Missouri Public Service Commission

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April 15, 2002

FILED
APR 15 2002
Missouri Public
Service Commission

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

RE: Case No. WR-2000-281

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of **STAFF'S RESPONSE TO MOTION TO STRIKE STAFF FILINGS AND MOTION TO DISQUALIFY COUNSEL.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Keith R. Krueger
Deputy General Counsel
(573) 751-4140
(573) 751-9285 (Fax)

KRK/lb
Enclosure
cc: Counsel of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
APR 15 2002
Missouri Public Service Commission

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

STAFF'S RESPONSE TO MOTION TO STRIKE STAFF FILINGS AND MOTION TO DISQUALIFY COUNSEL

COMES NOW the Staff of the Missouri Public Service Commission and, for its Response to Motion to Strike Staff Filings and Motion to Disqualify Counsel ("Response"), respectfully states to the Missouri Public Service Commission as follows:

Introduction

1. Ag Processing, Inc., Friskies Petcare, Wire Rope Corporation, the City of Riverside, and Gilster Mary-Lee (collectively, "Movants") filed their Motion to Strike Staff Filings Due to Conflict of Interest and Motion to Disqualify Counsel Due to Conflict of Interest ("Motion to Disqualify") on April 5, 2002. By this motion, Movants apparently seek to disqualify "counsel presently appearing on behalf of the Staff."[1] The gist of their argument is that the Staff's counsel should be disqualified because they have previously represented the Commission on judicial review of this same case, which has now been remanded to the Commission for further

[1] It would appear that this term refers to Keith R. Krueger, Robert Franson, and Dana K. Joyce; Movants may also seek to disqualify Cliff Snodgrass. Neither the introductory part of the motion nor the prayer clause names the attorneys to be disqualified, however those four attorneys are named in Paragraphs 1 and 2 of the Motion to Disqualify. No names are mentioned after Paragraph 2; instead the Movants refer only to "these attorneys." The Staff notes that Mr. Snodgrass is not "presently appearing on behalf of the Staff" in this case.

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proceedings. Movants also seek an order to strike the pleadings that have been filed by Staff's counsel, for the same reasons. Movants' motion is without merit and should be dismissed.

2. The Staff will readily stipulate to many of the factual allegations that are included in the Motion to Disqualify. Mr. Krueger, Mr. Franson, and Mr. Snodgrass did represent the Staff in the original hearing before the Commission, and then the Commission on judicial review of this case, and Mr. Krueger and Mr. Franson now represent the Staff on the remand of this case. Mr. Krueger did discuss this case with the Commission while the case was undergoing judicial review, and the Staff's attorneys did have an attorney-client relationship with the Commission during that judicial review. And the Staff's attorneys are, of course, bound by the Code of Professional Responsibility.

3. The primary sources of authority that govern the conduct of attorneys in Missouri are the ethical rules that are found in Supreme Court Rule 4. For this reason, it is surprising that, in this complaint about the ethical conduct of attorneys, the Movants pay scant attention to the actual text of the rules themselves, but rely instead upon: a misleading partial quote, taken out of context, from a Comment to the rules; their own subjective judgment about what "stands to reason,"[2] or what "would create a manifest injustice,"[3] or what "is simply inappropriate;"[4] and bare, unsupported conclusions that "other parties are substantially prejudiced."[5] Movants' Motion to Disqualify is woefully short of citation to authority. Movants cite only two cases, which are easily distinguished from the present situation. See the discussion at pages 14-16.

[2] See Motion to Disqualify, p. 6, Paragraph 12.
[3] See Motion to Disqualify, p. 6, Paragraph 12.
[4] See Motion to Disqualify, p. 7, Paragraph 14.
[5] See Motion to Disqualify, p. 6, Paragraph 13.

4. In this Response, the Staff, on the other hand, will examine the text of the Rules of Professional Responsibility[6] themselves, and demonstrate that Mr. Joyce, Mr. Krueger and Mr. Franson have violated neither the substance nor the spirit of any ethical rule. The Staff will also demonstrate that Messrs. Joyce, Krueger and Franson are not simultaneously representing both the Commission and the Staff in the same case, that they have not abused the "trust and confidence" of the Commission, as Movants insinuate, and that Movants have not shown that they will be harmed in any way if these attorneys continue to represent the Staff in this case. Finally, the Staff will, at length and in detail, demonstrate that it is not now asserting a "radically different" position on what is known as the "Phase-In Issue," as Movants alleged.[7]

Procedural Background

5. On October 15, 1999, Missouri-American Water Company ("MAWC" or "Company") filed with the Commission a general rate increase case, designated as Case No. WR-2000-281. Mr. Krueger, Mr. Franson and Mr. Snodgrass represented the Staff in this case. They did not discuss the case with the Commission while it was pending here. After a fully contested evidentiary hearing, held in June, 2000, the Commission issued a Report and Order on August 31, 2000, by terms of which it approved a rate increase of about $10.2 million and ordered a rate design to enable the Company to collect in annual revenues the amount of the authorized rate increase.

6. After the issuance of the Report and Order, seven parties or groups of parties filed applications for rehearing with the Commission. The Commission denied all of the applications for rehearing on September 19, 2000. The Staff's participation in the original hearing ended when the Commission denied the applications for rehearing. The Staff does not have the ability

[6] This is the proper title for the ethical rules that are now in effect. Movants' reference to the Canons of Ethics (in Paragraph 10 of the Motion to Disqualify) is in error; the Canons of Ethics were repealed many years ago.

to seek judicial review. The General Counsel's Office had therefore fulfilled its duty under applicable statutes and rules[8] to represent the Staff at the original hearing on MAWC's application.

Judicial Review of the Report and Order

7. Each of the seven parties or groups of parties that had filed applications for rehearing then filed petitions for writs of review in the Cole County Circuit Court. In three of these petitions, the petitioners filed "provisional" petitions for writs of review. See the discussion of these three cases in Paragraph 8, below. The court issued writs of review to the petitioners who filed the other four petitions, namely the Company,[9] the Office of the Public Counsel,[10] the City of St. Joseph, Missouri,[11] and a group known as the "St. Joseph Area Water Districts."[12] On May 25, 2001, the Circuit Court of Cole County issued its Order and Judgment on those four petitions. The Order and Judgment affirmed the Commission's ruling that the Company's decision to construct the St. Joseph water treatment plant and related facilities was prudent; reversed the Commission on the "premature retirement" issue and remanded the case to the Commission for further proceedings on that issue; and reversed the Commission's decision on the "phase-in" issue and remanded the case to the Commission to make better findings of fact and conclusions of law on that issue.

8. The circuit court did not, however, initially issue writs of review to the petitioners in the other three cases, namely the City of Joplin, Missouri,[13] Gilster Mary-Lee Company,[14] and a

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[7] See Motion to Disqualify, p. 7, Paragraph 16.
[8] 4 CSR 240-2.040(1).
[9] Case No. 00CV325014.
[10] Case No. 00CV325218.
[11] Case No. 00CV325206.
[12] Case No. 00CV325196.
[13] Case No. 00CV325217.
[14] Case No. 00CV325220.

group known as the "St. Joseph Industrial Intervenors."[15] Each member of this latter group of three parties filed what it called a "provisional" petition for writ of review in Cole County, and also filed another petition for writ of review in their apparently preferred venues of Buchanan and/or Jasper Counties. The Commission's motions to dismiss the Buchanan County and Jasper County proceedings were overruled. The Commission then filed applications for writs of prohibition against the Buchanan County and Jasper County Circuit Court judges, but the Court of Appeals denied the applications. Ultimately, however, the Missouri Supreme Court granted the writs of prohibition that the Commission requested, ruling that the Buchanan County and Jasper County courts had no jurisdiction to hear those three petitions for writs of review.[16] The Circuit Court of Cole County issued its judgment on those three writs of review on October 3, 2001, reversing the Commission on two additional issues and remanding the case to the Commission for the entry of better findings of fact and conclusions of law.

9. All of the various appeals from the decisions of the Circuit Court of Cole County were eventually consolidated in the Western District of the Court of Appeals in case number WD60080. The Western District dismissed the appeals on December 13, 2001, upon the motion of the St. Joseph Industrial Intervenors and the City of Riverside, Missouri, and the Missouri Supreme Court declined to transfer the case.

10. The Commission was a party in all of these appeals and was represented by Messrs. Krueger, Franson, and Snodgrass pursuant to § 386.071 RSMo 2000.[17] As counsel for the Commission, Mr. Krueger and Mr. Joyce did consult with the Commission about the case.[18]

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[15] Case No. 00CV325220. The St. Joseph Industrial Intervenors include Ag Processing, Friskies Petcare, and Wire Rope Corporation, all of whom are among the Movants.

[16] *State ex. rel. Public Service Commission v. Jackson*, 50 S.W.3d 250 (Mo. Banc 2001); *State ex rel. Public Service Commission v. Dally*, 50 S.W.2d 774 (Mo. Banc 2001).

[17] All statutory citations are to RSMo 2000, unless otherwise indicated.

[18] Movants found it necessary to attach to their Motion an 18-page exhibit to document the fact that the Commission consulted the Staff's attorneys about the litigation of these appeals. The Staff has not verified the accuracy of the

Proceedings Before the Commission on Remand

11. On March 7, 2002, the Commission ordered all parties in this case to file a pleading setting out their suggestions as to the course of action that the Commission should follow in regard to the remanded issues. The Commission also scheduled a prehearing conference for March 28, 2002.

12. On March 15, 2002, the St. Joseph Industrial Intervenors filed a Motion for Rehearing in which they suggested that the Commission's March 7, 2002 order was unlawful because it was issued by Regulatory Law Judge Kevin A. Thompson, who was the same hearing officer that presided at all hearings in this case before the Commission. Movants cited §536.083, in support of this motion.

13. The Staff responded to the St. Joseph Industrial Intervenors' Motion for Rehearing on March 25, 2002, in a pleading filed by Mr. Krueger and Mr. Franson. The Staff argued that Movants' reading of §536.083 was overbroad, and that §536.083 did not prohibit Judge Thompson from proceeding at this point in the remand, because the Commission was not yet conducting a rehearing, but was merely determining whether or not to have further proceedings.

14. On March 26, 2002, the Staff, through Mr. Krueger and Mr. Franson, filed its response to the Commission's March 7 Order Directing Filing.

15. On March 28, 2002, Judge Thompson convened a prehearing conference, as scheduled. At this prehearing conference, Judge Thompson announced that the Commission had overruled the Industrial Intervenors' Motion for Rehearing.

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specific dates mentioned in Exhibit B to Movants' Motion, but acknowledges that the Commission did consult Mr. Krueger and Mr. Joyce about this case on numerous occasions while the case was undergoing judicial review.

The Threatening Letter

16. A few minutes before the prehearing conference began, Stuart W. Conrad, one of the attorneys for the Movants herein, personally delivered to both Mr. Franson and Mr. Krueger a five-page letter.[19] A copy of this five-page letter was attached to the Motion to Disqualify, as Exhibit C. In this letter ("The Threatening Letter"), Mr. Conrad threatened to file a complaint with the Office of Chief Disciplinary Counsel of the Missouri Bar if Mr. Joyce, Mr. Krueger and Mr. Franson did not immediately recuse themselves from this case. He also argued that the entire General Counsel's Office should be disqualified from further representation in this case. The final two paragraphs of The Threatening Letter read as follows:

> I would like to have a prompt response or clarification of your position on these various concerns such that I may share with my clients. It would seem to me in the circumstances that recusal or withdrawal is the only available choice of action.
>
> In the event that you choose not to recuse yourself or respond to this letter promptly, I am prepared to present this matter to the Chief Disciplinary Counsel of the Missouri Bar on behalf of my clients including a copy of this letter and copies of other relevant documents in this and related proceedings.

17. On April 4, 2002, Mr. Krueger responded to The Threatening Letter by requesting from the Office of the Chief Disciplinary Counsel of the Missouri Bar ("OCDC") a written opinion concerning the propriety of his continuing to represent the Staff on the remand of this case. A copy of this letter to the OCDC is attached hereto as Exhibit 1. Mr. Krueger has not yet received a response to his letter to the OCDC. The Staff will, however, provide a copy of such response as soon as it is received from the OCDC, and intends to guide its conduct according to the advice that the OCDC provides on this matter.

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[19] Mr. Conrad handed two copies of the letter to Mr. Krueger and one copy to Mr. Franson in the hearing room, in the presence of half a dozen other attorneys, as well as employees of the Staff and to the Office of the Public Counsel. He never discussed the matter with Mr. Krueger or Mr. Franson before publicly presenting the letters. The Staff believes that it was done this way so as to cause the greatest embarrassment for Mr. Krueger and Mr. Franson. This supports the Staff's belief that Mr. Conrad's primary objective is to harass the Staff. See the fuller discussion of this subject *infra,* at pages 8-10.

The Motion to Disqualify

18. The next day, April 5, 2002, Movants filed their Motion to Disqualify. In Paragraph 1 of their motion, Movants state that: "As evidenced by their appearance at the original hearing, Attorneys Keith Krueger, Robert Franson and Keith Snodgrass[20] entered appearances for and on behalf of the Staff of the Missouri Public Service Commission ("the Staff") in the original hearing on this matter..."

19. Paragraph 18 of the Motion to Disqualify reads as follows:

> Undersigned counsel for St. Joseph Industrial Intervenors brought these matters to the direct attention of the attorneys involved, in a writing, a copy of which is attached hereto as Exhibit C. To date, despite this request, the attorneys have not chosen to respond to this communication in any manner whatsoever. Undersigned counsel accordingly believe that they are ethically obligated to bring this conflict to the attention of this Commission initially through this pleading.

As noted in the immediately preceding paragraph, however, Mr. Krueger did respond to The Threatening Letter by requesting ethical guidance from the OCDC.

Objections of Opposing Counsel Should be Viewed with Caution

20. On page 5 of The Threatening Letter, Mr. Conrad quotes the Comment to Rule 4-1.7, as part of his justification for sending The Threatening Letter itself.[21] He quotes this Comment as follows:

> Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question.

[20] The reference to "Keith Snodgrass" is apparently in error. The General Counsel's Office employs an attorney named Cliff Snodgrass, who did represent the Staff in this case, but the Staff knows no "Keith Snodgrass," and to the best of Staff's knowledge, no "Keith Snodgrass" has ever represented the Staff before the Commission. See Exhibit A to the Motion to Disqualify.

[21] Movants include this very same quote in Paragraph 15 of their Motion to Disqualify.

This quotation is accurate; but it is not complete. Mr. Conrad has omitted the next sentence, which puts an entirely different perspective on the one sentence that he quoted. The two sentences of this Comment to Rule 4-1.7, together, read as follows:

> Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. **Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.**

(Emphasis added).

21. The Staff respectfully suggests that this second sentence – the sentence that the Movants did not quote – casts an entirely different light on the sentence that the Movants did quote. As Staff understands this statement, it means that the Commission should ask itself whether Mr. Conrad and Jeremiah D. Finnegan, the attorneys for the Movants, are using this Motion to Disqualify to "harass" the Staff and its attorneys.

