



Martha S. Hogerty
Public Counsel

State of Missouri

Mel Carnahan
Governor

Office of the Public Counsel
Governor's Office Building
200 Madison, Suite 650
P.O. Box 7800
Jefferson City, Missouri 65102

Telephone: 573-751-4857
Facsimile: 573-751-5562
Web: <http://www.mo-opc.org>
Relay Missouri
1-800-735-2966 TDD
1-800-735-2466 Voice

September 13, 2000

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

FILED³

SEP 13 2000

Missouri Public
Service Commission

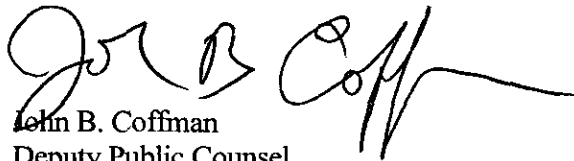
RE: Missouri-American Water Company
Case No. WR-2000-281, et al.

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case please find the original and eight copies of **Application for Rehearing**. Please "file" stamp the extra enclosed copy and return it to this office.

Thank you for your attention to this matter.

Sincerely,



John B. Coffman
Deputy Public Counsel

JBC:jb

cc: Counsel of Record

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

FILED³

SEP 13 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 et al.

APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (Public Counsel), pursuant to Section 386.500 RSMo. 1994 and Commission Rule 4 CSR 240-2.160, and applies for a rehearing and/or reconsideration of the August 31, 2000 Report and Order ("August 31 Order") of the Missouri Public Service Commission (Commission) in the above-captioned case.

The Report and Order, which was issued by the Commission on August 31, 2000, and bearing an effective date of September 14, 2000, is unlawful, unjust, unreasonable, arbitrary, capricious, contrary to the weight of the evidence, involves an abuse of discretion, and is not supported by competent and substantial evidence on the whole record in the following respects:

1. (a) The Commission misapplied the legal standard for reviewing prudence when it attempted to determine the valuation of the St. Joseph Water Treatment Plant.

The burden of proof to show that a proposed rate increase is just and reasonable is always borne by the public utility. Section 393.150(2) RSMo. 1994. However, the Commission unlawfully shifted the burden of proof regarding prudence from the water company to those parties who were challenging the prudence of Missouri-American Water Company's (Company's) decision to

abandon its river treatment plant and construct an expensive groundwater treatment facility. August 31 Order, pp. 40-42. The law merely requires that parties challenging prudence to bear the burden of production (not the burden of persuasion) in order to require the utility company to bear the burden of persuasion regarding whether an expenditure was prudent and reasonable.

Past Commission cases have required utilities in rate cases to prove the prudence of its management decisions when other parties "raise doubts" regarding prudence. Union Electric Company, 27 Mo.P.S.C.(N.S.) 183, 192-193 (1985). The overwhelming evidence contained in the results of the two independent prudence reviews admitted into the record of this case clearly raise serious doubts about whether Company made an economic decision when it chose to abandon its river treatment plant and construct an expensive groundwater facility. However, the August 31 Order erroneously discusses the issues related to the valuation of the St. Joseph water treatment plant as if parties other than Company bore the burden of proof to persuade the Commission on these issues. August 31 Order, pp. 42-43.

- (b) The Commission's decision regarding the valuation of the St. Joseph water treatment plant was unreasonable, against the weight of the evidence, and not supported by competent and substantial evidence.

The Commission criticized the credibility of Public Counsel witness Mr. Biddy on this matter based upon two narrow points. August 31 Order, pp. 42-43. Staff witness Mr. Merceil, whom the Commission stated was credible, could be as easily criticized on the same narrow points. Mr. Merceil has never designed a water treatment plant supplying drinking water of any sort, and he did not study soil conditions at the river

treatment plant himself. Furthermore, Mr. Merceil, by contrast, conducted no formal analysis comparing the cost of river and groundwater alternatives. (Tr. 1503-1504). Mr. Merceil could also produce no workpapers supporting a Staff prudence review on this matter. (Tr. 1529-1530).

Unlike Mr. Merceil's general analysis, Mr. Bidy and Dr. Morris conducted independent and detailed engineering prudence reviews revealing that Company had acted imprudently by abandoning its river treatment plant and had unreasonably inflated the cost of rehabilitating its river treatment plant. The August 31 Order does not accurately describe the various cost estimates for rehabilitation performed by Company from 1991 through 1996. Ibid. at 29-33. It was also unreasonable for the Commission to discount the overwhelming evidence in the record of this case that shows that Company management approved an uneconomic course of action with regard to its water treatment needs in St. Joseph. Public Counsel hereby incorporates its arguments on the issues regarding the proper valuation of the St. Joseph water treatment plant from its Initial Brief in this case. Ibid., pp. 9-21, 28-43.

- (c) The Commission's determination regarding the valuation of the St. Joseph water treatment plant is unlawful and unreasonable in that it was based upon findings regarding the credibility of witnesses that were made without a majority of the Commissioners being present at the evidentiary hearing to determine the demeanor of those witnesses.

Administrative tribunals are granted deference under the law when judging the credibility of witnesses; however, that deference is based upon the assumption that the tribunal was present to judge the demeanor and conduct of those witnesses as they testify. Phelps v. Metropolitan St. Louis Sewer District, 598 S.W.2d 163,166 (Mo.App.1980); St. Louis County v. State Tax Commission, 406 S.W.2d 644, 649 (Mo. en banc. 1966).

