

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a Session of the Public Service
Commission held at its office
in Jefferson City on the 27th
day of August, 1993.

In the matter of the joint application of)
Missouri-American Water Company and the)
City of St. Joseph, Missouri for approval) CASE NO. WO-93-298
of agreement and tariff filings relating)
to discontinuance of water service and)
delinquent charges or city sewer services.)

ORDER DENYING JOINT APPLICATION FOR
EXECUTION OF WATER DISCONTINUANCE AGREEMENT

On April 28, 1993, Missouri-American Water Company (MAWC) and the City of St. Joseph, Missouri (City or St. Joseph) filed a joint application pursuant to Section 250.236, RSMo Cum. Supp. 1992, seeking approval of the Commission of a water discontinuance agreement negotiated between the parties, which would allow the City to arrange with MAWC to have the water service of the City's sewer customers discontinued when those customers are delinquent in the payment of their sewer bills to the City. MAWC also seeks Commission approval of its proposed tariff schedules designed to implement the water discontinuance agreement.

On May 28, 1993, the Commission issued an Order and Notice setting an intervention deadline of June 28, 1993. The Commission received no requests for intervention. Since there were no applications to intervene and neither the Staff of the Public Service Commission (Staff) nor the Office of the Public Counsel (Public Counsel) requested a hearing, the Commission concludes that no hearing is necessary in this case, and will base its decision upon the Joint Applicants' verified application and attachments, and the recommendation of Staff. *State ex rel. Rex Deffenderfer Enterprises, Inc. v. Public Service Commission*, 776 S.W.2d 494, 496, (Mo App. 1989).

On June 28, 1993, the Joint Applicants filed a Motion To Withdraw Exhibit B To Application And Substitute In Lieu Thereof New Exhibit B. The new Exhibit B contains a new substituted proposed tariff sheet which contains language agreed to by MAWC and the Staff in response to Staff's finding that some of the original wording was ambiguous.

MAWC is a water corporation and public utility as defined in Section 386.020, RSMo Cum. Supp. 1992, and is engaged in providing water utility services within the City of St. Joseph, Missouri. The City of St. Joseph is a municipal corporation chartered under the laws of the State of Missouri, and is located within Buchanan County, Missouri. The City owns and operates a sewage collection and treatment facility for sewage and waste materials generated by the public within the City of St. Joseph, Missouri.

On June 29, 1993, the Staff filed a memorandum recommending approval of the water discontinuance agreement and proposed tariff schedules. Staff's recommendation lists summaries of some of the contract provisions in the water discontinuance agreement which Staff feels supports approval of the agreement. Some -- although not all -- of the contract provisions listed by Staff are as follows:

- (1) Notification of sewer customers by City via certified mail and posting;
- (2) City must identify owner of property if different from customer;
- (3) Notification of customer by MAWC ten days in advance of disconnection date, and presence of City and MAWC representatives at time of disconnection;
- (4) Restoration of service upon written notice by City;
- (5) Compensation by City to MAWC to cover MAWC's costs for disconnections and reconnections, and to cover lost water revenues;
- (6) Indemnification of MAWC by City for claims by sewer customers arising from the disconnection of water service, except for MAWC's own negligence;

- (7) Submission of disputes over the agreement to the Missouri Public Service Commission for decision; and
- (8) Termination by either party upon thirty days written notice.

Joint Applicants cite Section 250.236, RSMo Cum. Supp. 1992 as authority for their water discontinuance agreement. This statute makes reference to cities with a certain population, located in a certain type of county and with a certain type of government. The joint application makes no reference as to whether the City of St. Joseph falls within any of the categories enumerated in the statute; however, the Commission will take administrative notice of the fact that the City of St. Joseph is included within the statute, especially given that the City of St. Joseph is referenced in the statute's heading. Although the heading was not enacted by the General Assembly and cannot be relied upon to the extent as though it were, "headings and revises' catchlines may be pertinent in demonstrating how the statute has generally been read and understood." *Fiandaca v. Niehaus*, 570 S.W.2d 714, 716, n.2 (Mo. App. 1978).

Upon review of the verified joint application and attachments, and Staff's recommendation, the Commission finds that the water discontinuance agreement should be disapproved, as the Commission has some serious reservations about the wisdom of some of the contract provisions and about the clarity of the tariff schedules attached to the joint application. Sewer utilities which provide sewer service to their customers but do not also provide water service are at a disadvantage when their customers are in arrears in payment of their sewer bills. As a practical matter, it is difficult to control the continued use of sewer service when payment for that service is not forthcoming, short of discontinuing the water service to that household. Thus, in theory water discontinuance agreements such as the one presently before the Commission appear to be reasonable methods of solving this problem.

