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** Tariff No. 200000366 Tariff No. 200000367

ORDER CONCERNING MOTIONS TO COMPEL

This matter arose on October 15, 1999, when Missouri-American Water Company (MAWC) submitted to the Commission proposed tariff sheets intended to implement a general rate increase for water and sewer service provided to customers in its Missouri service area. The Commission, on October 28, 1999, suspended the proposed tariff sheets until September 14, 2000. The proposed water service tariffs are designed to produce an annual increase of approximately 53.97 percent ($16,446,277) in the Company's revenues. The proposed sewer service tariffs are designed to produce an annual increase of approximately 5.0 percent ($2,363) in the Company's revenues.

By Orders issued on December 1, December 6, and December 23, 1999, the Commission permitted numerous parties to intervene herein, including a group of three industrial customers of MAWC located in St. Joseph, Missouri: AG Processing, Inc. (a Cooperative), Friskies Petcare, a Division of Nestle USA, and Wire Rope Corporation of America, Inc., who style themselves as the "Industrial Intervenors." On December 27, 1999, the Industrial Intervenors filed their First Motion to Compel, to which MAWC

timely responded on January 6, 2000, and with an appendix filed on January 7, 2000. The Industrial Intervenors filed their reply and supplemental reply on January 11, 2000, and MAWC responded to those replies on January 13, 2000.

On January 10, 2000, the Industrial Intervenors filed their Second Motion to Compel. MAWC responded on January 20, 2000. Because the issues presented in the Second Motion to Compel are closely related to those raised by the Industrial Intervenors' First Motion to Compel; because the parties have made ample arguments concerning those issues and have each been heard on the Second Motion; and in view of the Industrial Intervenors' request for expedited treatment, the Commission will decide the Second Motion now as well.

Discussion:

A. The First Motion to Compel:

1. The Arguments of the Parties:

The dispute in the First Motion to Compel concerns the Industrial Intervenors Data Request (DR) No. 1, propounded to MAWC on December 15, 1999:

> Please provide a copy of your response to each data request, whether formal or informal, from any party to this proceeding other than these intervenors.
>
> This is a continuing request and should be updated as often as is necessary throughout the course of this proceeding. If you are unwilling to so regard this request, please advise counsel for the requesting party.

MAWC timely objected to DR 1 by letter of December 20, 1999:

> This data request asks for "a copy of [Missouri-American Water Company (MAWC)'s] [*sic*] response to each data request, whether formal or informal, from any party to this proceeding other than these intervenors." MAWC objects to this data request on the basis that it is not a proper data request and [is] also over broad and oppressive and creates undue burden and expense in that there are likely to be hundreds, if not thousands, of data requests and responses in this case. In particular, in the case of Staff and OPC data requests, it is over broad in that these parties have been said to have a statutory right to certain materials that may exceed those items which are relevant to this inquiry. [The Industrial Intervenors] have no such statutory basis for discovery. *See Order Concerning Motion to Compel, In the Matter of Southwestern Bell Telephone,* Case No. TO-89-56 (June 30, 1989).
>
> MAWC also objects to this data request on the basis that it is over broad and oppressive and creates undue burden and expense in that it would be impossible to track and duplicate all information that may be given to parties in response to "informal" requests. Such information may be provided orally in response to oral inquiries over the telephone or otherwise by any number of MAWC representatives. Attempting to answer to [*sic*] to the request made by the intervenors for informal responses is an impossible task and would place an unreasonable burden on MAWC.

In their motion to compel, the Industrial Intervenors address each of MAWC's objections. First, they note that MAWC has not specified how DR 1 is "not a proper data request" and explain that, in the event that response to any other DR is excused on this ground, then MAWC is relieved of any obligation to provide a copy under DR 1.

