

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

In the Matter of Missouri-American Water)
Company's Request for Authority to Implement) Case No. WR-2022-0303
General Rate Increase for Water and Sewer)
Service Provided in Missouri Service Areas.)

MAWC’S RESPONSE TO MOTION FOR PRODUCTION OF DOCUMENTS

Comes now Missouri-American Water Company (MAWC or Company), and, as its response to the Office of the Public Counsel’s (OPC) *Motion for Production of Documents Pursuant to §386.450 RSMO (Motion for Production)*, states as follows to the Missouri Public Service Commission (Commission):

INTRODUCTION

1. On February 3, 2023, OPC filed its *Motion for Production*, seeking a Commission order directing the production of certain documents by American Water Works Company, Inc. (“AWK”). AWK is an unregulated, non-party entity located outside of Missouri.¹ The Commission subsequently issued its *Order Directing Filing* directing MAWC to provide a response to the *Motion for Production* by February 10, 2023. The *Order Directing Filing* states, in part, that “OPC asks the Commission to order Missouri-American Water Company (MAWC) to provide certain information to OPC . . .” (emphasis added) As described, the *Motion for Production* does not seek information from MAWC, but from AWK.

NO MAWC DOCUMENTS REQUESTED

2. There is no suggestion in the *Motion for Production* that the records sought by OPC are records of MAWC or any jurisdictional public utility. MAWC, which is a Missouri public utility, water corporation, and sewer corporation, as defined by Missouri statutes, has answered more

¹ Section 393.140(12), RSMo, provides, in relevant part, that the Commission does not have jurisdiction over an affiliate that is not engaged in regulated activities if the operations of that affiliate are conducted such that its operations are

than 600 data requests in this matter and provided all documents requested that are within its possession, custody and control.

3. Accordingly, MAWC is unable to produce such documents contained in the *Motion for Production*. This Commission has previously recognized that the power and control in a corporate structure flows down, and not up, the corporate chain:

As to Staff's suggestion that Missouri-American should be required to attempt to obtain the information Staff seeks on the theory that, as an affiliate or subsidiary, Missouri-American enjoys superior access to the information in question, such superior access is an assumption and has not been demonstrated. Certainly, Missouri-American has no legal authority to obtain information and documents from its corporate parent and affiliates. An order requiring Missouri-American to attempt to acquire the information and documents from its parent and affiliates is likely to be unworkable in practice.²

4. Thus, while MAWC provides this response as directed by the *Order Directing Filing*, it reiterates that it has no ability to supply the information requested by OPC.

MOTION FOR PRODUCTION SHOULD BE DENIED

5. The *Motion for Production* is made pursuant to Section 386.450, RSMo, which states as follows:

At the request of the public counsel and upon good cause shown by him the commission shall require or on its own initiative the commission may require, by order served upon any corporation, person or public utility in the manner provided herein for the service of orders, the production within this state at such time and place as it may designate, of any books, accounts, papers or records kept by said corporation, person or public utility in any office or place within or without this state, or, at its option, verified copies in lieu thereof, so that an examination thereof may be made by the public counsel when the order is issued at his request or by the commission or under its direction.

(emphasis added)

6. In its pleading, OPC accurately quotes a prior Commission statement that Section

“substantially kept separate and apart” from the public utility.

² *In the Matter of Missouri-American Water Company's Tariff, et al.*, Case No. WR-2003- 0500, 2003 Mo. PSC LEXIS 1552, *19 (Mo. P.S.C. December 2, 2003) (emphasis added).

386.450, RSMo, “does not express a relevance requirement.”³ However, Section 386.450 does require a finding of “good cause.” The Commission has stated as follows in regard to a “good cause” requirement:

Although the term "good cause" is frequently used in the law, the rule does not define it. Therefore, it is appropriate to resort to the dictionary to determine its ordinary meaning. Good cause "generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." Similarly, "good cause" has also been judicially defined as a "substantial reason or cause which would cause or justify the ordinary person to neglect one of his [legal] duties."

Of course, not just any cause or excuse will do. To constitute good cause, the reason or legal excuse given "must be real not imaginary, substantial not trifling, and reasonable not whimsical." And some legitimate factual showing is required, not just the mere conclusion of a party or his attorney.⁴

7. Even though relevance is not specifically called out by the statute, this definition of good cause (substantial reason or cause) should be read to include, at a minimum, a relevance requirement. If done so in this situation, the OPC’s *Motion for Production* should be denied.

8. The Commission has recognized its constitutional duties in regard to the establishment of an appropriate return for a public utility:

The Commission is of the opinion that it must draw primary guidance in the evaluation of the expert testimony from the Supreme Court's *Hope* and *Bluefield* decisions. Pursuant to those decisions, returns for Empire's shareholders must be commensurate with returns in other enterprises with corresponding risks. Just and reasonable rates must include revenue sufficient to cover operating expenses, service debt and pay a dividend commensurate with the risk involved.⁵

The cost of capital should therefore be determined using the operating company’s capital structure and cost of debt, and the cost of equity is estimated by reference to a proxy group of firms with

³ *Motion for Production*, p. 6.

⁴ *In the Matter of S. K. & M. Water and Sewer Company's Rate Increase Request*, Order Granting the Office of the Public Counsel's Motion to Compel, Case No. WR-2007-0460, 2007 Mo. PSC LEXIS 844, *9-11, (June 26, 2007) (Footnotes deleted).

