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January 20, 2000

FILED²

JAN 20 2000

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

**RE: Missouri-American Water Company - Consolidated Case Nos. WR-2000-281
SR-2000-282**

Dear Mr. Roberts:

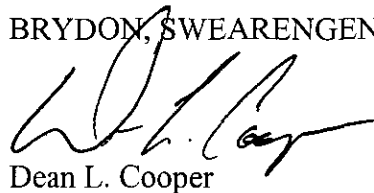
Enclosed for filing in the above-referenced proceeding please find an original and fourteen copies of MAWC's Response to AGP, Friskies and Wire Rope's Motion to Compel Response to Data Request and Request for Expedited Treatment Filed January 10, 2000. Please stamp the enclosed extra copy "filed" and return same to me.

Thank you very much for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Dean L. Cooper

DLC/rhg
Enclosures

cc: Office of the Public Counsel
Mr. Keith Krueger
Ms. Shannon Cook
Mr. Louis Leonatti
Mr. Jim Fischer
Mr. Leland Curtis
Mr. Brent Stewart
Mr. James Duetsch

Mr. Joseph Moreland
Mr. Stu Conrad
Ms. Lisa Robertson
Ms. Diana M. Vuylsteke

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

FILED²
JAN 20 2000

Missouri Public
Service Commission

In the Matter of Missouri-American)	
Water Company's Tariff Sheets Designed)	
to Implement General Rate Increases for)	Case No. WR-2000-281
Water and Sewer Service provided to)	Case No. SR-2000-282
Customers in the Missouri Service Area)	
of the Company.)	

**MAWC'S RESPONSE TO AGP, FRISKIES AND WIRE ROPE'S
MOTION TO COMPEL RESPONSE TO DATA REQUEST
AND REQUEST FOR EXPEDITED TREATMENT
FILED JANUARY 10, 2000**

COMES NOW Missouri-American Water Company ("MAWC" or "Company") and, in response to the Motion to Compel Response to Data Request and Request for Expedited Treatment filed on January 10, 2000, by Ag Processing Inc., A Cooperative ("AGP"); Friskies Petcare, A Division of Nestle USA ("Friskies"); and, Wire Rope Corporation of America Inc.'s ("Wire Rope"), states to the Missouri Public Service Commission ("Commission") as follows:

1. On January 10, 2000, AGP, Friskies and Wire Rope filed with the Commission their Motion to Compel and Request for Expedited Treatment.¹ This motion, among other things, asked that the Commission compel MAWC to respond to AGP, Friskies and Wire Rope's data requests numbers 16 and 17. Data requests numbers 16 and 17 stated as follows:

16. Please 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. Please provide a copy of each data request that you propound or have propounded to any party to this proceeding other than these intervenors.

¹ The Motion to Compel and Request for Expedited Treatment is hereinafter cited as "AGP Motion2."

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.

2. As an initial matter, it should be pointed out that this matter may not be ripe for Commission decision. MAWC stated its objections to AGP, Friskies and Wire Rope's data requests number 16 and 17 within ten days of receipt (as was necessary to preserve its objections). However, MAWC has also provided the documents requested by data request 16, beginning on December 22, 1999, one day after receipt of the data request. Additionally, as MAWC has not yet served data requests in this proceeding, there is no response to be made to data request number 17. Thus, it is likely that this issue is not ripe for Commission decision.

DATA REQUEST 16 COPIES OF DATA REQUESTS RECEIVED

3. MAWC's objection to data request number 16 is closely related to its earlier objection in this docket to AGP, Friskies and Wire Rope's data request number 1.² In fact, the decision cited as support for both of these objections is the Commission's *Order Concerning Motion to Compel, In the Matter of Southwestern Bell Telephone*, Case No. TO-89-56 (June 30, 1989). A copy of this Order is attached hereto as Appendix 1.

