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FILED³

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**Missouri Public
Service Commission**

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

Re: Case No. WO-2002-206
Proposed Acquisition of American Water Works Company
by the German Corporation RWE AG.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **REPLY TO JOINT SUGGESTIONS IN OPPOSITION TO MOTION OF THE OFFICE OF THE PUBLIC COUNSEL TO REVIEW PROPOSED ACQUISITION OF AMERICAN WATER WORKS COMPANY BY RWE AG**. 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

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Missouri Public
Service Commission

In the Matter of the Proposed Acquisition)
of American Water Works Company by) Case No. WO-2002-206
the German Corporation, RWE AG.)

**REPLY TO JOINT SUGGESTIONS IN OPPOSITION TO MOTION OF THE
OFFICE OF THE PUBLIC COUNSEL TO REVIEW PROPOSED ACQUISITION
OF AMERICAN WATER WORKS COMPANY BY RWE AG**

COMES NOW, the Office of the Public Counsel, and respectfully replies to the suggestions by Missouri-American Water Company (MAWC), et al. to Public Counsel's request for review of the pending acquisition of American Water Works Company (AWK) by RWE. In reply, Public Counsel submits the following suggestions to the Commission.

1. As a point of clarification, Public Counsel's reference to Missouri-American Water Company (MAWC) in its Motion should be taken by the Commission to refer to the entity which will exist at the completion of the merger between St. Louis County Water Company, d/b/a Missouri-American Water Company, MAWC, and Jefferson City Water Works Company. As noted in the Suggestions in Opposition, that merger is scheduled to be completed by December 31, 2001, and will in any event be completed prior to the consummation of the transaction at issue in Public Counsel's original motion.

2. Despite its reliance on a limited amount of precedent, MAWC's claim that this Commission does not have jurisdiction to review this proposed acquisition runs counter to "the public policy under which the Commission acts." See, Joint Application of Claricom Networks, Inc., Claricom Holdings, Inc., Staples, Inc., Stacom Holdings, LLC, and Platinum Equity, LLC, for Approval of Transfer of Stock, TM-2001-669 (November 15, 2001)(Slip Op., at p. 7). "The Commission's principle purpose is to serve

and protect ratepayers." State ex. rel. Capital City Water Co. v. PSC, 850 S.W.2d 903, 911 (Mo. App. W.D. 1993). (Citing State ex rel. Crown Coach Co. v. Public Service Commission, 179 S.W.2d 123 (1944).) Therefore, whenever the interests of rate paying customers may be adversely affected by a change in corporate structure, the Commission should review the proposed changes to ensure that the changes will cause those customers no harm. The Missouri Supreme Court has held that it is the Commission has the duty "to see that no such change shall be made as would work to the public detriment." State ex rel. City of St. Louis v. Public Service Commission, 335 Mo. 448, 459, 73, S.W.2d 393, 400 (Mo banc 1934).

3. In the case of North Missouri Telephone Co., 49 PUR 3d 313 (Mo. PSC Case No. 15,054)(1963), the Commission stated that "the commission should never lose sight of the cardinal principle of regulation, that the public should and must receive adequate service." 49 PUR 3d, at 318. The policies of RWE and the layers of corporate subsidiaries diagrammed at Appendix 1 of the Joint Suggestions **does not even identify MAWC**, which suggests that the interests of Missouri customers will take a low priority indeed in the RWE hierarchy. While RWE and its water subsidiaries managed by Thames Water could have the necessary expertise to operate a regulated water utility in Missouri, there is nothing in the record to suggest that Missouri customers will not suffer detriment as the result of this acquisition by virtue of becoming a small subsidiary of a subsidiary of a subsidiary of a subsidiary of RWE.

4. The Commission's authority to regulate the sale, transfer, or disposition of a utility's system or assets is broad. State ex rel. Marigney Creek v. PSC, 537 S.W.2d 388 (Mo. banc 1988). Section 386.250 RSMo provides the Commission with jurisdiction and

supervision over "all public utility corporations and persons whatsoever subject to the provisions of this chapter." §386.250(5).