Second, the Industrial Intervenors suggest that the provision of one additional copy of each DR response, to the Industrial Intervenors' technical expert, is hardly "oppressive." Again, the Industrial Intervenors point out that, in the event that response to any other DR is

excused on this ground, MAWC is relieved of any obligation to provide a copy under DR 1. The Industrial Intervenors point out, further, that where the response to a DR involves voluminous materials such that, under the protective order previously entered herein, MAWC will allow the requesting party access to the materials at a designated time and place rather than provide copies, DR 1 requires only that a single additional sheet of paper with this information be sent to the Industrial Intervenors' technical expert.

Third, the Industrial Intervenors respond that provision of an additional copy of each DR request to the Industrial Intervenors' technical expert is neither an undue burden nor likely to result in significant additional expense. The Industrial Intervenors further suggest that permitting MAWC to seek a rate increase of 67 percent while preventing consumers access to data within MAWC's control is a denial of due process. The Industrial Intervenors contend that DR 1 is actually intended to reduce the number of DRs faced by MAWC in this proceeding and note that some jurisdictions specifically provide for the sharing of DR responses by rule.

Fourth, the Industrial Intervenors reject MAWC's contention that Staff and the Public Counsel are entitled to broader discovery than they and that, consequently, they may not be entitled to information supplied in response to DRs propounded by Staff or Public Counsel. The Industrial Intervenors also assert that the existing protective order is sufficient to allay any concerns regarding confidentiality.

Fifth, the Industrial Intervenors state, with respect to MAWC's objections concerning informal data request responses, that they "proposed a possible solution that would provide Industrial Intervenors with equal access to the materials and information obtained by others without requiring the utility to perform an 'impossible' task." Unfortunately, the Industrial Intervenors do not provide details as to this proposal.

MAWC responded on January 6, 2000. MAWC asserts that DR 1 is improper under the Commission's decision in In the Matter of Southwestern Bell Telephone Company's Application for Classification of its Nonbasic Services, Case No. TO-89-56 (*Order Concerning Motion to Compel*, June 30, 1989) (hereinafter "the SWBT decision"). This decision found improper a DR requesting "copies of all discovery requests directed from Staff to SWBT[1] in connection with this proceeding," saying "other parties cannot obtain Staff DRs. Each party must determine its own interests and engage in its own discovery." The Commission's decision in 1989 was based upon Staff's special statutory discovery power under Section 386.450, RSMo, which is broader than that enjoyed by other parties under Rule 4 CSR 240-2.090. MAWC notes that the Commission recently reaffirmed its interpretation of Section 386.450, RSMo. *See* In the Matter of the Joint Application of Missouri-American Water Company and United Water Missouri, Inc., for Authority for Missouri-American Water Company to Acquire the Common Stock of United Water Missouri, Inc., and, in connection therewith, Certain Other Related Transactions, Case No. WM-2000-222 (*Order Regarding*

[1]Southwestern Bell Telephone Company.

Staff's Motion to Compel, Setting Prehearing Conference and Requiring Filing of Procedural Schedule, November 5, 1999) at 2-3 (hereinafter "the MAWC/UWM decision"). MAWC further states that it continues to object to DR 1 with respect to its request for informal DR responses, as well.

The Industrial Intervenors replied on January 11, 2000. The Industrial Intervenors assert that the SWBT decision is inapposite because that case, unlike the present one, was not a rate case; that MCI, unlike the Industrial Intervenors with respect to MAWC, was a competitor of SWBT; that this is not a telephone case under Chapter 392, RSMo; that there is a protective order already in place in this case; and that MAWC cannot claim the benefit of any special statutory enforcement obligations of Staff's. The Industrial Intervenors again suggest that the existence of "super" litigants, with "super" rights, is a denial of due process. Finally, the Industrial Intervenors contend that MAWC has raised, as a blanket objection to all requested information, an objection that actually applies only to "a very narrow list of Staff data requests, if there be any at all[.]"

