STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 23rd day of March, 2000.

In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increases for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company.	)))))	**Case No. WR-2000-281** Tariff No. 200000366 Tariff No. 200000367

ORDER CONCERNING NON-UNANIMOUS STIPULATION AND AGREEMENT, DENYING MOTION TO MODIFY PROCEDURAL SCHEDULE, GRANTING RECONSIDERATION AS TO ACCOUNTING AUTHORITY ORDER AND DENYING MOTION TO COMPEL

Procedural History:

On October 15, 1999, Missouri-American Water Company (MAWC) filed proposed tariff sheets seeking a general rate increase for water and sewer service provided to customers in its Missouri service areas. The Commission, on October 28, 1999, suspended the proposed tariff sheets until September 14, 2000. The proposed water service tariffs are designed to produce an annual increase of approximately 53.97 percent ($16,446,277) in the Company's revenues. The proposed sewer service tariffs are designed to produce an annual increase of approximately 5.0 percent ($2,363) in the Company's revenues.

This Order addresses several different but more or less related disputes which have arisen in the course of this matter. The first

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concerns a Non-unanimous Stipulation and Agreement filed by MAWC, together with the Staff of the Missouri Public Service Commission (Staff) and the Office of the Public Counsel (Public Counsel).[1] The second concerns the motion by the stipulating parties to modify the procedural schedule. The third concerns MAWC's efforts to obtain an Accounting Authority Order (AAO). The fourth concerns Public Counsel's motion to compel MAWC to respond to discovery.[2]

The Non-unanimous Stipulation and Agreement

On February 23, 2000, the Signatory Parties filed their Non-unanimous Stipulation and Agreement (Stipulation), which provided in part for a mechanism of "deferred revenues" during the lag period between the date that MAWC's new St. Joseph plant goes on line and the date MAWC's new rates, which may include the new plant in rate base, take effect.[3] In the event that the Commission approves this Stipulation, MAWC agreed to withdraw its proposed tariffs, the filing of which initiated this case.

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[1]Referred to jointly herein as the "Signatory Parties."

[2]On March 15, 2000, the Commission by Order extended the deadlines for the filing of Direct Testimony, thus disposing of that portion of Public Counsel's motion.

[3]The plant is currently expected to be on-line by April 30, 2000.

MAWC further agreed to merge with its subsidiary, St. Louis County Water Company, and to initiate a new rate case no later than May 31, 2000.

Such non-unanimous stipulations and agreements are governed by Commission Rule 4 CSR 240-2.115.[4] That rule provides, first, that nonsignatory parties have only five days after receipt of a non-unanimous stipulation and agreement to request a hearing. *Supra*, at (3). It further provides that, in the absence of a timely request for a hearing, the Commission may treat the non-unanimous stipulation and agreement as a unanimous stipulation and agreement. *Supra*, at (1).

Accordingly, on February 25, 2000, the Commission issued its Notice and Order, setting March 8, 2000, as the deadline for hearing requests pursuant to Rule 115(3). This Notice and Order was distributed by telefacsimile to counsel for all parties of record, as well as by First Class Mail. The Commission took this action out of concern that all non-signatory parties be afforded an adequate opportunity to file a request for a hearing.

[4]For the sake of brevity, referred to herein as "Rule 115."

On March 1, 2000, a group of fourteen intervenors[5] jointly filed an objection to the Stipulation and a request for hearing on "all issues in the case." The Objecting Intervenors did not specify these issues in their pleading and cited no authority except Rule 115.

On March 3, 2000, the Commission issued its Order Denying Rehearing and Concerning Accounting Authority Order, which Order concerned the Stipulation only in one respect:

> That the Commission will convene an evidentiary hearing on the Motion for Reconsideration filed on February 10, 2000, by Missouri-American Water Company with respect to the Commission's Order concerning the Accounting Authority Order. **That hearing will be held together with the hearing mandated by Rule 4 CSR 240-2.115(2) on the non-unanimous Stipulation and Agreement filed herein.** The Commission will set a date for that hearing and a procedural schedule in a separate Order.

