

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

In the Matter of Missouri-American Water)
Company's Request for Authority to)
Implement General Rate Increase for Water)
and Sewer Service Provided in Missouri)
Service Areas)

Case No. WR-2022-0303

**REPLY TO MAWC’S RESPONSE TO MOTION FOR PRODUCTION OF
DOCUMENTS PURSUANT TO § 386.450 RSMO.**

Comes now the Office of the Public Counsel (the “OPC”) and respectfully submits its reply to Missouri American Water Company’s (“MAWC”) Response to Motion for Production of Documents (“Response”) (Doc. 178):¹

In its Motion for Production of Documents Pursuant to § 386.450 RSMo. (the “Motion”), the OPC requested that the Commission, pursuant to its authority in § 386.450 RSMo. order American Water Works Company, Inc. (“American Water”) to produce documents and information in response to several data requests. In its Response, MAWC makes two general arguments and then addresses each of the OPC’s data requests. The OPC will address each ground in turn.

I. The OPC Did Not Request Documents from MAWC

MAWC opens its Response with an assertion that the OPC did not request documents from it and that “it has no ability to supply the information requested by OPC.” (Resp. 1-2, Doc. 178).

The OPC agrees that it did not request that the Commission order MAWC to produce any documents. (*See generally* Mot.). Rather, the OPC requests that the Commission order *American Water* to produce the requested documents and information. (*See id.*). As the Commission has recognized, § 386.450 RSMo. “has no requirement that the subjects of OPC’s investigation be

¹ In its Response to the OPC’s Motion for Production of Documents Pursuant to § 386.450 RSMo., the Staff of the Public Service Commission of the State of Missouri (“Staff”) took no position on the OPC’s motion. (Doc. 143).

parties to a case.” *In re Elm Hills Util. Operating Co., Inc.’s Request for a Water & Sewer Rate Increase*, Case No. WR-2020-0275, Order Granting Mot. for Production 2, Doc. 48 (hereinafter “*Elm Hills Order*”). It also “has no requirement that the subjects be jurisdictional utilities.” *Id.* Therefore, regardless of whether MAWC has access to the requested documents and information, the Commission has the authority to grant the Motion.

II. The OPC Has Demonstrated the Relevance of the Requested Information

In arguing that the Commission should deny the Motion, MAWC references a relevance requirement and states that “the requested [American Water] information is not relevant to the establishment of an appropriate cost of capital for MAWC.” (Resp. 5). In arguing relevance, MAWC attempts to incorporate its capital structure argument from the rate case into this discovery motion. This misconstrues the legal standard to be applied to this Motion.

Importantly, this Motion concerns only discovery. In deciding this Motion, the Commission need not decide the appropriate capital structure to use to set MAWC’s rates. As the OPC explained in its Motion, a dispute exists in this case regarding the appropriate capital structure to use to set MAWC’s rates. (Mot. 3-4). MAWC argues that the Commission should use MAWC’s capital structure. (Merante Direct Test. 10, Doc. 14; Swiz Rebuttal Test. 4, Doc. 116). The OPC, on the other hand, argues that the Commission should use a capital structure that “is consistent with American Water’s average quarterly consolidated capital structure, net of short-term debt, for the period June 30, 2021 through June 30, 2022.” (Murray Direct Test. 40, Doc. 78). The Commission will decide the appropriate outcome to this dispute after considering the evidence presented in pre-filed testimony and at the upcoming hearing. This is not a dispute that the Commission must decide to grant the OPC’s Motion.

Rather, in considering the OPC's Motion, the Commission applies the standard of review applicable to § 386.450 RSMo., which the Commission described in the *Elm Hills Order*. Although the Commission has previously stated that § 386.450 RSMo. "does not express a relevance requirement," it also discussed relevance in deciding a motion brought pursuant to § 386.450 RSMo. *Elm Hills Order* 4. Specifically, the Commission concluded that "[r]elevance can be established by a showing of the connection of OPC's requested information to this file, which is a rate case. Rate cases as a matter of course involve apportionment of capitalization, which involves assessments of capital structure." *Id.* The Commission's statutory duty to set just and reasonable rates, "includes an evaluation of the capital structure (funding) of" the utility. *Id.* 7.