22. Careful study of Rules 4-1.7 and 4-1.9 reveals that the principal thrust of the rules on conflict of interest is to protect one client of a lawyer, if that client may be adversely affected by the lawyer's relationship with another client. Third parties, who have no direct relationship with the lawyer, are only peripherally involved "where the conflict is such as clearly to call in question the fair or efficient administration of justice."[22] This suggests that a third party or its attorney should only raise the question if it is harmed by the alleged conflict of interest or if it can show harm to the fair or efficient administration of justice in general. Movants have failed to make any such showing. Accordingly, the Commission should carefully analyze whether the Movants have raised the question in this case as a technique of harassment.

23. The Movants have first attacked the regulatory law judge in this case, by obtaining a preliminary writ of prohibition against him, and have now threatened to file bar complaints against

[22] See the Comment to Rule 4-1.7, as quoted above.

Staff counsel if they fail to kowtow to the demands of Mr. Conrad. These systematic and heavy-handed tactics lay bare the real motivation of Mr. Conrad. He seeks to remove all members of the General Counsel's Office as well as the regulatory law judge, to retaliate for their past actions which displease him. In short, he has raised the ethical question in this case as a technique of harassment. It is a longstanding practice for Staff to be represented by the General Counsel's Office before the Commission, and this is required by Rule 4 CSR 240-2.040(1). The General Counsel is obligated to represent the Commission by §386.071. Mr. Conrad has practiced before the Commission for many years, and is only now raising this issue in this particular case. This factor also points to a motivation to harass Staff. In fact, "harassment" may not adequately describe the tactics used in The Threatening Letter, which might more accurately be described as using the threat of a bar complaint as a sword, to coerce opposing counsel to give in to his demands, instead of merely using it as a shield to protect himself and his clients.

The Rules of Professional Conduct

Rule 4-1.9 – the Rule on Subsequent Representation

24. The ethical rule that most directly addresses the present situation is Rule 4-1.9. It reads in full as follows:

4-1.9. Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

25. Mr. Krueger and Mr. Franson formerly represented the Commission on judicial review of this case. The present proceedings on remand are "substantially related" to those judicial reviews, and Mr. Krueger and Mr. Franson are currently representing "another person" – the Staff – in this substantially related matter.

26. As applied to the present situation, Rule 4-1.9 (a) may therefore be paraphrased as follows:

> Mr. Krueger and Mr. Franson shall not represent the Staff on remand of this case, if Staff's interests are materially adverse to the Commission's interests unless the Commission consents after consultation.

27. Note that this rule only prohibits the challenged representation if the Staff's interests are materially adverse to the Commission's interests. The Comment to this rule states: "The principles in Rule 1.7 determine whether the interests of the present and former client are adverse." Rule 4-1.7 is the general rule regarding conflicts of interest. Paragraph (a) of that rule addresses the situation where the representation of one client is "directly adverse" to another client. The Comment to the rule includes the observation that: "Paragraph (a) prohibits representation of opposing parties in litigation." (Emphasis supplied.) The Staff and the Commission are not opposing parties in this litigation; in fact, the Commission is not even a party. It is also clear that this Paragraph (a) is written for the protection of the clients – i.e. the Commission and the Staff – and not for the protection of third parties, such as Movants.

28. Other passages in the Comment to Rule 4-1.9 are similarly instructive. The Comment states: "Disqualification from subsequent representation is for the protection of clients and can be waived by them." (Emphasis supplied.) This reinforces the conclusion reached in the foregoing paragraph. It also makes clear that waiver could be granted by the Commission alone – that is, the consent of the Movants is not required in this case.

29. The Comment also states: "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client." (Emphasis supplied.) Again, this makes it clear that the rule is written for the protection of the clients – not for the protection of a third party, such as Movants.

30. Elsewhere, the Comment states: "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Movants have not identified any issue on which these attorneys have "changed sides" by moving from representation of the Commission to representation of Staff.

31. Paragraph (b) of Rule 4-1.9 prohibits a lawyer from using information relating to representation of a former client to the disadvantage of the former client. Thus Mr. Krueger and Mr. Franson may not use information they gained in representing the Commission to the disadvantage of the Commission. Movants do not here contend that Staff's attorneys possess information that might be used to the disadvantage of the Commission, and the Staff knows of no way that such a claim could plausibly be made.

32. With regard to complaints by an opposing party, the comment to Rule 4-1.9 also directs the reader to the Comment to Rule 4-1.7. See the discussion below, in Paragraphs 33-37.

Rule 4-1.7 – the General Rule on Conflict of Interest

33. Although Rule 4-1.9 is obviously more germane to the issue at hand than is Rule 4-1.7, Movants have totally ignored Rule 4-1.9, citing only Rule 4-1.7. Furthermore, their quotation from the Comment is taken out of context and is misleading. (See the discussion at pages 8-9, *supra.*)

34. Rule 4-1.7 provides in full as follows:

4-1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected;

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

35. Paragraph (a) would only apply to the matter at issue in this case if the Staff's interests are directly adverse to the Commission's interest. As explained above, that situation does not exist here. Even if it did, Mr. Krueger and Mr. Franson could still represent Staff if they reasonably believe the representation of Staff would not adversely affect their relationship with the Commission (as they in fact do believe) and the Staff and Commission both consent to the representation. Again, the authority to consent rests with the attorney's clients, exclusively, and not with third parties, such as Movants.

36. The Comment to Rule 4-1.7 states: "Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (b)." (Emphasis supplied.) As explained below, at pages 14-16, Mr. Krueger and Mr. Franson are not now representing the Commission in this case. There is no simultaneous representation, so the quoted comment does not apply to the present situation. In addition, the

Staff knows of no way in which the interests of the Staff in this litigation could conflict with the interests of the Commission.

37. Finally, it is clear from a reading of this rule and the comment that the rule is written for the protection of the clients, not of some third party, such as the Movants.

38. In summary, Movants have cited no ethical rule that prohibits Messrs. Krueger and Franson from representing the Staff on this remand, and the Staff knows of no such rule.

The Claim of Dual Representation

39. Movants' Motion to Disqualify is built upon the premise that Mr. Krueger and Mr. Franson are representing the Staff before the Commission at the same time as they are representing the Commission in the Cole County Circuit Court. The premise is mistaken, and the argument that is based upon it therefore fails.

40. Mr. Krueger and Mr. Franson did previously represent the Commission in the Cole County Circuit Court on appeals of this case. The Cole County Circuit Court has, however, remanded the case to the Commission. Appeals of the circuit court's decision were dismissed, thus leaving in place the circuit court's orders. As noted, those orders remanded the case to the Commission, and the Commission therefore now has jurisdiction of the case. Jurisdiction of a case cannot be in two tribunals at the same time. As the Commission now has jurisdiction of the case on remand, the circuit court now has no jurisdiction over this case.

41. When jurisdiction of this case returned to the Commission, Mr. Krueger and Mr. Franson ceased their representation of the Commission. They now represent the Staff in the proceedings before the Commission on remand. They are, of course, bound by the same *ex parte* rules that always apply when they represent the Staff before the Commission.

42. In support of their Motion to Disqualify, Movants quote from *Missouri v. Planned Parenthood of Kansas and Mid-Missouri, et al.*[23] as follows: "The attorney general, like all attorneys, is prohibited from representing a client if the representation of that client would be directly adverse to another client."[24] While this is an accurate quote, there is no question that legal counsel for a governmental body or any other entity (including counsel for Movants) may change positions on an issue of law, so long as counsel is advocating for only one party at a time in the same proceeding. Staff's decision to take a different position on the Phase-In Issue on remand is entirely due to a change in circumstances that took place after the Commission issued its Report and Order in Case No. WR-2000-281. There can be no doubt that counsel for Movants could advocate a new position on remand, with their clients' consent. There also can be no doubt that the principle laid down in *Planned Parenthood* applies with as much force to Movants' counsel, who have multiple clients, as it does to the attorneys for the Staff.

43. In fact, the rule in *Planned Parenthood* is actually more applicable to Mr. Conrad's representation in this case than it is to the attorneys for the Staff, because Mr. Conrad does simultaneously represent multiple clients in this case, and the interests of these clients would not appear to be identical. Mr. Conrad is ethically obligated to be certain that the interests of his clients, the St. Joseph Industrial Intervenors, do not conflict with the interests of his other client, Gilster Mary-Lee. It would seem, for example, that Gilster Mary-Lee and the St. Joseph Industrial Intervenors could very well disagree on how the Commission should decide the Joplin Issue.[25] If the Commission eventually decides to lower the revenue requirement for Joplin, instead of keeping it the same as it was prior to this case, then rates for Gilster Mary-Lee would fall, and the

[23] 66 S.W.3d 16 (Mo. 2002).
[24] Motion to Disqualify, p. 8, Paragraph 17.
[25] The "Joplin Issue" concerns the question of whether the revenue requirement for the Company's Joplin District should be reduced to the Joplin District's cost of service, or whether the Commission may require the ratepayers in

rates for the St. Joseph Industrial Intervenors would rise. Movants' Supplemental Response Re Certain Remanded Issues, filed in this case on April 4, 2002, is notably silent on the issue of Joplin rates.

44. In their Motion to Disqualify, Movants also cite *Terre du Lac Property Owners' Association, Inc. v. Shrum*, 661 S.W.2d 45.[26] Movants correctly assert that this case holds that "...the same attorney may not undertake to represent one client against another client that he is then representing."[27] That principle has no application to the present case, however, for Movants do not assert, and cannot credibly assert, that Mr. Krueger and Mr. Franson have ever represented the Staff against the Commission or the Commission against the Staff, for it has never happened.

How are Movants Harmed by Staff's Counsel Continuing in this Representation?

45. As explained above, Mr. Krueger and Mr. Franson are not simultaneously representing two parties in the same litigation; the interests of the Staff and the Commission are not directly adverse; and the ethical rules do not explicitly prohibit Mr. Krueger and Mr. Franson from continuing their representation. It may be argued, however, that they should not continue this representation because, although the Movants are not their clients, the continuing representation may somehow cause harm to the Movants that can only be remedied if Mr. Krueger and Mr. Franson terminate their representation. The question then becomes: How might Movants be harmed if Mr. Krueger and Mr. Franson continue to represent the Staff in the proceedings on remand?

46. It is hard for the Staff to understand what harm the continuing representation may have caused, or may yet cause, Movants. The Motion to Disqualify, unfortunately, does not

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the Joplin District to subsidize other districts of the Company. The resolution of the Joplin Issue is not material to the determination of the Motion to Disqualify.

[26] 661 S.W.2d 45 (Mo. App., E.D. 1983), cited in Movants' Motion to Disqualify, p. 8, Paragraph 17.

[27] *Id.*

make clear the type of harm it may have caused or the mechanism through which this harm operates. It would appear, though, that Movants' claim may have something to do with: (1) Movants' claim that "these attorneys"[28] have "gained the trust and confidence" of the Commission, by representing the Commission in defense of the writs of review,[29] and (2) the Staff's alleged change of position on the "Phase-In Issue."[30]

The Commission's 'Trust and Confidence' in Staff's Attorneys

47. First, as to the "trust and confidence" issue, the Staff knows of no ethical rule that prohibits an attorney from appearing before a judge or tribunal that has confidence in that attorney's legal judgment, ability, and integrity. The serial representation in this case is analogous to the representation that usually occurs when extraordinary writs are directed to a trial judge. In such circumstances, one party complains of an interlocutory ruling by a trial judge and obtains a preliminary order in prohibition or mandamus. The opposing attorney, in whose favor the trial judge ruled, then represents the trial judge in defense of the extraordinary writ. When the case is returned to the trial judge, this same attorney again appears before the same trial judge as an advocate in the same case.

48. This procedure is routinely followed in Missouri, without any complaint that the attorney has violated an ethical rule by unfairly gaining the "trust and confidence" of the trial judge. In fact, Mr. Conrad, one of the attorneys for Movants, went far down just such a road during the appeals of this very case. Mr. Conrad filed two petitions for writs of review of the Commission's order in this case. But, instead of filing the petitions in Cole County, as is customarily done, and where another petition for review of this case was already pending, Mr.

[28] Movants have consistently referred to Messrs. Joyce, Franson, and Krueger as "these attorneys" in their Motion to Disqualify. The Staff will occasionally do likewise through the remainder of this Response.
[29] See Motion to Disqualify, pp. 4-5, Paragraph 7.
[30] See Motion to Disqualify, pp. 7-8, Paragraph 16.

Conrad filed his petitions in Buchanan County and in Jasper County. The Commission filed motions to dismiss the Buchanan County and Jasper County petitions, but the trial judges in both cases overruled the Commission's motions. The Commission then filed, in the Court of Appeals, petitions for writs of prohibition, naming the trial judges as respondents. Mr. Conrad represented the trial judges in defense of those writs. He was successful in the Court of Appeals. The matter then moved to the Supreme Court, where Mr. Conrad again represented the trial judges. The Supreme Court ruled in favor of the Commission and against the trial judges.

49. If Mr. Conrad had been successful in the Supreme Court, the matter would have gone back in front of the trial judges – the same trial judges that Mr. Conrad would have successfully represented in the appellate court. It is reasonable to assume that Mr. Conrad would have resumed representation of his clients (who are among the Movants herein) in front of the same trial judges in the subsequent proceedings in the same case.[31]

50. No one would look askance at such representation, regardless of the fact that Mr. Conrad may have gained the "trust and confidence" of the trial judges and consulted with them behind closed doors during his representation in the appellate courts. In fact, it would be regarded as routine and proper.

51. Mr. Conrad may seek to distinguish his representation of the trial judges from what Mr. Krueger and Mr. Franson did in representing the Commission by saying that he did not actually consult with the trial judges in defense of the writs of prohibition, but only defended their rulings, and that he therefore did not gain their trust and confidence, whereas Mr. Krueger

[31] It is also possible, of course, that Mr. Conrad would not have resumed representation of his clients if the cases had been returned to the trial court. Such a scenario requires speculation, because Mr. Conrad lost in the Supreme Court. But the possibility seems so unlikely as to defy belief.

and Mr. Franson did consult with the Commission about the judicial review of this case.[32] Staff would point out, however, that in representing the trial judges, Mr. Conrad explained the trial judges' rationale in arguments to the Court of Appeals and the Missouri Supreme Court. In doing so, it would have been proper and wholly appropriate to consult with the trial judges. In fact, it might be considered ethically improper not to consult with the trial judges before telling the Court of Appeals and the Supreme Court why the trial judges ruled as they did.

52. The Staff submits that the mere fact that Mr. Krueger and Mr. Franson may have gained the "trust and confidence" of the Commission – whether this results merely from their prior appearances before the Commission or from representing the Commission on appeal, even in the same case – does not disqualify them from representing the Staff upon the remand of this case from the circuit court.

