

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



In the Matter of the Merger of)
American Water Works Company)
with National Enterprises, Inc.)
and the Indirect Acquisition by)
American Water Works Company of)
the Total Capital Stock of)
St. Louis County Water Company)

Case No. WM-99-224

REPORT AND ORDER

Issue Date: March 23, 1999

Effective Date: April 2, 1999

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OF THE STATE OF MISSOURI

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American Water Works Company)	
with National Enterprises, Inc.)	
and the Indirect Acquisition by)	<u>Case No. WM-99-224</u>
American Water Works Company of)	
the Total Capital Stock of)	
St. Louis County Water Company)	

APPEARANCES

Paul Boudreau, Attorney at Law, and W.R. England, III, Attorney at Law, Brydon, Swearngen & England, P.C., P.O. Box 456, 312 East Capitol Avenue, Jefferson City, Missouri 65102-0456, for Missouri-American Water Company.

James M. Fischer, Attorney at Law, James M. Fischer, P.C., 101 West McCarty Street, Suite 215, Jefferson City, Missouri 65101, for Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County.

Richard T. Clottone, Attorney at Law, 535 North New Ballas Road, St. Louis, Missouri 63141, for St. Louis County Water Company

Shannon Cook, Assistant Public Counsel, and John B. Coffman, Deputy Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, for the Office of the Public Counsel.

William K. Haas, Senior Counsel, P.O. Box 360, Jefferson City, Missouri 65102, for Staff of the Missouri Public Service Commission.

DEPUTY CHIEF REGULATORY LAW JUDGE: Lewis R. Mills, Jr.

REPORT AND ORDER

Procedural History

This case was opened to receive a Motion to Open a Docket filed by the Office of the Public Counsel (Public Counsel) on November 18, 1998. In that motion, Public Counsel requested that the Commission open a docket to consider the proposed merger of American Water Works Company (American Water) and National Enterprises, Inc. (National). American Water owns Missouri-American Water Company (MAWC), a Missouri corporation that operates as a regulated water utility in Missouri. National owns Continental Water Company (Continental), which in turns owns St. Louis County Water Company (SLCWC), a Missouri corporation that operates as a regulated water utility in Missouri. Pursuant to the agreement, American will acquire all of the common stock of National, and after the merger is effected, MAWC and Continental will be first-tier subsidiaries of American and SLCWC will be a second-tier subsidiary. Public Counsel noted that SLCWC and MAWC are the largest water utilities in Missouri. Public Counsel asserted that it is in the public interest for the Commission to give the proposed merger close scrutiny to assure that that the merger does not have anti-competitive results. Public Counsel believes that the Commission has jurisdiction pursuant to Sections 386.250(3), 386.330(1), and 393.190(1)¹.

¹All statutory references are to the Revised Statutes of Missouri 1994 unless otherwise indicated. At the oral argument, Public Counsel also argued that Section 393.190(2) gives the Commission jurisdiction.

On December 8, SLCWC and MAWC filed a joint response opposing Public Counsel's motion. The water companies assert that the merger is one of parent companies, and that the Commission does not have jurisdiction to review the merger. In essence, their argument was that, since each of the regulated companies will maintain its current corporate existence, the statutes cited by Public Counsel do not confer jurisdiction. Also on December 8, Staff filed a response to Public Counsel's motion. Staff stated that the Commission has not asserted jurisdiction over mergers of non-regulated parent companies when there were no changes to the operations of the regulated company, such as is the case with this merger. Staff asserted that the Commission should follow this practice now, and decline to assert jurisdiction. The Staff and the water companies urge the Commission to follow its recent decision in Case No. TM-99-76 in which the Commission declined to open a case to consider the proposed merger of Ameritech Corporation into SBC Delaware, Inc., a subsidiary of SBC Communications, Inc.

On December 7, 1998, Utility Workers of America Local 335, AFL-CIO (the Union) filed an Application to Intervene. On December 9, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County (the Water Districts) jointly filed an Application to Intervene.

On December 23, Public Counsel filed a pleading responding to the Staff and SLCWC and MAWC. By order dated February 4, 1999, the Commission set for oral argument the question of its jurisdiction.

Oral Argument

On March 2, Public Counsel, Staff, SLCWC and MAWC presented their arguments on the question of the Commission's jurisdiction². Public Counsel argued that 386.250(3) gives the Commission jurisdiction over all water corporations and their operations in Missouri. Public Counsel also argued that 393.190(2) gives the Commission the responsibility to oversee mergers and consolidations involving regulated water systems. Public Counsel interpreted the definition of water corporation to include parent companies of regulated water utilities. Public Counsel attempted to distinguish this case from TM-99-76 on the basis that there is no federal proceeding in which this merger will be examined.

