

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Reed Kline,)	
)	
Complainant,)	
)	
v.)	<u>Case No. WC-2006-0106</u>
)	
Missouri-American Water Company,)	
)	
Respondent.)	

ORDER GRANTING INTERVENTION, DIRECTING MEDIATION,
AND APPOINTING MEDIATOR

Issue Date: December 13, 2005

Effective Date: December 13, 2005

Procedural History and Allegations Against Missouri-American:

On September 9, 2005, Reed Kline of St. Joseph, Missouri, filed a formal complaint against Missouri-American Water Company, alleging that:

Missouri-American Water Company (MAWC) has, basically, refused to install new infrastructure in local developments here in St. Joseph, including mine. The reason given by MAWC is that revisions recently made (on June 20, 2005) to the City of St. Joseph's right-of-way management ordinance have hampered its now-common practice of circumventing certain City Code provisions by obtaining private easements outside the City's right-of-way. However, my development was platted prior to June 20, 2005, which is significant because the specific language contained in the amendment states that the June 20th revisions are only applicable to actions subsequent to its passage. Although MAWC has since agreed to proceed with providing service in these previously-platted developments, I am concerned about what might happen in the future, (in developments platted after June 20, 2005), due to certain information I have recently been made aware of. More specifically, that MAWC has implemented a new policy, which pre-dates the City's June 20, 2005 ordinance, wherein it will no longer place its facilities in any public rights-of-way

or public utility easements (not just in St. Joseph, but anywhere in the State of Missouri) unless it either: 1) has a specifically named property interest, or 2) the municipality or developer provides it with unlimited cost indemnifications forever into the future.

By placing its water lines exclusively in easements in which it has a property interest, MAWC is able to bypass its obligations to pay for the cost of relocation or adjustment of its mains at its own expense when the relocation occurs as a result of a public improvement - basically, it wants somebody, other than MAWC, to foot the bill for these costs. MAWC is, essentially, refusing to provide service/withholding service, in violation of the provisions of its tariff. MAWC may argue that it is not refusing to provide service/withholding service because it is simply in the process of "negotiating an agreement" with the developer and/or the municipality regarding the property interest and/or the indemnification language. However, the result is that MAWC is refusing to provide service/withholding service unless developers sign-off on its form language. Developers are often-times under extreme pressure to move their developments along. Time is money. MAWC knows this, which makes its tactics all the more repugnant .

The Commission issued its Notice of Complaint on September 12, requiring Missouri-American to file a responsive pleading by October 12. The Company met this requirement by filing a Motion to Dismiss on October 3, in which it prays that the Commission will dismiss Mr. Kline's Complaint because, first, he admits that the Company is presently providing him service and, second, his request that the Commission rule on a possible future eventuality is prohibited under the rule announced in *State ex rel. State Tax Commission v. Administrative Hearing Commission*,¹ in which the Missouri Supreme Court held that administrative tribunals may not render declaratory judgments. Missouri-American's motion is still pending and, on October 13, Mr. Kline moved for an extension of time within which to respond to it.

¹ 641 S.W.2d (banc 1982).

Meanwhile, on October 12, Missouri-American requested mediation as is permitted by the Commission's rules. Also on October 12, the City of St. Joseph applied to intervene, stating that it "is a large consumer of water services supplied by Respondent. St. Joseph is also deeply concerned about economic development in the City of St. Joseph and legitimately concerned about the impact of any decision in this proceeding on behalf of itself, its residents and businesses and the City's future economic growth. It desires to participate fully in this proceeding." St. Joseph states that it "supports the Complaint filed in this case," and goes on to state the following allegations:

The Respondent, Missouri-American Water Company, has implemented an arbitrary and illegal new policy concerning placing new facilities which threatens future development in the City. . . . that new policy appears to be that MAWC will no longer place its facilities in any public rights-of-way or public utility easements (not just in St. Joseph, but apparently anywhere in the State of Missouri) unless either: (1) MAWC has a specifically named property interest in the easement, or (2) the municipality or developer provides unlimited cost indemnification, in perpetuity, for any relocations of MAWC's facilities that may become necessary.

MAWC's refusal to provide water service facilities in rights-of-way or public utility easements made available to it on the same basis as other utilities is a violation of its duties pursuant to its Certificate of Convenience and Necessity from this Commission, its tariffs on file with the Commission, and its franchise and other obligations to the City of St. Joseph.

* * *

MAWC's now-common practice of circumventing the City's ability to regulate its rights-of-way by obtaining private easements (in which MAWC has a property interest) outside of the City's rights-of-way, allows MAWC to bypass its obligations to pay for the cost of relocation or adjustment of its mains on public projects. This is against public policy due to the fact that relocation costs are provided for, and included in, MAWC's tarified rates approved by this Commission.

