

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

In the Matter of the General Rate Increase)
for Water and Sewer Service Provided by)
Missouri-American Water Company.)

Case No. WR-2003-0500

**STAFF'S RESPONSE TO
MAWC'S RESPONSE TO STAFF'S MEMORANDUM**

COMES NOW the Staff in response to Missouri American Water Company's (MAWC's) Response to Staff's Memorandum Concerning the Affiliate Transactions Rule for Water Utilities (MAWC Response) and respectfully requests that the Commission promptly open a separate case for promulgation of an affiliate transactions rule applicable to Missouri water utility companies. In support of that recommendation, Staff states as follows.

1. It is apparent from MAWC's Response to Staff's Memorandum that there is disagreement as to the status of this case. Based on the Commission's Report and Order in Case No. WR-2003-0500, Staff considers this case to be a rulemaking case, which evolved from the rate case. MAWC now states that it is concerned that the rulemaking discussions were "a negotiation entered into by the parties as a result of a rate case settlement," which suggests the discussions are a continuation of the rate case (see MAWC Response at paragraph 4, p. 2-3). The rate case has been settled by Stipulation and Agreement. The Commission ordered the parties to engage in a rulemaking process, and Staff, therefore, does not consider its discussions with MAWC about promulgation of a rule to be "settlement negotiations" in a contested case.

2. On page 9 of the Commission's Report and Order approving the Stipulation and Agreement in this case, the Commission ordered the Company, the OPC and the Staff to "cooperate to obtain promulgation of a Commission rule on affiliate transactions applicable to

Company and its affiliates by April 16, 2005.”¹ Staff reads this order as directing the parties to engage in a rulemaking discussions.

3. Chapter 536 specifically states that a rule cannot be an order in a contested case:

“Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of an existing rule, but does not include: . . . (d) A determination, decision, or order in a contested case.

Section 536.010.

4. A rule, by statutory definition, cannot be a final decision in a contested case.

Section 536.010(4). The process requirements for promulgating rules, as set forth in Chapter 536, are notice and comment procedures. Section 536.021.2.

5. The evidentiary rule concerning settlement negotiations applies in “a litigation context” and not in a rulemaking. “As a general rule, because the law favors settlements, evidence about settlement negotiations is to be excluded at trial because such efforts should be encouraged and a party making an offer of settlement should not be penalized by revealing the offer to the jury if the negotiations fail to materialize. *Owen v. Owen*, 642 S.W.2d 410, 414 (Mo.App.1982). There is no “trial” in a rulemaking case. There is no jury.

6. Confusion about the status of the case under which a water affiliate transactions rule is promulgated and whether the necessary procedural process has been followed may undermine rulemaking efforts and encourage a court challenge to the rulemaking.

7. To avoid potential challenges to the Commission’s rule, Staff recommends that the Commission open a case that is indisputably a rulemaking case. Then, there can be no question as to the purpose of the case, the procedures to be followed and that any order issued

comes from a rulemaking proceeding. There will also be no evidentiary issue concerning whether discussions are “settlement negotiations.”

8. The Staff and MAWC have been ordered to file their proposed affiliate transaction rules, and the OPC may file its proposed rule, no later than September 16, 2005. As a result, a rulemaking case needs to be opened as soon as possible.

WHEREFORE, the Staff respectfully recommends that the Commission promptly open a rulemaking case for promulgation of an affiliate transactions rule for water utilities, to avoid any concerns that any Commission rulemaking order was the result of a contested case or that the proper procedures have not been followed.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile or electronically mailed to all counsel of record this 6th day of September 2005.

/s/ Lera L. Shemwell