Staff addressed each of the statutory sections that Public Counsel asserted give the Commission jurisdiction over this transaction. Staff stated that 386.330(1) deals with telecommunications companies and does not apply to water companies. Staff argued that 386.250(3) is merely a general grant of jurisdiction to regulate water corporations, and that neither of the entities involved in this transaction are water corporations. The last statutes cited by Public Counsel are 393.190(1) and (2) which provide that a water corporation must first obtain Commission approval prior to entering into a merger or consolidation, or transferring or mortgaging its works or system. Staff stated that the

² The Water Districts were represented by counsel, but did not participate. The Union was not represented by counsel.

instant transaction does not involve water corporations, so these statutes do not apply.

MAWC argued generally that the sections of the statutes cited by Public Counsel do not apply to this proposed merger. Its arguments on the statutes were very similar to those advanced by Staff. MAWC also discussed a number of Missouri cases that it believed demonstrate that the Commission has no jurisdiction over the instant merger. MAWC compared this case with others the Commission has recently considered, including TM-99-76, and concluded that the Commission has been correct in its conclusion that it has no jurisdiction to examine mergers of non-regulated parent corporations even though they may own Missouri-regulated utility companies.

SLCWC adopted MAWC's arguments. SLCWC pointed out that when Continental was formed and acquired the stock of water corporations, Commission approval was sought and received, but that when National was formed as the parent of Continental, no Commission approval was sought.

Discussion

The Commission has reviewed the arguments of the parties, the cases and the Missouri statutes cited by parties, and the structure of the proposed merger. The Commission determines that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies. The Commission's past approach to mergers of this type has been the proper one, and will be followed here. Since the Commission has no jurisdiction over this merger, it will close this case. The applications to intervene will be denied.

IT IS THEREFORE ORDERED:

1. That the Motion to Open a Docket filed by the Office of the Public Counsel on November 18, 1998 is denied.
2. That the applications to intervene of Utility Workers of America Local 335, AFL-CIO, Public Water Supply District Nos. 1 & 2 of Andrew County, Public Water Supply District No. 1 of DeKalb County, and Public Water Supply District No. 1 of Buchanan County are denied.
3. That this order shall become effective on April 2, 1999.
4. That this case may be closed on April 3, 1999.

BY THE COMMISSION



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Crumpton, Murray,
and Drainer, CC., concur and
certify compliance with the
provisions of Section 536.080,
RSMo 1994.
Schemenauer, C., dissents with opinion

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

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Dissenting Opinion of Commissioner Robert G. Schemenauer

I respectfully dissent with the majority opinion "that there is nothing in the statutes that confers jurisdiction to examine a merger of two non-regulated parent corporations even though they may own Missouri-regulated utility companies". The Commission is required by statute to review and approve or deny these types of transactions for the public good. I am not persuaded by Staff's argument that "the instant transaction does not involve water corporations, so these statutes", (386.250(3) and 393.190(1), "do not apply".

There is no clean or unfettered separation between the ownership of American Water Works Company, Inc. (AWW) and St. Louis County Water Company (County Water) after the merger. AWW has replaced National Enterprise, Inc. (NEI) as the owner of County Water. These two corporations have merged as recited in their Summary Description of Transaction and their testimony. Each "NEI common share issued and outstanding at the effective time of the merger ..." (which constitute 100% ownership of County Water), "will be canceled and converted ... to 15.5022106 shares of AWW common stock. All shares of AWW common stock issued and outstanding immediately prior to the effective time of the merger, taken together with AWW common stock issued in accordance with the merger agreement, will immediately thereafter constitute all of the issued and outstanding shares of the capital stock of the surviving corporation." This clearly shows the intent of the merger transaction is to assimilate the ownership of County Water into AWW. One share of AWW stock represents some ownership

of County Water and there is no ownership of County Water by any other entity other than AWW.

A clear reading of 393.190(1), "No ... water corporation ... shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, **nor by any means, direct or indirect, merge or consolidate** such works or system, or franchises, or any part thereof, with any other corporation, person or public utility without having first secured from the commission an order authorizing it ...", requires a review of this transaction by the commission.

The drafters of this statute clearly foresaw the possible corporate manipulations that could circumvent the intent of this statute and therefore inserted such phrases as "**nor by any means, direct or indirect, merge or consolidate**" to prevent such corporate gerrymandering.

If this transaction is not a "direct" merger of a water company corporation with another corporation it surely is an "indirect" merger as contemplated by the statute. My opinion is that the Commission has erred in abdicating its responsibility to review and either approve or deny this merger. This abdication may set a fatal precedent that undermines the authority of future commissions to review similar transactions.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert G. Schemenauer", written in a cursive style.

Robert G. Schemenauer
Commissioner

Dated at Jefferson City, Missouri,
on this 23rd day of March, 1999.

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COMMISSION COUNSEL
PUBLIC SERVICE COMMISSION