The Phase-In Issue

53. The other way in which Movants may be claiming they are harmed by Mr. Krueger's and Mr. Franson's roles, as attorneys for the Staff, then the Commission, and then again the Staff, is discussed briefly in Paragraph 16, of Movants' Motion to Disqualify. The Movants there claim that "these attorneys" are now asserting, on remand, a position on the Phase-In Issue that is "radically different" from the position that they asserted in the original hearing before the Commission. They darkly suggest that something nefarious must have happened as a result of Mr. Krueger's and Mr. Franson's roles as attorneys for the Commission. The criticism is misplaced, for several reasons.

54. The Staff has struggled to understand just how its alleged change of position has caused, or may yet cause, harm to the Movants. The Motion to Disqualify does not make clear

[32] Any suggestion by Mr. Conrad that he undertook to represent the trial judges without obtaining their trust and confidence would strain credibility.

the nature of any alleged harm or the mechanism that causes the harm. But the Staff wants to address all aspects of the Movants' complaint, and will respond to the best of its ability, making assumptions and suppositions where necessary.

Staff's Position on the Phase-In Issue at the Original Hearing

55. A brief review of the Staff's position at the time of the original hearing – nearly two years ago – and its position now, is in order.

56. The most concise statement of Staff's position in the original case is found in Staff's Statement of Positions on Issues, which was filed May 30, 2000, a copy of which is attached hereto as Exhibit 2. Staff therein stated its position on the Phase-In Issue as follows:

> **Issue No. 8d. Phase-In.** Should MAWC's rate increase be phased in over a number of years? If so, what is the appropriate "phase-in" amount, and what is the appropriate phase-in period?
>
> **Staff's Position.** Revenue requirements should be phased in over a five-year period for districts that experience a significant increase in rates. The Company should be allowed to earn a carrying charge, equal to the rate of return authorized by the Commission, on any amounts deferred. The Staff proposes phase-in for specific customer classes, in each district, that continue to experience very significant rate increases.

57. Additional documentation concerning the Staff's position on the Phase-In Issue may be found in the direct, rebuttal and surrebuttal testimony of Staff witness Stephen M. Rackers, copies of the relevant portions of which are attached hereto as Exhibits 3, 4, and 5, respectively, and in the Staff's Initial Brief and Reply Brief, copies of the relevant portions of which are attached hereto as Exhibits 6 and 7, respectively.

58. As a review of these documents makes clear, the Staff proposed that the Commission determine the revenue requirements for each of MAWC's seven districts through the use of District Specific Pricing ("DSP"), with one small modification, and that the Commission then determine the revenue requirement for each customer class in each district through the

application of a class-cost-of-service study. The application of this procedure would result in very large rate increases for some customer classes in some of the Company's districts. The effect that these large rate increases might have on ratepayers was commonly called "rate shock."[33] To mitigate the effects of "rate shock," the Staff proposed that the rate increases, determined as described above, would be phased in for some classes of customers in some of the Company's districts.

59. Thus, the Staff proposed that the revenue requirement for each customer class in each district be first determined. Then, where necessary to mitigate "rate shock," the rate increases would be phased in.

60. The Staff did not then, however, propose a phase-in of the Commission's move away from Single-Tariff Pricing ("STP") and toward DSP. Rather, the Staff proposed an immediate move from STP to DSP, with the one small modification; only the resulting rate increases would be phased in.

Staff's Current Position on the Phase-In Issue

61. After the Cole County Circuit Court remanded this case to the Commission for further proceedings, the Staff filed, in this case, its Response to Order Directing Filing, on March 26, 2002. Staff explained its position on the Phase-In Issue on pages 9, 10 and 11 of that document, copies of which are attached hereto as Exhibit 8.

62. As Exhibit 8 reveals, the Staff does not recommend that a phase-in be ordered at this time. This position is not, however, inconsistent with the position that the Staff advocated at the

[33] In his direct testimony, Staff witness Rackers defined "rate shock" as follows: "The term 'rate shock' has been used to characterize the extremely significant increase that would result from reflecting the entire first-year revenue requirement associated with the SJTP in rates. The revenue requirement associated with the return on investment and depreciation expense on the SJTP is approximately $10 million in the first year. This reflects approximately a 30% increase in total company revenues and a 100% increase in the revenues of the St. Joseph district." See Exhibit 3, p. 11, lines 16-21.

time of the original hearing, because time has passed and circumstances have changed since the original hearing.

63. At the time of the original hearing, in June 2000, the Staff was asked whether a phase-in should be ordered for rates that would begin to take effect in 2000. The Staff's answer (as to some customer classes in some districts) was affirmative. The question the Staff is now asked is different. The question that is now asked pertains to rates that have already been in effect for 19 months. The question now is whether the Commission should order a change that would probably begin to take effect in 2002.

64. The question now is different from the question that was asked in 2000. Not surprisingly, the answer now is different from the answer to the different question that was asked in 2000.

The Potential Effects of a Phase-In upon Rates

65. Staff believes that it has clearly stated the reasons why the answer given now is different from the answer that was given in 2000. See Staff's Response to Order Directing Filing, Exhibit 8, especially Paragraphs 24-27. Movants, however, apparently do not understand the words the Staff used in expressing its position. Perhaps a picture will help.

66. Exhibit 9,[34] shows, conceptually, how rates for some customer class in one of the seven districts might change, under each of three (or, actually, four) scenarios. On this graph, water rates are plotted on the vertical scale, and time is plotted on the horizontal scale. The bottom horizontal line represents the rate that was in effect before the effective date of the Report

[34] This exhibit was prepared by attorneys in the General Counsel's Office, for illustrating concepts only. The Staff does not represent it to be expert testimony. The numbers used are for illustration only.

and Order in this case. The first vertical line is the date that the Report and Order became effective,[35] each of the other five vertical lines represents an anniversary of that date.

67. The simplest scenario to plot on this graph is the one that the Commission ordered: an immediate increase in water rates, with no phase-in. The new rate, which would never change over the five-year period, is shown by a solid horizontal line halfway up the graph. The area beneath this horizontal line represents the total additional revenue that the Company would receive as a result of the rate increase in this case.[36] Let us assume (for purposes of illustration only) that this line represents a 60% increase above existing rates.

68. The next two scenarios (both of which look like five steps on a flight of stairs) depict the changes in rates that would have resulted if the Commission had adopted the Staff's phase-in proposal. The line on the graph that consists of a series of short dashes shows how rates would change over the five-year period, if there were no carrying charge. The rates might be about 20% greater than the prior rate during year one, 40% greater during year two, 60% greater during year three, 80% greater during year four, and 100% greater during year five. The area beneath this stair-step line represents the total additional revenue that the Company would receive as a result of a phased-in rate increase, if there were no carrying charge, and it is equal to the area under the flat horizontal line mentioned in Paragraph 67.

69. But in its Statement of Positions on Issues[37], the Staff proposed to include a carrying charge. Thus the actual rates that would have been ordered if Staff's proposal had been accepted would have the same stair-step appearance, but would be slightly higher than those described in the previous paragraph. These rates might perhaps be, say, 21% greater than the prior rates

[35] The Report and Order became effective September 14, 2000.
[36] Dollars per year may be plotted on the vertical scale; years are plotted on the horizontal scale. Dollars per year x years = dollars.
[37] See Exhibit 2.

during year one, and 41%, 61%, 81% and 101% greater during the subsequent four years.[38] The line on the graph that consists of a series of long dashes shows how rates would change over the five-year period, if there were a carrying charge. The area beneath this stair-step line represents the total additional revenue that the Company would receive as a result of a phased-in rate increase, with a carrying charge, and it is slightly greater than the area under the lines mentioned in Paragraphs 67 and 68.

70. The fourth scenario depicts the situation that would exist if the Commission were to now, at this late date, order a phase-in. It is represented by the heavy solid line on Exhibit 9. The Commission refused to order a phase-in, and the Report and Order has now been in effect for about 19 months; thus, for the first 19 months of the five-year period, the heavy line that depicts this scenario is the same as the line that depicts the first scenario mentioned in Paragraph 67. The area beneath the line that depicts this scenario, for the full five-year period, should be equal to the area under the first, horizontal line – or actually just a little greater, to account for a carrying charge.

71. There are many shapes that the graph depicting this fourth scenario might take. The one that seems most logical, however, would be to have a period of time at the end of the five-year period, during which the rate is the same as it has been for the first part of the five-year period, with a stair-step pattern between these two horizontal segments.[39] The rate for year three would probably also be the same as the rate at the beginning and the end of the five-year period. The phase-in would therefore produce a slightly lower rate than is now in effect, for the period of time between the effective date of this hypothetical new phase-in order and September 14, 2002

[38] The exact amount of the difference between the percentages of increase with the carrying charge and the percentages of increase without the carrying charge is of no significance here. This is offered only to point out that the increases would be greater because of the carrying charge, a point with which, Staff understands, the Movants would agree.

(the second anniversary of the effective date of the original Report and Order), and a slightly higher rate than is now in effect, for an equal period of time immediately after September 14, 2003 (the third anniversary of the effective date of the original Report and Order). Obviously, the resulting heavy line on the graph bears very little resemblance to the line that depicts the rates that would have resulted if the Commission had adopted the Staff's original proposal.

The Benefits of Ordering a Phase-In at this Time are Illusory

72. And even the heavy line shown on Exhibit 9 exaggerates the "benefits" that would occur if the Commission does decide to order a phase-in on this remand. A new order to require a phase-in could not take effect immediately. It could only take effect after the parties to this case have had an opportunity to present evidence[40] and file briefs, and for the Commission to deliberate,[41] issue a new order, allow time for an effective date, and entertain and dispose of applications for rehearing. The new order might not take effect for another one, or two, or perhaps five months.[42] If the new order would not become effective until September 14, 2002, the resulting heavy line on Exhibit 9, would be a horizontal line, just the same as the line described in regard to the first scenario above.[43] The benefits of the phase-in would be completely illusory, because the rates would be exactly the same with such a phase-in as they would be without a phase-in.

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[39] The rates cannot just gradually increase; they must increase in increments. All of the phase-in proposals that were presented in this case called for annual increases in rates. If adopted, this would produce the stair-step pattern.
[40] The Commission would probably have to hear evidence, for example, on the amount of each phased-in rate, the time at which each phased-in rate would become effective, and how long each phased-in rate would remain in effect.
[41] The makeup of the Commission has changed since the entry of the original Report and Order. The two new commissioners would be required by law to read the case file prior to ruling on this case. The time required for this task would probably result in some delay in a decision.
[42] It is worth noting that the Movants have further delayed this process by obtaining a writ of prohibition that prevents the present regulatory law judge from taking any further action in this case until further order of the Cole County Circuit Court. This order from the circuit court will probably not be issued until at least April 19, 2002, when an answer to the petition for writ of prohibition is due, and may not be issued until after the parties have briefed and argued the merits of the prohibition proceeding.
[43] See discussion of the first scenario, *supra,* at pp. 21-22, Paragraph 67_.

73. The foregoing is a painstaking, and no doubt tedious, explanation of what Staff believed should have been very clear from even a cursory reading of Paragraphs 24-27 of the Staff's Response to Order Directing Filing.

74. In this regard, one other point is worth noting. The principal – in fact, so far as Staff counsel can tell, the only – reason the Staff proposed a phase-in at the original hearing, was to mitigate the effect of "rate shock."[44] But as the Staff noted in its Response to Order Directing Filing, any "rate shock" that might occur as a result of the large rate increases ordered in this case has already taken place.[45] It is too late to prevent "rate shock," and if the Commission orders a phase-in now, it could not and would not undo any "rate shock" that has already resulted from the rate increases in this case.

75. Movants seem to argue otherwise, in their Supplemental Response Re Certain Remanded Issues, which they filed in this case on April 5, 2002. Copies of portions of that pleading are attached hereto as Exhibit 10. Movants there stated: "Intervenors[46] still support a phase-in[47] because our clients[48] were rate-shocked and today we remain rate shocked ..."[49] Movants may well be correct in stating that they are shocked by the rate increases they have experienced, and that they will continue to be shocked. But Staff is unable to understand how ordering a phase-in at this late date might mitigate the effects of this shock.

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[44] See the direct, rebuttal, and surrebuttal testimony of Staff witness Stephen M. Rackers, copies of the relevant portions of which are attached hereto as Exhibits 3,4, and 5, respectively.

[45] See Staff's Response to Order Directing Filing, Exh 8 hereto, at p. 9, Paragraph 24.

[46] It is not clear to whom the term "Intervenors" refers. The term "Intervenors" is not defined in that document. It is possible that it refers to "St. Joseph Industrial Intervenors," but it is also possible that it refers to all of the parties who filed that Supplemental Response. The resolution of this question is of no significance here.

[47] Interestingly, the St. Joseph Industrial Intervenors, who comprise part of the present group of Movants, stated in their Statement of Positions prior to the original hearing: "St. Joseph Industrial Intervenors have not proposed a phase-in." See Exhibit 11 attached. It would appear that they did not propose a phase-in because they thought the Commission should set the revenue requirement so low that no phase-in would be required. But it is nonetheless difficult to understand how they can now claim that they "still" support a phase-in.

[48] Presumably, "our clients" refers to the clients of the attorneys who signed this pleading – that is, the Intervenors themselves, not the clients of the Intervenors. The use of the first person here suggests that the pleading may actually be filed on behalf of the attorneys, rather than on behalf of the clients they represent.

76. It is, therefore, manifestly clear that the Staff has not changed its position on the Phase-In Issue in order to align itself with the Commission's position on appeal. Rather, the circumstances have changed so much that the Staff is now confronted with a different question than it confronted in 2000.

77. An analogy may serve to make this point more clearly. Almost any U.S. citizen who was asked, on December 8, 1941, whether the U.S. should declare war on Japan, would probably have answered yes. But if the same citizen were asked the same question the day after VJ Day, he would almost certainly have answered no. The second answer would be different from the first answer, but that does not mean it is inconsistent with the first answer, because of the dramatic change in the underlying circumstances. The Staff's present position is entirely logical and reasonable and guided by exactly the same principles as was its position at the time of the original hearing.

Staff Never Proposed Phasing In the Move from STP to DSP

78. As noted above, the Staff cannot understand how its current position on the Phase-In Issue causes any harm to the Movants. Staff has always understood that the Phase-In Issue had nothing to do with the allocation of the Company's revenue requirement among its seven districts (*i.e.*, the choice of STP or DSP, or some modification thereof), and that it likewise had nothing to do with the allocation of costs among customer classes within a district (*i.e.* the application of the results of the class cost of service study). The Staff understood that the Phase-In Issue had only to do with the timing of the rate increases for some class(es) of customers – that is, whether the rate increase would occur all at once, or would occur in stages.

[49] See Supplemental Response Re Certain Remanded Issues, Exhibit 10 hereto, at pp. 5-6, Paragraph 9.

79. Movants' Supplemental Response Re Remanded Issues[50] and some off-the-record comments by Movants' counsel at the prehearing conference, however, suggest that perhaps Movants had in mind a different type of phase-in. They may have been thinking about phasing in the move from STP to DSP.[51]

80. Movants suggested such a position in their Supplemental Response, especially Paragraphs 10 and 11.[52] Movants there state: "There are certainly more economical methods for phasing-in (*sic*) DSP than the method proposed by Staff with all its carrying costs." Movants also there discuss how the Commission phased in STP for Missouri-American's predecessor through use of an "equalization" factor that could change from year to year.

