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October 22, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

FILED⁴

OCT 22 2003

Missouri Public
Service Commission

RE: Missouri-American Water Company
Lead Case No. WR-2003-0500 and WC-2004-0168

Dear Mr. Roberts:

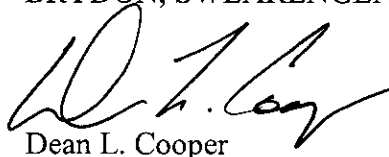
Enclosed for filing in the above-referenced matter are the original and eight (8) copies of Missouri-American Water Company's Answer to Staff Complaint, Request for Voluntary Mediation and Motion to Dismiss. A copy of the foregoing document has been hand-delivered or mailed this date to each party of record.

Thank you for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Dean L. Cooper

DLC/jar

Enclosures

cc: Cliff Snodgrass
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FILED⁴

OCT 22 2003

Missouri Public
Service Commission

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

In the Matter of the General Rate Increase)	
for Water and Sewer Service Provided)	Case No. WR-2003-0500,
by Missouri-American Water Company.)	Lead case
Staff of the Missouri Public Service)	
Commission,)	
)	
Complainant,)	
)	
v.)	Case No. WC-2004-0168
)	
Missouri-American Water Company,)	
)	
Respondent.)	

ANSWER TO STAFF COMPLAINT,
REQUEST FOR VOLUNTARY MEDIATION
AND MOTION TO DISMISS

COMES NOW Missouri-American Water Company ("MAWC" or "Company"), in accordance with Missouri Public Service Commission ("Commission") Rule 4 CSR 240-2.070, and, in response to the Excessive Earnings Complaint Against Missouri-American Water Company ("Complaint"), MAWC states the following as its Answer to Staff Complaint, Request for Voluntary Mediation and Motion to Dismiss:

SUMMARY

MAWC herein denies the allegations contained in the Complaint. In particular, MAWC points out that the Staff's allegations of over earnings depend in large part upon proposals the Staff makes in its testimony and that are inconsistent with existing Commission orders. MAWC further indicates its willingness to accept the Commission's offer to refer this matter to a neutral third-party

mediator for voluntary mediation. Lastly, MAWC moves that the Commission dismiss the Complaint.

BACKGROUND

1. On May 19, 2003, MAWC filed proposed tariff sheets to implement a general rate increase for water and sewer service provided by MAWC. The revised water rates were designed to produce approximately an additional \$20 million in gross annual water revenues (excluding gross receipts and sales taxes) or a 12.2% increase over existing water revenues.

2. The Commission most recently approved a rate increase for one of the MAWC properties from approximately three to three and one-half years prior to the operation of law date in the pending rate case (April 16, 2003). MAWC last received rate increases on the following effective dates:

- A. the former St. Louis County Water Company properties – May 13, 2001;
- B. the former United Water Missouri properties (Jefferson City) – December 1, 2000;
and,
- C. Missouri-American Water Company (Joplin, St. Joseph, Brunswick, Platte County, Warrensburg, St. Charles and Mexico services territories) – September 14, 2000.

3. The Company's ability to provide water service is dependent on a consistent level of adequate earnings. Adequate earnings are those which justify the investment of capital in the Company. Revenues must be sufficient to cover operating expenses, such as employee payroll and benefits, taxes, depreciation, and costs associated with maintenance and operation, and, thereafter, provide for the payment of capital costs which include interest and dividends. Revenues generated by the current rates the Company is authorized to charge for water will not adequately accomplish

this task. On a pro forma present rates basis, the Company's earned return on its rate base investment is only 5.84% versus an authorized level of 8.44%.

4. The water rate increase requested by MAWC is primarily due to the following factors:

A. The Company has made an investment in utility plant in the amount of approximately \$146 million since the last rate cases, to include significant capital expenditures related to its security initiatives as a result of the events of September 11, 2001;

B. The Company has experienced increases in its pension and health insurance costs and employee salaries since the last rate cases; and,

C. Inflationary pressures on operating expenses since the last cases.

5. The potential for increases should not be surprising considering the significant levels of investment made by MAWC since the last rate cases. Additionally, the most recent monthly surveillance reports provided to the Commission indicate that the Company is not earning the rates of return authorized by the Commission in the last rate cases. This is consistent with Staff testimony in the last St. Louis County Water Company rate case indicating that the water industry, unlike some other utility industries, is a rising cost industry (Transcript, Case No. WR-2000-844, p. 286, 819-820). This is because of the capital intensive nature of the industry.

