

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
March 12, 2002**

CASE NO: WO-2002-273

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

Dean Cooper
Brydon, Swearengen & England
312 East Capitol Ave.
P.O. Box 456
Jefferson City, MO 65102
James B. Deutsch
308 E. High St., Suite 301
Jefferson City, MO 65101

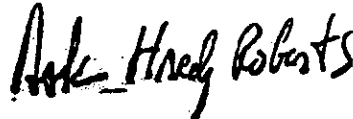
Jan Bond
Deikemper, Hammond, Shinnars, Turcotte
and Larrew, P.C.
7730 Carondelet Avenue, Ste. 200
St. Louis, MO 63105

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Jeremiah D. Finnegan, Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111
David P. Abernathy
Missouri-American Water Company
535 N New Ballas Road
St. Louis, MO 63141

Enclosed find a certified copy of an ORDER in the above-numbered case(s).

Sincerely,



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 12th day
of March, 2002.

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 Company, d/b/a Missouri-American Water)
Company, for an Accounting Authority Order Relating to)
Security Costs.)

Case No. WO-2002-273

ORDER REGARDING MOTION TO DISMISS.
PROTECTIVE ORDER AND DISCOVERY

On December 10, 2002, Missouri-American Water Company, St. Louis County Water Company and Jefferson City Water Works Company, the latter two doing business as Missouri-American Water Company,¹ filed their joint application for an accounting authority order relating to security costs incurred, the joint application states, as a direct result of the unexpected and extraordinary events of September 11, 2001.² The applicants seek an AAO so that they may attempt to recover some part of these costs in a later rate case.

¹On January 22, 2002, Missouri-American advised the Commission that St. Louis County Water Company and Jefferson City Water Works Company, both doing business as Missouri-American Water Company, had both merged into Missouri-American.

²An accounting authority order is universally referred to in the industry as an "AAO" and that acronym will be used here.

Motion to Dismiss:

On February 4, 2002, the Office of the Public Counsel filed its Motion to Dismiss, asserting therein that "MAWC has failed to file sufficient evidence in its direct testimony which would establish its claim for relief." Public Counsel points out that, pursuant to Commission Regulation 4 CSR 240-2.130.7(A), MAWC's prefiled Direct Testimony must "include all testimony and exhibits asserting and explaining [its] entire case-in-chief." Public Counsel characterizes the testimony filed by MAWC as "consist[ing] primarily of reasons why MAWC chose not to provide information on which the Commission could rely in making a reasoned and appropriate determination in this case." Public Counsel goes on to say, "Nothing in the pre-filed testimony . . . provides sufficient factual information on which this Commission may reasonably rely in making any findings of fact or conclusions of law in support of the requested AAO." In support of its motion, Public Counsel cites Section 386.430, RSMo Supp. 2001, which provides:³

In all trials, actions, suits and proceedings arising under the provisions of this chapter or growing out of the exercise of the authority and powers granted herein to the commission, the burden of proof shall be upon the party adverse to such commission or 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 of the commission complained of is unreasonable or unlawful as the case may be.

Missouri-American responded to Public Counsel's motion on February 14, providing a summary of the jurisprudence relating to AAOs drawn both from the reported decisions of Missouri Courts and the Commission's own orders. As Missouri-American

³All further statutory references, unless otherwise specified, are to the Revised Statutes of Missouri (RSMo), cumulative supplemental revision of 2001.

correctly points out, Section 393.140(8) authorizes the Commission, after hearing, to "prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited" as an exception to the uniform accounting procedures which the Commission is expressly authorized to adopt.⁴ Section 393.140(8) does not contain any express standard; consequently, the Commission may exercise this authority for good cause shown. As Missouri-American explains in its response, one purpose of an AAO is to treat some unexpected expense of significant size as a regulatory asset pending the company's next rate case, during which the utility will attempt to recover the expense. Missouri-American reminds the Commission that it has said in the past that "the primary focus is on the uniqueness of the event, either through its occurrence or its size."⁵

Having explored the Commission's authority for granting an AAO and the applicable standard, Missouri-American then summarizes the contents of the Highly Confidential testimony that it has filed. This testimony asserts that some millions of dollars have been expended by Missouri-American to upgrade the safety of the public water supply in its service area; that these expenditures were undertaken after, and as a direct result of, the events of September 11, 2001; that those events were extraordinary, unforeseen, and hopefully nonrecurring; that Missouri-American has received security advisories from various governmental agencies warning of terrorist threats to the public water supply; and that the particular measures adopted reflect the advice and input of state and federal agencies. Missouri-American contends that this testimony constitutes a *prima facie* case for an AAO.

