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June 5, 2000

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

FILED[2]
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Missouri Public Service Commission

RE: Missouri American Water Company
Case No. WR-2000-281, et al.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Office of the Public Counsel's Response to Missouri-American Water Company's Motion to Strike Testimony and to Motion for Summary Determination.** I have on this date mailed, faxed, and/or hand-delivered the appropriate number of copies to all counsel of record. Please "file" stamp the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,

Shannon Cook
Assistant Public Counsel

SC:jb

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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**

OFFICE OF THE PUBLIC COUNSEL'S RESPONSE TO MISSOURI-AMERICAN WATER COMPANY'S MOTION TO STRIKE TESTIMONY AND TO MOTION FOR SUMMARY DETERMINATION

COMES NOW the Office of the Public Counsel (Public Counsel), and for its Response to Missouri-American Water Company's Motion to Strike Testimony and Motion for Summary Determination, states as follows:

1. On June 1, 2000, Missouri-American Water Company (Company) filed a Motion to Strike Testimony and Motion for Summary Determination, apparently based upon a belief that the Public Service Commission (Commission) has previously determined the prudence of Company's decision to abandon its river treatment facility and build a new groundwater facility (St. Joseph Project) in the certificate case, Case No. WA-97-46. The Company further states that the Commission is estopped from litigating the prudence of this decision in this case and moves that portions of the testimony of Public Counsel witnesses Russell Trippensee and Ted Biddy be stricken as constituting collateral attacks upon a prior Commission order.

2. Company has clearly misread the Commission's Order in WA-97-46 by implying findings that were not made by the Commission in that case, has misstated the positions that Public Counsel took in that case, and furthermore, has based its arguments on a misapplication of the law.

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3. The case in which the Company claims that the prudence of the St. Joseph Project has been prejudged was a *certificate* case, not a rate case. It is important to realize that utility construction projects are simply not pre-approved in Missouri. Unlike other states, Missouri has no "pre-approval statute" granting the Commission specific authority to "site" new plants or to predetermine the prudence of projects such as the one at issue in this case. The Missouri Commission has never pre-approved the prudence of a construction project and certainly did not do so in WA-97-46.

4. A Commission certificate merely sets the boundaries of a utility's service territory. Pursuant to § 393.170 RSMo. 1994, Company already enjoyed a certificate of convenience and necessity to provide water in St. Joseph, Missouri, so if Company had planned to build its entire St. Joseph Project within the existing boundaries of that certificate, there would never have been a certificate case at all. The certificate that was requested and which was granted covered only the geographic area that would contain the future well field and pipeline, not the proposed treatment plant. WA-96-47, Report and Order, p. 15.

5. The purpose of a case to extend certificated boundaries is not to obtain a pre-approval of prudence or make any ratemaking determinations. Nonetheless, in its Application in WA-97-46 (at p. 8), Company made the unique request that the Commission not only extend its service territory north into Andrew County, but that it also make the additional finding that the St. Joseph Project "is the **most appropriate and cost effective** method of meeting [the need to improve its water treatment sytem]" (emphasis supplied).

6. Clearly, the Commission did not grant Company's extra-legal request in Case No. WA-97-46. The Commission merely noted in passing that the construction of a

new groundwater facility at a remote site was "a reasonable alternative" (Report and Order, Ibid. at 11.); however, there were four alternatives discussed in that case (including the improvement and upgrading of the existing river treatment facility in St. Joseph), none of which the Commission found to be unreasonable. Despite Company's desire to proceed forward with its favorite alternative risk-free, the Commission did not find in Case No. WA-97-46 that that the construction of a new groundwater facility at a remote site was the most reasonable alternative discussed in that case, nor did the Commission find that it was the most cost-effective alternative.

7. During the litigation of the certificate case, Public Counsel agreed that there was a need to either improve the existing source of supply, construct new facilities, secure an independent source of supply, or pursue some combination of these alternatives, but Public Counsel did not take a position regarding which alternative would be the most cost effective. Public Counsel did offer some testimony and commentary on the analysis (and lack thereof) in the Company's 1997 Study. However, Public Counsel did not conduct a prudence review in the certificate case, and did not offer any witness qualified to perform such an analysis.

Public Counsel earnestly cautioned the Commission in that case against any pre-approval of prudence or pre-judgment of any issue relevant to ratemaking, because such findings would be of no legal effect and very bad public policy (as Public Counsel reiterates below). See Initial and Reply Briefs of the Office of the Public Counsel in WA-97-46; Hearing Memorandum, p. 7; Tr. 30-42.

