BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company Tariff Sheets Designed to Implement General Rate Increases for Water and Sewer Service provided to Customers in the Missouri Service Area of the Company	)	WR-2000-281 et al.

POST-HEARING REPLY BRIEF
OF
AG PROCESSING INC. A COOPERATIVE, FRISKIES PETCARE, A DIVISION OF NESTLE USA and WIRE ROPE CORPORATION OF AMERICA, INC.

AND

THE CITY OF RIVERSIDE, MISSOURI

FINNEGAN, CONRAD & PETERSON, L.C.

Jeremiah D. Finnegan
Stuart W. Conrad

3100 Broadway
1209 Penntower Office Center
Kansas City, Missouri 64111
(816) 753-1122
Fax (816) 756-0373
E-Mail: fcp@fcplaw.com

August 2, 2000

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COME NOW Intervenors Ag Processing Inc. A Cooperative, Wire Rope Corporation of America, Inc.; Friskies Petcare Division of Nestle' USA ("St. Joseph Industrials"); and the City of Riverside, Missouri ("Riverside") (collectively referred to as "Indicated Intervenors") and submit their Joint Reply Brief in this matter.

I. THE ISSUE OF PRUDENCE AND VALUATION.

A. Missouri-American's Initial Brief and Arguments.

1. Collusion -- A Reckless Charge Unproven.

Zealous advocacy of a client's position is the sworn duty of an attorney. There is, however, a limit. MAWC's attempts have overstepped the permissible line and we take strong exception to the charge of "collusion" that appears at page 3 of MAWC's Initial Brief and pause but a moment to compare this charge to the transcript that is cited in support of the charge.

MAWC Brief asserts:	Transcript states:
"It is also interesting that these two parties admitted collusion in their testimony preparation. Counsel for St. Joseph Industrial Water Users acknowledged receiving testimony from OPC in advance of its simultaneous filing with their own. (Tr. 1139."	"MR. CONRAD: Yeah. Well, it was attached to -- as it turns out, the report that he is referring to was attached as an exhibit to Mr. Biddy's -- I believe his surrebuttal, which was filed essentially simultaneously, and in advance of that there had been -- we had obtained some material. ***Dr. [Morris] had, I think, been here at the Commission and had tried to obtain a copy of this after we found out that there was something apparently that was being referred to that we had not been provided with.***" Tr. 1139, ll. 14-23 (emphasis added).

Examination of the transcript at that point will show that the objection being discussed was to the reference in Mr. Young's **rebuttal** testimony to the 1993 Report, which had not been provided to Dr. Morris, but which, after MAWC's failure to provide the report pursuant to discovery was noted by Dr. Morris. Dr. Morris then undertook to locate the Report at the Commission, apparently through Mr. Merciel. Further, if this reference shows collusion, it fails to explain the respective witnesses' **direct** testimony which (as noted in our Initial Brief) reached results that were close to each other, but through entirely different

engineering approaches. Finally, if these two witnesses "colluded" as alleged by MAWC, they did an exceptionally poor job of synchronizing their testimony with the information gained, since MAWC itself seizes on the differences in their approaches in order to attempt to impeach one through the other.[1/]

Sadly, MAWC's brief contains numerous similar **ad hominem** statements that find no support in the transcript. Some additional examples will be noted **passim** in later portions of this brief. An **ad hominem**, shorthand for the latin phrase: **argumentum ad hominem**, is well recognized as a hallmark of fallacious reasoning in that it attempts to avoid the logic of the opposing argument by attacking the person (or personality) of the party making the opposing argument.[2/] It is nonetheless worth noting the old lawyers' adage that when the facts are against you, argue the law; when the law is against you argue the facts; when both law and facts are against you "pound the table and yell." MAWC's use of fallacious **ad hominem** arguments demonstrates not only the weakness of its logic, but the weakness of its case.

[1/]MAWC counsel might do well to review the Missouri Approved Instructions regarding defamation before engaging in further false assertions.

[2/]A working definition of the **ad hominem** argument that this writer learned in undergraduate debate was "an irrelevant, personal, derogatory attack."

2. Confusion Certainly Exists, But Neither OPC Nor St. Joseph Industrials Gave It Birth.

MAWC's prime argument appears to be that intervenors and OPC have injected "confusion" into what would otherwise have been as clear as the water in St. Joseph.

Right. If you believe that, we know of a bridge that we'd like to sell you.

Confusion did reign as Mr. Young sought to explain and tie together his various estimates, "scope" changes, and explain what was included in this estimate that was not included in that estimate, all without a net and making recourse only to his lump sum estimates. From those, he was able to discern "that's in there," and "that's not in there."[3/] Apparently Mr. Young is the only one who can tell whether "something" is "in there" or "not in there" with respect to his lump sum estimates. Is it any wonder that other engineers questioned whether Mr. Young's work

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[3/]Examples from Mr. Young abound in the record:

"I'm not sure that that was included **in there**." (Tr. 1188, ll. 3-4). "Q. Okay. There was an additional laboratory included in there, too, wasn't there? A. That's correct. There was a laboratory and some support facilities, office-type facilities **in there** as well, yes." (Tr. 1215, ll. 14-18). ". . . we had a 15 percent contingency **in there**, and then the 10 percent is the addition which results in the 25 percent total." (Tr. 1227, ll. 11-13). "You mean -- by "additional items," do you mean the non-construction costs associated with the project? Q. Correct. You label those as engineering services. Correct? A. No, **they [sic] are a lot of different ones *in there***." (Tr. 1233, ll. 17-23). "Yes. I think if you go through the Gannett Fleming '93 knee [sic] estimate and pull out the items associated with each one of those tasks and add them up, you'll find that the foundations are **not *in there***. (Tr. 1295, ll. 21-24). (Emphasis in all quotes added).

rose to the level of rigor and analysis that professional engineering work should?

