

FILED³

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FEB 14 2002

Missouri Public
Service Commission

In the Matter of the Joint Application)
of Missouri-American Water Company,)
St. Louis County Water Company d/b/a)
Missouri-American Water Company and)
Jefferson City Water Works Company)
d/b/a Missouri-American Water Company)
for an accounting authority order relating)
to security costs.)

Case No. WO-2002-273

RESPONSE TO PUBLIC COUNSEL'S MOTION TO DISMISS

COMES NOW Missouri-American Water Company and in response to Public Counsel's *Motion to Dismiss*, states as follows:

I. SUMMARY

1. Missouri-American filed a request for an Accounting Authority Order (AAO) to cover the costs associated with the increased security measures that were taken as a result of the unexpected and extraordinary events of September 11, 2001. Public Counsel filed a motion to dismiss Missouri-American's request for an AAO, alleging that Missouri-American had failed to present sufficient evidence upon which relief could be granted. Public Counsel's *Motion to Dismiss* should be rejected because: (a) Missouri-American has presented a *prima facie* case for an AAO that should allow Missouri-American to move forward and present its case to the Commission; (b) Public Counsel fails to meet Missouri law's standard for a motion to dismiss; and (c) Public Counsel's *Motion to Dismiss* is premature in that Missouri-American has not completed filing its prefiled testimony and because rebuttal testimony is the proper place for Public Counsel's objections to Missouri-American's case-in-chief.

II. RESPONSE

2. **Accounting Authority Orders.** The Commission is authorized to "prescribe uniform methods of keeping accounts, records and books, to be observed by . . . water corporations[.]" Section 393.140(4).¹ Pursuant to this authority, the Commission has promulgated its Rule 4 CSR 240-50.030, which requires water corporations to utilize the Uniform System of Accounts (USOA) issued by the National Association of Regulatory Utility Commissioners (NARUC) in 1973. The Commission is also authorized "after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited." Section 393.140(8).

3. An Accounting Authority Order is an order of the Commission authorizing an accounting treatment for a transaction or group of transactions other than that prescribed by the USOA. It is an accounting mechanism that is generally used to permit deferral of costs from one period to another.² The items deferred are booked as a regulatory asset rather than as an expense, thus improving the financial picture of the utility in question during the deferral period.³ During a subsequent rate case, the Commission determines what portion, if any, of the deferred amounts will be recovered in rates.

4. For example, expenses associated with a large project, such as a new utility plant, must be booked under the USOA from the day that the plant is first placed in service. These expenses include depreciation and the carrying costs of construction financing and

¹ All statutory references are to RSMo 2000 unless otherwise indicated.

² *In the Matter of Missouri Public Service*, 1 Mo.P.S.C.3d 200, 202 (Dec. 20, 1991)

³ *Id.*

can be quite significant in size. However, the new plant cannot be included in rate base until after a general rate case has been completed, an 11-month process. An AAO may be used in such a situation to assist the utility through the lag period between the on-line date and the effective date of the new rate order.⁴

5. **The Standard for an AAO.** AAOs should be used sparingly because they can permit ratemaking consideration of items from outside the test year:

The deferral of cost from one period to another period for the development of a revenue requirement violates the traditional method of setting rates. Rates are usually established based upon a historical test year which focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. *State ex. rel. Union Electric Company v. PSC*, (UE), 765 S.W.2d 618, 622 (Mo. App. 1988).⁵

Therefore, the Commission examines requests for AAOs on a case-by-case basis and examines to see whether they are for extraordinary, unique, and non-recurring events.

6. The Commission has granted AAOs in the past on a case-by-case basis. In Case No. EO-91-358, the Commission explained that deferral of costs from one period to a subsequent rate case should be allowed "when events occur during a period which are extraordinary, unique, and not recurring. These types of events generate costs which require special consideration. These types of costs have traditionally been associated with extraordinary losses due to storm damage or outages, conversions or cancellations. . . . exceptions are only for those items which are of significant effect, not expected to recur

⁴ See, e.g., *In the Matter of Missouri-American Water Company*, Case Nos. WR-2000-281 and SR-2000-282 (*Report & Order*, issued August 31, 2000), at pp. 48-50.

⁵ *In the Matter of Missouri Public Service*, 1 Mo.P.S.C.3d at 205.

frequently, and which are not considered in the evaluation of ordinary business operations."⁶ The Commission explained that "***the primary focus is on the uniqueness of the event, either through its occurrence or its size.***"⁷

7. In *State ex rel. Public Counsel v. Missouri Public Service Commission*,⁸ the Court of Appeals affirmed the Commission's decision to grant an AAO and explained:

The Commission's decision to grant authority to defer the costs . . . was the result of the Commission's determination that the construction projects were ***unusual and nonrecurring, and therefore, extraordinary.***⁹

The Court of Appeals recognized that the Commission had only determined that the costs of the projects were extraordinary and could be deferred. The Commission's *Report and Order* stated "that the amount of the deferred cost to be recovered as well as other ratemaking issues would be determined in a later rate case."¹⁰

8. In *Missouri Gas Energy v. Public Service Commission*,¹¹ the Court of Appeals stated that "AAOs are not the same as ratemaking decisions, and that AAOs create no expectation that deferral terms within them will be incorporated or followed in rate application proceedings. The whole idea of AAOs is to defer a final decision on current

⁶ *In the Matter of Missouri Public Service for the Issuance of an Accounting Authority Order Relating to Its Electrical Operations*, Case No. EO-91-358, *Report and Order*, issued Dec. 20, 1991 (1991 Mo. PSC LEXIS 56).