The Commission bases its decisions regarding the valuation St. Joseph water treatment plant upon stated opinions that the testimony of Public Counsel witness Mr. Biddy and St. Joseph Industrial Intervenor witness Dr. Morris were not credible and that the testimony of Company witness Mr. Young and the testimony of Commission Staff witness Mr. Merciel were credible. August 31 Order, p. 44. Mr. Biddy and Dr. Morris gave oral testimony and faced cross-examination on June 15, 2000, but the cover page of the Transcript of Proceedings for that day indicate the appearance of Commission Chair Sheila Lumpe and Commission Vice-Chair M. Diane Drainer, but no other commissioners. (Tr., Vol. 15). A majority of the Commission was never present to judge the questions and answers upon which the Commission purports to judge the demeanor and conduct of these witnesses. Staff witness Mr. Merciel testified on June 14, 2000 in this case, but the cover page of the Transcript of Proceedings for that day does not indicate the appearance of any of the five Commissioners during that day. (Tr., Vol. 14).

2. (a) The Commission's August 31 Order is unlawful because its rejection of Public Counsel's customer class rate design is not supported by findings of fact and conclusions of law that are sufficient to determine the basis of Commission's decision making on this matter.

In violation of Section 536.090 and 386.420 RSMo. 1994, the Commission's August 31 Order does not contain the requisite findings of fact or conclusions of law regarding customer class rate design, and thus would not give a reviewing court the basis for determining whether or not the Commission's decision was supported by substantial and competent evidence. State ex rel. Monsanto Company v. PSC, 716 S.W.2d 761, 795 (Mo. banc 1986). The very limited discussion contained in the August 31 Order is conclusory and provides little insight into the basis of the Commission's decision regarding customer class rate design. Ibid. at 61.

- (b) The Commission's August 31 Order is unlawful, unreasonable, and unsupported by competent and substantial evidence in that, to the extent it contains any "finding" regarding customer class rate design, rejects Public Counsel's customer class rate design merely on the basis of *ad hominen* reasoning.

Public Counsel's rate design recommendation regarding the proper amount of revenue shifting that should occur between customer classes was presented by its witness Hong Hu. In rejecting Ms. Hu's recommendation, the Commission's August 31 Report and Order gives in explanation only one short sentence:

Her class cost of service study was criticized by almost all of the other parties.

Ibid. at 61.

Such a statement implies that the Commission can reject an expert's opinion if it is outnumbered by the opinions of the total number of experts testifying on the subject. Public Counsel suggests that it is not lawful or reasonable to reject a witness's testimony merely because that witness's testimony is new or because that idea does not comport with a majority of experts testifying on the subject. An expert witness' testimony should be judged based upon the logic of the ideas presented and persuasiveness of that witness' testimony on the witness stand. Some of the most important advancements in science, including the social science of economics, were the result of the ideas (sometimes unpopular) held by only one individual. Public Counsel's evidence deserves to be judged by the merit of its ideas, not simply by how popular those ideas may be with a majority of experts representing conflicting interests in a particular case.

3. (a) The Commission's rejection of all recommendations that rate increases in this case be phased-in is unlawful because it is not explained in any finding of fact or conclusion of law.

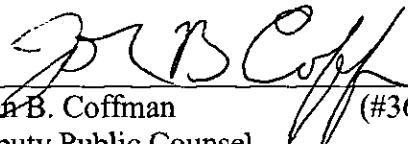
- (b) It is unreasonable for the Commission to permit the dramatic rate increases that are ordered in the August 31 Report and Order without approving some phase-in of the increases to the customer classes in those districts where severe rate shock would otherwise occur.

The phase-ins recommended by Public Counsel were just and reasonable and would not deny Company the value of the revenue requirement determined in this case because carrying costs would be calculated and included in the recommended annual phased-in increases. Please refer to Public Counsel's Reply Brief, pp. 18-21.

WHEREFORE, for the foregoing reasons, Public Counsel respectfully requests that the Commission grant a rehearing to reconsider the matters raised herein.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

By:  (#36591)
John B. Coffman
Deputy Public Counsel
P. O. Box 7800
Jefferson City, MO 65102
(573) 751-1304
(573) 751-5562 FAX

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed or hand-delivered to the following this 13th day of September 2000:

Keith Krueger
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Louis J. Leonatti
Leonatti & Baker
P.O. Box 758
Mexico, MO 65265

Charles B. Stewart
Stewart & Keevil
1001 Cherry St., Suite 302
Columbia, MO 65201

Leland B. Curtis
Curtis, Oetting, et al.
130 S. Bemiston, Suite 200
Clayton, MO 63105

Chuck D. Brown
303 E. Third St.
P.O. Box 1355
Joplin, MO 64802-1355

Joseph W. Moreland
Blake & Uhlig
2500 Holmes Rd.
Kansas City, MO 64108

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

James M. Fischer
100 Madison Street, Suite 400
Jefferson City, MO 65101

Dean L. Cooper
William R. England, III
Brydon, Swearingen & England
P.O. Box 456
Jefferson City, MO 65102

Jeremiah D. Finnegan
Finnegan, Conrad & Peterson, LC
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111

Karl Zobrist
Blackwell, Sanders, Peper, Martin, LLP
2300 Main Street, Suite 1100
Kansas City, MO 64501

Diana M. Vuylstek
Bryan Cave, LLP
211 N Broadway, Suite 3600
Kansas City, MO 63102

James B. Deutsch/Henry T. Herschel
Blitz, Bardgett & Deutsch, LC
308 East High Street, Suite 301
Jefferson City, MO 65101

A handwritten signature in black ink, appearing to read "J. B. Coffey", written over a horizontal line.