Obviously, neither Dr. Morris, nor apparently Mr. Biddy, had seen MAWC's work product before this case. Trying to peel apart the layers of this onion, and finding nothing at the center, would certainly lead to some questions being asked. MAWC's support for its twisted string of ballooning estimates and its flawed estimating process is the quintessential hollow man: an outward skin of apparent rectitude with no substance at its core. Do you seek integrity? Do you seek clarity? Do you seek analysis? To borrow from Mr. Young: It is "***not in there***."

The source of confusion, if confusion there be, is MAWC, not the two professional engineers who tried to pick through the potsherds and detritus of MAWC's decisional process in a vain search for rationality, rigor and engineering discipline. MAWC chose the manner in which its case was put together and it was MAWC that had complete control of all the various and sundry estimates that surfaced and submerged in this case. However, MAWC would have the Commission be satisfied with "lump sum" estimates that lack detail and display no more than "back of the envelope" numbers, as a basis of comparison between alternatives that are costly to the captive ratepayers. Where is the level of detail that can be scrutinized? Where, indeed, is the level of detail and analysis that one would reasonably expect to underlie an investment of $75 million and a write-off of over $3 million (on the old plant). What, indeed, would the Commission

scrutinize in order to fulfill its charge and the request of the numerous public witnesses that testified in this matter?

If there was confusion regarding the estimates, that confusion must be held against MAWC. At any time, MAWC could have simply brought forward the detailed work supporting the estimate that it wanted to stand behind, then submit to scrutiny on the detail and the engineering work underlying the various components of that estimate. Now it appears that MAWC wants to stand behind a $63.3 million number, but **the only "detail" that underlies that number is a series of lump-sum numbers which MAWC now argues "were never intended to represent the specific elements of either project or construction costs."** (MAWC Initial Brief, p. 27). Where, then, are (to use MAWC's phrase) the "specific elements of either project or construction costs" that total to the $63.3 million figure on which MAWC now argues that it based its comparison?

The answer is that those "specific elements of either project or construction costs" that total to that number **don't exist**. They don't exist in the 1995-96 comparison that MAWC asserts was controlling, which Mr. Merciel "compared," (Staff Initial Brief, p. 22) and, in Mr. Young's own words, "it gets tricky"[4/] when you try to find them elsewhere.

MAWC asserts that its study is "sophisticated." MAWC Initial Brief, p. 8. But the estimating process, though requiring a rigorous discipline, isn't rocket science. There is

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[4/]Tr. 1332, l. 15.

nothing inherently "sophisticated" about comparing two alternatives to identify the one that is the best bargain for the ratepayers. On a much smaller and less grand scale, each of us does this each time we shop and select between alternative products to supply our needs or desires.

In this case, however, we are presented with a regulated **public** utility that is contemplating developing an alternative source of supply. Here is a **public** utility that should reasonably know and expect that a proposed investment of $75 million will attract some "attention." Here is a **public** utility that should reasonably anticipate the rate impact of a proposed investment of $75 million. Yet this same public utility cannot seem to come up with the "specific elements of either project or construction costs" that underlay the estimates on which it claims to have based its decision regarding alternatives, and is comfortable with an explanation that "here is where it gets a little tricky." Tr. 1332, l. 15.

3. Confusion Could be Resolved by Producing the Detailed Component Estimates.

A public utility should be able to demonstrate that its choices are solid choices, well documented, provable and repeatable. **And, under Missouri law, a public utility -- any public utility -- has the burden of doing just that!** It is not the burden of intervenors, nor the Public Counsel, to prove that the public utility's practices and decisions were imprudent; it is the public utility's burden to prove that they are prudent.

Given that, and if such "specific elements of either project or construction costs" existed and totaled to the $63.3 million figure to which MAWC now pins its case, would it not have been easy to come forward with such detail? Would that not have been the way to address the alleged "confusion?" MAWC states that one of its problems with this case is "how to concentrate on what is relevant without leaving accusations unanswered." (MAWC Initial Brief, p. 14). Would not the simple course have been to just come forward with the "specific elements of either project or construction costs" that totaled to the estimate that MAWC supposedly used to make its decision? MAWC's failure to do so speaks far more than all its arguments about confusion could ever voice.

There is yet another reason why MAWC should be held to this burden of proof. Without those "specific elements of either project or construction costs," there is nothing that can be scrutinized to ascertain the validity of those estimates. And that, of course, **is the very point**. Exposing the specific elements of estimates to scrutiny results in an intellectual rigor about the production of those estimates that, in the case of a public utility, is not only desirable, but necessary. **It precludes the ability of the utility to hide inflated estimates within assertions of scope changes, contingency allowances and "water company expenses."** In this case, however, MAWC has produced reams of paper in an attempt to **create** confusion therein to hide the lack of its intellectual rigor and conceal the lack

of integrity in its internal processes and, by the way, its biased and inflated estimates.

Just as the young boy who noted that the emperor had no clothes was not wrong in his observation, neither are MAWC's critics wrong in noting that the reams of produced paper contain no substance and are no more than chaff orchestrated to confuse and hide the inflated estimates. Mr. Biddy testified that he had "looked in vain for a cost estimate of $63,000,000" (Tr. 1696, l. 6) and no MAWC witness demonstrated that such an estimate existed. Certainly the young boy's observation created "confusion" and consternation for the naked emperor and his embarrassed minions; this entire exercise has substantiated that Mr. Young's valiant efforts on the back end to rehabilitate MAWC's flawed decision-making process cannot provide the obviously non-existent front end documentation to substantiate, and allow independent evaluation and validation of that decision.