The water discontinuance agreement between MAWC and the City provides for several different forms of notice to the City's sewer customers, which helps protect the customer, the City, and MAWC. The agreement also provides for payment to MAWC of the cost of discontinuing water service, the cost of restoring water service, and a sum representing estimated lost water revenues. Thus, the agreement appears to allow MAWC to assist the City without incurring any costs on behalf of MAWC or its ratepayers. The Commission has reservations, however, concerning the indemnification provisions found in numbered paragraph 7 of the agreement. This provision provides that the City shall indemnify MAWC against all losses "except for the water company's own independent negligence or the independent negligence of its agents, officers, servants, or employees...." While it is understandable that the City would want a provision protecting it from the negligence of MAWC, no distinction is made between gross negligence and other, lesser forms of negligence. But for the request of the City to discontinue water service pursuant to the agreement, MAWC would not be placed in a position where their action or inaction could result in potential liability. Under the agreement MAWC and its ratepayers therefore obtain no direct benefit but do incur the risk of potential liability.

It may have behooved MAWC to have waited and acted under newly enacted Section 393.015, Senate Committee Substitute for House Bill No. 453, First Regular Session, 87th General Assembly, effective August 28, 1993. This statute is broader than Section 250.236, and rather than limiting its application to a couple of cities, permits most sewer corporations, municipalities, or sewer districts to contract with most water corporations, municipalities, or public water supply districts to terminate water services to customer premises for nonpayment of sewer bills. In particular, the statute provides:

A water corporation, municipality, or public water supply district acting pursuant to a contract with a sewer corporation, municipality or sewer district as provided in subsection 1 of this section shall not be liable for damages

related to termination of water services unless such damage is caused by the negligence of such water corporation, municipality, or public water supply district, in such case the water corporation, municipality, or public water supply district shall be indemnified by the sewer corporation, municipality or sewer district.

Section 393.015.2. Under the new statute a water corporation would thus be liable in the first instance only for damages caused by its negligence, but would be indemnified by the sewer corporation, municipality, or sewer district for those damages.

Section 250.236 also contains language regarding the issue of liability: "A private or public water company acting pursuant to a written request from the city as provided in subsection 1 of this section is not liable for damages related to termination of water services." Section 250.236.2, RSMo Cum. Supp. 1992. This language is very broad and general and does not specifically provide for indemnification. The language in Section 393.015 on the other hand is stronger and more specific, is mandatory¹, and is less vulnerable to interpretations which could create loopholes. Reference to Section 393.015 or contract language similar to this statutory language regarding liability and indemnification would appear adequate to protect a water corporation entering into a water discontinuance agreement. In any event, contract language such as that contained in the Joint Applicants' agreement, which provides greater exposure to liability than apparently contemplated by Section 250.236, seems unnecessary.

The Commission also finds that MAWC's proposed tariff schedules, including new Exhibit B, contain potential ambiguities. The proposed tariff schedules list rules, regulations and conditions of service pertaining to the discontinuance of water service and renewal of water service after

¹ The language of the statute commands compliance, as when it states that "the water corporation...shall be indemnified by the sewer corporation, municipality or sewer district." Section 393.015.2 (emphasis added.)

discontinuance. It is unclear whether and when these provisions will apply to a customer whose water service is discontinued because of nonpayment of a sewer bill. For example, Section 7(D) allows a postponement of up to 21 days before water service is discontinued if the discontinuance will aggravate an existent medical emergency of a permanent resident of the premises, and section 7(F) basically provides that service will not be terminated for nonpayment so long as the undisputed portion of the bill is paid, or if that amount cannot be determined, if 50 percent of the bill in dispute is paid, as long as future bills are paid and the customer enters into bona fide discussions with the company to settle the dispute. Section 8(A), which provides for the renewal of water service after termination, makes reference to the payment of a sewer bill, but is unclear with respect to whether only payment of the sewer bill is required, or whether payment of all other proper charges is also required prior to reconnection.

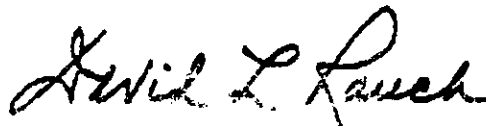
The commission is of the opinion that the Water Discontinuance Agreement presented to the Commission for approval is not, as is, reasonable and in the public interest. The Commission believes that it is not appropriate to approve an agreement under which a regulated water corporation assumes a risk of potential liability in the course of providing a service at cost to a municipality operating a sewer treatment facility. However, the Commission is not in principle opposed to such agreements, and has in fact approved a similar agreement between St. Louis County Water Company and the St. Louis Metropolitan Sewer District in Case No. WO-93-348, after having specifically found that the indemnity protection for the water company was adequate. In the event the Joint Applicants can agree on a water discontinuance agreement similar to the present one, but which contains indemnity provisions which reference Section 393.015.2 or contain similar language, or language similar to the agreement approved in Case No. WO-93-348, the Commission would be amenable to approval thereof. Any

tariff schedules submitted with such an agreement should clarify whether and when MAWC's rules, regulations and conditions of service pertaining to the discontinuance of water service and renewal of water service apply when water service is discontinued for nonpayment of a sewer bill.

IT IS THEREFORE ORDERED:

1. That the joint application of Missouri-American Water Company and the City of St. Joseph for approval of the Water Discontinuance Agreement attached as Exhibit "A" to the joint application, and approval of the tariff schedules filed on June 28, 1993 as new Exhibit "B", be and is hereby denied.
2. That this Order shall become effective on September 8, 1993.

BY THE COMMISSION



David L. Rauch
Executive Secretary

(S E A L)

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