The Industrial Intervenors also filed their supplementary reply on January 11, 2000, stating that they had just learned that Staff and the Public Counsel had each propounded a DR to MAWC essentially identical to the Industrial Intervenors' DR 1.[2] The Industrial Intervenors note that MAWC made no objection to these DRs and cite authorities for the

[2]Staff's DR 10 and Public Counsel's DR 3001.

proposition that a rate proceeding must be fair and involve fair play and a full hearing.

MAWC again responded on January 13, 2000. MAWC again asserts that the SWBT decision and the MAWC/UWM decision are good law and control. MAWC explains that it did not object to the DRs propounded by Staff and the Public Counsel because of their broad statutory discovery power. MAWC asserts, "If Staff and OPC discovery is not limited by concepts of relevance, then a request for responses to all Staff and OPC data requests is by definition over broad."

2. Analysis:

Discovery is generally available in cases before the Commission on the same basis as in civil cases in circuit court.[3] 4 CSR 240-2.090(1). The scope of discovery is the same as in civil cases generally under Rule 56.01(b)(1), Mo. R. Civ. Pro., and the same time limits and sanctions apply. Rule 4 CSR 240-2.090(1) *and see* St. ex rel. Arkansas Power & Light Co. v. Missouri Public Service Commission, 736 S.W.2d 457, 460 (Mo. App., W.D. 1987). However, in addition to depositions, written interrogatories, requests for production, and requests for admissions, parties before the Commission may also employ DRs. A DR is "an informal written request for

[3]The Commission was authorized to provide for interrogatories by rule even before Chapter 536 was amended to make that option generally available to administrative agencies. *See* St. ex rel. Southwestern Bell Tel. Co. v. Public Service Commission, 645 S.W.2d 44, 50-51 (Mo. App., W.D. 1983).

documents or information, which may be transmitted directly between agents or employees of the commission, public counsel or other parties to a proceeding before the commission." 4 CSR 240-2.090(2). Responses to DRs are due within 20 days of receipt of the request, but need not be made under oath nor in any particular format. *Id.* Objections are due within 10 days of the receipt of the request. *Id.* Sanctions for non-cooperation are the same as those applicable to other forms of discovery. *Id.*

MAWC is correct that the Staff of the Commission and the Public Counsel enjoy broader discovery powers than other litigants. Section 386.450, RSMo, authorizes the Commission and the Public Counsel to examine "books, accounts, papers or records" in the hands of "any corporation, person or public utility," "kept . . . in any office or place within or without this state[.]" The Commission has interpreted this statute to authorize Public Counsel to serve DRs on regulated entities, and the Commission to compel responses to those DRs, even in the absence of a pending proceeding. *See* In the Matter of Public Counsel's Audit and Investigation of the Raytown Water Company Regarding the Reasonableness of its Current Rates and its Compliance with Past Commission Orders, Case No. WO-94-192 (*Order Compelling Answers to Data Requests,* January 5, 1994). Likewise, this authority is not conditioned on considerations of relevance under Rule 56.01(b)(1), Mo. R. Civ. Pro., made applicable to Commission proceedings by Section 536.073.2, RSMo, and Commission Rule 4 CSR 240-2.090(1).

According to the MAWC/UWM decision relied on by MAWC, discovery under Section 386.450, RSMo, differs from discovery under Rule 4 CSR

240-2.090 in two respects: it may be pursued outside of the context of a pending case and the relevance standard of Rule 56.01(b)(1), Mo. R. Civ. Pro., does not apply. These two differences are necessarily interdependent, i.e., if there is no pending matter, then there can be no way to measure relevance.[4] As the Industrial Intervenors acknowledge, the discovery powers accorded to Staff and the Public Counsel in Section 386.450, RSMo, are intended to further their ongoing statutory duties. Thus, MAWC is correct in its assertion that a DR propounded by Staff or the Public Counsel might be objectionable if propounded by the Industrial Intervenors, because Staff and Public Counsel can request irrelevant information.