4. The Public Policy Behind Requiring Detailed Estimates.

There are at least three reasons why such reviewable detailed estimates and analysis should be -- must be -- required before authorizing over $70 million of rate base additions and their associated rate impact:

First, enforcing a requirement that a public utility must clearly document its decisions with reviewable detail enforces a salutary requirement of rigor in the utility's internal decisional processes. Significant economic decisions that

affect the rates paid by ratepayers must be substantiated and documented by verifiable and repeatable analysis supporting the decision. Reliance on "back of the envelope" analyses, lump sum estimates and examinations which lead only to an intricate and convoluted series of after-the-fact rationalizations and justifications that show not a rational and rigorous internal decision-making process, but rather reveal a flawed internal process manifesting arrogant lack of concern for its public responsibility and its ratepayers, coupled with a smoldering contempt for the regulatory process itself.

Second, such a requirement preserves integrity in the overall regulatory process. Not only should the public utility be held to a standard of integrity in its decisional processes, the regulator must be provided the documented analysis that permits regulatory scrutiny and review and undergirds the integrity of the regulatory process itself. Decisions that are correct are easily demonstrated to be correct and do not depend on "trickiness" or confusion to sustain them. The light of a correct decision need not be hidden under a bushel of meaningless paper and internally inconsistent scope changes, excessive contingency allowances and lump sum allowances for "public relations," rather it should be revealed where its underpinnings and assumptions may be scrutinized, validated and tested to confirm their accuracy and rectitude.

Third, such a requirement preserves public confidence in the overall regulatory process and in those who hold public

positions of trust within that process. Decisions that are permitted to "squeeze by" on matters that the public will perceive as technicalities, while the substance of the utility decision evades review, erode and destroy public confidence and enhance public cynicism. Similarly, regulatory failures to sift, identify and evaluate evidence, not on its volume, but rather on its substantive content, damage not only the ratepayers, who are charged with paying for the utility's decisional errors, but also the regulators themselves, who pay with their honor for their breach of public trust.

5. The "Intrinsic Value" of Groundwater Does Not Bridge the Prudence Gap.

MAWC seeks to bridge its flawed process and its lack of professional rigor and replicable analysis, by appealing to the "intrinsic value" of a groundwater supply. Reminiscent of the tearful plea of a prior MAWC manager to the Commission ("Please rescue us from the vagaries of the river"), such intangibles, vague and somewhat unproven though they may be, might well tip decisional scales in close comparisons. But those intangibles are simply insufficient to bridge a $32 million gap -- a gap that (absent clear action by this Commission) must be bridged by St. Joseph ratepayers' money.

Even cursory review of the public hearing transcript from St. Joseph shows that an attempt to justify an additional $32 million expenditure by appealing to "intangible benefits" would not be favorably received by the customers in St. Joseph.

In fact, they presently see no "intangible benefits" at all. Their elected representatives oppose this expenditure and question the decision. (Entire St. Joseph Public Hearing Transcript). The old plant provided safe and adequate water service -- from the river -- for over 100 years. As Public Witness Barclay testified:

> But I must confess that I was not impressed by the fact that water was brought to the people of St. Joseph in 1870 something. What I was impressed with is how the old facility had been maintained, retrofitted, expanded, improved upon, that there was much technical equipment, that there was good maintenance, excellent quality control and on and on. In other words, that facility was functioning properly.
>
> Last point. In the 50 years that Wire Rope Corporation has been in St. Joseph, there have been two major floods that impacted the water company. First was in 1952. At that time a channel was dredged by the Corps of Engineers to prevent the water company from being separated from their source, the Missouri River, and being left high and dry. St. Joseph at that time made the sacrifice of forfeiting their bridge across the Missouri River to Rosecrans Field. The bridge was never replaced as was promised.
>
> The second flood was in 1993. The water company was flooded and the water service was interrupted for let us say two weeks.[5/] **What I have a problem with is how can we possibly have 50 years of good service in an adequate facility and suddenly to prevent two weeks of interruption spend $70 million and increase the rates on the citizens of this community and the industries here by over 50 percent.** Thank you.
>
> JUDGE THOMPSON: Thank you, sir.
>
> (Applause).

St. Joseph Public Hearing Transcript, pp. 59-61 (lines indicated, emphasis and footnote added). Clearly such intangible benefits don't make up for a $32 million gap.

Dr. Morris made reference to the "ground water under the direct influence of surface water" controversy not to show

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[5/]Mr. Barclay was being kind; the water service was interrupted for only four days.

that such water supplies are bad, but that there are simply a **different set of problems** that must be faced with a plant that is supplied from alluvial wells that are 90 percent recharged from the same river MAWC sought to escape. There is a reason why MAWC did not go to a true groundwater source, and that reason is evidenced by the saga of Warrensburg. As virtually anyone past pubescence who has lived in Missouri for any significant period (or certainly anyone who has sought to drill their own water well) knows, groundwater sources in the central and northern part of the state are brackish, high in hardness and mineral content and may require extensive treatment measures to make the water both safe and palatable. Warrensburg's problems are typical. Yet, one can bathe in or drink directly from many of the spring water ground sources in the southern part of Missouri, e.g., Bennett Spring and Johnson Shut-Ins. Palatability and hardness are rarely issues. This results from Missouri's geologic history as well as the resulting topology and is unlikely to be changed by Commission orders.

Moreover, as Dr. Morris testified, the quality of the water from MAWC's new alluvial wells will change. Tr. 1817-18. Indeed, some change has already occurred (Tr. 1816) and is touted by MAWC as an apparent resolution of the hardness problem that it identifies as the source of the complaints about water taste and film in St. Joseph. Tr. 1817-18.