The above-cited language in the Commission's Order of March 3, 2000, provoked the Objecting Intervenors to file their motion for rehearing on March 7, 2000. In that pleading, the Objecting Intervenors assert that the Commission has misunderstood both its Rule 115 and their request for hearing of March 1, 2000.

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[5]AG Processing, Inc., a Cooperative, Friskies Petcare, a Division of Nestle USA, Wire Rope Corporation of America, Inc., St. Charles County, the cities of St. Peters, Warrensburg, O'Fallon, Weldon Spring, and Joplin, Hawker Energy Products, Inc., Harmon Industries, Inc., Stahl Specialty Company, Swisher Mower and Machine Company, and Central Missouri State University. Jointly referred to herein as "the Objecting Intervenors."

The Objecting Intervenors point out that they requested a hearing "on all issues in the case" and not a hearing on the Stipulation as the Commission's Order implied. This, they state, is a factual error in the Order that should be corrected. The Objecting Intervenors further assert that the Order of March 3, 2000, is unlawful and contrary to Rule 115(1) to the extent that it indicates that the hearing therein contemplated will be limited in scope to the Stipulation. State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39 (Mo. App., W.D. 1982), *cert. den.*, 464 U.S. 819, 104 S.Ct. 81, 78 L.Ed.2d 91 (1983). The Stipulation, the Objecting Intervenors assert, is no more than the joint recommendation of the parties that signed it. *See* State ex rel. Kansas City Power & Light Company v. Public Service Commission, 770 S.W.2d 740, 742 (Mo. App., W.D. 1989); In re Application of Empire District Electric Company, 1999 Mo.P.S.C. Lexis 173, 179 (1999); In re Missouri Public Service, 2 Mo.P.S.C.3d 221, 223 (1993).

On March 13, 2000, the Signatory Parties filed suggestions in opposition to the Objecting Intervenors' motion for rehearing. The Signatory Parties suggest therein that the Order of March 3, 2000, correctly construed Rule 115 when it referred to a hearing on the Stipulation. They rely on no citations to authorities for this position, but urge that it is the plain and unmistakable reading of the rule. They also assert that the rule of Fischer, *supra*, is inapplicable because of differences between the present circumstances and those in that case. These differences amount to no more than the Signatory Parties' assertion that the Objecting Intervenors will get a full hearing on the merits of this

matter, and thus due process, no matter which way the Commission might rule.

In Fischer, the Commission was presented with a non-unanimous stipulation and agreement in which all parties joined but the Public Counsel. The Commission held a hearing on the non-unanimous stipulation and agreement, but permitted Public Counsel to present such testimony, and to pursue such cross-examination, as he chose. The Commission then approved the non-unanimous stipulation and agreement and based its order disposing of the case upon it. The Court of Appeals reversed. First, the Commission's order was held inadequate as a matter of law because the factual findings were conclusory and insufficient to support the Commission's disposition of the case, in violation of Section 386.420, RSMo. That statute requires that all parties have the opportunity to be heard and to present evidence in Commission proceedings and also that all Commission orders contain written findings of fact. Fischer, 645 S.W.2d at 42-43; State ex rel. Rice v. Public Service Commission, 220 S.W.2d 61, 65 (Mo. 1949). The court stated:

> Rather than performing its statutory duty to fix a rate design . . . based on findings of fact supported by competent and substantial evidence, the Commission appears to have simply adopted the stipulation [and] agreement. This procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission.

Fischer, *supra,* 645 S.W.2d at 43.