4. In *Southwestern Bell*, the Commission upheld an objection to a data request asking for copies of data requests only -- not responses. MCI had propounded a data request asking the Commission Staff ("Staff") to provide "copies of all discovery requests directed from Staff to *Southwestern Bell* in connection with *that* proceeding." This is precisely the type of request that

² See AGP, Friskies and Wire Rope's Motion to Compel filed December 27, 1999; MAWC's Response to same; AGP, Friskies and Wire Rope's Reply and Supplement to Reply; and, MAWC's Response to Reply which have previously been filed with the Commission.

AGP, Friskies and Wire Rope have made in their data request number 16, except, rather than asking Staff for copies of these requests, they have asked MAWC. The Commission found in *Southwestern Bell* that MCI's data request was improper in that it requested information that was not discoverable.

In reaching this decision, the Commission stated as follows:

The Commission has determined that other parties cannot obtain Staff DRs. Each party must determine its own interests and engage in its own discovery. Because of the specific statutory authority granted Staff, it is inappropriate to allow other parties access to Drs propounded by Staff.

5. As can be seen from this quote, the Commission resisted this form of discovery based upon the differing parameters of discovery due the Staff and other intervenors. This line of reasoning was found to be applicable even though the party involved requested only the data requests and not the responses to Staff and OPC data requests. There was a recognition by the Commission that since data requests often build upon information provided in prior answers, the prohibition from disclosure follows the information no matter what form it takes.

6. This differing parameters of discovery was based upon what was described by the Commission as Staff's "unique position." This unique position also applies to the OPC and has been confirmed by the Commission as recently as November 5, 1999, in Commission Case No. WM-2000-222. In that case, the Commission, in ruling on MAWC's objections to Staff data requests based on relevance, stated:

Section 386.450, RSMo 1994, misleadingly entitled "inspection of out of state records," confers broad authority on *the Commission and the Office of the Public Counsel (OPC)* 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[.]" This statute has been interpreted to authorize OPC 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*, issued January 5, 1994). 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 Cum. Supp. 1998, and Commission Rule 4 CSR 240-2.090(1). Therefore, MAWC must provide the information requested by Staff.

(Emphasis added.)

7. As stated in the *Southwestern Bell* decision, “each party must determine its own interests and engage in its own discovery.” Data request number 16 is not consistent with this principle. AGP, Friskies and Wire Rope have made a blanket request for a large body of information which may or may not be proper discovery. This objection does not involve a situation where AGP, Friskies and Wire Rope have requested specific information relevant to this case. These parties have instead attempted to “piggyback” on the work of the Staff and OPC without regard for the different standards which may be applicable. Upholding MAWC’s objection will not hamper AGP, Friskies and Wire Rope’s ability to obtain information concerning issues in which they have an interest. It merely will prevent them from blindly obtaining stacks of documents produced in response to the work and labor of others.

COMPETITION

8. In stressing their position, AGP, Friskies and Wire Rope allege that “this monopoly utility has no competitors in any of its service territories in this state.” (AGP Motion 2, para 15g). While not significant to the outcome of this motion, this is an inaccurate statement. MAWC does have competitors in its service territories and, in fact, one of the intervenors in this case, Public Water Supply District No. 2 of St. Charles County, described its interest in this case as follows in pleadings before the Commission: “Moreover, the District is specifically interested in this proceeding because the District presently provides water service in and around Missouri-American Water Company’s (“MAWC”) certificated service areas in St. Charles and Warren Counties and

because the District *directly competes* with MAWC for customers in these areas.” (Emphasis added)

DATA REQUEST 17

9. AGP, Friskies and Wire Rope data request number 17 requests copies of each data request MAWC propounds or has propounded on other parties to this case. MAWC has objected to this data request because it is over broad and, more specifically, that 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.

10. The Missouri Supreme Court, in *State ex rel. Atchison, Topeka and Santa Fe Railway Company v. O'Malley*, 898 S.W.2d 550 (Mo.banc 1995), recently described the forms of work product and the protection afforded to each as follows:

Work product has evolved into a two-pronged doctrine that consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney's mental impressions, conclusions, opinions, and legal theories--sometimes called opinion work product).