As we stated in our Initial Brief, Dr. Morris did not make this statement to suggest that ground water under the direct

influence of surface water was evil, nor that the change in quality could not be addressed, but rather to make the point that, because of its proximity to the river, its intentional [by design] recharging from the river, the water source will come in time to resemble water drawn from the river as before, with the possible elimination of one step in the sedimentation or clarification process -- an elimination that MAWC in its brief acknowledges. (MAWC Initial Brief, p. 16). Certainly whatever intangible benefits there are in moving from the river, then gradually moving back to it over a period of years, cannot justify a $32 million gap nor bridge MAWC's inflated estimates. MAWC attacks Dr. Morris' characterization of the water source,[6/] without apparently realizing that the very change in quality that MAWC argued will solve the palatability and hardness problem in St. Joseph simply confirms Dr. Morris' evaluation of the character of the water supply.

As before, this Commission need not make a "determination" as to the characterization of the water supply. It is what it is, and the geology of the alluvial wells is what it is. Over time, the water quality will come more and more to resemble that of the river that recharges the alluvial wells. The point is that this short-run increase in hardness and brackishness, then

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[6/]Without proof, we note in passing, since MAWC's counsel acknowledged that the Black and Veatch study identifying the positioning of the wells was not available at the time of hearing and would not be available for some time. Tr. 1908, ll. 15-18. Let us trust that Black and Veatch will not use Mr. Young's approach that the wells are "***about*** 200 feet away."

followed gradually by a transition back to the essential qualities of Missouri River water, is not believed by the citizens of St. Joseph to be worth the additional $32 million and the resultant revenue responsibility.

6. MAWC's "This is a cash flow document" Argument.

MAWC spends a portion of its brief on the supposed errors of the two reviewing engineers with respect to MAWC's supposed Cash Flow documentation. These arguments appear as two points. First, MAWC argues the document isn't a construction estimate and cannot be tied to particular aspects of the project. Second, MAWC argued that Dr. Morris derived his estimates from the cash flow document. We will address the second point first.

At the prehearing conference, to save time, the parties agreed that they would provide copies of their respective witnesses' workpapers to other parties along with the corresponding testimony. Pursuant to that agreement, we provided MAWC with a copy of what was marked as Exhibit 91. The Regulatory Law Judge will recall that we had no objection to the exhibit, save that it be properly identified in the record. Tr. 1425. That was not sufficient for MAWC.

During cross-examination of Dr. Morris, MAWC counsel strove valiantly to make of this sheet more than it was and more than Dr. Morris repeatedly said it was. Having apparently failed in its effort to get Dr. Morris to follow MAWC's "script," MAWC

now simply invents testimony for Dr. Morris. A comparison follows:

MAWC Brief asserts:	Transcript states:
"He showed us his calculations on his work papers in Exhibit 91." (MAWC Initial Brief, p. 12)	[Dr. Morris]: Again, this is just a work sheet. I wasn't relying on the numbers on that sheet. I simply found a comparison or similarity between those numbers presented and the ones that I came up with. (Tr. 1856).
"Where he found those numbers was disclosed in his workpapers." (MAWC Initial Brief, p. 32)	[Dr. Morris]: But again you're missing the point. This is a work sheet. I was just writing the numbers on that sheet. It doesn't mean that's where they came from. (Tr. 1859).
"... and admitting his misunderstanding (Tr. 1856) [apparently that the sheet was a cash flow sheet] . . . ." MAWC Initial Brief, p. 13.	[transcript page 1856 begins] would work, correct? A. Yes. Q. All right. Now, on page 13 and 14, the same section, you say that MAWC estimated a 1998 expenditure of 18 million for replacement/renovation of existing filters, superpulsators and the presedimentation clarifier. Now, that matches this statement exactly also. That's coincidence? A. Like I say, I arrived at the 30.1, and those two numbers totaled up to my estimate, construction cost estimate for those items. So I selectively picked those as representing at least my estimate of the cost. Again, this is just a work sheet. I wasn't relying on the numbers on that sheet. I simply found a comparison or similarity between those numbers presented and the ones that I came up with. Q. Well, how did you tie it exactly to the date, then? You said, MAWC estimated -- A. Because that's what was shown in the -- Q. Let me finish my question, sir. The question was, with respect to your statement that MAWC estimated a 1998 expenditure of 18 mil-

lion. That tells me that had to have come off this sheet. Nowhere else could you have determined that it was a [transcript page 1856 ends].

Once again, MAWC's zeal overcomes both common sense and the plain language of the record. Apparently it is good enough for MAWC counsel that he **wanted** the witness to accept his assertions and characterizations; it does not matter that the witness did not testify as MAWC counsel would have wished, in fact he testified to exactly the opposite. Not only does this exchange **not** demonstrate or substantiate the assertions made in MAWC's brief, they simply confirm that Dr. Morris did what he said he did, namely to attempt to find ***some substantiation, some relationship,*** between MAWC's lump sum total estimate, his own **independent** estimate, and the components of MAWC's estimate **as they were provided to Dr. Morris by MAWC.** Despite the repeated attempts by counsel to mischaracterize his testimony, Dr. Morris made very clear that he had derived his own estimate, then attempted to correlate **his** component estimates to what MAWC had provided **in response to our data requests!** MAWC's argument amounts to a contention that because an engineer doodles on a restaurant napkin, he has made a design for a new restaurant. Dr. Morris' testimony comprehensively explained the method he had used to derive his estimate and stated his professional disgust at not finding anything but lump sum estimates in the materials MAWC provided in response to our data requests.

MAWC's second point appears to be that its "cash flow numbers were never intended to represent the specific elements of either project or construction costs." MAWC Initial Brief, p. 27. Although, as usual, not specified, we **presume** MAWC's reference to "cash flow numbers" relates to Exhibit 91, or the multi-page document from which that was drawn. Let's also assume that the cash flow numbers **do** represent **something** that is meaningful, namely the **total** of MAWC's estimate that it now states it used to compare the new plant to the cost of renovating the old plant.

