies of such material or information shall be made and only limited notes may be taken**, and such notes shall be treated as the Highly Confidential." (Letter of December 31, attached.) The Applicants have no authority to make this demand. The MAWC premises are in the metropolitan St. Louis area. Public Counsel is a small office with 15 employees. It is not certain how many Public Counsel employees will be involved in this case.² This demand will cause undue hardship and prevent Public Counsel from complying with its statutory duty to protect the public.

12. After receiving the December 31 letter, Public Counsel contacted the Applicants' attorney by telephone. The parties discussed the fact that Public Counsel is entitled, as is the Commission staff, to copies of highly confidential and proprietary information which is the subject of data requests, and that the restrictions on the dissemination of "highly confidential" information imposed by Paragraph C of the Protective Order does not apply to either Staff or Public Counsel.

13. Public Counsel provided a written list of the persons who may have access to highly confidential or proprietary information in this case in a letter which described the security conditions which prevail in the Office of the Public Counsel for safeguarding sensitive information received in the course of Public Counsel's work on cases before the Commission. That letter further acknowledged Public Counsel's belief that some of the information sought in the data requests was likely to be proprietary information and would be treated as such upon receipt. (Letter attached.)

² It should be noted that the date proposed for this limited "viewing" of information (January 9) was a date on which the assistant public counsel assigned to this case was unavailable due to matters scheduled before the Commission.

14. On January 16, 2002, Public Counsel sent another letter to Applicants' attorney. This letter voiced the considerable frustration Public Counsel has experienced in attempting to obtain the information necessary to forming a position in this case. (Letter attached.) The Applicants still refuse to send the information to Public Counsel. As a result, Public Counsel is unable to critically evaluate the Applicants' AAO request.

15. Public Counsel submitted the data requests at issue in order to investigate whether the Applicants' actions and proposed actions, which form the basis for requesting an AAO, merit special accounting treatment. The information sought is vital in determining whether the Commission's requirements for issuing an AAO are met. Public Counsel acknowledges that the catastrophic events of September 11 have caused public utilities to reevaluate their security and safety precautions, to determine whether additional or improved procedures are necessary to ensure public safety and engender public trust. However, it does not necessarily follow that such a reevaluation will result in the type of extraordinary expenditures envisioned by the Commission in cases where it grants a company an AAO.

CONCLUSION

Public Counsel has a statutory duty to investigate the Applicants request for an AAO in order to protect the public from possible adverse effects. In order to perform that duty, Public Counsel must evaluate the request by reviewing the actions and plans which form the basis of the request. The Applicants have taken a position which places an unduly heavy and unfair burden on Public Counsel's ability to perform its required obligation to the public by refusing to respond to the data requests in the usual manner for

such responses in matters before this Commission. The Applicants have no legal basis for these obstructionist actions.

WHEREFORE, it is respectfully requested that the Commission Order Missouri-American Water Company to provide Public Counsel with all information sought in data requests numbered 1001 through 1009 which were submitted in connection with this matter.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 

M. Ruth O'Neill (#49456)

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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 23rd day of January, 2002:

GENERAL COUNSEL

Missouri Public Service Commission
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A handwritten signature in cursive script, appearing to read "David P. Abernathy", is written over a horizontal line.