The Public Counsel in Fischer also attacked the Commission's order as made on unconstitutional procedure. The court agreed that the hearing procedure adopted by the Commission denied due process to the Public

Counsel because, although he was permitted to present evidence and conduct cross examination, "the Commission had previously decided that the only issue it would consider was whether or not to approve the stipulation and agreement." *Id.* The court went on to explain:

> the hearing afforded Public Counsel was not meaningful, in that the Commission was precluded from considering anything but the stipulated rate design in the course of the hearing in question. The question properly before the Commission was what rate design to adopt, rather than whether or not to adopt one particular proposal.

Fischer, *supra,* 645 S.W.2d at 43.

Turning to the present case, the Commission's statutory duty is to set a rate for MAWC based on findings of fact supported by competent and substantial evidence. The attempt by the Signatory Parties to distinguish Fischer fails, for even if due process were satisfied in the present case, there remain the requirements of Section 386.420, RSMo. The Court in Fischer stated, with respect to the procedure of determining a case on the basis of a non-unanimous stipulation and agreement, "[t]his procedure is completely contrary to law, and cannot form the basis for a valid order by the Commission." The Commission understands Fischer to mean that it cannot, by any procedural gymnastics, impose a non-unanimous stipulation and agreement on objecting parties and thereby dispose of a contested case.

In previous cases, the Commission has stated that it considers a non-unanimous stipulation and agreement "to be merely a change of position by the signatory parties from their original positions to the stipulated position." In the Matter of the Application of Empire District Electric Company, Case No. EA-99-172 (*Report and Order,* issued December 7, 1999);

In the Matter of Missouri Public Service, 2 Mo.P.S.C.3d 221, 223 (1993).

As the Commission explained in Empire District, *supra:*

> The Commission need not, and will not, "approve" or "disapprove" the Agreement. In that regard, some of the parties have suggested that Empire and the other signatories to the Agreement have an obligation to present evidence to "support" the Agreement. In the context of this case, that suggestion is misleading. Section 393.170.3, RSMo 1994, provides that the Commission may grant a certificate of convenience and necessity if, after due hearing, it determines that "such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service." If the Commission finds that the requirements of law have been satisfied, it will grant the requested certificates of convenience and necessity. If those requirements have not been met, then no certificates will be granted, no matter what some of the parties may have agreed upon in the non-unanimous stipulation and agreement.

Likewise, the Commission will proceed in the present matter pursuant to law and its own rules of practice and procedure, granting such relief as, after hearing, it concludes has been shown to be warranted under the law.

In the Missouri Public Service case cited above, 2 Mo.P.S.C.3d at 223, the Commission also addressed the responsibilities of parties objecting to a non-unanimous stipulation and agreement:

> When a nonunanimous stipulation is filed, the nonsignatory party must notify the Commission and the stipulating parties of the specific issues which it is disputing and must adduce evidence or testimony on those specific issues. The stipulating parties must likewise file evidence and testimony supporting settlement of the disputed issues.

The Objecting Intervenors have not, by requesting a hearing on "all issues in the case," given notice of "the specific issues which it is disputing." However, it is hard to see how, at this early stage in this case, they could do so. The Commission concludes that the filing of testimony, an

issues list, and position statements as called for in the existing procedural schedule will be sufficient to define the issues actually in dispute herein.

For the reasons explained above, the Commission determines that the Objecting Intervenors' request for a hearing on "all issues in the case," pursuant to the existing procedural schedule, should be granted. Their Motion for Rehearing directed at the Commission's Order of March 3, 2000, which served primarily to clarify their hearing request, shall be denied.

The Joint Motion to Modify the Procedural Schedule

This motion, filed by the Signatory Parties the day following the filing of their Stipulation, calls for extensive modifications to the procedural schedule in order to permit a hearing and determination on the Stipulation prior to April 30, 2000. In that motion, they promised to file direct testimony in support of the Stipulation on or before March 1, 2000; and, on March 1, MAWC, Staff and Public Counsel filed the direct testimony of four witnesses in support of the Stipulation.