Further, the standard of relevance applicable to discovery motions is enlightening. Regarding this standard, the Missouri Court of Appeals has stated that "[t]he purpose of pretrial discovery is to aid in the ascertainment of the truth, eliminate surprise, narrow issues, facilitate trial preparation, and obtain relevant information." *State ex rel. MacDonald v. Franklin*, 149 S.W.3d 595, 598 (Mo. Ct. App. 2004) (citing *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247, 251 (Mo. Ct. App. 1989)). Thus, in the context of discovery, the term "relevant . . ." is broadly defined to include material "reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 598-99 (quoting *State ex rel. Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. banc 1995)). This has been reaffirmed by the Supreme Court of the State of Missouri, which stated

Missouri's discovery rules allow parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. It is not grounds for objection that the information may be inadmissible at trial, but it is sufficient if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

State ex rel. BNSF Ry. Co. v. Neill, 356 S.W.3d 169, 172 (Mo. 2011) (internal citation and quotation marks omitted).

In the context of this general rate case, the OPC's witness, Mr. David Murray, presents extensive evidence to support the OPC's position that the Commission should use a capital structure consistent with American Water's capital structure in setting MAWC's rates. (*See generally* Murray Direct Test., Murray Rebuttal Test., Doc. 110, Murray Surrebuttal Test., Doc. 158). As Mr. Murray explained in the memorandum attached to the OPC's Motion, the information sought from American Water will also allow the OPC to investigate MAWC's requested rate of return and its position that MAWC is financially independent from American Water. (Mot. Ex. B "Murray Memorandum" 1, Doc. 139). Though MAWC may disagree with the OPC's position regarding the appropriate capital structure and maintain its claims of financial independence, these contentions alone do not make the information sought in the Motion any less relevant to the OPC's argument and investigation. *See BNSF Ry. Co.*, 356 S.W.3d at 172 ("Missouri's discovery rules allow parties to obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.").

The information the OPC seeks in the Motion is clearly relevant under both the Commission's specified standard regarding § 386.450 RSMo. and the standard of relevance applicable to discovery motions. Therefore, the Commission should disregard MAWC's arguments that the information is not relevant to the instant case.

III. American Water's Board of Directors Materials

Referencing the OPC's data requests 3064 and 3065, which pertain to American Water's Board of Directors Materials, MAWC argues that by "[n]ot limiting these requests by subject and

to a time shorter than three years results in requests that exceed even the stated reason for their relevance.” (Resp. 5). However, the OPC through Mr. Murray’s memorandum has explained the relevance of these documents.

In Data Request 3064, the OPC requests “the minutes, presentation materials and handouts for all American Water . . . Audit, Finance and Risk Committee of The Board of Directors meetings since January 1, 2020.” (Mot. Ex. A “Data Requests” 1, Doc. 139). Similarly, in Data Request 3065, the OPC requests “the minutes, presentation materials and handouts for all American Water’s Board of Directors meetings since January 1, 2020.” (*Id.*).

Though MAWC asserts that the name of the Audit, Finance, and Risk Committee suggests that the committee considers matters other than “merely finance matters,” MAWC has provided no indication that the audit and risk issues covered by the committee are not also relevant to the issue of the appropriate capital structure. (*See* Resp. 5). Mr. Murray explained in his memorandum that the OPC cannot “verify MAWC’s claims that it is financially independent from its parent company without access to American Water’s books and records, which includes the OPC’s request to review American Water’s Board of Director materials and the Audit, Risk and Finance Committee of the Board of Directors materials.” (Murray Mem. 1). In addressing American Water’s Board of Directors materials, Mr. Murray also references MAWC’s claim that its “regulatory risk profile would likely be higher than its affiliates, requiring a higher [rate of return] from MAWC’s ratepayers.” (*Id.* 2). Because American Water has not claimed that its Board of Directors materials are privileged and this information “relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,” this information meets the standard for pretrial discovery, which is all the OPC must do at this procedural stage. *See BNSF*

Ry. Co., 356 S.W.3d at 172. Therefore, the Commission should ignore MAWC's arguments specific to data requests 3064 and 3065.