MAWC is also correct that the SWBT decision controls here. As the Commission stated in that decision, each party must independently pursue its own discovery, including formulating and propounding its own requests. Contrary to the assertion of the Industrial Intervenors, the broader discovery available to Staff and the Public Counsel under Section 386.450, RSMo, cannot result in any denial of due process to other litigants.

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[4] "Relevant" evidence is that which tends to prove or disprove a fact of consequence to a pending matter. W. Schroeder, 22 Missouri Practice—Missouri Evidence, § 401.1(a) (1992). Relevance must be determined by reference to the pleadings. *See* St. ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327-28 (Mo. App., E.D. 1985). With no pending matter, and no pleadings, relevance is a meaningless concept.

First, while Staff and the Public Counsel can obtain irrelevant information, that information is no more admissible in their hands than in those of any other party. And, if admitted, irrelevant information is, by definition, immaterial and not probative. Its availability to one side and not another cannot be prejudicial. Second, all parties, including the Industrial Intervenors, can obtain discovery of all relevant information, so long as not privileged. The denial of discovery of irrelevant information is the norm and has never been held to be a denial of due process. Anything that Staff and the Public Counsel can obtain that is useful in the context of this proceeding is necessarily also available to the Industrial Intervenors in response to their independently formulated and propounded DRs.

The Commission has considered MAWC's other arguments and also finds them persuasive. Providing a copy of each of its responses to DRs to the Industrial Intervenors' technical expert is unduly burdensome, whether or not it results in significant extra expense to MAWC. Additionally, the Commission is concerned that the existing protective order may not dispose of all confidentiality concerns.

The Commission also agrees with MAWC's position with respect to informal DR responses. The letter of the Industrial Intervenors' counsel to MAWC's counsel of December 20, 1999, suggests, at page 3, that "public utilities . . . do a fairly comprehensive job of 'tracking' and 'documenting' such informal requests, particularly from Staff and Public Counsel[.]" That comment is, at best, an unproven assumption on the part of the Industrial Intervenors' counsel.

B. The Second Motion to Compel:

1. The Arguments of the Parties:

The dispute in the Second Motion to Compel concerns the Industrial Intervenors' DRs 16 and 17, propounded to MAWC on December 21, 1999:

> 16. Provide a copy of each data request that you have received from any party other than these intervenors.
>
> This is a continuing request and should be updated as often as is necessary throughout the course of this proceeding. If you are unwilling to so regard this request, please advise counsel for the requesting party.
>
> 17. Provide a copy of each data request that you propound or have propounded to any party to this proceeding other than these intervenors.
>
> This is a continuing request and should be updated as often as is necessary throughout the course of this proceeding. If you are unwilling to so regard this request, please advise counsel for the requesting party.

MAWC timely objected to DRs 16 and 17 by letter of December 30, 1999:

> MAWC objects to this data request [DR 16] on the basis that it is not a proper data request, is over broad and oppressive, is not reasonably calculated to lead to the discovery of admissible evidence and creates undue burden and expense. In particular, in the case of Staff and OPC data requests, it is over broad in that these parties have been said to have a statutory authority to obtain certain materials that may not be discoverable by other parties and not reasonably calculated to lead to the discovery of admissible evidence.
>
> MAWC objects to this data request [DR 17] on the basis that it is over broad. Also, providing these requests will constitute the disclosure of mental impressions, conclusions, opinions or legal theories of MAWC's attorneys and are therefore attorney work product and privileged.

In their second motion to compel, the Industrial Intervenors address each of MAWC's objections. In general, these arguments are identical to those raised with respect to DR 1 and need not be repeated here. As to DR 16, MAWC raises a relevancy objection not raised with respect to DR 1. The Industrial Intervenors respond that a rate case is a broad inquiry into all aspects of a utility's operations and that the utility must show that its proposed rates are just and reasonable and that its expenditures are prudent. In this context, the Industrial Intervenors assert, relevancy is necessarily a broad concept. As to DR 17, MAWC asserts the attorney work product privilege, an objection not raised with respect to DR 1. The Industrial Intervenors respond that MAWC has waived any such privilege as to DRs actually propounded to adverse parties.

