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June 5, 2000

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Missouri Public
Service Commission

Mr. Dale H. Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
301 West High R530
Jefferson City, Missouri 65102

Re: **Missouri-American Water Company**
**MoPSC Case No. WR-2000-281 et al.**

Dear Mr. Roberts:

Enclosed are the original and fourteen (14) conformed copies of a pleading, which please file in the above matter and call to the attention of the Commission.

An additional copy of the material to be filed is enclosed, which kindly mark as received and return to me in the enclosed envelope as proof of filing.

Thank you for your attention to this important matter. If you have any questions, please call.

Sincerely yours,

FINNEGAN, CONRAD & PETERSON, L.C.

By: Stuart W. Conrad

SWC:s
Enclosures
cc: All Parties

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**STATE OF MISSOURI**
**MISSOURI PUBLIC SERVICE COMMISSION**

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| **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)** |

**RESPONSE IN OPPOSITION TO MOTION TO STRIKE BY ST. JOSEPH INDUSTRIAL INTERVENORS**

COME NOW Intervenors AG PROCESSING INC, A COOPERATIVE ("AGP"), FRISKIES PETCARE, A DIVISION OF NESTLE USA ("Friskies") and WIRE ROPE CORPORATION OF AMERICA INC. ("Wire Rope") (collectively herein "St. Joseph Industrial Intervenors") and respond to the Motion to Strike Testimony and Motion for Summary Determination (Motion) filed herein on or about June 2, 2000 by Missouri-American Water Company (MAWC).

MAWC's Motion proceeds on three grounds. First, MAWC argues estoppel, arguing initially that parties are estopped from taking inconsistent positions. Second, MAWC argues that the Commission itself is estopped from relitigating "this issue," meaning the amount that should be included in MAWC's rate base with respect to the new St. Joseph water treatment plant. Finally, MAWC argues that the testimony it seeks to strike constitutes a collateral attack on the prior order of the Commission. MAWC's confusing and obviously desperate assertions are without merit.

MAWC appears to have trouble understanding Commission orders. As was revealed at the recent public hearing in this matter held in St. Joseph, MAWC represented to the people in St. Joseph that the Commission had approved Single Tariff Pricing ("STP").

**A. The Commission Has Not Previously Decided the Reasonableness of Construction.**

This point is easily disposed. While the Commission did find the project to be "a reasonable alternative", **a** reasonable alternative is not the same thing as **the** reasonable alternative.

Review of the Report and Order in WA-97-46 is dispositive of this argument. MAWC asked for pre-approval of the treatment plant project and issues 1 and 2 identified in the hearing were "Is it appropriate for the Commission to determine the prudence of this project and, if so, is the MAWC proposed project a prudent alternative?" WA-97-46, pp. 8-9. The Commission noted that "authority exists supporting the position that the Commission may not legally take any further action regarding the pre-approval of the proposed project" citing both *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903 (Mo.App. 1993) and *Union Electric Company (Callaway Nuclear Plant)*, 27 Mo. PSC (N.S.) 183 that the proper time for prudence to be considered is when a rate case is filed in which a utility

attempts to recover the associated costs of such a project. WA-97-46, pp. 12-14. The Commission rejected MAWC's request to pre-approve the prudence of its project. MAWC now asserts that the Commission decided exactly the point that the Commission earlier rejected. Importantly, in Ordered 5 of its Report and Order in WA-97-46, the Commission ordered:

> 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.

Not only did the Commission **not** make any determination as to the prudence of the "proposed construction project," it expressly **disclaimed** that it was doing so and expressly **reserved** its right to decide that issue in a future proceeding. MAWC's statements that the Commission pre-approved this project as to prudence are not factual.

**B. There is No Estoppel Applicable to These Parties.**

At the outset, MAWC has its facts wrong. Neither Friskies nor Wire Rope were in any manner involved in the WA-97-46 proceeding. No estoppel could apply to them in any respect.

Only AGP was involved in the WA-97-46 proceeding and then only as a **participant** -- not an intervenor.

Estoppel does not apply against Ag Processing either. Estoppel does not arise when there is no legal duty or obligation to do other than remain silent, which MAWC's Motion acknowledges was exactly what AGP did.[1/] While correctly quoting the *elements* of estoppel[2/] from *Lick Creek Sewer Systems, Inc. v. Bank of Bourbon*, 747 S.W.2d 317 (Mo.App 1988), MAWC badly *misunderstands* those elements, even as quoted. MAWC's very first element ("an admission, statement or act inconsistent with a claim later sued upon") demonstrate that action is required, not inaction. AGP made no admission, and no statement that could conceivably be inconsistent with its current position and MAWC shows no assertion to the contrary. All MAWC can say is that AGP "remained silent."