IV. Goodwill Impairment Evaluations

In its Response, MAWC also calls the Commission's attention to data request 3066, again arguing that the OPC has failed to establish the relevance of the requested goodwill impairment evaluations. (Resp. 5-6). In doing so, MAWC argues that American Water would "be required to provide publicly any adverse conclusions of such reports." (*Id.* 5). Further, MAWC contends that the goodwill impairment evaluations are backward looking and "will provide no meaningful information on which to set the cost of capital on a forward-looking basis in this proceeding." (*Id.* 5-6). Again, the Commission should disregard MAWC's arguments.

First, American Water designating the information as confidential when it provides the information can resolve MAWC's argument that American Water would have to "provide publicly any adverse conclusions of such reports." (*Id.* 5). If American Water determines that a higher level of confidentiality is required, it can also designate the information as highly confidential because the Commission has entered a protective order in this case. (*See* Doc. 91).

Second, MAWC's reliance on its contention that the goodwill impairment reports are backwards looking ignores the Commission's precedent in using historical test years to establish rates. Use of a historical test year necessarily means that nearly all information considered in a rate case is backwards looking. This information is then used to set just and reasonable rates on a going forward basis. MAWC has provided no explanation for why a goodwill impairment evaluation could not be used in the same way.

Finally, MAWC's claim that the OPC has not explained why the goodwill impairment evaluations are relevant ignores the testimony filed in this case. Mr. Murray references and relies

on the goodwill impairment analysis to which he has access in his testimony. (*See* Murray Dir. Test. 36 n. 41). Mr. Murray further references the goodwill impairment analysis in his surrebuttal testimony. (Murray Surrebuttal Test. 26). Similarly, in his surrebuttal testimony, Mr. Murray explains his concern about MAWC and American Water’s resistance to provide these documents. (*Id.* 27). Through its reliance on this information, the OPC has met its burden to show that these reports are relevant. *See BNSF Ry. Co.*, 356 S.W.3d at 172.

For these reasons, the Commission should reject each of MAWC’s arguments pertaining to data request 3066.

V. Information Pertaining to Common Equity Issuance

In addressing the OPC’s data requests 3067-3069, which request information concerning an American Water announced common equity issuance, MAWC asserts that “access to this type of forward-looking information could result in violations of insider trading regulations of the Security and Exchange Commission.” (Resp. 6). MAWC maintains that “[s]trict confidentiality would need to be imposed to ensure no such violations occur.” Neither of these grounds represent reasons to deny the OPC’s Motion.

MAWC’s assertions regarding insider trading are unnecessarily inflammatory for this discovery motion. MAWC has cited to no reason to suggest that such violations would occur in this case or that any party, its agents, or its employees would use the information filed to commit such a violation. In fact, pursuant to the Commission’s own rules “[a]ll persons who have access to information under [the Confidential Information] rule shall keep the information secure and may neither use nor disclose such information for any purpose other than preparation for and conduct

of the proceeding for which the information was provided.” 20 CSR 4240-2.135(13).² Therefore, concerns regarding insider trading are not a reason to deny the OPC’s Motion.

Further, as the OPC referenced above, American Water remains free to designate the documents as confidential or highly confidential, should it desire protection against public disclosure. Therefore, the Commission should disregard MAWC’s arguments against data requests 3067-3069, as well.

VI. Requests Regarding American Water Capital Corporation’s Debt Issuances

Regarding the OPC’s data requests 3070 and 3071, which pertain to American Water Capital Corporation’s debt issuances, MAWC again asserts that the information is not relevant. It also asserts that if the Commission finds the information to be relevant, the requests are overbroad. MAWC has again failed to set forth a sufficient reason to deny the OPC’s Motion.