The Objecting Intervenors make several arguments against the joint motion to modify the procedural schedule, the best of which is the fact that the hearing contemplated by Rule 4 CSR 240-2.115(2), and which these intervenors requested on March 1, 2000, is not a hearing on the Stipulation but a hearing on whatever issues the movant identifies. In the present case, that is a hearing on "all issues in the case." However, under Fischer, supra, the disposition of a contested case on the basis of a non-

unanimous stipulation and agreement is not permissible.[6] Thus, the modifications to the procedural schedule requested by the Signatory Parties are unnecessary.

The Commission has granted, by Order issued on March 15, 2000, an extension of time for the filing of Direct Testimony by all parties other than MAWC. This was the one aspect of the joint motion on which all parties that were heard from agreed.

The Accounting Authority Order

On November 19, 1999, MAWC filed its motion for an Accounting Authority Order (AAO) with respect to its new plant in St. Joseph, Missouri. In support of its motion, MAWC stated that the plant is expected to go on-line about four-and-one-half months before MAWC's new tariffs take effect. During this interval, MAWC asserted that it will be exposed to large costs with respect to the plant, $347,000 monthly, and will collect no corresponding revenues. Therefore, MAWC sought authority to continue to capitalize the allowance for funds used during construction (AFUDC) until September 14, 2000, and to amortize the post-in-service AFUDC over twenty years at 7.22 percent per annum. MAWC also sought to defer depreciation on its new plant until September 14, 2000, and to amortize the deferred depreciation over the life of the plant. An AAO was warranted, in MAWC's view, because the new plant is an extraordinary and unique item, equal in value to fully 40 percent of MAWC's rate base.

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[6]Except, of course, in those cases in which a failure to file timely requests for a hearing permits the Commission to treat the non-unanimous stipulation and agreement as a unanimous stipulation and agreement. Rule 115(1).

Other parties, including Staff, Public Counsel and the Industrial Intervenors,[7] an informal association of industrial customers of MAWC from St. Joseph, opposed the AAO. The Industrial Intervenors contended that it would mean higher rates for customers. Public Counsel and Staff asserted that the new plant was not a unique or extraordinary event such as supports an AAO and that MAWC was simply trying to avoid regulatory lag. MAWC responded that all AAOs are intended to avoid regulatory lag and that granting the AAO would do nothing but preserve the issue of the recovery of these amounts for the rate case and would not in any way guarantee that MAWC will recover all or any part of them.

The Commission issued its Order Concerning Test Year, True-up, Accounting Authority Order, and Local Public Hearings on February 1, 2000. In that Order, the Commission stated:

> That the Commission will defer decision on Missouri-American Water Company's Motion for an Accounting Authority Order until it issues its Report and Order in this case. The parties will thoroughly advise the Commission on this issue in testimony and briefing. Any party that wishes to supplement its already-filed testimony to include this issue may do so.

Thereafter, on February 10, 2000, MAWC filed its Motion for Reconsideration of the Order of February 1, 2000, with respect to the Accounting Authority Order. MAWC asserted therein that the AAO must be in place before the new plant goes on line in order to preserve the issue of recovery for the rate

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[7]AG Processing, Inc. (a Cooperative), Friskies Petcare, a Division of Nestle USA, and Wire Rope Corporation of America, Inc.

case. The Industrial Intervenors responded in opposition to MAWC's motion on February 18, 2000; MAWC replied on February 28, 2000. On March 15, 2000, Public Counsel filed its very belated suggestions in opposition to MAWC's motion for reconsideration and, on March 22, filed its Motion to Suspend Procedural Schedule and Request for Expedited Consideration. On March 23, 2000, MAWC filed its Response to Public Counsel's Suggestions in Opposition to MAWC's Motion for AAO and for Reconsideration of Order Concerning AAO.

On March 3, 2000, as previously noted, the Commission issued its Order Denying Rehearing and Concerning Accounting Authority Order. In that Order, the Commission indicated that it would hold a hearing on MAWC's motion for reconsideration together with a Rule 115 hearing on the Non-unanimous Stipulation and Agreement. However, as explained previously in this Order, the Commission will not hold a hearing on the Non-unanimous Stipulation and Agreement. Neither will the Commission hold a hearing on MAWC's motion for reconsideration.