MAWC claims it is not denying service to developers, but rather is engaged in "negotiations" with them. In the "negotiations," MAWC is advising the developers that a condition of the contract is that they

provide MAWC with a private easement or indemnification against possible future relocation costs of MAWC's facilities. The "negotiations" MAWC is having with municipalities and developers regarding property interest and/or indemnification language should *not* be considered by the PSC as a valid excuse for MAWC to refuse to provide, or withhold, service in violation of its tariff. It is simply not a fair negotiation when one party (MAWC) refuses to provide, or withholds, a service that is essential to the other party (the developer) until such time as the developer agrees to do exactly what MAWC wants. Allowing this type of stranglehold negotiation tactic to continue would soon put developers out of business, which would not be in the best interest of promoting economic development in the State of Missouri. This type of behavior on the part of a public utility is violative of public policy in every respect. Nowhere does the MAWC tariff provide authority to MAWC to exact such conditions for service.

* * *

The City of St. Joseph would be amenable to attending a meeting at which all parties to this Complaint are present; *provided, however*, that MAWC is first required to submit its new policy upon which its actions are purportedly based in *written form* to all parties involved, in advance. Without being given the courtesy and opportunity to review and evaluate the precise policy at issue, those outside of MAWC's inner circle are at a distinct disadvantage.

On October 21, the Commission granted Complainant until November 2 to respond to the Motion to Dismiss. The Commission directed all of the parties, including Intervention-Applicant City of St. Joseph, to respond to Missouri-American's request for mediation by the same date.

St. Joseph responded on October 28, conditionally agreeing to mediate. Its conditions are (1) that one of the Commission's Regulatory Law Judges be appointed as mediator; (2) that legal counsel be permitted to participate in the mediation; (3) that the City of St. Joseph be permitted to participate in the mediation; and (4) that Missouri-American be directed to respond to St. Joseph's First Set of Data Requests. In the same pleading, the City also responded in opposition to Missouri-American's Motion to Dismiss.

Complainant responded on November 2, stating that he was willing to mediate on the same conditions proposed by the City of St. Joseph. Complainant further requested that his response deadline to Missouri-American's Motion to Dismiss be suspended until after the mediation process is complete; in the alternative, Complainant adopted the City's response to that motion.

Missouri-American replied on November 7, stating that it accepted the conditions set by the City and by Complainant, with certain qualifications, namely, that the Regulatory Law Judge appointed as the mediator be someone other than the Regulatory Law Judge that will preside if there is a contested case hearing in this matter and that the mediator be required to keep whatever he or she learns in the mediation process confidential. Missouri-American also stated that its response time to the City's data requests has not yet started to run as the City is not yet an actual party to the case. Finally, Missouri-American opposes any further extension to Complainant's opportunity to respond to Missouri-American's Motion to Dismiss, pointing out that Complainant has, in fact, responded. However, Missouri-American agrees that there is no need for the Commission to take up the Motion to Dismiss until after the mediation process is completed.

The City of St. Joseph responded to Missouri-American's reply on November 16, stating that it accepted Missouri-American's qualifications to the mediation conditions set out by the City and the Complainant. The City further stated that it will negotiate a date for responses to its data requests with Missouri-American. The City urged the Commission to grant its Application for Intervention and Missouri-American's Request for Mediation, with the conditions agreed by the parties.

Discussion:

The Commission will grant the City's Application for Intervention and Missouri-American's Request for Mediation, with the conditions agreed by the parties.

IT IS THEREFORE ORDERED:

1. That the Application to Intervene filed by the City of St. Joseph on October 12, 2005, is granted. The Commission's Data Center shall add counsel for the City of St. Joseph to the service list maintained in this case.

2. That the Request for Mediation filed by Missouri-American Water Company on October 12, 2005, is granted, subject to the conditions discussed above. Legal counsel may participate fully; the City of St. Joseph may participate fully.

3. That Missouri-American Water Company shall respond to the City of St. Joseph's First Set of Data Requests, if it hasn't already, at a mutually agreeable time.

4. That Regulatory Law Judge Morris Woodruff is appointed as Mediator herein. The Mediator shall have all necessary authority to schedule and conduct such procedures as he deems necessary until such time as he ascertains that further mediation would be useless or a settlement is reached. The parties are directed to comply with the Mediator's directions. The Mediator shall not discuss this case or any information obtained therein with any other Regulatory Law Judge or any Commissioner, except that, the Mediator is authorized to discuss the case as necessary with the Chief Regulatory Law Judge, who shall also keep confidential any information obtained thereby.

5. That this case shall be held in abeyance while the mediation process goes forward.

6. That this order shall become effective on December 13, 2005.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Kevin A. Thompson, Deputy Chief
Regulatory Law Judge, by delegation
of authority pursuant to Section 386.240,
RSMo 2000.

Dated at Jefferson City, Missouri,
on this 13th day of December, 2005.