Mr. Murray explained the interwoven corporate structure of which MAWC is a part in his direct testimony. (*See* Murray Direct Test. 40-42). As a part of this discussion, Mr. Murray explains how American Water Capital Corporation’s debt issuances can affect the appropriate capital structure the Commission should use to set MAWC’s rates in this case. (*See id.*). The OPC also referenced this corporate structure in its Motion. (*See* Mot. 2-3). Therefore, this information is relevant to Mr. Murray’s argument. *See BNSF Ry. Co.*, 356 S.W.3d at 172.

As to MAWC’s argument that the OPC’s request is not more tailored, the OPC tailored its requests in data request 3071 to only that information that “relates to American Water Capital Corporation’s planned debt issuances through May 31, 2023.” (*See* Data Request 3071). Similarly,

² A limited exception exists in this rule that allows the OPC or Staff to use confidential information obtained under the rule as the “basis for additional investigations or complaints against any public utility.” 20 CSR 4240-2.135(13). However, a later provision of the Confidential Information rule specifically asserts that “[n]either the officers or employees of the commission, nor the public counsel and the employees of the Office of the Public Counsel shall use or disclose any information obtained in discovery for any purpose other than in the performance of their duties.” 20 CSR 4240-2.135(16).

data request 3070 specifically asks “how American Water Capital Corporation plans to raise the \$120 million of financing proceeds it anticipates lending to MAWC on May 15, 2023” only “[a]s it relates to Mr. Merante’s proposed discrete adjustments to . . . [MAWC’s] capital structure through May 31, 2023.” (*See* Data Request 3070). Therefore, the OPC’s requests are limited in both time and subject matter.

For these reasons, the Commission should disregard MAWC’s arguments against data requests 3070 and 3071, as well.

VII. The Commission’s Power to Enforce the Order

In its final argument, MAWC appears to assert that the Commission may not have the power to enforce its Order should that be required. MAWC also cautions the Commission that it “should remain aware of where the requested order may, or may not, lead.” (Resp. 6). These arguments are both inherently problematic.

First, MAWC’s contention that the Commission may not be able to enforce its order, presumes that American Water will not comply with the Commission’s order granting the OPC’s Motion. Such an action directly disregards the Commission’s ability to require “any corporation, person or public utility” to produce documents “within this state” upon good cause shown by the OPC. *See* § 386.450 RSMo. MAWC’s contention that its parent company will disregard a Commission Order is concerning.

Second, while this apparent disregard for the Commission’s authority is troubling, the larger problem present in MAWC’s argument is the obvious nature by which MAWC seeks to hide material and valuable information from regulators through its corporate structure. As Mr. Murray explained in his memorandum, the “OPC’s requested discovery of parent company books and records in this case is similar to less intertwined Missouri utility companies, such as Ameren

Missouri, Spire Missouri, Evergy Metro and Evergy Missouri West.” (Murray Mem. 1 (footnote omitted)). Mr. Murray further clarifies in his memorandum that “[a]s wholly-owned subsidiaries of the parent companies, the strategies, analysis, financial policies and transactions of the parent company in each case impacts the management of the subsidiaries’ capital structures. These capital structures consequently affect the [rate of return] the subsidiary utility company requests the Commission authorize for purposes of setting its rates.” (*Id.*). For the Commission to set just and reasonable rates in accordance with its statutory mandate, it must consider MAWC’s capital structure holistically, with all material information at hand. *See* § 393.130.1 RSMo.; *Elm Hills Order 7-9* (relying on the Commission’s statutory duty to ensure “just and reasonable” rates, which includes “an evaluation of the capital structure (funding)” of the utility).

As explained above, the information the OPC requests in the Motion is relevant to this matter. The Commission must not allow MAWC to hide this information using its corporate structure, especially where the Commission has the statutory authority to compel American Water to produce the information.

VIII. Conclusion

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant its Motion and, pursuant to its authority under § 386.450 RSMo., order American Water to provide documents and information responsive to the data requests attached as Exhibit A to the Motion no later than February 16, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 15th day of February 2023.

/s/ Lindsay VanGerpen