⁴Section 393.140(4); and see Commission Regulation 4 CSR 240-50.030.

⁵*In the Matter of Missouri Public Service, Case No. EO-91-358 (Report & Order, iss'd December 20, 1991) at 12.*

Missouri-American is correct. The necessary *prima facie* showing for an order under Section 393.140(8) is that significant expenditures have been incurred due to the occurrence of a unique event. In determining a motion to dismiss for failure to state a claim, the Commission takes all of the allegations and testimony of the motion-defendant to be true.⁶ Contrary to the assertion of Public Counsel, Missouri-American has stated a *prima facie* case for an AAO.

The Motion to Dismiss is denied.

Motion to Modify Protective Order:

On January 23, 2002, simultaneously with Public Counsel's Motion to Compel Responses to Data Requests, Missouri-American filed its Motion to Modify Protective Order. Therein, Missouri-American proposed that the Commission's "standard" protective order, adopted in this case on December 12, 2001, be modified to include a provision allowing sensitive security-related information to be designated "Highly Confidential" and treated accordingly.⁷ Additionally, Missouri-American proposed that the protective order be further modified to apply Paragraph C, relating to access to Highly Confidential information, to Staff and the Public Counsel.⁸ Missouri-American further seeks to modify Paragraph W to limit access to sensitive security-related information by Staff's and Public Counsel's in-house technical experts on a "need to know" basis. Finally, Missouri-American proposes to further modify Paragraph C to require that persons seeking access to sensitive security

⁶*Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001).

⁷The proposed provision would be Item (6) of the definition of Highly Confidential information in Paragraph A of the Protective Order.

⁸ Paragraph W presently provides that Paragraphs C, D, J, and L do not apply to Staff or the Public Counsel.

information first undergo a criminal history check by the Missouri Highway Patrol and that access be restricted to United States citizens.

Public Counsel responded on January 30 and agreed to the modification of the Protective Order by the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order; Public Counsel objected to all of the other modifications proposed by Missouri-American. Public Counsel characterizes the other requested modifications as "alarmist, frivolous, [and] without foundation"; and also as "insulting, unprofessional and scurrilous." Public Counsel suggests that these modifications will interfere with both Staff and Public Counsel in the discharge of their official duties. Public Counsel complains that being required to view the information in St. Louis would be a hardship on its small office in a time of tight state budgets. The criminal history check and restriction of access to American citizens has "no rational basis." Public Counsel seeks an evidentiary hearing on the proposed Protective Order modifications.

Intervenors the City of Joplin and the St. Joseph Industrials take the same position as Public Counsel. While they do not object to the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order, they object to the other proposed modifications on the same grounds raised by Public Counsel. Joplin characterizes these modifications as "unnecessary" and as "clearly and unreasonably intended to limit access to documentation to be relied upon by MAWC[.]" The St. Joseph Industrials expound at length on the shortcomings of the proposed modifications, including the lack of any provision to safeguard and hold confidential the results of the proposed criminal history checks. In general, the requested modifications are "overbroad and unnecessary." The St. Joseph Industrials urge the Commission to view

Missouri-American's motion as a "rather inartful, crudely conceived and unbelievably arrogant attempt to use a terrorist attack . . . to scare the Commission into approval of its expenses without a rigorous investigation of these expenses through the judicial and administrative process."

The Commission's Staff, like Public Counsel, Joplin, and the St. Joseph Industrials, consents to the insertion of item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order and objects to all of the other modifications proposed by Missouri-American. Staff denounces the proposed modifications as *"frivolous and . . . designed only to vex and harass the Staff and OPC in their duties[.]"* Staff further states that the proposed modifications "are not supported by any legal authority or any information that would justify such extraordinary restrictions. Further, the proposed measures do not rationally enhance the security of sensitive information, are unduly restrictive, overly burdensome, unnecessary and are contrary to the Commission's regulatory oversight responsibilities."