The simple fact is that ***nowhere in any of the packet that MAWC now relies upon will one find anything other than the unexplained lump sums for gross parts of project that are shown on the "cash flow sheets."*** We have shown in our Initial Brief how particular parts of the project were inflated in cost so as to distort and bias the comparison. Dr. Morris has shown that the lump sum estimates that MAWC relied upon were overstated and inflated. MAWC argues that he estimated the wrong things, but MAWC continues to hide behind its lump sum estimates to avoid analysis of its own numbers. Moreover, since MAWC now contends that these numbers have **no** meaning with respect to "the specific elements of either project or construction costs," (supra), we are left logically with MAWC's apparent concession that there simply has been no delineation, analysis, breakdown, or whatever other word you choose to employ, that will indicate any substantiation or documentation whatsoever as to how MAWC's $63.3

million estimate was developed, what underlies it, what is included or excluded in its lump sum numbers, or on what assumptions it is based. That, of course, is the basic point that we have made -- and that Dr. Morris made -- all along: MAWC's estimates are unsupported, undocumented and unsubstantiated. MAWC simply has failed to carry its **burden of proof!** MAWC stated that Dr. Morris' "association with the University at Rolla made it painful for those in the hearing room who heard his testimony." MAWC Initial Brief, p. 31. We agree. The discomfiture at MAWC's counsel table caused by Dr. Morris' testimony was painfully obvious.

7. What Makes Up an Estimate.

Another area of disagreement that MAWC appears to have with Dr. Morris concerns how engineering cost estimates are prepared. In an attempt to argue that Dr. Morris' work could be off by 45% since it was a "preliminary cost estimate," MAWC appeals to the text Water Treatment Plant Design by the AWWA. "[O]ne of many" texts on the subject, testified Dr. Morris. Tr. 1870, l. 19. But MAWC overlooks that Dr. Morris wasn't going to be forced into its mold or, to put a finer point on it, into the book's author's definitions:

> Q. What level would you say your estimates are here of those four categories of determinations? What level would you describe yours as being? Do they rise to preliminary design?
>
> A. I would have to look at his definitions of what he means by each of those levels. I had earlier defined my definition. I

could equally write the book the same as this person did. I wouldn't write it the way he did. I would have two levels, basically what I would call a preliminary cost estimate and then one after you developed plans and specs. That what I did when I was in practice.

Q. So you disagree with that table or you just would state it differently?

A. I think it's another way to look at it. There's legitimate differences of opinion.

. . . .

A. Again, I'd have to look at what he -- how he defines preliminary. I used my terms and I defined them. That's what I'd like to stick to.

. . . .

Q. Well, this says your estimate could float 45 percent?

A. I don't think that's what he's saying. He's just saying on the average, that's his opinion of what one might anticipate.

Q. On the average, that's his opinion of what one might anticipate at the preliminary design stage, there's a 45 percent swing?

A. However he defines the preliminary stage.

Tr. 1871-73. Perhaps MAWC has overlooked that Dr. Morris also writes engineering textbooks. His estimates allowed a specific amount for contingencies ($2 million) rather than an add-on percentage. As he said, there are legitimate differences of opinion. However, those escape MAWC.

8. The Mystery of the 1991 Estimate and DNR Approval of the Renovation.

MAWC continues to miss the point in its brief that its 1991 project (which Mr. Young wants to characterize as the "filter project" -- it was somewhat more than that) had been approved by DNR and was progressing at the time of the flood. Public Counsel's Initial Brief noted that this information was not provided[7/] to the Commission at the time of the certificate case. Those things don't matter, says Mr. Young, because the "scope" changed. And, if the "scope" didn't change, then this was a "construction cost estimate" and not a "total project cost estimate." Then if both those are reconciled, the estimate, of course, failed to include AFUDC. Shifting sands that would make the Sahara proud. Even the 1993 Gannett Flemming estimate, argued Mr. Young, though the only estimate that MAWC provided in a sufficient level of detail to allow scrutiny of its components, should nonetheless be disregarded as "incomplete" because the "scope" of the evanescent project had changed yet again.

Regardless, and without at the time having access to the 1993 Gannett Flemming study (Tr. 1866, ll. 2-3, Tr. 1867, ll. 2-8), Dr. Morris supplied the "missing" components, namely a reconstruction of the intake structure and associated pumping, allowed for additional land acquisition if needed, provided for additional flood protection the requisite height above the flood of record, and even allowed a contingency for unexpected matters,

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[7/]Unlike MAWC's brief authors, we will avoid use of the pejorative term "concealed" and substitute a more neutral verb.

still for less than $40 million. As Dr. Morris testified, these improvements

> would have provided MAWC and its St. Joseph ratepayers facilities with sufficient operational flexibility to allow maintenance, and a treatment process that is more easily operated, monitored and controlled to provide optimum treatment of the finished water. As a side benefit, these improvements would also have freed up space at the plant for potential future needs such as treatment residual dewatering facilities. The total cost in the 1991 Report was estimated to be $26.6 million. I then applied a reasonable inflation rate based on data from Engineering News Record and my experience with construction cost, for the period of 1991-1996 of 13.2% to develop the $30.1 million for renovation of the treatment plant.

Morris **Direct**, Exhibit 65, p. 15. Dr. Morris did not provide for ozone in his estimate, simply because it is not now and might never be needed. Furthermore, there are already cheaper alternatives available to do the job of more expensive ozone treatment, he testified:

> [I excluded ozone b]ecause I don't think it's necessary and I don't think it's proper to include it since it's not know -- one, it's know we have to do it. Secondly, there are other alternatives that in my opinion are cheaper than ozone for producing disinfection.

Tr. 1864, ll. 11-15. Although disagreeing with the need, he estimated the cost of such an installation at the old plant at about $4 million. Tr. 1865, l. 2.