Public Counsel further explained how a "bifurcation" of the prudence issue between the selection of the alternative and the management of the project was a false distinction because the two aspects are inherently interrelated.

Public Counsel was very forthright about the possibility that it would perform a prudence review of the St. Joseph Project in the appropriate rate case and that a rate case was the proper time under the law to determine the ratemaking impact of Company's decisions.

8. Nowhere in the Report and Order, issued on October 9, 1997 in Case No. WA-97-46, did the Commission state that it was pre-approving the prudence of any Company decision or pre-determining any ratemaking issue whatsoever. In fact, the only mention of prudence in the "ORDERED" section of the Report and Order is a caveat that states as follows:

> 5. That nothing in this Report and Order shall be considered a finding by the Commission of the prudence of either the proposed construction project or financial transaction, or the value of this transaction for ratemaking purposes, and the Commission reserves the right to consider the ratemaking treatment to be afforded the proposed construction project and financial transaction and their results in cost of capital in any future proceeding (emphasis supplied). Ibid., pp. 16-17.

9. In the body of the Report and Order, the Commission discussed why pre-approval of construction projects outside of a rate case proceeding would be bad public policy, upsetting the regulatory balance inherent in rate of return regulation:

> In the regulation of monopoly providers, one of the basic functions of this Commission is to stand in the stead of competition. The Commission performs this function principally in the context of a rate proceeding, authorizing recovery through rates of only those costs which were prudently incurred, that is to say spent as if the utility were operating in a competitive environment. Id. at 10.

The fact that large construction projects will be scrutinized upon completion in the course of a rate case in order to determine whether those projects are prudent and cost effective is arguably the most important consumer safeguard in place for the captive

utility ratepayer. The risk borne by Company's shareholders is recognized through the return on equity component of ratemaking. Pre-approval would unfairly shift that risk onto the ratepayers.

9. The Commission's Report and Order further recognized that any statement of pre-approval in the certificate case would not even be legally binding upon the Commission in the future:

> Authority exists supporting the position that the Commission may not legally take any further action regarding the pre-approval of the proposed project. In State ex rel. Capital City Water Co. v. Public Service Commission, 850 S.W.2d 903 (Mo.App. W.D. 1993) the Court stated:
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> > "The Commission's principal interest is to serve and protect ratepayers, *State ex rel. Crown Coach Co. v. Pub. Serv. Comm'n,* 238 Mo.App. 287, 179 S.W.2d 123, 126 (1944), and as a result, the Commission cannot commit itself to a position that, because of varying conditions and occurrences over time, may require adjustment to protect the ratepayers, *State ex rel. Chicago, Rock Island & Pacific Railroad Co.,* 312 S.W.2d at 796."
>
> and in re Union Electric Company (Callaway Nuclear Plant), 27 Mo. PSC (N.S.) 183, the Commission states:
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> > "...the appropriate time for the Commission to inquire regarding the prudence of a capital improvement project is a rate case in which a utility attempts to recover the associated costs of such a project..."
>
> Id. at 15.

10. In the recent appellate case, Missouri Gas Energy v. PSC, 978 S.W.2d 434, the Western District Court of Appeals addressed the issue of estoppel as it relates to Commission ratemaking:

> Equitable estoppel is not applicable if it will interfere with the proper discharge of governmental duties, curtail the exercise of the state's police power or thwart public policy, and is limited to those situations where public rights have to yield when private parties

> have greater equitable rights. *State ex rel. Capital City Water Co. v. Missouri Public Service Com'n,* 850 S.W.2d 903, 910 (Mo.App.1993). The setting and regulation of utility rates by the PSC is a duty of state government.

Id. at 439.

11. Company's Motion was filed on the last business day prior to the evidentiary hearing in this case, necessitating a swift Response. However, Public Counsel reserves the right to supplement this Response within the ten day deadline permitted under Commission Rule 4 CSR 240-2.080(16).

WHEREFORE, Public Counsel respectfully requests that Commission deny Company's Motion to Strike Testimony and Motion for Summary Determination. The prudence and ratemaking impact of the St. Joseph Project has not been foreclosed nor could it have been under the law.

Respectfully submitted,

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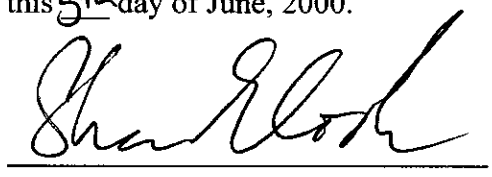
CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing document have been faxed, mailed, or hand-delivered to all counsel of record as shown on the attached service list this 5th day of June, 2000.



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