MAWC timely responded on January 20, 2000. MAWC first notes that this dispute is not ripe for decision because MAWC has complied with DR 16 and has not yet propounded any DRs of its own, so that DR 17 does not yet apply. However, because MAWC has not withdrawn its objections to those DRs, the question is indeed before the Commission for decision. MAWC asserts the same arguments with respect to DR 16 as it asserted with respect to DR 1; these need not be repeated here.[5]

With respect to DR 17, which seeks copies of DRs propounded by MAWC to other parties, MAWC contends that these are the tangible work products of its attorneys, containing the intangible work products of its attorneys, and thus protected from discovery. MAWC relies on the decision

[5]MAWC does not discuss, and may therefore be considered to have abandoned, the relevancy objection raised to DR 16 in its letter of December 30, 1999.

of the Missouri Supreme Court in State ex rel. Atchison, Topeka and Santa Fe Railway Company v. O'Malley, 898 S.W.2d 550 (banc 1995). In that case, the court upheld objections to interrogatories "asking about whether certain statements or reports had been obtained from third persons and whether the recipient of the interrogatories had conducted inquiries of third persons"[6] because the interrogatories "seek a schematic of the attorney's investigative process . . . this schematic aids the other attorney not because it reveals facts relevant to the case, but because it reveals the investigative process and relative weight attributed to certain witnesses' statements by the opposing side." *Supra*, 898 S.W.2d at 553. MAWC notes that the involvement of third parties in the investigation in O'Malley did not result in waiver of the asserted privilege.

2. Analysis:

MAWC's objections to DR 16 are identical to its objections to DR 1, discussed above. Those objections are meritorious as to DR16, just as they are meritorious as to DR 1.

As to DR 17, MAWC has asserted the attorney work product privilege. The attorney work product privilege, set out at Rule 56.01(b)(3), protects from discovery (1) trial preparation materials, except on a showing of "substantial need" and "undue hardship," and (2) "the mental impressions, conclusions, opinions, or legal theories" of

[6]MAWC's Response, p. 5, ¶ 11.

a party's attorney.[7] Opinion work product, unlike trial preparation materials, is absolutely privileged. *See* O'Malley, *supra*, 898 S.W.2d at 552-53 *et passim*. The party raising these objections has the burden of establishing them. Hutchinson v. Steinke, 353 S.W.2d 137, 144 (Mo. App. 1962).

In O'Malley, discovery was denied because the interrogatories in question sought details concerning the interrogated party's investigation rather than facts material to the pending case. 898 S.W.2d at 553. If permitted, such discovery necessarily reveals elements of opinion work product. MAWC contends that the Industrial Intervenors' DR 17, equally, will reveal elements of its attorney's opinion work product and that, under O'Malley, its DRs propounded to parties other than the Industrial Intervenors are privileged from discovery.

The Commission agrees with MAWC's understanding of O'Malley. To the extent that a party's DRs reveal that party's strategy, then DRs are privileged from discovery. Further, one purpose of the work product privilege is to prevent a party from appropriating the trial preparation of another party. The Industrial Intervenors have ample access to necessary information through their own individually drafted and propounded DRs. The Commission can discern no legitimate reason to allow them to obtain the DRs propounded by other parties.

[7]This second category is often referred to as "opinion work product."

IT IS THEREFORE ORDERED:

1. That the Industrial Intervenors' First Motion to Compel is denied.

2. That the Industrial Intervenors' Second Motion to Compel is denied.

3. That this order shall become effective on February 15, 2000.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to 4 CSR
240-2.120(1) (November 30, 1995)
and Section 386.240, RSMo 1994.

Dated at Jefferson City, Missouri,
on this 2nd day of February, 2000.