



John B. Coffman

Acting Public Counsel

State of Missouri

Bob Holden

Governor

Office of the Public Counsel
Governor Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <http://www.mo-opc.org>
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

February 15, 2002

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

FILED³

FEB 15 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 **Supplemental Response Regarding Discovery Matters**. 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

FILED³
FEB 15 2002

In the Matter of the Joint Application)
of Missouri-American Water Company,)
St. Louis Water Company, d/b/a Missouri-)
American Water Company and Jefferson)
City Water Works, d/b/a Missouri-American)
Water Company for an accounting authority)
order relating to security costs.)

Missouri Public
Service Commission

Case No. WO-2002-273

SUPPLEMENTAL RESPONSE REGARDING DISCOVERY MATTERS

COMES NOW, the Office of the Public Counsel, and responds to Missouri-American Water Company's "Reply to Pleadings Concerning Discovery Issues." While it is not Public Counsel's general practice to file a "reply" to a "reply" ad infinitum, this reply is warranted for several reasons.

1. The facts regarding Public Counsel's attempts to obtain discovery in this case are misrepresented in MAWC's pleading. For example,

*On Thursday, January 31, 2002, Public Counsel sent a proposal for review of documents to counsel for MAWC, which proposed a compromise for viewing the documentation in question. That proposal is attached to this pleading, and was rejected by the Company.

*On or about February 4, 2002, Public Counsel proposed, in a telephone conversation with the Company's attorney, to travel to MAWC's St. Louis area office for a preliminary review the requested information. This proposal included a provision that the assistant public counsel be allowed to bring a lap top computer so that she could take notes, and recognition that Public Counsel was not changing its position on the discovery

29

dispute. This proposal was rejected telephonically, because MAWC did not want the assistant public counsel to take notes via computer.

*On February 8, Public Counsel e-mailed the Company's attorney, reminding him of the outstanding data requests. A copy of that e-mail is attached.

*On February 14, prior to receiving the company's "Reply" pleading, Public Counsel again proposed a preliminary review, without waiving any prior position, to travel to St. Louis to review the data requested. A copy of that e-mail is attached.

2. In view of the Company's admission, at pages 5-6 of its reply, that it **"cannot provide testimony indicating that there is a greater risk of security information being divulged, either intentionally or unintentionally, than is normally the case,"** the normal procedures for handling highly confidential information should be sufficient security for the documentation requested

3. In the February 15, 2002, edition of the *St. Louis Post-Dispatch*, a staff editorial discusses the current spate of legislation "from the White House to the statehouses in Jefferson City and Springfield, [in which] officials are using the threat of terrorism to stifle the free flow of information about the government." The editorial staff opines: "Too often, security is just a convenient excuse for withholding embarrassing or unflattering information." While agreeing that sensitive information should be dealt with in a careful manner, the editorial concludes with the following caveat:

"Public officials should take care not to manipulate the fear of terrorism to cover up their own failure to protect the public. The war on terrorism shouldn't be a war on the public's right to know."

Public Counsel represents the interests of the public. Public Counsel has a right to know whether the Company's actual and proposed expenditures meet the Commission's criteria for deferral in an AAO.

4. As columnist Walter Williams stated in a recent column,

"President George W. Bush's State of the Union address told us that legislation passed, expenditures made and troops deployed are just the beginning of our war on terrorism. But shouldn't we begin to confront the hard-minded questions: How much should we sacrifice, and for how long? To answer at least in part, **there must be a realistic assessment** of the risks of further terrorist acts and the attendant expected losses. There is such a thing as over-caution against terrorist acts as well as under-caution. Both can be costly errors." (From *The Columbia Tribune*, Saturday, February 9, 2002.)(emphasis added.)

Public Counsel has a duty to make a realistic assessment of risks and the proposed manner in which those risks are being addressed. Failing to make a realistic, fact-based assessment does a disservice to MAWC's customers. If extraordinary costs are being incurred to address realistic threats, an AAO might be an avenue for handling those costs. If the expenditures represent an exercise in over-caution, the Commission should have that information as well. Overreaction in the face of the tragedies of September 11 hands victory to the criminals who perpetuated that atrocity. If Public Counsel and Staff are restricted in obtaining the Company's information, they will not be able to fulfill their duty to the people of Missouri.

5. In the Periscope column of the February 11, 2002, issue of *Newsweek* magazine, "Overstatements in the State of the Union?", Michael Isikoff and Roy Gutman reported that President Bush's statements regarding the discovery in Afghanistan of "diagrams of American nuclear power plants and public water facilities" referred to

material "that had been downloaded from the Internet—and it was unclear whether it related to any still-active terrorist plots." Other news sources have clearly indicated that this "discovery" in Afghanistan occurred several months ago.

6. It is not Public Counsel's intention to dismiss **real** security concerns facing MAWC in today's less secure environment. However, the issue in this case is whether the Company should be granted an AAO, and that decision must be made on the basis of **all relevant information**. MAWC's proposed restrictions thwart the Commission's ability to discern the facts underlying the Company's request. The Commission should consider the ramifications of its decision regarding the discovery methods, as that decision may affect future cases, including the rate case which the Company will eventually file, and which will seek recovery of the deferred costs in rates.


7. The Commission must decide this case based upon the evidence presented in this case. The Commission should be mindful that now, more than ever, granting these extraordinary restrictions in this case may result in every other regulated utility lining up outside the Commission's door tomorrow, seeking similar discovery restrictions in the name of "security." MAWC's demands that (1) no copies of discoverable documents be made, and (2) only limited notes taken, coupled with the physical hardship imposed on Public Counsel's small staff of traveling over 250 miles (round trip) each time a witness or attorney seeks to review the information, disproportionately burden Public Counsel's right to access this information. There is no rational relationship between these requirements and limiting access to highly confidential information to persons involved in the regulatory review process who are entitled by law to investigate the Company's request for relief.