The Commission has quoted samples of the strong language offered in opposition to the requested modifications in order to reflect the degree of emotion that seems to have charged this issue. In its Reply to Pleadings Concerning Discovery Matters, filed on February 14, Missouri-American stated that it was "shocked and amazed by the reaction and responses that have been filed concerning MAWC's Motion to Modify." Missouri-American further stated that, while it cannot show that the risk that sensitive information will be divulged is greater in this case than in any other case, it is "obvious . . . that the consequences of any such release in this case are monumentally greater." The Commission convened a prehearing conference on February 22 and found the parties

unable to reach a mutually acceptable compromise on these points. The parties are continuing to attempt to resolve discovery disputes.

The Commission does not need an evidentiary hearing to resolve Missouri-American's motion and Public Counsel's request for a hearing on Missouri-American's motion is denied. All of the parties are agreed that the Protective Order should be modified to permit sensitive security-related information to be designated Highly Confidential. This can be accomplished by the insertion of proposed item (6) into the definition of Highly Confidential information in Paragraph A of the Protective Order. The Commission is aware, in the wake of the events of September 11, of the need for heightened security with respect to the utilities upon which the people of Missouri depend. The attempt by persons still unknown, shortly after September 11, to disperse Anthrax through the public mail necessarily causes the Commission concern for the safety of the public water supply. For these reasons, the Commission agrees with Missouri-American that sensitive security-related information must be protected from disclosure.

While the Commission agrees that security information must be protected, the Commission does not believe that all of the measures proposed by Missouri-American are either necessary or desirable. The other parties object strenuously to the other modifications proposed by Missouri-American and the Company has not shown any convincing reason why they should be adopted. For example, the prisons of this state are full of American citizens and it follows that limitation of access to American citizens might add little to the protection of sensitive security-related information. Furthermore, any such restriction

may itself be unlawful.⁹ It is also not clear that a criminal history check would make this information any more secure. What sort of offenses would be disqualification and who would decide? Missouri-American has not shown that such a background check would actually be effective in identifying those in league with foreign terrorists. Indeed, the recent arrest of a career counter-intelligence agent of the Federal Bureau of Investigation for espionage on behalf of the former Soviet Union suggests that a criminal history check might well be useless in identifying true security risks. The objecting parties have found both of these suggested modifications to be highly offensive.

Missouri-American explains that its proposal that access to security information be limited to its premises pursuant to Paragraph C of the Protective Order, even for Staff and the Public Counsel, is based upon the logical consideration that security is reduced by permitting multiple copies of sensitive information to exist in multiple locations. Public Counsel and Staff respond that such a restriction would interfere with their performance of their duties and would have a negative impact on their manpower. Technical staff would be required to travel several hours in order to review the necessary documents, preventing their performance of any other useful work. The Commission finds that this proposed

⁹ "In *City of New Orleans v. Dukes*, 427 U.S. 297, ___, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511, ___ (1976), the United States Supreme Court said: 'Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" *Bethel v. Sunlight Janitor Service*, 551 S.W.2d 616, 621 (Mo. banc 1977). "The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, ___, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313, 440 (1985).

modification is unnecessary.¹⁰ There is no evidence that either Staff or the Public Counsel has ever failed to adequately safeguard copies of sensitive documents in their offices. As the objecting parties point out, the Commission's Staff and the Public Counsel are bound by the criminal law to refrain from revealing information learned in the course of their duties.

For the reasons discussed, Missouri-American's Motion to Modify the Protective Order is granted in part in that proposed item (6) will be inserted into the definition of Highly Confidential information in Paragraph A of the Protective Order; in all other respects, the motion is denied. The Commission encourages the parties to continue their cooperative effort to access relevant material with attention to security.

Motion to Compel Responses to Data Requests:

On January 23, 2002, Public Counsel moved the Commission to order Missouri-American to respond to certain data requests. Public Counsel states that it served its Data Requests 1001 through 1009 on Missouri-American on December 20, 2001, and that Missouri-American, while not raising any valid objection, nonetheless refuses to divulge the requested information. The data requests in question seek various details of the security procedures implemented by Missouri-American.