An AAO is, as MAWC has repeatedly asserted, merely an accounting mechanism that permits deferral of costs from one period to another. In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991). The items deferred are booked as an asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period. *Id.* AAOs should be used sparingly because they permit ratemaking consideration of items from outside the test year:

> The deferral of cost from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. Rates are usually established based upon a historical test year

> which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. State ex. rel. Union Electric Company v. PSC, (UE), 765 S.W.2d 618, 622 (Mo. App. 1988).

In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 205.

The Commission will not hold a hearing on MAWC's Motion for Reconsideration because no hearing is necessary. The Commission, pursuant to its authority to prescribe uniform accounting methods at Section 393.140(4), RSMo, has adopted the Uniform System of Accounts (USOA) and required public water utilities to comply with it. Rule 4 CSR 240-50.030(1). The USOA authorizes utilities to defer extraordinary and non-recurring expenses without prior permission of the Commission. State ex rel. Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 810 (Mo. App., W.D. 1993); In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 203. The Commission has previously taken the position that, as authority from the Commission in the form of an AAO is not necessary for deferral anyway, the Commission need not hold an evidentiary hearing prior to granting an AAO. In the Matter of Missouri Public Service, 1 Mo.P.S.C.3d at 204.[8]

The only benefit from seeking prior Commission approval for deferring costs is to remove the issue of whether those costs are

[8]This theory has not yet been tested on appeal. *See* Office of the Public Counsel v. Public Service Commission, 858 S.W.2d 806, 809-10 (Mo. App., W.D. 1993).

extraordinary from the case. *Id.*, at 203-204. It is not appropriate to remove that issue where, as here, it is contested. The Commission will authorize MAWC to capitalize its post-in-service AFUDC and defer depreciation on its new plant after its in-service date. Specific Commission approval is not necessary; Rule 4 CSR 240-50.030(1) authorizes MAWC to do so. All issues, including whether or not these costs are indeed extraordinary and non-recurring, remain for the hearing, as the Commission indicated in its Order of February 1, 2000.

Although MAWC does not need Commission approval to defer the costs in question, the motion for reconsideration will be granted.

Public Counsel's Motion to Compel

On February 28, 2000, Public Counsel filed its Motion to Compel Responses to Data Requests, Request for Extension of Time to File Testimony and Request for Expedited Consideration. That motion is now moot because, on March 15, 2000, the Commission extended the deadline for the filing of direct testimony by all parties other than MAWC. Therefore, Public Counsel's motion will be denied.

IT IS THEREFORE ORDERED:

1. That the request for a hearing on "all issues in the case" pursuant to the existing procedural schedule herein, filed by certain intervenors on March 1, 2000, and clarified by their Motion for Rehearing filed on March 7, 2000, is granted.

2. That the Motion for Rehearing of the Commission's Order of March 3, 2000, filed by certain intervenors on March 7, 2000, is denied.

3. That the Motion to Modify the Procedural Schedule filed on February 23, 2000, by Missouri-American Water Company, the Staff of the Public Service Commission, and the Office of the Public Counsel is denied.

4. That the Motion for Reconsideration filed by Missouri-American Water Company on February 10, 2000, is granted. Missouri-American Water Company may capitalize post-in-service AFUDC and defer depreciation with respect to its new water treatment plant in St. Joseph, Missouri, pending the final determination by this Commission.

5. That the Motion to Compel Responses to Data Requests, Request for Extension of Time to File Testimony and Request for Expedited Consideration filed by the Office of the Public Counsel on February 28, 2000, is denied.

5. That this Order shall become effective on April 4, 2000.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Drainer,
Murray, and Schemenauer, CC., concur.

Thompson, Deputy Chief Regulatory Law Judge