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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 7th
day of January, 1994.

In the matter of Missouri-American Water)
Company for authority to file tariffs)
reflecting increased rates for water)
service in the Missouri service area of)
the Company.)

Case No. WR-93-212

ORDER DENYING REHEARING AND GRANTING MOTION FOR CLARIFICATION

On November 18, 1993, the Commission issued a Report and Order in this case resolving the contested issues which were presented at the hearing. On November 24, 1993, the Missouri-American Water Company (Missouri-American or Company) filed an Application for Rehearing and on that same date the Office of the Public Counsel (OPC) also filed an Application for Rehearing. Also, on November 24, 1993, the Staff of the Missouri Public Service Commission (Staff) filed a Motion for Clarification and Correction. On November 30, 1993, Missouri-American filed its Response to Staff's Motion for Clarification, the Industrial Intervenors filed Suggestions in Opposition to Missouri-American Water Company's Application for Rehearing and OPC filed its Reply to Missouri-American's Application for Rehearing.

The Company's Application for Rehearing included a request for leave to file additional suggestions in support of the Application for Rehearing on or before December 3, 1993. In light of the unusual holiday period which immediately preceded the effective date of the Report and Order, the Commission believes that a brief recitation of these circumstances is appropriate in order to maintain a clear record. The Commission issued its Report and Order in this case on November 18, 1993, with an effective date of November 29, 1993. Because

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November 29, 1993 was a Monday and because an application for rehearing must be filed before the effective date, one must count backwards to arrive at the last business date on which such an application may be filed. The period of November 27/28, 1993 was a weekend and was thus eliminated from the available dates upon which to file an application for rehearing. The Thursday and Friday which preceded that weekend were state (Thanksgiving) holidays which further reduced the time in which to file by an additional two (2) days. As the last four (4) days of the ten (10) day period were not business days for the Commission, the actual time period in which to file an application for rehearing was reduced to the day the order was issued and the six (6) days thereafter.

Prior to the expiration of this time period, Missouri-American requested an extension of the filing deadline or, in the alternative, asked if it might file suggestions in support of its Application for Rehearing. As a procedural matter, Missouri-American was advised by the Hearing Examiner that if it was not able to draft a sufficient application for rehearing in the amount of time available it could comply with the statutory requirements by setting out the reasons upon which it requested a rehearing and simultaneously requesting leave to subsequently file suggestions in support of the Application. On November 24, 1993, Missouri-American filed its Application for Rehearing and asked for leave to file suggestions in support of the Application.

The Commission has reviewed the Company's Application for rehearing and finds that the argument portion of this document is approximately twenty-eight pages long excluding the attachment. The Commission finds that the Application filed by Missouri-American is sufficiently comprehensive as to the issues raised and when viewed in its entirety does not require further suggestions in support thereof. Company's request for leave to file suggestions in support of the

Application for Rehearing is denied.

In response to the Staff's motion the Commission follows the doctrine of *nunc pro tunc*¹, which recognizes the Commission's inherent authority to make its records reflect what has actually occurred. This doctrine permits acts to be done with a retroactive effect to supply omissions or clarifications of actions which took place but were not thoroughly, accurately or clearly recorded.

The Staff's Motion for Clarification and Correction has pointed out that an incorrect number was referred to regarding an adjustment which was advocated by the Staff. Although the discussion under Deferred Maintenance Costs refers to a figure of one hundred ten thousand one hundred fifty dollars (\$110,150), the number which was advocated by Staff was one hundred two thousand seven hundred ninety-three dollars (\$102,793). This reference shall be clarified, *nunc pro tunc*, as this is not a dispositive matter. The Commission finding for this issue approved of the Staff position on the issue and reflected the correct adjustment which was based on Staff's number.

Similarly, as to the depreciation issue, the position of Staff was transposed and the Report and Order will be clarified, *nunc pro tunc*, to reflect that the position of Staff, reflected by the settlement, was based upon the whole life method of calculating depreciation rates. Again, this is a clarification for the benefit of the parties which does not affect the final decision of the Commission. The Commission accepted the mutual agreement as to depreciation which was reached between Staff and Company.

Lastly, as to the Return on Equity/Double Leverage Issue, the Staff has requested clarification regarding the appropriate rate of return to be applied in this case. The Commission finds that the meaning of the Report and Order

¹ The doctrine of *nunc pro tunc* is recognized by the Federal Rules of Civil Procedure, Missouri Rules Of Civil Procedure and Missouri cases too numerous to cite.

herein was clear within the context of this case; however, the Commission also finds that that portion of the Report and Order which addressed the issue of rate of return and return on equity might not be sufficiently clear on its face, especially to parties unfamiliar with this case.² The Commission finds the clarification is necessary for the additional reason that throughout this case, partly due to the double leveraging issue, the parties have consistently referred to two (2) different sets of numbers. The Commission will grant the Staff's request for clarification on this issue.

Beginning on page 3 of Staff's motion it has suggested that the Report and Order might lend itself to one of three (3) different interpretations. Staff has correctly concluded that the Commission intended to adopt that which staff has labeled as "interpretation #1". The Commission finds that this is the only interpretation which is consistent with the Commission's use of the double leverage methodology as adopted by the Report and Order. The Commission further finds the rationale offered by staff as reasons for disregarding "interpretation #2 and #3" are accurate and correct.