6. On October 3, 2003, the Commission Staff filed a document entitled "Staff Excessive Earnings Complaint Against Missouri-American Water Company." The Complaint alleges, among other things, that "MAWC's water revenues are excessive in the range of \$19 to \$21 million, on a total company basis." The Staff "manufactures" its approximately \$20 million "over earnings" case through four primary adjustments. These adjustments and their approximate impact are as follows:

Staff lower depreciation rates	\$12 million impact
Staff's lower return on equity	\$ 5 million impact

Staff's hypothetical capital structure (And related items)	\$ 6.8 million impact
<u>Staff's disallowed pension costs</u>	<u>\$ 3.6 million impact</u>
Total	\$27.4 million

All four of these adjustments require the Commission to make findings that are inconsistent with methodologies utilized by the Commission in setting MAWC's rates in prior Commission orders. Without these prospective Staff proposed adjustments, MAWC rates must be increased. Additionally, because Staff's case relies on proposed adjustments, there are no "excessive earnings" or any earnings that are contrary to Commission order.

ANSWER

7. MAWC admits the allegations contained in paragraphs one (1), two (2) and three (3) of the Complaint.

8. The statutes and rule identified in paragraphs four (4), five (5), six (6), seven (7), eight (8), nine (9), ten (10), eleven (11) and twelve (12) are the best evidence and speak for themselves. MAWC denies the allegations in these paragraphs to the extent they are inconsistent with the statutes and rule.

9. MAWC admits that it filed proposed tariff sheets with the Commission on May 19, 2003, seeking a general increase for water and sewer service. MAWC further admits that the proposed water rates were designed to produce approximately an additional \$20 million in gross annual water revenues (excluding gross receipts and sales taxes) over existing water revenues. The Commission orders identified in paragraph thirteen (13) are the best evidence and speak for themselves. MAWC denies the allegations in these paragraphs to the extent they are inconsistent

with the orders or the law. Lastly, MAWC denies the remaining allegations contained in paragraph thirteen (13) of the Complaint.

10. MAWC denies the allegations contained in paragraph fourteen (14) of the Complaint.

11. MAWC admits that Mr. Ed Grubb spoke to an employee of the Commission Staff prior to the date upon which Staff filed the Complaint.

12. The testimony referred to in paragraphs sixteen (16) and seventeen (17) of the Complaint is the best evidence and speaks for itself. MAWC denies the allegations in these paragraphs to the extent they are inconsistent with the Staff's testimony.

13. MAWC denies that the rates being charged by it are excessive. The remainder of the allegations contained in paragraph eighteen (18) of the Complaint do not appear to be allegations of fact for which an admission or denial is required, and therefore MAWC denies the same.

14. For further answer and defense, pursuant to 4 CSR 240-2.070(8), MAWC provides the following additional grounds of defense, both of law and fact:

A. The Commission purported to authorize its "Staff" to file a complaint in the Suspension Order and Notice issued May 29, 2003, wherein the Commission stated that "the Staff of the Missouri Public Service Commission is hereby authorized to file a complaint seeking a reduction in Missouri-American Water Company's revenues if its audit reflects that Missouri-American Water Company's earnings are excessive." That purported authorization is unlawful, unjust, unreasonable, arbitrary, capricious, involves an abuse of discretion, is unsupported by competent and substantial evidence upon the whole record and is unconstitutional in that it was issued without the benefit of any evidence or hearing in violation of requirements of due process. As of the date the subject "authorization," no information had been presented to the Commission

other than the Company's uncontroverted proposed tariff sheets, direct testimony and minimum filing requirements. The Commission had no information upon which to base an authorization for the filing of a complaint.

B. The Complaint fails to state a claim upon which relief may be granted. The Complaint quotes the following sections as authority for the Complaint:

i. Section 386.390.1 - "Complaint may be made by the commission of its own motion . . . by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission"

ii. Section 393.130.1 - "All charges made or demanded by any . . . water corporation . . . for . . . water . . . or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited."

iii. Section 393.140(5) - "Whenever the commission shall be of the opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such persons or corporations are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter

to be in force for the service to be furnished, notwithstanding that a higher rate or charge has heretofore been authorized by statute.”