The mystery yet remains of what happened to this approved 1991 project. The DNR regulations were the same, the age of the plant was virtually the same. If MAWC wants now to

contend that the project it proposed for approval to DNR was incomplete or inadequate, so be it. But presumably an inadequate or incomplete plan would not have received DNR approval. Yet all that was in place and moving forward at the time of the flood. MAWC's explanations of this mystery surrounding the 1991 "filter" renovation plan remain missing. Unexplained, it hangs 'round MAWC's neck like the Ancient Mariner's albatross.[8/]

9. The AFUDC Ploy.

No one, save MAWC, seems to understands AFUDC. Dr. Morris doesn't understand it, argues MAWC (Initial Brief, p. 34) because he hypothesizes a construction staging essentially like that originally proposed by MAWC in the 1991 project and justified by the saving that would result in AFUDC. Dr. Morris wasn't offered as an accountant, but he is not a novice and obviously understood that timing of rate case filings would need to be coordinated to the renovation staging and schedule to minimize AFUDC charges. But by taking smaller bites, AFUDC could be minimized. Even Mr. Young confirmed that as part of MAWC's later-rejected staging plan. Tr. 1319. Certainly minimization of AFUDC would require planning and coordination; we hadn't thought MAWC incapable of such.

[8/]See, Rhyme of the Ancient Mariner, Samuel Taylor Coleridge.

B. Staff's Initial Brief.

As regards Staff's Initial Brief, only a few points need be made at this juncture.

First, Staff appears to be overly interested in engaging Dr. Morris on the characterization of the source of supply, and like MAWC misses the point of the entire issue. Staff's focus appears to be more on health and safety issues, but it has never been argued that there was anything inherently evil about ground water under the direct influence of surface water. It just presents a different set of treatment issues and changing conditions that, in time, come more to resemble issues surrounding surface water. Staff's own cross-examination of Dr. Morris confirmed that the water quality was changing and elicited information correlating the changes to those experienced in the river. As with MAWC, Staff also asserts the unproven, namely that the new wells are located more than 200 feet from the river. As noted in the similar response to MAWC's contentions, the very proof that MAWC offered in an attempt to mitigate the complaints regarding the taste and hardness of the new source of supply simply confirm Dr. Morris' observations about the supply. What causes the raw water to decline in hardness is the increased infiltration from the river source. The wells are roughly 50 feet deep. This is not groundwater in the classic sense, which is why the unique category was established for it. There are and will be treatment differences, but those differences do not justify a $32 million additional rate base premium to obtain.

Second, Staff now appears to suggest or imply that Mr. Merciel "compared the costs of rebuilding the old plant versus building a new one" (Staff Initial Brief, p. 22). We have little doubt that Mr. Merciel is capable of subtracting (and perhaps did subtract) the **lump sum of** $63.3 million from **the lump sum of** $63.7 million thereby not surprisingly obtaining a **lump sum** difference of $400,000. Setting aside MAWC's admission that this $63.3 million number was nothing more than the sum of a series of periodic cash flows that cannot be used to identify "specific elements of either project or construction costs," if that subtraction operation constitutes the comparison that is referred to in Staff's Initial Brief, so be it. There was no indication that Mr. Merciel's comparison extended beyond that, nor does his thirty-year track record at the Commission suggest that he performed a more detailed or aggressive "comparison."

Third, it appeared that Mr. Merciel has been so captivated by a water company that actually wanted to do more than was necessary that he failed to consider the rate base and revenue impacts resulting from the company's distorted choices. Like the fabled engineer, third in line to be guillotined, who sought to identify and repair the mechanical flaw in the guillotine that had saved the life of the prior two prisoners, Mr. Merciel may have lost a certain "perspective" on the problem and, dare we say, lost sight of his public responsibility. New and shiny technological toys have a certain appeal, and are clearly impres-

sive, but they may come at a cost that should not be foisted upon ratepayers.

II. CLASS COST OF SERVICE STUDIES.

A. Office of Public Counsel Initial Brief.

At Page 65 of its Initial Brief, OPC purports to have demonstrated a "primary flaw" in the long-accepted Base-Extra Capacity cost allocation method, claiming that it "skews" the allocation of costs toward customers that have volatile demand such as the residential and small commercial users whose usage is relatively weather sensitive. In response, OPC mounted a quixotic, two-pronged attack on this method, first by claiming to "prove" its absolute equivalency to the peak responsibility method, and second by meddling with the allocation factors to reflect its unsupported quantification of "economies of scale".

That the claimed equivalency simply does not exist, except under highly unrealistic assumptions, was amply demonstrated in the Surrebuttal Testimony of Witness Harwig (Ex. 62. pp. 13 - 15), and by Exhibits 68 - 70, discussed in the Ag Processing/City of Riverside Initial Brief at 56-57.

As to the economies of scale adjustment, OPC relied exclusively on analogies pertaining to pipe size, and to no other segments of MAWC's water supply, treatment or storage plant (Ex. 30, p. 6). Thus, the alleged economies of scale were neither evaluated nor quantified by OPC. These fatal deficiencies in OPC's cost studies, which are unchallenged in the record, com-

pletely undermine OPC's claim that its studies "best capture the true cost relationships between customer classes and should guide the Commission in adopting rates that better reflects [sic] the district specific class cost of service." (OPC Brief at 65-66) To the contrary, OPC would have the Commission impose unjustified real dollar burdens on high load factor customers on the basis of admittedly fictitious numbers. OPC's results should be given no weight by the Commission in the design of rates in this case. Rather, as recommended by Witness Harwig (Ex. 61, p. 8) the Commission should increase rates in all districts across the board, on a district-specific basis, to avoid the large and disproportionate increases that would be produced on a strict cost of service basis. This is precisely the recommendation made by the Company at Page 69 of its Initial Brief.