81. But the Staff has never supported a phase-in of the recommended move away from STP and toward DSP. The Staff recommended that this change in rate design – the move to DSP, with one small modification – be accomplished in a single step. The Staff has not changed its position on this issue, much less "radically changed" it, as Movants charge, so Staff's current position on phasing in the change to DSP cannot cause harm to Movants.

82. Moreover, it would appear that the Movants supported an immediate move to DSP at the time of the original hearing. In their Statement of Position, the St. Joseph Industrial Intervenors said: "District Specific Pricing is not only correct, but the only lawful means of establishing the rates for this utility."[53] One assumes that, if DSP is the only lawful rate design, the St. Joseph Industrial Intervenors would not recommend that the Commission phase in the move to DSP, but would instead advocate the immediate implementation of DSP.

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[50] See Exhibit 10 hereto.
[51] The Staff has not been able to determine whether the Movants supported such a concept at the time of the original hearing in this case or not. Movants have not cited any portion of the record that indicates they did so, and Staff has not found any.
[52] See Exhibit 10 hereto.
[53] See Exhibit 11 hereto. The St. Joseph Industrial Intervenors are among the Movants, and are the only Movants who filed a Statement of Position prior to the original hearing in this case.

83. The Staff's position on the Phase-In Issue has not harmed, and will not harm, Movants, and it is not unethical. The Commission should disregard the arguments in Paragraph 16 of the Motion to Disqualify.

Movants' Arguments are Inconsistent

84. It is noteworthy that the two arguments Movants appear to emphasize – the issue of "trust and confidence" and the issue of the Staff's alleged change of position on the Phase-In Issue – are logically at odds with one another.

85. The "trust and confidence" issue would seem to affect Movants only if, by virtue of the fact that the Commission reposes special confidence in "these attorneys," the Staff thereby gains an unfair advantage in its ability to persuade the Commission. The complaint about the alleged change in position on the Phase-In Issue, on the other hand, seems to be based upon a belief that, by virtue of the past relationship, the Commission has already persuaded the Staff to change its position.

86. One therefore cannot help but wonder: Are Movants concerned that the Staff will influence the Commission, or that the Commission has influenced the Staff?

87. Movants' arguments on these two matters are inconsistent with one another. The only thing that is consistent about them is that they are both designed to harass the Staff's attorneys, extend the resources of both the Staff and the Commission, and further delay these proceedings.

Conclusion

88. The Staff apologizes for the length of this Response, and begs the Commission's indulgence. However, Mr. Conrad has threatened to file a bar complaint against Mr. Joyce, Mr. Krueger and Mr. Franson, which amounts to a threat to the livelihood of these lawyers. Even

though the Staff regards the allegations in The Threatening Letter and the Motion to Disqualify as devoid of merit, the Staff and the attorneys in the General Counsel's Office rightly regard the threat of a bar complaint as a very serious matter, to which a vigorous defense is required and justified.

89. The foregoing Response clearly shows that the Staff's attorneys are not simultaneously representing the Staff and the Commission on this same case, and that they have not violated any ethical rules. Furthermore, they have not abused the "trust and confidence" of the Commission and their continued representation of the Staff will not harm the Movants in this litigation. Finally, the Staff has not done a "surprising flip-flop"[54] to a "radically different" position on the Phase-In Issue at the behest of the Commission.

90. As the Comment to Rule 4-1.7 advises, the Commission should view Movants' complaint against Staff's attorneys with caution, for the complaint can be misused as a technique of harassment. The Staff submits that Movants' counsel has, in fact, used it for that very purpose.

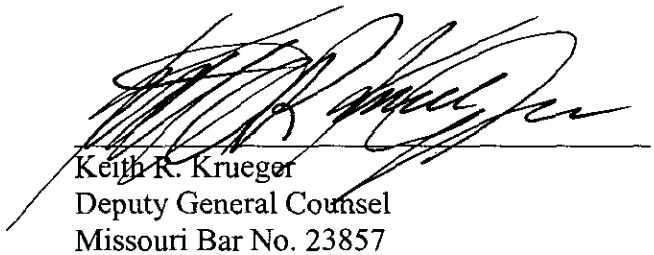
91. The Motion to Strike and the Motion to Disqualify should both be overruled.

WHEREFORE, the Staff requests that the Commission overrule Movants' Motion to Strike Staff Filings Due to Conflict of Interest and Motion to Disqualify Counsel Due to Conflict of Interest.

[54] See Exh. 10, Movants' Supplemental Response, p. 5, Paragraph 9.

Respectfully submitted,

DANA K. JOYCE
General Counsel



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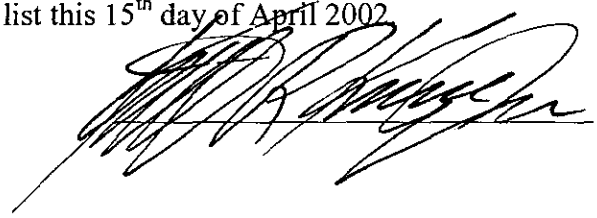
Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 15th day of April 2002.



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April 4, 2002

Maridee Edwards
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Re: Keith Krueger, Assistant Deputy General Counsel, Missouri Public Service Commission
Request for emergency advisory opinion

Dear Ms. Edwards:

I am writing at the request of Mr. Keith Krueger, Assistant Deputy General Counsel to the Missouri Public Service Commission (the "PSC," or "Commission").

Mr. Krueger has been threatened with a Bar complaint, under Rule 4-1.7(b) (regarding conflicts of interest), based on his continued representation of the staff of the PSC in a case pending before the Commission. For your reference, I enclose a copy of the March 27, 2002 letter written by Mr. Stuart W. Conrad, Finnegan, Conrad & Peterson, L.C., which fully sets out Mr. Conrad's position.

Some background on the organization and function of the PSC may prove helpful. The PSC retains a staff of individuals comprised of economists, engineers, accountants, and others professionals having experience with the various industries regulated by the PSC. This group is simply called "the staff." The PSC also has a legal section, the "General Counsel's Office," in which Mr. Krueger works.

The Commission itself functions in two primary capacities: The Commission acts as the adjudicator of cases, and as a rule maker. In adjudicated cases before the Commission, the General Counsel's Office represents the PSC's staff. The staff is a named party and participates in adjudications the same as does any other party, except that the Staff has no standing to seek judicial review. Thus, staff and the General

Exhibit 1

Counsel's Office, when the General Counsel's Office is representing staff, are both subject to the same rules regarding ex parte contacts with the Commission as any other party to an adjudication. Staff is charged by law with presenting the Commission with a position that advances the public policy embodied in Missouri statutes and the Commission's regulations. Hearings and pre-hearing procedures are conducted before a regulatory law judge ("RLJ," which is essentially the same as an administrative law judge). The RLJ position has certain authority delegated to it by the Commission, and otherwise makes recommendations for commission rulings in adjudicated matters much as a special master or court commissioner would in the judicial setting. At the conclusion of an adjudication, the Commission reaches a decision, which is then subject to judicial review. On judicial review, the General Counsel's Office represents the Commission and seeks to uphold the Commission's decision.

The General Counsel's Office has, as prescribed by law (§ 386.071, RSMo 2000) and by long-standing practice, represented the Commission on judicial review of adjudicated decisions that are appealed. This makes logical sense, even though the General Counsel represented staff in the underlying adjudication. Staff's mandate is to balance the interests of ratepayers and public utilities, and to advocate what it believes should be the public policy of the State of Missouri, unless the Commission already has a well-established position. Once a case is decided by the Commission, that decision becomes the public policy of the Commission, regardless of the earlier position staff may have advocated during adjudication. After a decision is remanded following an appeal, it is appropriate for staff, through its General Counsel, to resume its role in the case as a policy advocate until such time as the Commission issues another final ruling. Consistent with staff's duty as a public policy advocate, the General Counsel's Office has represented staff in remand proceedings.

Mr. Krueger represented staff in a case before the Commission known as *Missouri-American Water Company*, Case No. WR-2000-281. This case involved several issues, which included setting rates for water services. Mr. Conrad represented a group of ratepayers who intervened in this same case. After the Commission issued its decision in *Missouri-American*, several parties (not staff) sought writs of judicial review. Consistent with past practice, Mr. Krueger represented the Commission throughout that judicial review proceeding. The outcome was that some issues were remanded back to the Commission for additional findings. On remand of *Missouri-American*, Mr. Krueger has resumed representing the PSC's staff. It is in this representation that Mr. Conrad believes Mr. Krueger to have a conflict of interest.

Mr. Conrad's letter gives Mr. Krueger the option to "recuse" himself from the Missouri-American remand case, or "respond to this letter promptly," failing which Mr. Conrad promises to initiate disciplinary proceedings against Mr. Krueger. To give a meaningful response, Mr. Krueger and I both believe an opinion from your office is critical. In addition, Mr. Conrad suggests that the entire General Counsel's Office may be disqualified from representing the PSC's staff in the remand of the *Missouri-American* case. Thus, resolution of this issue may be necessary before the remand proceedings can move forward.

If it would be helpful to you, I will provide your office with additional information about the substantive and procedural history of the *Missouri-American* case. However, I see four broader questions on which Mr. Krueger would appreciate an opinion at your earliest convenience. The ethical issues, as I see them, are these:

- Procedurally, if Mr. Conrad believes that Mr. Krueger has a conflict in representing PSC staff in the remand proceedings, how should the matter be determined?

- Whether on remand of the *Missouri-American* case to the Commission, Mr. Krueger has a conflict of interest in representing the PSC's staff?

- Whether the conflict, if one exists, would disqualify Mr. Krueger from further representation of staff on remand in the *Missouri-American* proceedings, or could any conflict be cured?

- Whether the conflict, if one exists and could not be cured, would disqualify other attorneys in the office of the General Counsel from representing PSC staff in the remand of *Missouri-American*?

Before stating my position on these issues, I wish to make the scope of my own representation clear. I represent only Mr. Krueger, not any of the components of the PSC and not the Commission itself. Mr. Krueger personally wishes to continue representing staff on the remand of the *Missouri-American* case. I believe that is also the desire of the General Counsel, Mr. Dana K. Joyce, but I do not speak for him.

It is my view that the question of whether Mr. Krueger has a conflict of interest, which prohibits him from representing staff in the remand of *Missouri-American*, is an issue which Mr. Conrad ought to raise with the Commission by motion to disqualify Mr. Krueger, rather than through the Bar's disciplinary process. The notes to Rule 4-1.7

specifically authorize a motion to disqualify an attorney who is believed to be conflicted, though the notes caution that an opposing counsel's motion to disqualify "should be viewed with caution" because of the potential for misusing this remedy. I believe that Mr. Krueger's qualification to represent staff is a matter better resolved by motion to disqualify, than through disciplinary channels, because there are many questions of fact that must be decided in determining whether Mr. Krueger has a conflict, and whether Mr. Conrad's client is prejudiced. I conclude that determining Mr. Krueger's qualifications to represent staff in the *Missouri-American* remand is a matter within the prescribed authority of the RLJ handling the case. If Mr. Conrad is not satisfied with the RLJ's ruling on a motion to disqualify, and he legitimately believes his client to be prejudiced, Mr. Conrad will have made a record that will enable him to seek further review, including judicial review.

Substantively, it is my view that Mr. Krueger does not have a conflict of interest. Although Mr. Krueger did have the opportunity to communicate with the Commission about the case in the posture it held while under judicial review, those communications occurred after the Commission had completed its decision and, therefore, took place at a time when the Commission did not have the matter under consideration. The passage of time has altered some of the issues, and the composition of the five-member Commission has changed considerably; all mitigating against any prejudice to Mr. Conrad's client.

I find the situation raised by Mr. Conrad to be analogous to that presented when one party to circuit court litigation seeks an interlocutory writ of prohibition or mandamus against the trial judge. While the writ petition is pending before the higher court, counsel for one of the litigants nearly always assumes the task of representing the respondent trial judge, and may in that context communicate with the trial judge about the writ proceedings. Representing the respondent trial judge in the writ action does not disqualify a party's counsel from continuing to represent his or her client before the same trial judge. Likewise, attorneys sometimes get hired by judges to represent them personally. That fact does not create a conflict of interest that disqualifies the judge's former counsel from handling a particular case before the judge who is his or her former client, or disqualify counsel for handling a matter before any tribunal on which the judge sits. Other ethical considerations may govern the judge's responsibility to advise of the prior representation and perhaps to recuse; however, the conflict of interest rules, Rule 4-1.7 through 4-1.11, do not control that issue.

Furthermore, the fact that staff may be advocating a different legal position on remand of *Missouri-American* than it did when this case was first before the Commission is nothing improper. As the Supreme Court recently noted, in *State v. Planned*

Parenthood of Kansas, Slip Op. No. 83778 (Mo. banc, January 22, 2002), legal counsel for a governmental body may change positions on an issue of law, so long as counsel is advocating for only one party at a time in the same proceeding. Mr. Krueger argues persuasively that staff's different position on a remand issue—that issue being the phasing-in of rates—is the result of a change in circumstances occurring since the initial adjudication of *Missouri-American.* However, this too is an issue better resolved by the RLJ on a motion addressing Mr. Krueger's qualification to serve as staff's counsel.

Regardless of whether one could validly conclude that Mr. Krueger has a conflict, it is my belief that the issue of a conflict in this instance is one that does not concern Mr. Conrad's clients unless he can first show prejudice. Mr. Krueger's successive clients in the *Missouri-American* case were staff, the Commission, and then again staff. All the while, Mr. Krueger continued to represent the PSC's staff in other matters before the Commission. Under the present facts, it may well be objectively reasonable for Mr. Krueger to represent the staff on remand in *Missouri-American*, with the consent of staff and the Commission, as authorized under Rule 4-1.7(b)(2).

Another consideration weighing toward the conclusion that Mr. Krueger may ethically represent PSC staff in the *Missouri-American* remand proceedings is the timing of the conflict allegation being now made. Efforts at disqualifying counsel because of a conflict must be timely raised to avoid the inference of abuse. *Terre du Lac Property Owners Ass., Inc. v. Shrum*, 661 S.W.2d 45, 48 (Mo.App., E.D. 1983). Here, the PSC's practice of having the General Counsel's Office represent staff during the pendency of adjudications, and the Commission on appeal, has been long known to all concerned. The timing of the current objection, and the related issue of whether this objection has thus been waived, are factors that ought properly be considered by the RLJ in the context of a motion to disqualify, if one is filed.