5. The proposed sale of MAWC's parent company at issue here differs from the earlier merger of AWK and St. Louis County Water's former parent Company, National Enterprises, Inc. (NEI). In that case, AWK acquired the common stock of NEI. (See, Joint Suggestions, Appendix 2, at p.3). However, the RWE acquisition of AWK would occur, according to the information contained in the Joint Suggestions, by converting each outstanding share of AWK stock "into the right to receive the merger consideration, which is \$46 per share in cash." (Joint Suggestions, Appendix 1, at p. 3.) The Commission should not be misled by the claim that AWK will be the "surviving" subsidiary upon the merger; all ownership of MAWC will change from ownership by the shareholders of AWK, to ownership by the shareholders of RWE. There is no provision for providing former AWK shareholders with RWE stock.

6. The claim in the Joint Suggestions that this transaction will be "transparent" to Missouri customers was also made in WM-99-224. Yet, at the earliest opportunity, the St. Louis County Water division came before this Commission to seek recovery of "acquisition costs" of the merger between AWK and NEI. St. Louis County Water also sought to increase customer rates as part of a "shared savings plan" which was also attributed to the merger. Although this Commission correctly refused to allow recovery of those elements of the rate increase request, all parties to that rate case (WR-2000-844) expended considerable time and effort on these issues. Therefore, Public Counsel suggests that any claim of "transparency" from MAWC should be taken with a grain of salt.

7. In State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo App.

E.D. 1980), the court of appeals stated that:

“Before a utility can sell assets that are necessary or useful in the performance of its duties to the public it must obtain the approval of the Commission.... The obvious purpose of this provision is to ensure the continuation of adequate service to the public served by the utility.” 596 S.W.2d, at 468.

This Commission should assert its jurisdiction and determine whether to approve this sale of this Missouri-regulated utility and its attendant assets.

8. The proposed transaction will create additional layers of unregulated corporations, structure, which as a group may not be subject to the laws of any one country, between the customers of the Missouri regulated utility (or utilities until the Missouri merger is completed), and the ultimate corporate decision makers, the board and shareholders of RWE. In the past, this Commission has heard arguments from the Missouri companies, in particular and most recently, in the St. Louis County Water Company rate case, WR-2000-844, that capital investment decisions are made at the parent company level, and that American Water Works makes capital investment decisions within its affiliates based upon the level of return it will receive on that investment. In that rate case, St. Louis County Water sponsored the testimony of Harold Walker. This witness pre-filed testimony, which was admitted into evidence as Exhibit 32 in that case. In that testimony, the Company’s witness stated that “investors (AWK) will not provide the equity capital necessary for increasing the amount of common equity in a capital structure unless the regulatory authority allows an adequate rate of return on equity.” (WR-2000-844, Exhibit 32, p. 20.) This Commission has the right and duty to

ensure that the additional corporate layers between the regulated utility and the ultimate investor will not operate to the detriment of the public interest of Missouri customers.

9. In his dissent from the case of Re Kansas City Power and Light Company, EM-2001-464, 212 P.U.R.4th 335 (August 2, 2001), Commission Gaw expressed concerns that KCPL's reorganization was designed to allow the Company to engage in profitable, unregulated sales of wholesale power "with no duty or obligation to the customers of Kansas City Power & Light" creating a "significant risk to the interests of Missouri consumers". If the Commission does not act now to ensure that this proposed transaction will not be detrimental to the public interest, either by denying the transaction or imposing conditions on the transaction, MAWC's customers may suffer detriment. If the American-owned parent of the regulated company could threaten to withhold capital financing from a subsidiary, with the impunity offered in WR-2000-844, what will a foreign owned great-grandparent corporation do, when asked to consider the very real needs of Missouri customers? The Commission is charged with protection Missouri customers, but RWE's interests are far-flung, and there is no reason that it will consider the real needs of those customers as a priority.

CONCLUSION


The public policy which forms the foundation of the Commission's regulatory authority requires that it protect the interests of the customers of a monopoly public utility. The proposed acquisition of American Water Works by RWE would add additional corporate layers between the customers of the Missouri-regulated utility and the ultimate decision makers within the company. It would further separate the decision makers from the Commission's oversight of decisions which will affect Missouri

customers. Therefore, the Commission has an affirmative duty to determine, prior to the transaction, that the interests of Missouri customers are not at risk.

WHEREFORE, this Commission should assert its jurisdiction in this matter in order to ascertain that the proposed transaction contains sufficient protections for the Company's Missouri customers, and that the result of the transaction will not be detrimental to the public interest. Further, if the parties can not establish lack of detriment, the Commission should either forbid the transaction or impose sufficient conditions to protect the interests of the Missouri customers.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By: 
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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 28th day of November 2001:

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A handwritten signature in dark ink, appearing to read "T. E. Pulliam", is written over a horizontal line.