⁷ *Id.* at * 12 (emphasis added).

⁸ 858 S.W.2d 806 (Mo. App. WD 1993).

⁹ *Id.* at p. 811.

¹⁰ *Id.* at 812.

¹¹ 978 S.W.2d 434 (Mo. App. WD 1998).

extraordinary costs until a rate case is in order.”¹²

9. **The Standard for a Motion to Dismiss.** Public Counsel states that Missouri-American has “failed to file sufficient evidence in its direct testimony which would establish its claim for relief.”¹³ In essence, Public Counsel is raising a motion to dismiss for failure to state a claim. Therefore, the Commission must assume that all facts in Missouri-American’s *Application* and Direct Testimony to be true:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff’s petition. It ***assumes that all of plaintiff’s averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.***¹⁴

In this case, Missouri-American’s *Application* states that Missouri-American has “adopted new procedures, updated existing procedures, and installed facilities to further safeguard their water plant and systems in light of the events of September 11, 2001.”¹⁵ Missouri-American’s *Application* states that these steps were taken after consulting with such governmental entities as the Federal Bureau of Investigation, the Missouri State Highway Patrol, the Governor’s Special Advisor for Homeland Security, and the State Emergency

¹² *Id.* at p. 438.

¹³ Public Counsel’s *Motion to Dismiss*, p. 1

¹⁴ *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001) (emphasis added).

¹⁵ Missouri-American’s *Application*, pp. 3-4.

Management Agency (SEMA).¹⁶ Missouri-American further stated that the events of September 11, 2001 "were ***extraordinary in nature***," and that the steps taken by Missouri-American "have a significant cost that under the current law might not be recoverable if it does not fall within a rate case test year."¹⁷

10. **Missouri-American's Direct Testimony.** Public Counsel argues that Missouri-American "failed to present sufficient evidence in its prepared direct testimony, and attachments thereto, that it is entitled to the relief it seeks."¹⁸ But Missouri-American's Direct Testimony lays out all of the necessary facts to make a *prima facie* case for an AAO:

- (A) **Mr. Grubb's Direct Testimony.** The Direct Testimony of Edward Grubb states that the costs and the underlying event are both of an extraordinary nature to the company.¹⁹ Mr. Grubb also presents testimony regarding the impact of these increased costs on Missouri-American's net income.²⁰
- (B) **Mr. Kartman's Direct Testimony.** The Direct Testimony of Frank Kartmann states, "The events of September 11, 2001, and the threat resulting therefrom, were extraordinary in nature . . ."²¹ Mr. Kartmann testifies that Missouri-American "believed it was necessary to adopt new procedures, update existing procedures, and install facilities to further safeguard its water

¹⁶ *Id.* at p. 4.

¹⁷ *Id.* at pp. 4-5.

¹⁸ Public Counsel's *Motion to Dismiss*, p. 1.

¹⁹ Direct Testimony of Mr. Edward J. Grubb, p. 6.

²⁰ *Id.* at p. 7(HC).

²¹ Direct Testimony of Mr. Frank Kartmann, p. 2.

plant and systems with a sense of urgency and in an extremely short period of time”²² Mr. Kartmann testifies as to the general nature of these increased security measures, and Mr. Kartmann’s testimony also includes a schedule that sets out the costs of Missouri-American’s increased security measures.²³ Mr. Kartmann’s Direct Testimony does not spell out the specific measures the Missouri-American has taken.²⁴ Mr. Kartmann explains that releasing the information about Missouri-American’s increased security measures could lessen their effectiveness and therefore be counter-productive.²⁵

These facts establish a *prima facie* case for an AAO, so Missouri-American should be allowed to move forward and present its case to the Commission. Public Counsel will have the opportunity to present its own witnesses and cross-examine Missouri-American’s witnesses during the hearing.

11. Public Counsel’s *Motion to Dismiss* is also premature in that Missouri-American and the other parties have not completed filing their prefiled testimony. None of the parties have offered their prefiled testimony into the record, and the Commission has not accepted the testimony into the record. The place for Public Counsel’s objections to Missouri-American’s case-in-chief is rebuttal testimony. Under 4 CSR 240.2.130.7(C),

²² *Id.* at p. 4.

²³ *Id.* at pp. 7-8; Schedule FLK-3.

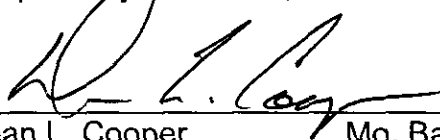
²⁴ *Id.* at pp. 4-5(HC).

²⁵ *Id.* at p. 5.

"Where only the moving party files direct testimony, rebuttal testimony shall include all testimony which explains why a party rejects, disagrees or proposes an alternative to the moving party's direct case."

WHEREFORE, Missouri-American respectfully moves that the Commission deny Public Counsel's *Motion to Dismiss* and for such other relief as the Commission deems reasonable in the circumstances.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand delivered, on this 14th day of February, 2002, to the following:

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