The [*Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947)] decision recognized that discovery of tangible work product will inevitably disclose the attorney's mental impressions, conclusions, opinions, and legal theories, and, therefore, must be protected. > *Id.* at 509-10, 67 S.Ct. at 393. The decision also recognized, however, that, upon a showing of substantial need, the materials may be discoverable. > *Id.* at 511-12, 67 S.Ct. at 394. The substantial need requirement applies only to tangible work product and does not apply to require disclosure of intangible work product.

Aitchison at 552.

11. The court in *Aitchison* upheld objections to several 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. In doing so, it stated as follows:

As to written or recorded statements, we have no difficulty in understanding how the above interrogatories seek information that would, to some degree, reveal Santa Fe's

attorney's mental impressions, conclusions, opinions, or legal theories. *The broad interrogatories seek a schematic of the attorney's investigative process. In general, this schematic aides 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.* The work product doctrine applies to protect the requested information.

Aitchison at 553 (emphasis added).

12. Similarly, AGP, Friskies and Wire Rope's request does not seek facts relevant to the case, but instead seeks to uncover the preparation process followed by MAWC's attorneys and the importance MAWC places on various aspects of the litigation. This is an impermissible attempt to discover the mental impressions, conclusions, opinions, and legal theories of MAWC's counsel and, therefore, is protected from discovery.

13. AGP, Friskies and Wire Rope attempt to attack this protection, in part, by stating that any protection that may be afforded is waived by disclosure to third parties. This concept of waiver is not applicable to work product situations. These are not materials that are protected as a result of the attorney-client privilege and do not depend upon the confidentiality of that attorney-client relationship. Work product primarily involves situations that have developed in the first instance from contact with a third party. For example, the request in the *Aitchison* case, which was found to be improper, asked whether statements or reports had been obtained from *third parties*. This was information that originated with a third party. However, that fact did not undermine or weaken the work product protections.

14. Additionally, AGP, Friskies and Wire Rope make a statement earlier in their motion that "it is though MAWC noticed a deposition of a Staff or Public Counsel witness, then sought to exclude the other parties from that process." (AGP Motion2, para 12). This is absolutely not the case. Under the Commission's rules, data requests are a separate and distinct process from

depositions, interrogatories and other forms of discovery available in civil actions in the circuit court. If MAWC chooses to pursue data requests, it necessarily has chosen to not pursue a deposition at that point in time and will not be subject to the rules governing the deposition procedures. Data requests are “an informal written request for documents or information.” “Answers to data requests need not be under oath or be in any particular format.” (4 CSR 240-2.090(2)). The Commission has distinguished this process from those relating to depositions.

15. The data requests to be propounded by MAWC include both intangible and tangible work product and are thus protected from discovery.

GOOD FAITH

16. MAWC disagrees with AGP, Friskies and Wire Rope’s assertion that they made “a good faith attempt to resolve the dispute short of this motion.” (AGP Motion2, para. 6) In response to its objections, MAWC received correspondence from AGP, Friskies and Wire Rope’s counsel at 3:38 p.m. on January 5, 2000 (AGP Motion2, Exh. E). This correspondence demanded compliance with AGP, Friskies and Wire Rope’s requests numbers 16 and 17 by close of business on January 6, 2000. This was four days before a response to these data requests was even due per Commission Rule 4 CSR 240-2.090 and in spite of the fact that MAWC had previously provided responses to AGP, Friskies and Wire Rope’s data request 16. It is not surprising that no response was received by AGP, Friskies and Wire Rope’s counsel during the unilaterally imposed response time.

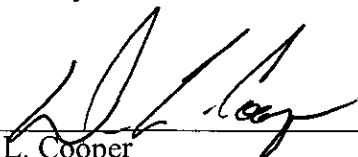
REQUEST FOR EXPEDITED TREATMENT

17. AGP, Friskies and Wire Rope ask the Commission to rule on their motion to compel on “an expedited basis.” MAWC asks only that it be given ten (10) days, as provided by regulation, to respond to the motion, MAWC does not object to an expedited Commission decision.