On page 29 of its Report and Order, the Commission adopted the use of double leveraging for determining the return on equity (ROE) for Missouri-American since it is a wholly owned subsidiary of American Water Works Company, Inc., (AWWC or parent company). The Commission adopted the four-step analysis as described by Staff Witness Caplinger in Exhibit 43, page 19, as set out below:

1. Determine a rate of return on equity for the publicly traded holding company;
2. Verify (the) reasonableness of this return through proxy group comparisons;
3. Assume holding company return on equity is representative of required return on equity at

² The Commission finds it preferable that a Report and Order be sufficiently clear on its face so that an uninformed party may refer to it after the case has been resolved and comprehend the issues and their resolution from that Report and Order, without referring to the case exhibits and transcript. The Commission finds this is an additional reason for granting Staff's Motion to Clarify.

- parent level and perform WACC³ calculation using parent only (PO) capital structure;
4. Assume PO WACC is representative of required return on equity at subsidiary level and calculate subsidiary WACC using subsidiary capital structure. (TR 19)

The order is consistent with a finding that a 12 percent return on equity figure for the parent company, AWWC, is appropriate and results in an overall rate of return for AWWC of 10.8% which (by virtue of double leveraging) is used as the return on equity for Missouri-American and results in an overall rate of return for Missouri-American of 8.5%. Each of these findings is consistent with the scenario and the conclusion that Missouri-American should be authorized to increase its total revenues by two hundred nineteen thousand four hundred fifty-two dollars (\$219,452).

The Commission shall clarify the Report and Order, nunc pro tunc, so that on page 32 the last sentence of the subsection on Return on Equity will read as follows:

Therefore, based upon the adoption of double leveraging, the Commission finds that the fair and reasonable return on equity for Missouri-American shall be 10.8% which results from a fair and reasonable return on equity of 12% for American Water Works Company, Inc.

In response to the Application for Rehearing as filed by OPC, the Commission notes that the sole argument proffered by this party is centered on the issue of depreciation. OPC is free to argue its point of view but where the Commission finds that OPC's Application for Rehearing has made a conspicuous misstatement of the evidence the Commission must correct this inaccuracy. OPC has stated that it, ". . . was precluded from any cross-examination of Mr. Merciel regarding his original rebuttal testimony, sworn under oath and prefiled in this case." (Emphasis in original text) The record reflects that OPC had ample opportunity to cross-examine Witness Merciel and the record reflects that

³Weighted average cost of capital.

OPC took advantage of that opportunity as evidenced from pages 637-656 of the Transcript. Within these twenty (20) pages of the transcript, OPC cross-examined Witness Merciel at length regarding his testimony. OPC goes on to state that its subsequent request to offer a copy of Exhibit 57, Mr. Merciel's unaltered prefiled rebuttal testimony, into evidence was denied. The Transcript from this hearing reflects that on more than one occasion, counsel for OPC was advised to lay a proper foundation in order to proceed and OPC repeatedly failed to do so. (Transcript at page 638, page 650, page 651 and again at 655 where OPC was given the one word admonishment "unless . . ." in response to Staff's objection to foundation.) OPC was advised that the lack of having a witness on this issue was not diminishing its right to cross-examine the witness but rather OPC was only permitted to cross-examine the witness on the evidence that had been placed in the record.

The Commission stated in the Report and Order on this case, as it has stated elsewhere, that a party cannot adopt the testimony of some other party where that other party chose not to offer the testimony into evidence in the first place. It should be clear that no party can force another party to offer testimony which the originating party no longer feels is beneficial or appropriate for its own case. Similarly, a party may not properly cross-examine a witness on testimony which has not been admitted into evidence. If OPC had laid the proper foundation it could have cross-examined the witness on the exhibit.

The Commission finds that the cross-examination of Witness Merciel which was undertaken by OPC and which is contained in the Transcript of the hearing from pages 637-656, and which could have continued thereafter but for notification from OPC that it had no further questions, constitutes ample and unlimited opportunity to cross-examine the witness subject to the rules of evidence. The Commission finds that the Application for Rehearing as filed by

the Office of the Public Counsel is without merit and the Application shall be denied.

The Application for Rehearing which was filed by Missouri-American was based upon seven (7) different points.

The Commission has reviewed all of the Company's points and finds that they do not present sufficient justification for granting a rehearing.

The Commission finds that Staff's Motion for Clarification and Correction should be granted. The Commission finds the issues raised by Staff's Motion would benefit by clarification and that this action will preserve a clear record and is in the public interest. The Commission finds the Applications for rehearing, as filed by Missouri-American and OPC, fail to raise any issues which require or warrant rehearing.

IT IS THEREFORE ORDERED:

1. That the Motion for Clarification and Correction as filed by the Missouri Public Service Commission Staff is granted and the Report and Order is clarified as described in this order.
2. That the Application for Rehearing of the Office of the Public Counsel is hereby denied.
3. That the Application for Rehearing as filed by the Missouri American Water Company is hereby denied.
4. That this order shall become effective on the date hereof.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

Mueller, Chm., McClure, Perkins,
Kincheloe and Crumpton, CC., Concur.

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