III. THE ESTOPPEL ISSUE -- THE COMMISSION HAS NOT DECIDED THE REASONABLENESS OF THE CONSTRUCTION OF THE NEW ST. JOSEPH TREATMENT PLANT; IS NOT ESTOPPED FROM CONSIDERING THE PRUDENCE OF CONSTRUCTION OF THE PLANT; AND ITS CONSIDERATION THEREOF IS NOT A COLLATERAL ATTACK ON THE COMMISSION'S REPORT AND ORDER IN WA-97-46.

On the eve of hearing, MAWC sought to strike both Mr. Biddy's testimony and that of Dr. Morris. Contending that the issue of prudence had already been approved by the Commission in the earlier certificate case, they claimed that the Commission was "estopped" to consider the challenge to MAWC's decision making process by Public Counsel or by these intervenors. Although these intervenors have already responded to that motion, since MAWC (and, inexplicably, Commission Staff) sought to raise

that issue anew in their respective initial briefs, we will respond to their erroneous contentions.

MAWC's argument in its Point II. C. of its Initial Brief proceeds on three grounds. First, MAWC argues that the Commission has previously decided the reasonableness of construction. Second, MAWC argues that the Commission itself is estopped from relitigating "this issue," meaning the amount that should be included in MAWC's rate base with respect to the new St. Joseph water treatment plant. Finally, MAWC argues that questioning the prudence of the construction is prohibited as a collateral attack on the prior order of the Commission. MAWC's confusing and obviously desperate assertions are without merit.

MAWC continues to appear to have trouble understanding Commission orders. As was revealed at the recent public hearing in this matter held in St. Joseph, MAWC represented to the people in St. Joseph that the Commission had approved Single Tariff Pricing ("STP").

A. The Commission Has Not Previously Decided the Reasonableness of Construction.

This point is easily disposed. While the Commission in WA-97-46 did find the proposed project to be "a reasonable alternative", **a** reasonable alternative is not the same thing as **the** reasonable alternative.

Review of the Report and Order in WA-97-46 is dispositive of this argument. MAWC asked for pre-approval of the treatment plant project. Issues 1 and 2 identified in the hearing

were: "Is it appropriate for the Commission to determine the prudence of this project and, if so, is the MAWC proposed project a prudent alternative?" R&O, WA-97-46, pp. 8-9. The Commission noted that "authority exists supporting the position that the Commission may **not** legally take any further action regarding the pre-approval of the proposed project" citing both *State ex rel. Capital City Water Co. v. Public Service Commission*, 850 S.W.2d 903 (Mo.App. 1993) and *Union Electric Company (Callaway Nuclear Plant)*, 27 Mo. PSC (N.S.) 183, that the proper time for prudence to be considered is when a rate case is filed in which a utility attempts to recover the associated costs of such a project. R&O, WA-97-46, pp. 12-14. Thus, the Commission clearly rejected MAWC's request to pre-approve the prudence of its project. Nevertheless, MAWC now asserts that the Commission decided exactly the point that the Commission earlier rejected. Importantly, in Ordered: 5 of its Report and Order in WA-97-46, the Commission ordered:

> 5. **That nothing in this Report and Order shall be considered a finding by the Commission of the prudence of** either **the proposed construction project** or financial transaction, or the value of this transaction for ratemaking purposes, **and the Commission reserves the right to consider the ratemaking treatment to be afforded the proposed construction project** and financial transaction and their results **in cost of capital in any future proceeding**. [Emphasis added.]

Not only did the Commission **not** make any determination as to the prudence of the "proposed construction project," **it expressly disclaimed that it was doing so and expressly reserved**

its right to decide that issue in a future proceeding. MAWC's statements that the Commission pre-approved this project as to prudence are not factual.

B. The Commission Is Not Estopped; the Issue Has Never Been Litigated.

MAWC's next argues that the Commission is estopped from relitigating this issue. Only two quick points need to be made to demonstrate the lack of merit of this argument.

First, MAWC correctly states that equitable estoppel does not run against the Commission. *State ex rel. Capital City Water Co. v. Missouri Public Service Commission*, 850 S.W.2d 903 (Mo.App. 1993). MAWC, however, asserts an exception. *Capital City Water* involved a claim by the utility that the Commission had issued five letters concerning a contract that the utility asserted constituted approval of that contract. The utility argued that the Commission erred when it subsequently disallowed expenses associated with the contract. The language used by the court to describe these letters is pertinent for consideration.

> "The letters did not express an opinion as to the wisdom of the contract terms, specify the future treatment of the contract for rate setting purposes, or refer to any of the specific contract provisions."

Second, the test for application of the exception to the general rule that estoppel is not applicable against a governmental entity indicates that the conduct of the government sought to be estopped must rise to the level of *affirmative misconduct*.

> "In an estoppel claim against the government, these three elements must be satisfied **in addition to showing that the governmental action on which the claim is based constitutes affirmative misconduct.**" (citing *Farmers' & Laborers' v. Dir. of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987)) [Emphasis added].

Capital Cities, supra, at 910.

That is certainly not the case in WA-97-46. There the Commission's Report and Order clearly reserved future determinations of prudence to future cases. It explicitly rejected MAWC's request that the prudence of the new plant be pre-approved. There is no action of the Commission that should be estopped and this issue is not being relitigated. **It is being litigated for the first time in the appropriate proceeding for such litigation - MAWC's rate case.**

MAWC's reliance on *Lick Creek Sewer Systems, Inc. v. Bank of Bourbon*, 747 S.W.2d 317 (Mo.App 1988), as authority for the proposition that equitable estoppel applies is patently misplaced. While the case correctly states the elements necessary to warrant the equitable estoppel doctrine in the case of non-governmental entities, such is not the applicable law insofar as governmental entities are concerned. In addition to the three elements stated in *Lick Creek*, the additional element of affirmative misconduct by the governmental agency must be shown as the Court in *Capital City* held. There has simply been no "showing that the governmental action on which the claim is based constitutes affirmative misconduct." Thus, the Commission is not estopped from considering this issue.