⁵ *In the Matter of the Filing of The Empire District Electric Company, et al.*, Report and Order, Case No. ER-2004-0570, 2005 Mo. PSC LEXIS 348, *68 (March 27, 2005) (emphasis added).

comparable risk.⁶

9. The Commission has also noted the following:

To determine a return on equity, the Commission must consider the expectations and requirements of investors when they choose to invest their money in Spire Missouri rather than in some other investment opportunity. As a result, the Commission cannot simply find a rate of return on equity that is unassailably scientifically, mathematically, or legally correct. Such a “correct” rate does not exist. Instead, the Commission must use its judgment to establish a rate of return on equity attractive enough to investors to allow the utility to fairly compete for the investors’ dollar in the capital market without permitting an excessive rate of return on equity that would drive up rates for Spire’s ratepayers. To obtain guidance about the appropriate rate of return on equity, the Commission considers the testimony of expert witnesses.⁷

10. The Commission has understood that the authorized return must be attractive enough to ensure a utility can compete for capital with other investments of comparable risk. The relevant questions for the Commission are the (1) actual financing of MAWC’s Missouri rate base; (2) risk profile of MAWC as a Missouri utility; and (3) peer utilities who MAWC competes with for necessary financing. OPC suggests that MAWC desires a “higher cost of capital than American Water.”⁸ That is not accurate. MAWC desires a cost of capital commensurate with its risk profile, regardless of what that may be in relation to AWK.

11. MAWC has explained in its testimony: (1) MAWC is a stand-alone business enterprise, with independent state operations, capital investments, management, and corporate governance; (2) MAWC’s customers benefit from American Water’s size and scale to realize cost savings in securing necessary financing; (3) MAWC’s stand-alone capital structure appropriately reflects its distinct risk profile, which is unlike the business and financial risks of American Water; (4) MAWC’s capital structure is in line with the capital structures and return on equity expectations for utility companies with similar risk; and (5) deviating from the stand-alone principle would create

⁶ Surrebuttal Testimony of Ann E. Bulkley, p. 16.

⁷ *In the Matter of the Laclede Gas Company’s Request to Increase Its Revenues for Gas Service*, Amended Report and Order, p. 28. File Nos. GR-2017-0215 and GR-2017-0216 (March 7, 2018).

adverse impacts to customers.⁹

12. All of the OPC production requests concern information about and held by AWK. AWK is a separate and distinct entity from MAWC – a holding company, with separate operating companies in multiple states. This results in a risk profile that is much different from that of MAWC and the requested AWK information is not relevant to the establishment of an appropriate cost of capital for MAWC.

13. Further, it is important to note that the OPC requests do not limit themselves to even the matters OPC alleges are relevant. First, there is no explanation as to why complete “minutes, presentation materials and handouts” are required for “all” AWK “Audit, Finance and Risk Committee” meetings since January 1, 2020.¹⁰ This is an AWK committee that involves much more than merely finance matters, as is obvious from its very name. OPC also requests complete “minutes, presentation materials and handouts” for “all” AWK Board of Director meetings since January 1, 2020.¹¹ Similarly, the AWK Board of Directors handles many other things than financing decisions. Not 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. There is no “good cause” to order production of “all,” or any, of these documents.

14. Request 3066 relates to reports concerning good will impairment evaluations performed at the AWK level. As noted by OPC’s request, the existence of these evaluations is publicly announced. AWK would also be required to provide publicly any adverse conclusions of such reports. Further, MAWC witness Bulkley explained that ratemaking and the estimation of the cost of equity are both forward looking. Any impairment analysis is necessarily backward looking

⁸ *Motion for Production*, Exh. B, p. 2.

⁹ Surrebuttal Testimony of J. Cas Swiz, pp. 2-3.

¹⁰ *Motion for Production*, Exh. A, Item 3064.

¹¹ *Motion for Production*, Exh. A, Item 3065.

and will provide no meaningful information on which to set the cost of capital on a forward-looking basis in this proceeding.¹² It is unclear, nor does OPC explain, why the actual AWK reports would be relevant to establishing an appropriate cost of capital for MAWC.

15. Requests 3067-3069 concern an announced common equity issuance by AWK. Because AWK is a publicly traded entity, the access to this type of forward-looking information requested could result in violations of insider trading regulations of the Security and Exchange Commission. Strict confidentiality would need to be imposed to ensure no such violations occur.

16. Requests 3070 and 3071 concern AWK debt issuances. Neither request is directly related to how MAWC will obtain debt, but instead how American Water Capital Corporation will obtain debt. The requests further seek “all” investment/financial advisor presentations, “all” copies of materials presented/discuss at AWK Audit, Finance and Risk Committee meetings and “all” materials presented/discussed at AWK Board of Directors’ meetings. These items are not relevant to the cost of MAWC’s debt and, even if there were found to be some connection, very much overly broad in terms of the information requested.

17. Lastly, regardless of the Commission’s actions, there remains the question of enforceability of a statute purporting to provide the OPC with access to the documents of any person and any corporation in the world. The Commission has previously recognized this important issue as to Section 386.450 to be a question for a different body – “The enforceability of such data requests, when directed to unregulated, non-party entities located outside of Missouri, is a question for another tribunal.”¹³ While the Commission may not be concerned with that aspect of the request, it should remain aware of where the requested order may, or may not, lead.

¹² See Rebuttal Testimony of Ann E. Bulkley, pp. 71-73.

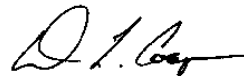
¹³ *In the Matter of Missouri-American Water Company's Tariff to Revise Water and Sewer Rate Schedules*, Order Concerning Motion to Compel, Case No. WR-2003-0500, FN 23, 2003 Mo. PSC LEXIS 1552, *18 (December 2, 2003).

CONCLUSION

18. There is no “substantial reason or cause” justifying a finding of good cause for the issuance of an order directing the requested production given that the documents OPC seeks from AWK do not address any of the issues relevant to this case.

WHEREFORE, MAWC respectfully requests that the Commission deny the OPC’s *Motion for Production* for the reasons stated herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail, on February 10, 2023, counsel for all parties.