Even if a prohibited conflict of interest were found, it is my view that other attorneys within the office of the General Counsel could represent staff. Although not expressly addressed by either Rule 4-1.10 or 4-1.11, Mr. Krueger's situation is comparable to that of an individual who represented a prior client in private practice, and then accepts representation of an agency at a later time. In that situation, the notes to paragraph (c), of Rule 4-1.11 suggest that the prohibition "does not disqualify other lawyers in the agency with which the lawyer in question has become associated." This rule, which qualifies others within the agency's legal department to represent the agency after a conflicted attorney joins the agency, is authority for permitting Mr. Krueger's colleagues to represent the PSC's staff in the *Missouri-American* case, should Mr. Conrad's contentions about a conflict prove valid.

Mr. Krueger and I would both appreciate your attention to this request. Your prompt reply will be helpful because adjudicating the substantive issues in the remanded *Missouri-American* proceedings may be delayed until the question of Mr. Krueger's qualification is resolved.

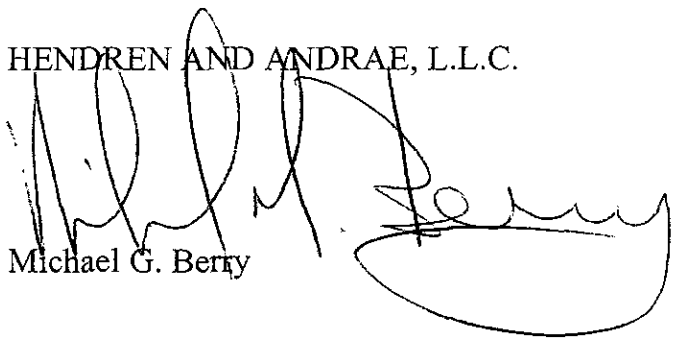
When you respond to this request, I would appreciate the favor of providing a copy of your letter to Mr. Conrad, at the address shown below:

Stuart W. Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111

Thank you.

Very truly yours,

HENDREN AND ANDRAE, L.L.C.



Michael G. Berry

MGB:ls
Enclosure
cc Mr. Krueger
Mr. Conrad

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[3]

MAY 3 0 2000

Missouri Public
Service Commission

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

STAFF'S STATEMENT OF POSITIONS ON ISSUES

COMES NOW the Staff of the Missouri Public Service Commission ("Staff"), and for its Statement of Positions on the Issues, states to the Missouri Public Service Commission ("Commission") as follows:

Issue No. 1. Accounting Authority Order. Should MAWC be allowed to include in the cost of service, through rate base and expense adjustments, amounts related to post-in-service AFUDC and deferred depreciation expense for the period from the in-service date of the new St. Joseph water treatment plant to the operation of law date in this case?

Staff's Position: The Commission should deny recovery of the amounts the Company deferred under the Accounting Authority Order, because the construction and placing into service of the St. Joseph Treatment Plant does not constitute an extraordinary event, and because the financial results that the Company can expect during the period of time that the Accounting Authority Order will be in effect do not threaten the financial integrity of the Company.

Exhibit 2

Issue No. 2. Premature Retirement. Shall the net plant investment associated with the existing St. Joseph water treatment plant facilities that are no longer providing service to St. Joseph customers be included in MAWC's rate base and amortized to expense?

Staff's Position: Neither the net plant investment nor the cost of removal and demolition should be amortized until a depreciation study is performed to evaluate the accuracy of the reserve and depreciation rates for the major accounts of the Company. The plant account and depreciation reserve account should be reduced by the original cost of the "old" St. Joseph plant when the plant is actually retired. The cost of removal should reduce the depreciation reserve account when the cost is actually incurred. A depreciation study should be initiated as soon as possible.

Issue No. 3. AFUDC Capitalization Rate. Should MAWC's rate base be adjusted to reflect a different capitalization rate for AFUDC?

Staff's Position: The AFUDC rate should first reflect all of the outstanding amount of short-term debt available to the Company as the primary source of financing for construction. The rate for the construction balance in excess of short-term debt should then be based on the composite rate of the other sources of financing available to the Company during the construction period. There should then be an adjustment to the plant investment as part of the true-up audit.

Issue No. 4. St. Joseph Treatment Plant and Related Facilities ("SJTP") Valuation. What valuation should be included in rate base for the water treatment plant and related facilities necessary to provide water for the St. Joseph District?

Staff's Position: The valuation of the new treatment plant and related facilities in the St. Joseph District should be the actual costs, incurred and recorded on the books of the Company, as adjusted to reflect the proper AFUDC capitalization (Issue No. 3) and capacity (Issue No. 5).

Issue No. 5. SJTP Capacity. What is the appropriate capacity for SJTP that should be included in rate base?

Staff's Position: The appropriate capacity to include in rate base is 21.6 million gallons per day. This is equal to the amount of water that can be treated when one filter is out of service and the remaining filters are loaded at a rate of 4 gallons per minute per square foot.

Issue No. 6. Deferred Taxes. Should MAWC's rate base be adjusted to reflect the amount of deferred taxes existing on the books of Missouri Cities Water Company prior to its acquisition by MAWC? If so, what is the appropriate adjustment?

Staff's Position: The amount of deferred taxes existing on the books of Missouri Cities Water Company prior to its acquisition by MAWC should be used as reduction to rate base.

Issue No. 7. Return on Equity. What return on equity is appropriate for MAWC?

Staff's Position: The Commission should approve a return on common equity based on a range of 9.50 percent to 10.75 percent.

Issue No. 8. Rate Design.

Issue No. 8a. Single Tariff Pricing, District Specific Pricing or Compromise. Shall MAWC's rates be designed consistent with a "single-tariff" rate design, "district-specific" rate design, or some other methodology?

Staff's Position: The rates should be designed consistent with a "district specific" rate design, with one modification. The modification is that the commodity rates for the customers in the Company's Brunswick District should be set equal to the highest

commodity rates of any of the other districts; to the extent that the Company fails to recover its revenue requirement for the Brunswick District through use of this commodity rate, the shortfall should be added to the revenue requirement for the Joplin District.

Issue No. 8b. Allocation of Corporate District Expense. What is the proper allocation of MAWC's corporate district investment and expense?

Staff's Position: Corporate District investment and expense should be allocated on the basis of the composite payroll allocation.

Issue No. 8c. Allocation of Cost/Revenue Among Classes. On what basis shall the portion of revenues to be borne by MAWC's various customer rate classes be determined?

Staff's Position: The customer rates by class should be determined consistent with a "district specific" rate design method, as presented by Wendell R. Hubbs, with the one modification mentioned in Issue No. 8a above. That modification is that the commodity rates for the customers in the Company's Brunswick District should be set equal to the highest commodity rates of any of the other districts; to the extent that the Company fails to recover its revenue requirement for the Brunswick District through the use of this commodity rate, the shortfall should be added to the revenue requirement for the Joplin District on a percentage of revenue basis to each class. The class rates should be "phased in" consistent with Staff's proposal in Issue No. 8d below.

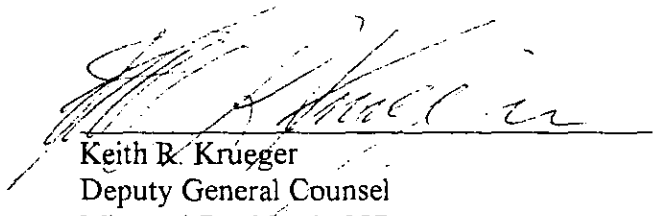
Issue No. 8d. Phase-In. Should MAWC's rate increase be phased in over a number of years? If so, what is the appropriate "phase-in" amount, and what is the appropriate phase-in period?

Staff's Position: Revenue requirements should be phased in over a five-year period for districts that experience a significant increase in rates. The Company should be

allowed to earn a carrying charge, equal to the rate of return authorized by the Commission, on any amounts deferred. The Staff proposes phase-in for specific customer classes, in each district, that continue to experience very significant rate increases.

Respectfully submitted,

DANA K. JOYCE
General Counsel



Keith R. Krueger
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Q. What treatment has the Staff afforded this item in its calculation of revenue requirement?

A. The Staff has included the permanent and unamortized balances in rate base. The annual amortization is included in expense as a component of the Staff's calculation of annualized OPEB expense, as previously discussed.

NEW ST. JOSEPH TREATMENT PLANT PHASE-IN

Q. Please discuss the Staff's recommendation regarding the recognition of the revenue requirement associated with the new SJTP.

A. The Staff is recommending a five-year phase-in of the revenue requirement associated with the return and depreciation on the new SJTP.

Q. Why is this treatment appropriate?

A. The SJTP represents approximately a 100% increase in the total rate base of MAWC and a 300% increase in the rate base of the St. Joseph district. A phase-in will partially mitigate the "rate shock" associated with this extremely large plant addition.

Q. Discuss what you mean by the term "rate shock."

A. The term "rate shock" has been used to characterize the extremely significant increase that would result from reflecting the entire first-year revenue requirement associated with the SJTP in rates. The revenue requirement associated with the return on investment and depreciation expense on the SJTP is approximately $10 million in the first year. This reflects approximately a 30% increase in total company revenues and a 100% increase in the revenues of the St. Joseph district.

Q. Has the Staff proposed similar treatment in the past for extremely significant plant additions?

A. Yes. The Staff proposed phase-ins when the nuclear plants owned by Ameren/UE and Kansas City Power and Light Company were included in rates. Recognizing the entire revenue requirements of these plant additions immediately would have had the same relative effect on rates as immediate recognition of the entire SJTP.

Q. Why is the Staff proposing a five-year time period?

A. A five-year time period reduces the level of the first year rate increase to a significant, but not extreme, level of approximately 12%, on a total company basis to MAWC and on a stand-alone basis, to the St. Joseph district. Although the Staff views this level of increase as significant, considerable mitigation has occurred from the extreme levels previously discussed. Subsequent annual increases to fully reflect the SJTP in rates are also in the 12% range. In addition, phasing-in the plant over only five years should provide a higher level of confidence to the Company with regard to recovery of the deferred amounts.

Q. Please explain the Staff's phase-in methodology.

A. The Staff's method defers a portion of the revenue requirement associated with the SJTP. These deferrals earn a return equal to the rate of return recommended by the Staff in this case. The accumulated deferrals are recovered in the future through additional rate increases in years two through five. By the end of year five, the plant will be fully reflected in rates and all prior phase-in deferrals will be recovered.

Q. How will the Company effectuate the rate increases in years two through five?

A. The Staff recommends that the Commission approve all four of the subsequent rate increases as part of its order in this case. These rate increases will take

effect automatically on the annual anniversary of the effective date of the rates from this case. However, if the Company files a rate case, or a complaint case is filed against the Company prior to the end of the phase-in, the appropriateness of all subsequent increases will be examined during that proceeding. This statement does not imply that the deferrals will not be recovered if a rate proceeding is filed, but that the method or term of the recovery may change.

Q. Will the Staff track the Company's earnings during the phase-in?

A. Yes. The Company should be ordered by the Commission to provide annually a Phase-In Monitoring Report. This report would provide a 12-month per book total water cost of service calculation.

AFUDC

Q. Please define this issue.

A. AFUDC is the carrying cost that utilities are allowed to capitalize as an additional cost of a construction project. The Staff recommends that the Commission order the Company to adjust the AFUDC rate it has used since the effective date of the rates in the last case. The method the Staff is proposing should also be used by the Company to determine the AFUDC rate in the future.

Q. What AFUDC Rate is the Company using?

A. The Company is using the rate of return from the last case to compute the AFUDC carrying cost for any project with a construction period in excess of 30 days.

Q. Why is this rate inappropriate?

A. This rate is inappropriate for two reasons. First, no short-term debt is reflected in the calculation. Second, the amount of debt and equity, as well as the

PHASE-IN

Q. How would the Staff propose to address the significant rate increases experienced by various classes within districts under a district specific pricing rate design?

A. The significant increases are due to several factors, including plant additions, revenue shifts and the elimination of single tariff pricing. Where significant recent plant additions have occurred, the Staff proposes a five-year phase-in, similar to its proposal for the SJTP. After the phase-in of recent plant additions, the Staff proposes phase-in for specific customer classes, in each district, that continue to experience very significant rate increases.

Q. Does this conclude your rebuttal testimony?

A. Yes, it does.

In addition, Mr. Salser's calculations regarding the return on equity are inappropriate and misleading. Rates are not set for five-month intervals. The returns on equity proposed by the various parties reflect annual returns. The five-month return provided by Mr. Salser is not comparable to these annual returns on equity.

Q. Have you calculated the annual return on equity including the adjustment for AFUDC?

A. Yes. The annual return on equity, including an adjustment for the write-off of disallowed AFUDC, would be 7.88% for the twelve months ending September 30, 2000. This level is substantially higher than the return cited by Mr. Salser.

PHASE-IN

Q. Do you agree with Mr. Salser's comments regarding phase-in on pages 7 and 8 of his rebuttal testimony?

A. No. Mr. Salser's conclusions regarding the Staff's inclusion of accumulated depreciation and deferred taxes in the first year phase-in rate base are incorrect. These amounts were included to reflect the fact that the plant would be in service prior to the effective date of the rates from this case and prior to the start of the phase-in. The Staff assumed that the plant would go into service approximately six months prior to the effective date of the rates and the start of the phase-in. As a result, depreciation and deferred taxes would have accumulated prior to the start of phase-in. The amounts that accumulate beyond the true-up cut-off date are not usually included as offsets to rate base. However, since the Commission granted the Company an Accounting Authority Order (AAO), allowing the deferral of depreciation and a

Exhibit 5

continuation of AFUDC, recognition of rate base offsets beyond the true-up cut-off date is appropriate.

Q. If the Commission allows recovery of the deferred depreciation and continued capitalization of AFUDC, according to the AAO, would recognition of these amounts, in phase-in, be appropriate?

A. Yes. However, consistent with the Staff's recommendation of no recovery of the amounts accumulated according to the AAO, these offsets should be removed from the phase-in calculation.

Q. Are there other problems with Mr. Salser's proposal to include half of the first year phase-in deferrals in rate base?

A. Yes. Mr. Salser is suggesting that it is appropriate to recognize half of the annual depreciation and deferred income tax expense as well as phase-in deferrals in the calculation of the rate base, but only for the new St. Joseph Treatment Plant (SJTP). If this concept was consistently applied to all the other plant investments, total company rate base would be reduced by over $2 million for a half year of depreciation and deferred taxes on other plant in service. It would be inappropriate to apply the concept suggested by Mr. Salser to only one of the Company's investment items.

Q. What is your response to Company witness Jenkins' rebuttal testimony regarding phase-in and financial earnings on pages 5 and 6.

A. The Staff is mindful of the fact that its phase-in proposal may cause a reduction in the level of earnings reported on the Company's financial statements. However, this proposal is being recommended in light of the severe level of increased rates that would be experienced absent a phase-in. In addition, although reported

earnings may be initially reduced, the Staff's proposal accumulates deferrals that will be reflected in the Company's rates and reported financial statement earnings in the future. As Mr. Jenkins recognizes in his testimony, these deferrals will receive a carrying cost equal to the rate of return until fully reflected in rates. This compensates the Company for the time value of money during the general period.

Q. What is your response to Company witness Walker's rebuttal testimony on page 23, regarding the recovery of regulatory deferrals?