Silence can give rise to estoppel only in certain narrow circumstances. Mere silence or inaction will not work estoppel. There must be a right and an opportunity to speak, and in addition, an obligation or duty to do so. *UAW-CIO Local No. 31 Credit Union v. Royal Ins. Co. Ltd.*, 594 S.W.2d 276 (Mo.

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[1/]In fact, AGP's participation was limited by the Commission to an opening statement and a post-hearing brief.

[2/]What MAWC appears to refer to is not a legal estoppel, but rather an equitable estoppel, or estoppel in pais. Two different concepts are involved. However, the distinction appears lost on MAWC in this context.

1980). The party must be under a duty to speak up and not remain silent. *Medical West Bldg. Corp. v. E. I. Zoernig & Co.*, 414 S.W.2d 287, appeal after remand, 440 S.W.2d 744 (Mo. 1967). *See, e.g., Karsznia v. Kelsey,* 262 S.W.2d 844, 845 (Mo. 1954) ("The doctrine [of estoppel through silence or inaction] invoked by plaintiff is not operative unless a duty to speak exits. [Citations omitted] There is no obligation to disclose matters of which the other party has actual or constructive knowledge.")[3/] Absent a duty to speak or act, failure to do so cannot form the basis of estoppel. *Bass v. Rounds*, 811 S.W.2d 775 (Mo.App. 1991).

In *Investors Title Co. V. Chicago Title Ins. Co.*, 983 S.W.2d 533, 537 (Mo.App. 1998), the Missouri Court of Appeals articulated the requirements in the following words:

> "Estoppels are not favorites of the law and will not be invoked lightly.... To prevail on an estoppel theory, the party asserting estoppel bears the burden of establishing by clear and satisfactory evidence every fact essential to create an estoppel. To support estoppel, there must be a representation made by the party estopped and relied upon by

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[3/]In several cases, the "duty" may arise as a result of involvement between the parties in the same transaction and could easily be analyzed as breach of an implicit duty of good faith between contracting parties. In fact, the *Lick* case, the sole case cited by MAWC, involved litigation between various parties interested in a real estate financing. *See, e.g., Continental Grain Co. v. North Kansas City Elec. Co., Inc.*, 658 F.Supp. 767 (Mo. W.D. 1987) where the estoppel arose as between parties to a contact and notice of nonconforming performance of a condition to the contract.

> another party who changes his position to his detriment. The representation may be manifested by affirmative conduct, either acts or words, or by silence amounting to concealment of material facts. These facts must be known to the party estopped and unknown to the other party." [Citations omitted].

Analysis of this statement shows that, to support "estoppel by silence," the person's silence must amount to active concealment of material facts that are known to the party estopped and unknown to the other party. MAWC could not possibly support an assertion that AGP had knowledge of facts regarding the prudent construction of the St. Joseph facility that MAWC did not have. Indeed, even today, and in this case, other than his own experience and knowledge of its expert, all the information on which Dr. Morris' opinions are based came directly from MAWC or from sources identified by MAWC. "[I]f both parties know the facts or have equal means of ascertaining them there can be no estoppel . . . ." *Rhodes v. Rhodes*, 342 Mo. 934, 119 S.W.2d 247, 252 (1938), quoted in *Shumate v. Dugan*, 934 S.W.2d 589, 595 (Mo.App. 1996). MAWC, being in sole possession of all the information regarding its decisions in this case, cannot seriously claim an estoppel against those parties who had no access to that information, much less those who simply "remained silent." If anything, estoppel might be properly asserted against MAWC, whose actual actions operated to mislead the people of St. Joseph to their detriment regarding the costs of this project and the

claim that the Commission had adopted STP as a permanent ratemaking approach.

MAWC also cannot show that its position changed in reliance on AGP's silence. Indeed, even to state such an argument demonstrates its lack of substance. Is MAWC truly prepared to argue that it was prepared in 1997 to renovate the existing side-of-river plant in St. Joseph and was induced to change its position and, instead, construct a new $70 million facility **because AGP "remained silent"?** How ludicrous. The very thrust of Dr. Morris' testimony is that, as evidenced by the documentation MAWC supplied in response to data requests, shortly after the 1993 flood MAWC reached a corporate decision to construct a new facility. Following that decision, Dr. Morris testified, MAWC set about to justify its decision to construct a new facility by inflating its estimates of alternatives that had been previously approved in order to justify its decision.

WA-97-46 was litigation before the Commission. As an opposing party, AGP had no duty, obligation or any responsibility whatever to MAWC to run MAWC's case or make MAWC's decisions, either before during or after the case. AGP was under no duty whatsoever to interpret the Commission Report and Order for MAWC. MAWC was more than equally aware of the pertinent facts and certainly was no less equally able to interpret the Commission's Order. Even if it had been asked (which it wasn't), AGP would

have had no duty to do other than remain silent. There is and was no duty or obligation on the part of AGP to manage MAWC's business. For that, MAWC should be grateful. This part of the Motion fails.