Missouri-American responded on January 31, and denied that it had refused to provide the requested information. Rather, in Missouri-American's view, it had not been able to reach an agreement with Public Counsel on the form that access should take. Missouri-American denies that Public Counsel has any right to have its own copies of

¹⁰ In a pleading filed on March 7, Public Counsel indicated that Missouri-American has agreed to make the information available at its Jefferson City office and has agreed to limited copying and note-taking. Both parties appear voluntarily to have made these adjustments to the method of access in order to move this case forward.

security-related information. Missouri-American further contends that Section 386.450, RSMo Supp. 2001, only requires that Missouri-American produce the requested documents; it says nothing about copies. Finally, Missouri-American urges the Commission to take up Public Counsel's motion to compel in conjunction with its motion to modify the protective order. Public Counsel, in its reply filed on February 6, agreed that the two motions be considered together.

On February 14, Missouri-American filed its further pleading, Reply to Pleadings Concerning Discovery Matters, in which it addressed both the Motion to Modify Protective Order and Public Counsel's Motion to Compel. With respect to the motion to compel, Missouri-American states that it should be denied and its own motion to modify granted. Public Counsel responded to this pleading on February 15 with its Supplemental Response Regarding Discovery Matters. Therein, Public Counsel draws the Commission's attention to several national commentators who have opined that security concerns, however *legitimate, not be permitted to deprive the public of access to information of public concern.*

Public Counsel's Motion to Compel was also discussed at the prehearing conference on February 22. Several parties pointed out at that time that Missouri-American was in violation of the Commission's discovery rules and urged the presiding officer to grant Public Counsel's motion in peremptory fashion.

Counsel for Missouri-American wrote a letter to Public Counsel on December 31, 2001, acknowledging receipt of the data requests on December 20. That letter states that it "should be considered, to the extent necessary, an objection" However, the letter *nowhere states any grounds for objection to Public Counsel's data requests and, in any*

event, the letter was not timely.¹¹ Since Missouri-American has failed to raise any objections to the discovery, the Commission will grant it unless it is improper on its face.

The Commission has considered these issues and, as stated elsewhere in this order, will modify the Protective Order in one respect so that security information will be entitled to designation and treatment as Highly Confidential information. In view of the resolution of the Protective Order issue and in view of Missouri-American's repeated protestations that it has not refused to comply with the data requests and that its only concern is the manner in which the information is accessed, the Commission will grant Public Counsel's motion.

The Commission will direct Missouri-American to respond to Public Counsel's data requests forthwith.

IT IS THEREFORE ORDERED:

1. That the Motion to Dismiss filed by the Public Counsel on February 4, 2002, is denied.
2. That the Motion to Modify Protective Order filed by Missouri-American Water Company on January 23, 2002, is granted in part and denied in part. The Protective Order previously adopted in this case is hereby modified by the insertion of the following language in Paragraph A, the definition of Highly Confidential information: "and (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." In all other respects, the Motion to Modify Protective Order is denied.

¹¹Objections to data requests must be raised within 10 days of receipt. Commission Rule 4 CSR 240-2.090(2).

3. That the Public Counsel's request for an evidentiary hearing on Missouri-American Water Company's Motion to Modify Protective Order is denied.

4. That the Motion to Compel Applicants to Respond to Data Requests of the Office of the Public Counsel, filed by the Public Counsel on January 23, 2002, is granted. Missouri-American Water Company will respond to Public Counsel's data requests no later than the effective date of this order.

5. That this order shall become effective on March 22, 2002.

BY THE COMMISSION

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge**

(S E A L)

Simmons, Ch., Murray, Lumpe,
Gaw, and Forbis, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge

ALJ/Secretary: Thompson/Boyle
3-8
Date Circulated 60-2002-273
CASE NO.
KS
Simmons, Chair in p 8+9
Murray, Commissioner 88 p 10
Lumpé, Commissioner 118 - comm p. 2
Gaw, Commissioner 108
Forbis, Commissioner
3-12
Agenda Date
Action taken: 5-0 AA
Must Vote Not Later Than

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,
Missouri, this 12th day of March 2002 .

Dale Hardy Roberts
Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