A. Mr. Walker's statements insinuate that the Commission may not allow recovery of phase-in deferrals in the future. Such a statement is totally baseless. In the previous two phase-ins ordered by the Commission, involving Union Electric Company and Kansas City Power and Light Company, all amounts deferred were reflected in the cost of service and rates. There is no reason to believe that the Commission or its Staff would not propose to reflect amounts previously deferred, under an ordered phase-in plan for MAWC, in the cost of service.

Q. Is Mr. Walker's statement on page 23 of his rebuttal testimony about the Company being forced to continue deferrals or forgo recovery of deferrals due to future rate increases required by future plant additions correct?

A. No. This statement is incorrect and baseless. Nothing in the Staff's phase-in proposal prevents the Company from filing a rate increase to address future plant additions or other changes in the cost of service. Any rate case filing during the phase-in period would require an examination of the total cost of service. However, this examination would not prevent recovery of amounts already deferred. Again, the past actions of the Commission and/or the Staff provide no basis for the insinuation that

amounts deferred under an ordered phase-in plan for MAWC would not be reflected in the cost of service.

Q. In response to Company witness Stout and other parties in this case, is the Staff recommending that phase-in be expanded beyond the new SJTP?

A. Yes. The Staff recommends that the revenue requirements be phased-in for districts experiencing significant increases in rates. This will help mitigate the rate shock to customers that result from significant plant additions and the adoption of district specific pricing. The allocation of the phased-in revenue requirements to customer classes is discussed in the surrebuttal testimony of Staff witness Randy Hubbs. This method of phase-in for the revenue requirement is easier to implement than a phase-in of discrete plant items, as the Staff previously recommended for the SJTP.

Q. During what period of time would the Staff recommend that the cost of service be phased-in?

A. The Staff recommends that the revenue requirement be phased-in over a five-year period. As stated in my direct testimony, a five-year phase-in should provide the Company with a higher level of confidence than a longer period would provide. However, the length of the phase-ins can be increased if the Commission determines that the level of rate increase is still too severe. Regardless of the length of the phase-in, the Staff recommends that the Company be allowed to earn a carrying charge, equal to the rate of return authorized by the Commission, on any amounts deferred.

Q. Is it necessary for a phase-in to contain an automatic rate reduction as OPC witness Trippensee states on pages 3 through 5 of his rebuttal testimony?

A. No. Mr. Trippensee's proposal assumes that the cost of service over the life of the phase-in will not increase as a result of other factors by the amount of the amortization of deferrals following the final year of the phase-in. I believe that since the Company will continue to be in a construction mode, its cost of service will also continue to increase. At this point, the level of increase is uncertain. However, the Staff intends to examine the change in the cost of service during the phase-in and has asked the Commission to order the Company to provide monitoring reports to facilitate this effort. The positive aspect, of ordering an automatic reduction in rates, for the year following the full recovery of phase-in deferrals, is that the Company will be required to take action, such as filing a rate case, or it will experience a significant rate reduction. I believe the Company will almost certainly file a rate case to address this situation. Without an automatic rate reduction provision, the Staff or another party will have to take action, such as filing a complaint case, to address the possible overearnings situation. Although OPC's proposal will require initial action on the part of the Company, either proposal will result in an audit being performed to address the change in the cost of service.

Q. Does this conclude your direct testimony?

A. Yes, it does.

The extra capacity factor of the Base-Extra Capacity Method allocates costs based on both a peak day responsibility of the class and the peak hour responsibility of the class. As can be seen in the allocation factors for the Base-Extra Capacity Method, the hourly peak factors for the residential class are dramatically higher than the daily peak factors, which are in turn dramatically higher than base usage factors. The base-extra capacity method allocates costs related to the capacity of the system based on each specific class use. (Hubbs Surrebuttal, Ex. 32, p. 9).

Ms. Hu states, at page 9 of her Rebuttal testimony, that a reasonable cost allocation methodology should give weight to both class annual water consumption and class maximum water demand. Mr. Hubbs agrees and this is exactly what the Base-Extra Capacity method does and for that reason (Hubbs Surrebuttal, Ex. 43, p. 9, lines 12-13) the Staff's cost of service study should be adopted.

ISSUE NO. 8d: PHASE-IN

Should MAWC'S rate increase be phased in over a number of years? If so, what is the appropriate "phase-in amount, and what is the appropriate phase-in period?

As previously discussed, supra, Staff advocates a District Specific Rate Design in this case. However, Staff is cognizant of the significant increases in rates in several of the districts. For this reason Staff advocates a five-year phase-in of rates and recommends allowing the Company to earn a carrying charge equal to the rate of return authorized by the Commission on any amounts deferred. (Rackers Surrebuttal, Ex. 54, p. 5, lines 18-20).

The significant rate increases that will be produced in this case are due to several factors. (Rackers Rebuttal, Ex. 53, p. 7, lines 2-10). These factors include plant

additions, with the most significant being the St. Joseph treatment plant, revenue shifts, and the elimination of single tariff pricing. (Rackers Rebuttal, Ex. 53, p. 7, lines 2-10). A phase-in of rate increases would mitigate rate shock. (Rackers Direct, Ex. 52, p. 11, lines 13-14). The term "rate shock" has been used to characterize the extremely significant increase that would result from reflecting the entire first-year revenue requirement associated with the SJTP in rates, for example. (Rackers Direct, Ex. 52, p. 11, lines 15-21). Other extremely significant rate increases will be felt from revenue shifts and the elimination of single tariff pricing. Such other significant rate increases can also be mitigated by the use of phase-ins.

The Staff's phase-in methodology defers a portion of the rate increases resulting from the revenue requirement associated with the SJTP as well as the extremely significant increase from the aforementioned factors. These deferrals would earn a return equal to the rate of return ultimately approved by the Commission in this case. The accumulated deferrals would be recovered in the future though additional rate increases in years two through five. By the end of year five, all necessary rate increases associated with the plant and other factors will be fully reflected in rates and all prior phase-in deferrals will be recovered. The Staff recommends that the Commission approve all four of the subsequent rate increases as part of its order in this case. Each of these rate increases will take effect automatically on the annual anniversary of the effective date of the rates from this case. (Rackers Direct, Ex. 52, p. 12, line 14 - p. 13, line 10; Rackers Rebuttal, Ex. 53, p. 7, lines 2-12; Rackers Surrebuttal, Ex. 54, p. 3, line 11 - p. 7, line 17).

Staff realizes that its phase-in proposal may cause a reduction in the level of earnings reported on the Company's financial statements. (Rackers Surrebuttal, Ex. 54,

p. 4, line 20 - p. 5, line 14). Although reported earnings may be initially reduced, the Staff proposal accumulates deferrals that will be reflected in the Company's rates and reported financial statement earnings in the future. (Rackers Surrebuttal, Ex. 54, p. 5, lines 1-5). Staff advocates a carrying cost equal to the rate of return ultimately approved by the Commission until the entire approved rate increase is actually fully reflected in rates. (Rackers Surrebuttal, Ex. 54, p. 5, lines 4-5). This carrying cost compensates the Company for the time value of money during the deferral period. (Rackers Surrebuttal, Ex. 54, p. 5, lines 4-5).

The Company contends that it would not be able to record the deferred revenues on its books until the future rate increases are actually enacted. (Hamilton Surrebuttal p.5 lines 1-10). Regardless of whether the deferred revenues can be or are recorded on the books of MAWC before they are actually received in future years, it is clear that the effects of the numbers that can be presented on MAWC's financial statements must be weighed against other considerations. As discussed supra, the specific reason for the phase-in is to prevent the extreme rate increases from being implemented at one time. This certainly is an important consideration that can override MAWC's concerns, especially when it is coupled with the carrying costs that will compensate the Company for the time value of money. The Company's financial statements could contain a footnote explaining the deferrals. (Tr. 509 lines 2-12). Such a footnote would notify investors of the reasons for the deferral, and would provide accurate information about the financial condition of the Company.

The Company argues against the phase-in by suggesting that the Commission may not allow recovery of phase-in deferrals in the future. (Rackers Surrebuttal, Ex. 54,

p. 5, lines 6-14). Such a contention is without any support in the record or in the history of the Commission. In the previous two phase-ins ordered by the Commission, which involved Union Electric Company and Kansas City Power and Light Company, all amounts deferred were fully reflected in the cost of service and rates. (Rackers Surrebuttal, Ex. 54, p. 5, lines 6-14). Utilizing the old adage that past actions are the best predictor of future behavior, there is no credible reason to believe that the Commission or its Staff would not propose to reflect amounts previously deferred, under an ordered phase-in plan for MAWC, in the cost of service.

The Company also suggests that the Company could be forced to continue deferrals or forgo recovery of deferrals due to future rate increases required by future plant additions. (Rackers Surrebuttal, Ex. 54, p. 5, lines 8-14). This contention is also without merit. There is nothing in the Staff's phase-in proposal that prevents the Company from filing for a rate increase to address future plant additions or other changes in the cost of service. (Rackers Surrebuttal, Ex. 5, p. 5, lines 18-20). As a matter of course, any future rate case filing during the phase-in period would require an examination of the total cost of service but clearly would not prevent recovery of amounts previously deferred. (Rackers Surrebuttal, Ex. 54, p. 5, lines 18-23). The past actions of the Commission and Staff provide no basis for the allegation that deferred amounts under an ordered phase-in for MAWC would not be reflected in the cost of service.

In view of the foregoing Staff submits that there is a legal basis for phase-ins, that a phase-in of five years is appropriate herein to reduce rate shock, and that as

compensation for MAWC the phase-in should have a carrying cost equal to the rate of return authorized by the Commission in this case.

CONCLUSION

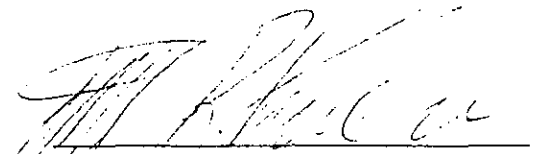
The Commission issued a Report and Order in Case No. WA-97-46, in which it stated that MAWC's proposal to construct a new ground water source of supply and treatment at a remote site was a reasonable alternative for providing water service to its customers in the St. Joseph District. The Company reasonably relied on that Commission finding when it constructed its new facilities to serve the St. Joseph District. Except for the adjustments that have been suggested by Staff, the costs of constructing the SJTP should now be included in the Company's rate base.

The Company's costs of providing water are most appropriately borne by the customer causing the cost. Because of the very large construction costs that the Company has incurred in the St. Joseph District, Single Tariff Pricing would result in large subsidies from the customers of the other six districts to the customers of the St. Joseph District, thus defeating the principle objective of rate design. The Commission should therefore adopt District Specific Pricing in this case, with a minor modification to accommodate the needs of the customers in the Company's Brunswick District.

If the Commission allows the Company to recover the full amount of its prudently incurred costs in a single rate increase, it will result in "rate shock" to the customers of Missouri-American Water Company. The Commission should therefore order that the rate increase should be phased in over a period of five years for the customers who would otherwise face very large rate increases.

Respectfully submitted,

DANA K. JOYCE
General Counsel



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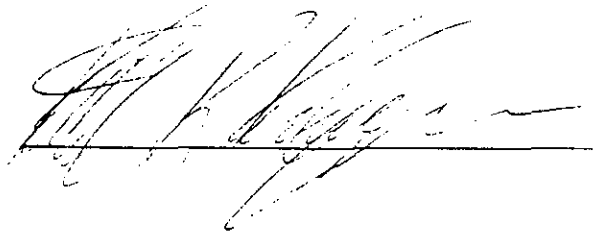
Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 24th day of July 2000.



ISSUE NO. 8d: PHASE-IN

Should MAWC's rate increase be phased in over a number of years? If so, what is the appropriate "phase-in" amount, and what is the appropriate "phase-in" period?

As previously discussed, supra, Staff advocates a District Specific Rate Design in this case. However, Staff is cognizant of the significant increases in rates that would occur in several of the districts if DSP is implemented. For this reason Staff advocates a five-year phase-in of rates, and recommends allowing the Company to earn a carrying charge equal to the rate of return authorized by the Commission on any amounts deferred. (Rackers Surrebuttal, Ex. 54, p. 5, lines 18-20).

The only party that clearly objects to a phase-in is MAWC (MAWC Initial Brief at 68-78). While MAWC raises several arguments against a phase-in (MAWC Initial Brief at 68-78), its primary concern appears to be the alleged negative impact on MAWC's financial statements. In its brief, MAWC states the following: "...While the Company would like nothing better than to be able to agree to a phase-in plan, the financial impact of not being permitted to recognize for accounting and reporting purposes any phase-in revenue deferrals will result in a weakened financial position in the early years of the phase-in period..." (MAWC Initial Brief, p. 69). While MAWC purports to be willing to accept a phase-in, it takes the position that there would be a negative impact on its financial statements and accordingly it cannot accept phase-ins. This apparently would include phase-ins with a carrying cost to the Company. (MAWC Initial Brief, p. 75).

However, unlike MAWC, this Commission has a much broader mission. It cannot merely consider an alleged short-term negative impact on the financial statements of MAWC and automatically grant MAWC its every wish. "Because ratemaking is not an exact science, the

utilization of different formulas is sometimes necessary." *State e. rel. Associated Natural Gas Company v. Public Service Commission of Missouri,* 706 S.W.2d 870, 880 (Mo. App., W.D. 1985). The Commission can select its methodology in determining rates and then make the pragmatic adjustments that are called for by particular circumstances. *Id.* at 880. Clearly the Commission has considerable discretion in ratemaking. Staff urges the Commission to determine that not only is a phase-in necessary but that it is appropriate in this case.

Staff submits that while the alleged impact on MAWC's financial statements is one concern for the Commission, it is by no means the only concern and it certainly is not the most important. In testimony, Mr. Hamilton admitted that his only consideration was the Company's books. (Tr. 370). Of course, this Commission is not so narrowly focused. It must consider all parties and all positions in reaching a decision. Staff has considered this impact in its phase-in proposal. Even though the Company's reported earnings may be initially reduced, the Staff's proposal accumulates deferrals that will be reflected in the Company's rates and in its reported financial statement earnings in the future. (Rackers Surrebuttal, Ex. 54, p. 5, lines 1-5). Staff advocates a carrying cost equal to the rate of return ultimately approved by the Commission until the entire approved rate increase is actually fully reflected in rates. (Rackers Surrebuttal, Ex. 54, p. 5, lines 4-5). This carrying cost compensates the Company for the time value of money during the deferral period. (Rackers Surrebuttal, Ex. 54, p. 5, lines 4-5).

Financial Accounting Standards ("FAS")

MAWC next alleges that it is subject to the accounting requirements of Statement of Financial Accounting Standards 71 ("FAS 71") about regulatory accounting and Financial

Accounting Standard 92 (FAS 92) which MAWC alleges severely restricts the ability to record phase-in plans for plants commenced after January 1, 1988 (MAWC Initial Brief at 70-72).