### C. The Commission Is Not Estopped; the Issue Has Never Been Litigated.

MAWC's next argues that the Commission is estopped from relitigating this issue. Only two quick points need to be made to demonstrate the lack of merit of this argument.

First, MAWC correctly states that equitable estoppel does not run against the Commission. *State ex rel. Capital City Water Co. v. Missouri Public Service Commission*, 850 S.W.2d 903 (Mo.App. 1993). MAWC, however, asserts an exception. *Capital City Water* involved a claim by the utility that the Commission had issued five letters concerning a contract that the utility asserted constituted approval of that contract. The Commission erred, argued the utility, when it subsequently disallowed expenses associated with the contract. The language used by the court to describe these letters is pertinent for consideration.

> "The letters did not express an opinion as to the wisdom of the contract terms, specify the future treatment of the contract for rate setting purposes, or refer to any of the specific contract provisions."

Second, the test for application of the exception indicates that the conduct of the government sought to be estopped must rise to the level of *affirmative misconduct.*

> "In an estoppel claim against the government, these three elements must be satisfied **in addition to showing that the governmental action on which the claim is based constitutes affirmative misconduct.**" (citing *Farmers' & Laborers'* v. *Dir. of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987)) [Emphasis added].

*Capital Cities, supra*, at 910.

That is certainly not the case in WA-97-46. There the Commission's Report and Order clearly reserved future determinations of prudence to future cases. It explicitly rejected MAWC's request that the prudence of the new plant be pre-approved. There is no action of the Commission that should be estopped and this issue is not being relitigated. It is being litigated for the first time in the appropriate proceeding for such litigation - MAWC's rate case.

**D. No Prior Decision is Being Collaterally Attacked.**

As noted above, the Commission has not made a determination regarding prudence or the amount to be allowed into rate base with respect to the new plant. The Report and Order in WA-97-46 is ample evidence that the Commission intended to, and did, leave to future cases (this one) those determinations. WA-97-46 was a certificate case, not a rate case and limited even as to

that. There was no need for a certificate to build the treatment plant since such was to be constructed in MAWC's existing certificated area. MAWC's attempts to obtain pre-approval of its plans were clearly rejected by the Commission. Thus there is no decision to "collaterally attack."

MAWC turns to Section 386.550 RSMo for support, and cites *State ex rel., Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W.2d 597 (Mo.App. 1996). The case supports the precise opposite point and, in fact, would support dismissal of this case if MAWC's argument had merit.

*Ozark Border* concerned a territorial agreement under Section 394.312. The Commission denied the requested change and Ozark Border appealed. The *Ozark Border* court stated at 924 S.W. 2d 601:

> "If a change in circumstance has occurred since the last order, the complaint would not be attacking the previous order and would not be in conflict with section 386.550. It would be an independent proceeding to determine whether the change in circumstances [**10] causes the territorial agreement to no longer be in the public interest."

Section 386.550 provides finality to Commission decisions, but not if there have been changed circumstances. The current rates were established by the Commission decision in WR-97-237. Changed circumstances is the reason for the instant rate case.

MAWC's argument is nothing more than a bootstrap. This is an independent proceeding in which MAWC seeks to increase its rates, not alter the terms of the limited certificate granted in WA-97-46. MAWC tries to bootstrap itself into a collateral attack on WA-97-46 by its grasping argument that the Commission's WA-97-46 decision granted the very pre-approval that the Commission expressly declined to issue. That argument lacks merit as shown above and by the explicit terms of the decision in WA-97-46.

**E. Motion for Summary Determination.**

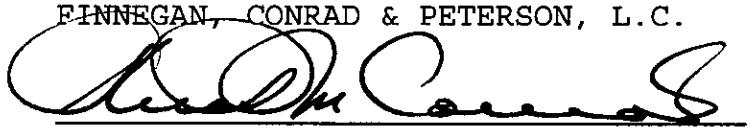
Inasmuch as there is no basis for its Motion to Strike, there clearly is no basis for a Summary Determination. Moreover, any decision by the Commission would have to be based upon competent and substantial evidence on the whole record as required by the Missouri Constitution. There is no lawful basis for such a Motion in any event and certainly not in this case.

**F. Conclusion.**

WHEREFORE, for the foregoing reasons, MAWC's Motion should be denied in its entirety.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by hand delivery or U.S. mail, postage prepaid addressed to the following persons:

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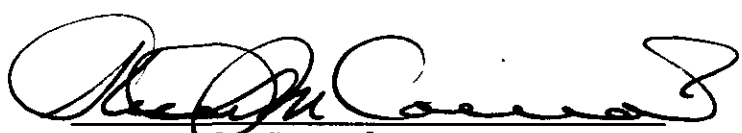

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