8. As to the statements contained in MAWC's pleading at p. 4, paragraph 6, Public Counsel respectfully disagrees with MAWC's analogy between a lawyer's voluntary submission to a background check in order to avoid other security procedures, and the mandatory restrictions MAWC seeks to place on Public Counsel's, and Staff's, right to conduct discovery. There is a huge difference between voluntarily complying with routine security measures at state buildings (or submitting to a background check to avoid the metal detectors at the doors), and requiring Public Counsel employees to submit to a criminal history check and allowing a governmental entity provide those results to a private corporation. It is also wrong for the Company to create a situation which will prevent persons employed by the Office of the Public Counsel from having access to necessary information on the basis of national origin, especially in light of the Company's inability to draw any rational connection between U.S. citizenship and the need to safeguard the information at issue.

WHEREFORE, for the reasons set forth in the Motion to Compel, the Response to Motion to Modify the Protective Order and Reply to (the First) Response to the Motion to Compel, and as set forth above, it is respectfully requested that this Commission grant the Motion to Compel previously filed in this case, designate as "highly confidential" that information which is clearly **"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"** but deny all of the Company's other requests in regard to modifying the protective order. In the alternative, Public Counsel renews its request for a hearing on these matters.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 

M. Ruth O'Neill (#49456)

Assistant Public Counsel

P O Box 7800

Jefferson City, MO 65102

(573) 751-1304

(573) 751-5562 FAX

Email: roneill1@mail.state.mo.us

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 15th day of February 2002:

VICTORIA L KIZITO

Missouri Public Service Commission

PO Box 360

Jefferson City MO 65102

Attorney for Staff

vkizito@mail.state.mo.us

DEAN L COOPER

Brydon Swearengen & England PC

312 E Capitol Avenue

PO Box 456

Jefferson City MO 65102

Attorney for Applicant

dcooper@brydonlaw.com

DAVID P ABERNATHY

Missouri-American Water Company

535 N New Ballas Road

St Louis MO 63141

Attorney for Applicant

dabernathy@slwc.com

STUART CONRAD

Finnegan Conrad & Peterson

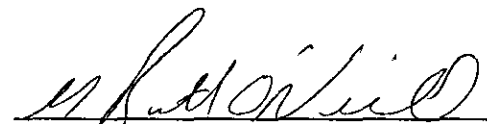
1209 Penntower Office Center

3100 Broadway

Kansas City MO 64111

Attorney for City of Riverside, Missouri

stucon@fcplaw.com



O'Neill, Ruth

From: O'Neill, Ruth
Sent: Thursday, January 31, 2002 3:56 PM
To: 'dcooper@brydonlaw.com'
Subject: discovery issues in MAWC AAO case 02-273

Dear Dean,

You know, the real purpose of discovery is to find things out.

Before things spin any further out of control on the discovery issue, I would be willing to the following method of receiving the information we have requested in this case, and any further data request responses we may issue:

- 1) We will treat all information as highly confidential (not really an issue, but as a reminder).
- 2) MAWC will make the information requested available at the Brydon Swearengen & England law offices (in Jeff City) during regular business hours, Monday through Friday, for access by members of the Office of the Public Counsel who are assigned to work on this case. Public Counsel may access this information as frequently as necessary, upon 1 hour's notice.
- 3) Public Counsel employees will review the documents in the BS&E offices, and will be allowed to obtain copies of specific documents upon request. Public Counsel will use due discretion in requesting copies. There will be no limitation on the notes which are taken. Notes may be taken by handwriting or by computer.
- 4) Initially, the Public Counsel employees who will have access to this information include: Ruth O'Neill, Kimberly Bolin, Russ Trippensee, John Coffman, Ted Robertson, and my secretary, Jere Buckman. Additional members of the office may have access as the case progresses.
- 5) Public Counsel may include any information obtained as a result of the data requests in highly confidential versions of pre-filed testimony, and/or any attachments to prefiled testimony. At the evidentiary hearing in this case, Public Counsel shall have the right to utilize this information for purposes of cross-examination under the Commission's procedures for taking highly confidential testimony.
- 6) Other than as set forth in (5) above, Public Counsel will not disclose any information obtained from MAWC which is not otherwise publicly available to any person outside those authorized to review this information in this case.
- (7) all of MAWC's other requests regarding access to this information will be withdrawn.

Given the content of the company's direct testimony, it is even more important that we resolve this issue. Please try to let me know your client's response to this proposal by Monday evening, 2/4.

Thanks,

Ruth

O'Neill, Ruth

From: O'Neill, Ruth
Sent: Friday, February 08, 2002 4:30 PM
To: 'dcooper@brydonlaw.com'
Subject: MAWC 02-273 discovery

Dean,

Just another reminder that I have not gotten any responses to my data requests in this case. We still need the information in order to evaluate your client's request for an AAO, assuming that the Commission decides not to dismiss the case.

Ruth

O'Neill, Ruth

From: O'Neill, Ruth
Sent: Thursday, February 14, 2002 3:26 PM
To: 'dcooper@brydonlaw.com'
Cc: Bolin, Kim; Trippensee, Russ
Subject: MAWC AAO case discovery

Dean,

Please advise regarding the status of the Company's responses to our outstanding data requests.

My witnesses advise that they will be unable to prepare rebuttal testimony without responses.

In light of the inability to prepare rebuttal, our only option is to recommend against granting the AAO.

If we were to agree that, without waiving any position, to travel to St. Louis area for preliminary review of records, will the Company guarantee that ALL requested information will be available?

Will note taking be allowed?

Who will be present with us as we review the data?

Ruth