MAWC insinuates, but not overtly state, that since it is supposedly bound by these accounting standards, and because these standards don't allow MAWC to record rate phase-ins on their accounting statements, the Commission cannot order a phase-in in this case. This position is without any authority whatsoever, and MAWC does not even seriously suggest that there is any such authority. On the contrary, such a position would significantly impair the authority of the Commission to do its job. It should be summarily rejected.

MAWC also suggests that FASB 92 prohibits the recognition of phase-ins until the actual dollars are received (MAWC Initial Brief at 70-71). MAWC is justifiably concerned about the validity of its position as evidenced by its attack on Mr. Trippensee's testimony. OPC Witness Trippensee correctly points out that there is absolutely no reference to the water industry in FAS 92. (Trippensee Surrebuttal, Ex. 35, p. 7, line 4 – p.8, line 2). Mr. Trippensee explains that FAS 92, by its very terms, applies only to the electric industry. (Trippensee Surrebuttal, Ex. 35, p. 7, line 4 – p. 8, line 2).

However, any arguments regarding FAS 92 or its impact are largely moot because the individual who has the final say on this matter, Mr. Hamilton, has already made his determined on behalf of MAWC that FAS 92 does apply to their situation if a phase-in is ordered. (Tr. 372, lines 11`-16; Hamilton, Surrebuttal, Ex. 3, p. 8, lines 15-22).

Rate Shock

MAWC next addresses the issue of rate shock. It attacks other parties for allegedly being insensitive to rate shock. (MAWC Initial Brief, pp. 72-74). On the contrary, Staff is well aware

of the causes and effects of the rate increases in this case and took these matters into account in developing its rate design including a phase-in to mitigate rate shock.

The Staff's phase-in methodology defers a portion of the rate increases that result from the revenue requirement associated with the SJTP as well as the extremely significant increase from the aforementioned factors. These deferrals would earn a return equal to the rate of return ultimately approved by the Commission in this case. The accumulated deferrals would be recovered in the future through additional rate increases in years two through five. By the end of year five, all necessary rate increases associated with the plant additions recognized in this case and other factors will be fully reflected in rates, and all prior phase-in deferrals will be recovered. The Staff recommends that the Commission approve all four of the subsequent rate increases as part of its order in this case. Each of these rate increases will take effect automatically on the annual anniversary of the effective date of the rates from this case. (Rackers Direct, Ex. 52, p. 12, line 14 – p. 13, line 10; Rackers Rebuttal, Ex. 53, p. 7, lines 2-12; Rackers Surrebuttal, Ex. 54, p. 3, line 11 – p. 7, line 17).

Exhibit 105 sets out the phase-in for the affected districts and shows that the phase-in does successfully mitigate rate shock, contrary to the assertion of MAWC.

Legality of Phase-ins

MAWC next challenges the legality of phase-ins. (MAWC Initial Brief, pp. 76-77). MAWC does not cite any specific authority that prohibits phase-ins. Instead it points to § 393.155, RSMo, which expressly allows for phase-ins in electric rate cases. (MAWC Initial Brief, p. 76). MAWC suggests that since only the electric industry is mentioned, the Commission must not have the authority to order phase-ins in other regulated utility rate cases.

By this same logic, since water corporations are not mentioned in FAS 92, then FAS 92 does not apply to MAWC.

MAWC's argument presupposes that the only possible reason that a statute regarding rate phase-ins would be enacted is that the Commission had no such power prior to the enactment of the statute. This is incorrect. Statutes can also be enacted to clarify, rather than to change, existing law. *State ex re. Laclede Gas Co. v. Public Service Commission of Missouri,* 535 S.W.2d 561, 567 (Mo. App., K.C.D. 1976). MAWC does not offer any authority for the proposition that the Commission had no authority to utilize phase-ins in rate cases prior to the enactment of §393.155.

The Commission did and does, in fact and in law, have the power to utilize phase-ins. One recent water case with a rate phase-in is *In re United Water Missouri, Inc.*, Case No. WR-99-326 (order issued September 2, 1999). The Public Service Commission is an administrative agency of limited jurisdiction. *State ex rel. Gulf Transport Company v. Public Service Commission of Missouri,* 658 S.W.2d 448, 452 (Mo. App., W.D. 1983). It only such powers as are expressly conferred by statutes and reasonably incidental thereto. *State ex rel. Kansas City Transit, Inc. v. Public Service Commission*, 406 S.W.2d 5, 8 (Mo. Banc_1966); section 386.040. Section 386.040 provides that the Commission has all powers and duties specified in Chapter 386 as well as all powers necessary or proper to enable it to carry out fully and effectually all the purposes of Chapter 386.

The Commission has considerable discretion in rate setting due to the inherent complexities involved in the rate setting process. *State ex. rel. Office of the Public Counsel v. Public Service Commission of Missouri,* 938 S.W.2d 339, 344 (Mo. App., W.D. 1997). It is not the theory or methodology, but the impact of the rate order that_counts. *Id.* at 344. It is not the

methodology or theory but the impact of a rate order which counts in determining whether rates, are just, reasonable, lawful and nondiscriminating. *State ex rel. Associated Natural Gas Company v. Public Service Commission*, 706 S.W.2d 870, 879 (Mo. App. W.D. 1985). Commission determinations about ratemaking are favored by a presumption of validity. *Id.* at 344. Judicial inquiry ends if the total effect of the rate order cannot be said to be unjust and unreasonable. *Id.* at 344.

The Commission, as stated above, has considerable discretion in setting rates. The Commission also requires flexibility in exercising its ratemaking function to deal with changing and unforeseen circumstances. *State ex. rel. Capital City Water v. Public Service Commission*, 850 S.W.2d 903, 911 (Mo. App., W.D. 1993).

In the present case, the Commission must exercise its discretion. If the Commission allows the Company to recover the full amount of its prudently incurred costs in a single rate increase, it will result in "rate shock" to the customers of Missouri-American Water Company. The Company's interest is protected under the Staff's proposal, because it provides for a carrying cost on the phase-ins. The Commission should therefore order that the rate increase should be phased in over a period of five years as advocated by Staff, subject to all of the other conditions advocated by Staff.

Other Phase-In Issues

MAWC complains that OPC's and Staff's phase-in calculations fail to include one-half of the first year's net phase-in deferred balance. (MAWC Initial Brief at 75). MAWC opines that Staff's and OPC's phase-in calculations require MAWC to carry the deferred revenues for the first year and to only begin earning a return commencing in the second year of the phase-in

(MAWC Initial Brief at 75). This is incorrect as Mr. Salser admitted on cross-examination (Tr. 570-572). As Mr. Salser admits on cross-examination, all of the Staff's deferrals and revenue requirements already include a full year's worth of return. (Tr. 570-572). Apparently the Company wants 18 months of return. It would be inappropriate to include more than a full year's rate of return in determining revenue requirements for phase-in.

MAWC further alleges that the OPC's and the Staff's phase-in proposal fail to include one-half of the first year's net phase-in deferred balance. (MAWC Initial Brief, p. 75). MAWC fails to state specifically what part of the first year's net phase-in deferred revenue should be included. (MAWC Initial Brief, p. 75). MAWC does not specify in what half of the first year's net phase-in should be included within. (MAWC Initial Brief, p. 75). However, by looking at the testimony of Mr. Salser, as cited by MAWC, it would appear that MAWC wants to inflate rate base by adding half of the first year revenue phase-in to rate base. (MAWC Initial Brief, p. 75; Salser Rebuttal, Ex. 7, p. 7; Salser Surrebuttal, Ex. 8, p. 2). To inflate rate base in this matter is inappropriate and should be rejected. (Rackers Surrebuttal, Ex. 54, p. 4).

There is no basis for any argument that the Company may not receive the full rate increase ordered by the Commission. In the previous two phase-ins ordered by the Commission, which involved Union Electric Company and Kansas City Power and Light Company, all amounts deferred were fully reflected in the cost of service and rates. (Rackers Surrebuttal, Ex. 54, p. 5, lines 6-14). Utilizing the old adage that past actions are the best predictor of future behavior, there is no credible reason to believe that the Commission or its Staff would not propose to reflect amounts previously deferred, under an ordered phase-in plan for MAWC, in the cost of service.

The Company also suggests that it could be forced to continue deferrals or to forgo recovery of deferrals due to future rate increases required by future plant additions. (Rackers Surrebuttal, Ex. 54, p. 5, lines 8-14). This contention is also without merit. There is nothing in the Staff's phase-in proposal that prevents the Company from filing for a rate increase to address future plant additions or other changes in the cost of service. (Rackers Surrebuttal, Ex. 5, p. 5, lines 18-20). As a matter of course, any future rate case filing during the phase-in period would require an examination of the total cost of service, but clearly would not prevent recovery of amounts previously deferred. (Rackers Surrebuttal, Ex. 54, p. 5, lines 18-23). The past actions of the Commission and Staff provide no basis for MAWC's suggestion that deferred amounts under an ordered phase-in for MAWC would not be reflected in the cost of service.

In view of the foregoing, Staff submits that there is a legal basis for phase-ins, that a phase-in of five years is appropriate herein to reduce rate shock, and that MAWC should be compensated for the deferrals by means of a carrying cost equal to the rate of return authorized by the Commission in this case.

Decision Not to Phase In the Rate Increases

21. The circuit court's discussion of the "phase-in" issue was very brief.[13] The circuit court reversed the Commission on this issue, stating that the Report and Order was:

> Reversed as to the "phase-in" issue and remanded to the Public Service Commission with instructions that the Commission make findings of fact and conclusions of law sufficient to support a resolution of the phase-in issue in Case No. WR-2000-281 and to permit the Court to determine whether such resolution is based upon and supported by the competent and substantial evidence on the whole record in that case and is otherwise reasonable and lawful.[14]

22. The Staff advocated that the rate increases be phased in to mitigate the effects of "rate shock."[15] The Office of Public Counsel and other parties also urged the Commission to order a phase-in of the rate increase. The Commission declined to do so, however, stating: "As the Company requested, no phase-in of rate increases shall be permitted.[16]

23. With the passage of time, however, the issue of a phase-in may have become moot. The Staff no longer supports a phase-in, and it is possible that no other party would support a phase-in at this time, either since the benefits that might be expected from a phase-in can no longer be realized.

24. The rate increases that were ordered in this case became effective in September 2000 – more than 18 months ago. Any "rate shock" that might occur as a result of the large rate increases that were ordered has already taken place. The ratepayers can no longer be "shocked" by the immediate implementation of a rate increase that has already been in effect for more than 18 months.

25. Furthermore, if a phase-in were ordered at this late date, there would be very little that could be postponed, and determining exactly what shape the phase-in would take would

[13] See the Order and Judgment, issued May 25, 2001, ¶ 63, at pp. 17-18.
[14] See the Order and Judgment, issued May 25, 2001, at p. 18.
[15] Rackers Direct, Ex. 52, pp. 11-13.

Exhibit 8

probably require additional evidence and hearings. The Staff's phase-in proposal contemplated that rates would be increased each year during the first five years following the Report and Order, and that carrying charges would accrue on the deferred revenue. By so doing, the rates during the first year (September 2000 – September 2001), the rates would be considerably less than they would be (and have been) with no phase-in ordered. But to compensate for this, the rates during the fifth year (September 2004 – September 2005), the rates would have to be considerably more than they would be with no phase-in ordered. During the third year (September 2002 – September 2003), the rates would have be approximately the same as they would be with no phase-in ordered,[17] and would be approximately equal to the rates over the full five-year period.

26. If a phase-in were now, at this late date, ordered, and if it became effective on September 20, 2002 (the start of the third year after the issuance of the Report and Order), the "phased-in" rates would be virtually the same as the rates now are, without the phase-in. And as the Company would not have had to defer any revenue because of the phase-in, there would be no reason to increase the rates in the fourth and fifth years after the issuance of the Report and Order. The benefits of a phase-in would be nil.

27. If the phase-in could be ordered to take effect before September 20, 2002, the rates might decrease slightly for a short period of time, but would then have to gradually increase over the remainder of the five-year period. If this occurs, the ratepayers would be able to delay a small part of their water bill. But the result would be: first "rate shock" (in September 2000); then nearly two years without a change in rates; then a brief decline in rates; then gradual

[16] Report and Order, issued August 31, 2001, at p. 58.
[17] They would probably actually have to be slightly higher, to account for the carrying charge.

increases in rates; and finally, assuming no general rate increase in the interim, another decrease in rates to the current levels. This would be confusing and of little benefit to ratepayers.

28. In addition, evidence opposing a phase-in of the rates may be found in the testimony of Company witnesses.[18]

29. However, it is necessary for the Commission to set out findings of fact and conclusions of law pursuant to the circuit court's Order and Judgment.

WHEREFORE, the Staff submits its Response to Order Directing Filing.

Respectfully submitted,

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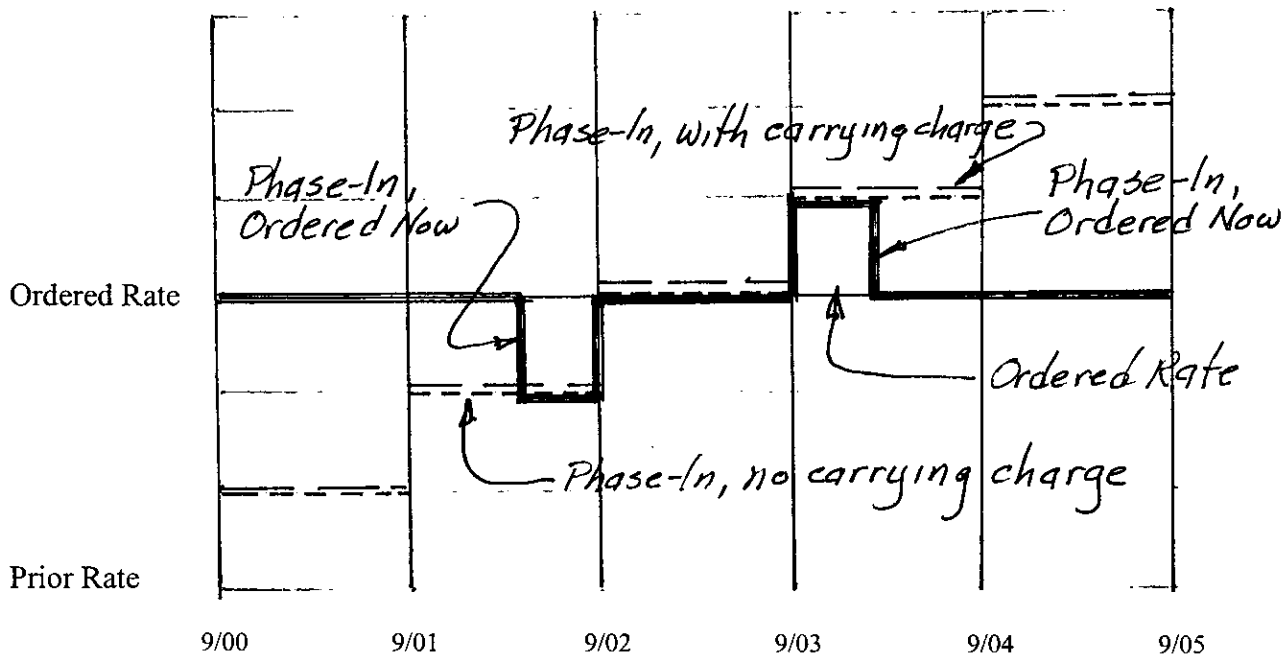
[18] See, for example, Jenkins Rebuttal, Ex. 4, p. 5, line 20 – p. 6, line 26; and Hamilton Surrebuttal, Ex. 3, p. 2, line 25 – p. 9, line 21.