WHEREFORE, MAWC respectfully requests that the Commission issue its order: 1) denying

the Motion to Compel filed by AGP, Friskies and Wire Rope; and, 2) granting such further relief as the Commission should find to be reasonable and just.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI-AMERICAN
WATER COMPANY

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or hand-delivered on this 20th day of January, 2000, to the following:

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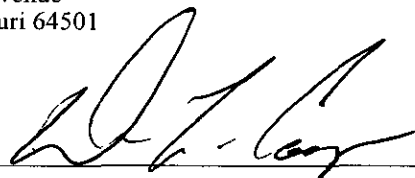
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City Hall - Room 307
1100 Frederick Avenue
St. Joseph, Missouri 64501



At a session of the Public Service
Commission held at its office
in Jefferson City on the 30th
day of June, 1989.

)
) Case No. TO-89-56
)
)

On June 2, 1989, MCI Telecommunications Corporation (MCI) filed a motion requesting the Commission order Commission Staff to answer a data request (DR). The DR asked that Staff provide to MCI "copies of all discovery requests directed from Staff to SWBT (Southwestern Bell Telephone Company) in connection with this proceeding." The DR was made on May 1, 1989. Staff filed a response to the motion, as did Southwestern Bell Telephone Company (SWB).

4 CSR 240-2.090(2) authorizes the use of DRs as a means of discovery in Commission proceedings. Parties are required to respond to DRs within 20 days after receipt unless otherwise agreed by the parties. If a party objects to a DR or determines it will be unable to answer a DR within the 20 days, the party shall serve, in writing, within 10 days after receipt of the DR, the objections or the reasons for the inability to answer.

MCI states that Staff informed MCI by letter dated May 18, 1989, of its objection to the DR. Staff admits it did not state its objection within the 10 days required. Staff states it failed to comply with the requirements of 4 CSR 240-2.090(2) because it was waiting for Southwestern Bell Telephone Company (SWB) to indicate whether SWB objected to the release of Staff DRs directed to SWB.

The controversy over this DR raises two issues which the Commission has determined it must confront directly to avoid similar controversies throughout these

proceedings. The first issue is whether Staff's DRs propounded to utilities regulated by the Commission are discoverable by other parties. The second issue is whether strict compliance with 4 CSR 240-2.090 will be required.

Staff has a unique position in proceedings before the Commission since it has auditing authority over all of a company's records and has a continuing relationship with a company. Staff propounds DRs to companies based upon information it has obtained under its authority, not just from a particular case. Since Staff is not constrained by Commission Protective Orders, Staff's DRs may contain information which is considered confidential and not discoverable by other parties and information gathered outside the scope of particular proceedings.

The Commission has determined that other parties cannot obtain Staff DRs. Each party must determine its own interests and engage in its own discovery. Because of the specific statutory authority granted Staff, it is inappropriate to allow other parties access to DRs propounded by Staff.

The Commission has learned from discovery disputes in other cases that the requirements of 4 CSR 240-2.090(2) regarding the time for answering or objecting to DRs are not strictly followed. Staff's failure to follow the notice of objection requirements follows the pattern in other disputes. Parties do not insist upon compliance and do not comply themselves until the laxity conflicts with their own interests.

The Commission believes that strict adherence to the provisions of 4 CSR 240-2.090(2) is necessary to ensure discovery proceeds on a reasonable basis. The notice process for objections and inability to answer are particularly necessary. Staff should be especially cognizant of the 10 day notice provision since the DR rule was proposed by Staff.

The Commission has determined that parties should adhere to the requirements of 4 CSR 240-2.090(2). Those provisions provide for agreements to extend the

20 days for answering, and notice of objections and inability to answer. The provisions are reasonable and should be followed.

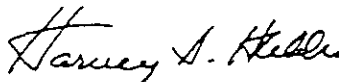
In the motion before the Commission, though, the motion to compel seeks information that the Commission has determined is not discoverable. MCI's motion will therefore be denied.

It is, therefore,

ORDERED: 1. That the motion to compel filed by MCI Telecommunications Corporation is hereby denied.

ORDERED: 2. That this order shall become effective on the date hereof.

BY THE COMMISSION



Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Mueller,
Fischer and Rauch, CC., Concur.
Hendren, C., Not Participating.