The Complaint alleges that MAWC’s current rates are “excessive” and “not just and reasonable.” However, the rates currently being charged by MAWC are in accordance with an “order or decision” of the Commission and deemed to be just and reasonable. Section 386.270, RSMo 2000 (“all rates . . . fixed by the commission shall be in force and shall be prima facie lawful . . . until found otherwise in a suit brought for that purpose . . .”). Thus, the current rates cannot, by definition be “excessive.” Furthermore, as stated above, without certain proposed Staff adjustments that are inconsistent with an “order or decision” of the Commission in prior MAWC rate cases, there is no allegation of over earning, and certainly no valid “excessive earnings complaint” against MAWC. The Complaint should therefore be dismissed as a matter of law.

C. i. The Commission “Staff” has no standing to bring a complaint as it is not one of the enumerated parties listed in Section 386.390.1, RSMo 2000, which is authorized to file a complaint, nor is it one of the enumerated parties listed in Section 386.240, RSMo 2000, which can be authorized by the Commission to undertake such acts.

ii. While the Commission’s rule concerning the initiation of complaints, 4 CSR 240-2.070, purports to authorize the “Staff” to file a complaint, this can be done under the rule only through the general counsel. Since the general counsel does not have authority under statute to initiate a complaint (Section 386.390.1, RSMo), and in effect has been prohibited from doing so by the legislature, the method specified by the Commission in 4 CSR 240-2.070 is unlawful as it is in conflict with statute. Consequently, the Commission may not authorize the “Staff” or its general counsel on behalf of the Commission to file a formal complaint under 4 CSR 240-2.070

because the “Staff” may act under the rule only through its general counsel and the legislature has prohibited the general counsel from filing a complaint.

iii. Alternatively, assuming the Commission may bring a complaint “upon its own motion” and does so through its general counsel, the “Staff” and the Commission members themselves may not act in said case – “. . . members of the Public Service Commission may not act in cases pending before that body in which they are interested or prejudiced or occupy the status of a party.” *Union Electric v. Public Service Commission*, 519 S.W.2d 134 (Mo.App.W.D. 1979).

D. The Commission may not simultaneously hear the Complaint and MAWC’s request for rate increase. “At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . water corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.” Section 393.150.2, RSMo 2000. In a Complaint case, the burden of proof rests with Complainant to show by clear and satisfactory evidence that a rate approved by this Commission is unlawful. *State ex rel. City of St. Louis v. Public Service Commission*, 36 S.W.2d 947 (Mo. 1931); Section 386.430, RSMo 2000. These burdens are irreconcilable in the matters at hand and, thus, the Commission should dismiss or suspend the Complaint until the conclusion of the rate increase request has been decided. Section 386.390.2, RSMo 2000 indicates that “[a]ll matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties . . .” is not applicable to this matter because the it is not complaints or grievances that are sought to be joined, but instead a complaint and a rate increase request, a situation not governed by Section 386.390.2.

E. The Commission does not have jurisdiction over this matter because the Complaint is an unlawful collateral attack on the prior orders of the Commission in violation of Section 386.550, RSMo 2000 (“in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive”), in that the Complaint does not allege a substantial change in circumstances since the orders establishing MAWC’s current rates. See, *State ex rel. Ozark Border Electric Cooperative v. Public Service Commission*, 924 S.W.2d 597 (Mo.App.W.D. 1996).

A REQUEST FOR VOLUNTARY MEDIATION

15. In its Notice of Complaint, the Commission provided the following alternative -- “. . . the Respondent may file a written request that the complaint be referred to a neutral third-party mediator for voluntary mediation of the complaint.” MAWC understands that the Complaint alleges that it has been brought under the authority granted by Section 386.390.1, RSMo 2000 (“[c]omplaint may be made by the commission of its own motion . . .”).

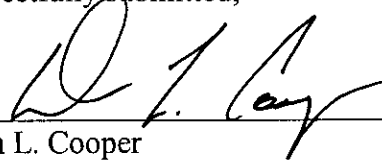
16. Accordingly, this should be considered MAWC’s written request that the Complaint be referred to a neutral third-party mediator for mediation with the Commission, as offered by the Complainant Commission.

MOTION TO DISMISS

17. MAWC further moves the Commission to dismiss the Complaint for the reasons stated herein.

WHEREFORE, MAWC, having fully answered and set forth its affirmative defenses, respectfully requests that the Commission dismiss the Complaint.

Respectfully submitted,



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WATER COMPANY

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, or electronic mail on this 22nd day of October, 2003, to the following:

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