MISSOURI-AMERICAN WATER COMPANY

Graph Showing the Effect of a Phase-in of Rate Increases Over Time Under Various Scenarios



LEGEND:

———————	Rates that would occur under the original Report and Order, with no phase-in.
— — — — — —	Rates that would occur under a proposal similar to Staff's proposal, but without including a carrying charge.
——— ——— —	Rates that would occur under a proposal similar to the Staff's proposal, but with a carrying charge.
═══════	Rates that might occur if a phase-in were ordered now, to be effective immediately.

Note: The above graph is conceptual only, and is for the purpose of illustrating the patterns of rates changes that would occur under various scenarios. It was prepared by Staff counsel, and it is not presented as expert testimony.

Exhibit 9

STATE OF MISSOURI
MISSOURI PUBLIC SERVICE COMMISSION

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	**WR-2000-281 SR-2000-282 (Consolidated)**

SUPPLEMENTAL RESPONSE
RE CERTAIN REMANDED ISSUES

COME NOW AG PROCESSING INC, A COOPERATIVE ("AGP"), FRISKIES PETCARE, A DIVISION OF NESTLE USA ("Friskies") and WIRE ROPE CORPORATION OF AMERICA INC. ("Wire Rope") (hereinafter collectively "St. Joseph Industrial Intervenors"), CITY OF RIVERSIDE, MISSOURI ("Riverside"), and GILSTER MARY-LEE CORPORATION("Gilster"), and supplement their earlier response as follows:

1. This Supplemental Response is filed without prejudice to the separate Motion to Strike Staff Response and Motion to Disqualify Counsel filed contemporaneously herewith.

Overallocation of Costs to Transmission Main Customers

2. On the issue of the transmission mains, the evidence in the record reveals that Staff's witness failed to follow the Base-Excess Allocation method because that method is based upon peak utilization data that is specific to the district being served. Instead, Staff's witness used identical peak day and peak load factors for the various customer classes in each of

Exhibit 10

his district specific studies. Exhibit 61, p. 4, ll. 4-7. He failed to perform calculations that were specific for districts where there were customers served through 12" mains with the result that these customers were overallocated costs of a distribution system that they did not cause.

3. The Staff witness was cross-examined as follows:

Page 969:4 - 970:17 from: Volume 12 (6/8/00)

Q. Would subsidies among customers in the industrial class be minimized if the distribution's mains costs were allocated only to the customers in the class that uses them?
A. I'm sorry. You're going to have to repeat that.
Q. I'll do my best.
Would subsidies among customers in the industrial class be minimized if distribution mains costs were allocated only to the customers in that class who use those distributions?
A. I'm sorry. I really don't understand the question.
Q. What part of the question are you not able to understand, Mr. Hubbs?
A. I'm not sure exactly what kind of relationship that your question may have on -- with regard to --
Q. I'll try to focus you, I guess, intraclass, because in other parts of your testimony you've talked about minimization subsidies as a goal, I think we've agreed on that?

0970

A. Yes, sir.
Q. And you have also talked about the remaining differences would be customers within a class, so an intraclass type of intracustomer, if you will, intraclass subsidization. In an ideal world, I think I take your testimony to be that we could eliminate that if we had a rate schedule for every individual customer, right?
A. Correct.
Q. But that's not practical, and I think we all agree with you. So in that context and kind of thinking along that line, would subsidies among customers in the industrial class be minimized if distribution mains costs were allocated only to the customers in that class who make use of those distribution mains?
A. Yes.

4. Moreover, the Staff witness interpolated nonexistent ***customer classes***, attempting to argue that the cost of

service was determined, not by the size of the water service main and meter provided, but rather by the nature of the business or use to which the water was put. Exhibit 42, Schedule WRH 2-2 St. Joseph, demonstrates that, although Staff witness attempted to segregate business customers into categories that he was familiar with from his natural gas experience, the revenues from each of the districts so categorized are based not on customer class but on ***size of service***.

5. There was at the time of this case and there still is today, ***no tariffed definition of what is an "industrial" or "commercial" or "residential" customer***. Moreover, Missouri-American's rates have been designed on a base-excess methodology in at least the last two cases.[1/] Staff witness simply tried to take customer categories with which he was familiar and force this water case into those categories. The result was a misallocation that dramatically overallocates distribution costs to customers served through transmission-sized mains.

6. In fact, Staff witness' allocation "method" was not the Base-Excess method that the Commission apparently thought it was approving, but was something that categorized together

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[1/] A copy of Missouri-American's ***prior*** tariff for water service for the St. Joseph district (effective November 12, 1997) is attached hereto as Exhibit A. This is the tariff that was in effect at the time WR-2000-281 was filed. As examination will reveal, this tariff has ***no classifications for "industrial" or "residential***," and differentiates customer charges on the basis of the size (and thus cost) of the meter) and shows a declining block usage rate for all usage ***regardless of the size of customer consuming the water*** or whether the customer was a residential, commercial establishment, water district or industrial customer.

customers into a class where there were no common load or usage characteristics. Staff witness admitted this in his cross-examination by arguing that his "industrial" class included both small and large customers.[2/]

Page 960:20 - 960:24 from: Volume 12 (6/8/00)
20 Q. So its just the differential between.
21 Would you agree then that the movement with respect
22 to those classes is the opposite of the current
23 rate design for Missouri American?
24 A. ***It is definitely different.*** (emphasis added)

7. His method even resulted in an "inverted" rate structure which charges a customer served through a transmission main a higher unit cost than that same customer would be charged if it received service under a 2" main and meter.[3/]

Page 961:8 - 961:18 from: Volume 12 (6/8/00)
8 Q. Would you agree with me that your proposed
9 industrial rates in St. Joseph are significantly
10 greater than your proposed residential rates?
11 A. Are you talking about just the usage
12 rates?
13 Q. Right.
14 A. The average rate is quite a bit less.
15 Q. Well, I understand, but --
16 A. But the rates that are being -- if you're
17 just looking at the usage area rates, yes, they
18 are.

[2/]Such also should have been apparent to the Commission inasmuch as the decision was made not to change the rates for the Joplin district. Yet, within that district (whose rates had previously been designed on base-excess), revenue shifts occurred as admitted by Staff witness at Tr. 957, l. 23 - 958, l. 3. Such shifts would not result if the ***same*** base-excess method were used when there were no additional costs being allocated to the district.

[3/]Of course, as even the Staff witness admitted, such customers could not be provided service through such small ***distribution*** mains. Tr. p. 968, l. 24 - 969, l. 3:

> Q. Would you also agree with me that not all industrial customers and wholesale customers could be adequately served by the system in the smaller mains?
> A. That's true, not all of them could.

8. The Commission should simply recognize in its findings of fact that the Staff witness did not, in fact, perform a base-excess allocation on all the districts on a separate basis and that, because of his use of identical peak allocators for each district regardless of the service size of customers served from that district, and his grouping together of customers that did not have common load and usage characteristics, resulted in an overallocation of distribution system costs to transmission-level customers. Complete rectification of the problem will require that a proper base-excess allocation study be done, based on customer service size, and with data that is specific for each separate district of the utility. Customers should be grouped together on the basis of common load and usage characteristics rather than on an artificial end-use basis that has no relation to their cost causal characteristics. *State ex. rel. Laundry, Inc. v. Public Service Commission, 345 S.W.2d 37 (Mo. 1931).*

Failure to Order Appropriate Phase-In of Rate Shifts

9. In a surprising flip-flop, in Staff's Response it announces that it no longer supports a phase-in and opines that it is possible that no other party would support a phase-in at this time. Staff is wrong. Intervenors still support a phase-in because our clients were rate-shocked and today we remain rate-shocked as well as shocked as to how the Staff could abandon phase-in when everybody was rate-shocked by the ***lack*** of a phase-

in. This is a case in which theology has overtaken good Missouri common sense.

10. While we still applaud the Commission's decision to "move toward" District Specific Pricing (DSP) and believe that such rate design is the only lawful rate design available for the disparate districts, we still cannot understand how the Commission could have done so without phasing-in the rates to avoid rate shock. Just as the previous move toward Single Tariff Pricing (STP)took a period of years to attain, so should the correcting move back to DSP have taken several years to avoid rate shock.

11. In its Response, Staff posits that if a phase-in were ordered today, there would be very little that could be postponed and "determining what shape the phase-in would take would probably require additional evidence and hearings." If such be the case, so be it. There are certainly more economical methods for phasing-in DSP than the method proposed by Staff with all its carrying costs. One merely needs to review how the Commission phased in STP for Missouri-American's predecessor, Missouri Cities Water Company for a better way to phase-in rates over a period of years through the use of an "equalization" factor that could change every year until full DSP was realized in all districts. Under such procedure, Missouri-Cities received its full revenue requirement, while the districts slowly approached full STP over a period of years and several rate cases. In other words, instead of throwing the lobster in boiling water

like the Commission did here, it could have placed it in a pot of cold water and slowly turned up the heat. The same result is ultimately realized only it is a lot less noticeable to the victim. Furthermore, this appears to be the result the Commission intended when it decided to "move toward" DSP.

12. The Commission is required to make findings of fact on the phase-in issue. If the current record is inadequate, it should reopen the record to get the necessary facts.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

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ATTORNEYS FOR CITY OF RIVERSIDE, MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by U.S. mail, postage prepaid addressed to the parties of record or their representatives as disclosed by the Commission's records in this proceeding.

Dated: April 5, 2002

Stuart W. Conrad

EXHIBIT A

FORM NO. 13 P.S.C. MO. NO. 1 (7TH REVISED) SHEET NO. 1
CANCELLING (6TH REVISED) SHEET NO. 1

MISSOURI-AMERICAN WATER COMPANY FOR CITY OF ST. JOSEPH, MO AND VICINITY
NAME OF ISSUING CORPORATION COMMUNITY, TOWN OR CITY
(ST. JOSEPH DISTRICT)

CLASSIFICATION OF SERVICE
GENERAL WATER SERVICE

Customer Charges

All metered general water service customers shall pay a Customer Charge based on the size of meter installed (or multiple meters installed -- in which case, the charge is based on the total of all meters installed). The Customer Charge rates listed below do not include any allowance for water usage.

Size of Meter	Customer Charge Per Month	Customer Charge Per Quarter	
5/8 - inch	$5.94	$17.82	*
3/4 - inch	7.60	22.80	*
1 - inch	10.77	32.31	*
1 1/2 - inch	18.73	56.19	*
2 - inch	28.28	84.84	*
3 - inch	50.54	151.62	*
4 - inch	82.34	247.02	*
6 - inch	161.85	485.55	*
8 - inch	257.26	771.78	*
10 - inch	416.20	1,248.60	*
12 - inch	686.53	2,059.59	*

Meter Rates

The following shall be the rates for monthly and quarterly usage, and are in addition to the customer charges provided for herein.

	Hundred Cubic Feet Per Month	Hundred Cubic Feet Per Quarter	Rate Per 100 Cubic Feet	
For the first	134	402	$1.4661	*
For the next	2,533	7,598	$0.8213	*
For the next	4,000	12,000	$0.6338	*
For all over	6,667	20,000	$0.4268	*

100 Gallons	100 Gallon Per Month	100 Gallon Per Quarter	Rate Per 100 Gallons	
For the first	1,000	3,000	$0.1955	*
For the next	19,000	57,000	$0.1095	*
For the next	30,000	90,000	$0.0845	*
For all over	50,000	150,000	$0.0569	*

* *Indicates new rate or text*
\+ *Indicates change*

DATE OF ISSUE November 12, 1997 (month day year) DATE EFFECTIVE November 12, 1997 (month day year)

ISSUED BY: W.F. L'Ecuyer, Vice President & Manager (Name of Officer, Title) St. Joseph, MO (Address)

5. **Issue 5. SJTP Capacity.** Consistent with our position that the SJTP should not have been constructed and represents imprudently incurred costs that should not be charged to the ratepayers, capacity issues associated with the **new** facility are irrelevant to our position. Accordingly, we take no position on this issue.

6. **Issue 6. Deferred Taxes.** St. Joseph Industrial Intervenors take no position on this issue.

7. **Issue 7. Return on Equity.** St. Joseph Industrial Intervenors believe that the allowed return on equity should be the absolute minimum deemed necessary for the company to attract capital; consistent, however, with a finding that the company was imprudent in its decision to construct a new treatment plant in its St. Joseph district.

8. **Issue 8. Rate Design.**

   a. **Issue 8a. Single Tariff pricing, District Specific Pricing or Compromise.** District Specific Pricing is not only correct, but the only lawful means of establishing the rates for this utility. This means that costs and rate base that are directly associated with the provision of service to a particular district should be charged only to that

district as supported by Mr. Harwig's testimony. Administrative and general costs should be allocated on a consistent and proper basis to each district, thereby allocating to each district the scale economies of such combined operations as supported by Mr. Harwig. See Issue 8b.

b. **Issue 8b. Allocation of Corporate District Expense**. These costs should be allocated to the respective districts on the basis proposed by Mr. Harwig.

c. **Issue 8c. Allocation of Cost/Revenue Among Classes**. Having once established the proper district-specific cost of service for each district, the costs **within that district** should be allocated to (and rates should be designed to recover from) the respective classes of customers within that district using the base-excess methodology with district-specific allocators. An approach that uses company-wide base-excess allocators misallocates costs. The proposal of Public Counsel to further adjust base-excess allocators is mistaken and should be rejected.

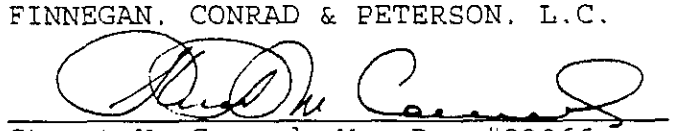
d. **Issue 8d. Phase-In.** St. Joseph Industrial Intervenors have not proposed a phase-in. Consistent with their position that the proper choice was to renovate the existing St. Joseph facility, that renovation would have been implemented over a period of several years. That being the model, no "phase-in" as suggested by other parties would be required as company would seek (and presumably obtain) incremental increases associated with the incremental expenditures of renovation as particular projects and portions were constructed and brought on line. The result is a mitigation of the increase for the St. Joseph district, but as a result of the incremental renovation of the existing facility rather than a result of some further artificially-imposed "phase-in."

No phase-in of any kind or nature should be required where the transition to district-specific pricing results in a decrease in a district's current rates. Any phase-in of an **increase** associated with the transition to district-specific pricing should be identified on a district-specific basis, should be handled exclusively within

that district and should be without additional cost to the ratepayers in that district.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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