C. No Prior Decision is Being Collaterally Attacked.

As noted above, the Commission has not made a determination regarding prudence or the amount to be allowed into rate base with respect to the new plant. The Report and Order in WA-97-46 is ample evidence that the Commission intended to, and did, leave to future cases (this one) those determinations. WA-97-46 was a certificate case, not a rate case and limited even as to that. There was no need for a certificate to build the treatment plant since such was to be constructed in MAWC's existing certificated area. MAWC's attempts to obtain pre-approval of its plans were clearly rejected by the Commission. Thus there is no decision to "collaterally attack."

MAWC turns to Section 386.550 RSMo for support, and cites *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W.2d 597 (Mo.App. 1996). The case supports the precise opposite point and, in fact, would support dismissal of this case if MAWC's argument had merit.

Ozark Border concerned a territorial agreement under Section 394.312. The Commission denied the requested change and Ozark Border appealed. The *Ozark Border* court stated at 924 S.W. 2d 601:

> "If a change in circumstance has occurred since the last order, the complaint would not be attacking the previous order and would not be in conflict with section 386.550. It would be an independent proceeding to determine whether the change in circumstances [**10] causes the territorial agreement to no longer be in the public interest."

Section 386.550 provides finality to Commission decisions, but not if there have been changed circumstances. The current rates were established by the Commission decision in WR-97-237. Changed circumstances is the reason for the instant rate case.

MAWC's argument is nothing more than a bootstrap. This is an independent proceeding in which MAWC seeks to increase its rates, not alter the terms of the limited certificate granted in WA-97-46. MAWC tries to bootstrap itself into a collateral attack on WA-97-46 by its grasping argument that the Commission's WA-97-46 decision granted the very pre-approval that the Commission expressly declined to issue. That argument lacks merit as shown above and by the explicit terms of the decision in WA-97-46.

IV. OTHER ISSUES.

Indicated Intervenors have only replied to the issues they deem necessitate reply. They have addressed the other issues of major concern to them in their Initial Brief and do not wish to burden the record further by repeating these arguments. However, by not re-addressing such issues in their Reply Brief, Indicated Intervenors do not want the Commission believe that such other issues are not equally or even more important than the issues addressed in this Reply Brief. They have not been addressed here merely because the Initial Briefs of the other parties on those issues did not warrant a reply.

V. CONCLUSION.

WHEREFORE, for the foregoing reasons and arguments, these Intervenors respectfully pray that the Commission should disallow inclusion of imprudent capital expenditures in rate base, reject the concept of single tariff pricing, and otherwise direct that rates be calculated in accordance with the recommendations contained herein and in our Initial Brief.

Respectfully submitted,

FINNEGAN, CONRAD & PETERSON, L.C.

Stuart W. Conrad Mo. Bar #23966
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: stucon@fcplaw.com

ATTORNEYS FOR AG PROCESSING INC., FRISKIES PETCARE, A DIVISION OF NESTLE USA and WIRE ROPE CORPORATION OF AMERICA, INC.

and

Jeremiah D. Finnegan Mo. Bar #18416
3100 Broadway, Suite 1209
Kansas City, Missouri 64111
(816) 753-1122
Facsimile (816)756-0373
Internet: jfinnegan@fcplaw.com

ATTORNEYS FOR CITY OF RIVERSIDE, MISSOURI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing pleading by hand delivery, electronic mail delivery or by overnight mail, or by expedited U.S. mail, postage prepaid addressed to the following persons:

Mr. John Coffman
Assistant Public Counsel
Office of the Public Counsel
P. O. Box 7800
Jefferson City, MO 65102

Ms. Shannon Cook
Assistant Public Counsel
Office of the Public Counsel
P. O. Box 7800
Jefferson City, MO 65102

Mr. Dean Cooper
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102-0456

Mr. Lee Curtis
Attorney
130 S. Bemiston
Suite 200
Clayton, MO 63105

Mr. James B. Deutsch
Attorney
Blitz, Bardgett & Deutsch, L.C.
308 East High Street
Suite 301
Jefferson City, MO 65101

Mr. William R. England
Brydon, Swearengen & England, P.C.
312 East Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102-0456

Mr. James M. Fischer
Law Offices of Jim Fischer
101 West McCarty Street
Suite 215
Jefferson City, MO 65101

Mr. Keith Krueger
Assistant General Counsel
Missouri Public Service Commission
Truman Office Building - R530
P. O. Box 360
301 West High - P.O. Box 360
Jefferson City, MO 65102-0360

Mr. Louis J. Leonatti
Attorney
Leonatti & Baker, P.C.
123 E. Jackson St
P. O. Box 758
Mexico, MO 65265

Mr. Joseph W. Moreland
Attorney
Blake & Uhlig, P.A.
2500 Holmes Road
Kansas City, MO 64108

Ms. Lisa M. Robertson
City of St. Joseph
City Hall, Room 307
11th & Frederick Ave.
St. Joseph, MO 64501

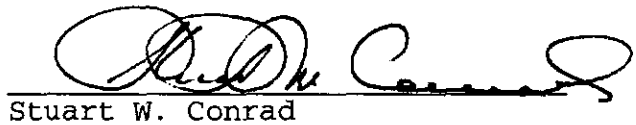
Mr. Charles B. Stewart
Stewart & Keevil
1001 E. Cherry Street
Suite 302
Columbia, MO 65201

Ms. Diana Vuylsteke
Bryan Cave, LLP
One Metropolitan Square
Suite 3600
St. Louis, MO 63102-2750

Mr. Martin W. Walter
Blake & Uhlig, P.A.
2500 Holmes Road
Kansas City, MO 64108

Mr. Karl Zobrist
Blackwell Sanders Peper Martin LLP
Two Pershing Square
2300 Main, Suite 1100
Kansas City, MO 64108

Dated: July 24, 2000



Stuart W. Conrad

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