

**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

INITIAL BRIEF

Comes now the Office of the Public Counsel (the “OPC”) and offers this initial post-hearing brief addressing the remaining issue in this matter.

I. Background

Missouri-American Water Company (“MAWC”) brought this case requesting authority to raise its rates for water and sewer service. The Parties¹ entered into two Stipulations and Agreements² (Docs. 218, 223) to settle most of the issues identified in the List of Issues, List and Order of Witnesses, Order of Opening, and Order of Cross Examination (the “List of Issues,” Doc. 185).

On March 9, 2023, the Commission held a hearing on the remaining issue, Issue 3a. (*See* Tr., Doc. 226). That issue asks the Commission to consider two questions related to affiliate transactions rules. (List of Issues 3). As a part of the March 9, 2023 hearing, MAWC, the Staff of the Public Service Commission of the State of Missouri (“Staff”), and the OPC offered opening statements and agreed to waive cross examination of witnesses. (*See* Amended List of Issues 4, Doc. 220; Tr. 49-72). The Public Service Commission of the State of Missouri (the

¹ Though not all of the Parties to this matter are Signatories to both Stipulations and Agreements, no party has objected to either Stipulation and Agreement and the time to do so has expired. Therefore, the Commission may treat both Stipulations and Agreements as unanimous. 20 CSR 4240-2.115(2)(C).

² On March 29, 2023, the Parties discussed these Stipulations and Agreements at the On-the-Record presentation.

“Commission”) called Ms. Kimberly Bolin, witness for Staff, to testify. (Tr. 72). Ms. Bolin was the only witness to offer live testimony at the hearing.

II. Argument: Issue 3a.³ Should MAWC be required to file a Cost Allocation Manual with the Commission? Should the Commission open a new rulemaking docket in order to draft affiliate transactions rules for water and sewer?

In deciding this issue, the Commission must determine whether it should require MAWC to file a Cost Allocation Manual (“CAM”) and whether it should open a new rulemaking docket in order to draft affiliate transactions rules for water and sewer utilities. (*See* List of Issues 3). The Commission should answer both of these questions in the affirmative. Because the answer to the first question necessarily flows from the Commission’s answer to the second question, the OPC will address the second question—regarding whether the Commission should open a new rulemaking docket—first.

A. The Commission Should Open a New Rulemaking Docket to Promulgate Affiliate Transactions Rules for Large Water and Sewer Utilities

The road to affiliate transactions rules applicable to Missouri’s regulated water and sewer utilities is long—spanning at least nineteen years. As pointed out by Chairman Rupp at the March 9, 2023 hearing, this is “the epitome of the Commission kicking the can down the road.” (Tr. 71). The Commission must end this drawn out process now. It must open a new rulemaking docket to promulgate affiliate transactions rules applicable to Missouri’s large water and sewer utilities.

The importance of this issue cannot be overstated. The Supreme Court of the State of Missouri has recognized the importance of affiliate transactions rules in upholding the Commission’s enactment of affiliate transactions rules for electric, gas, and steam heating⁴

³ For clarity, the OPC retains the original numbering from the List of Issues.

⁴ Although the affiliate transactions rules applicable to electric, gas, and steam heating utilities currently exist in different chapters of the Commission’s rules, the rules “are essentially the same.” (Ex. 211 “Mantle Direct Testimony,” Schedule LMM-D-2 “Mantle Whitepaper” 3 n.1, Doc. 76).

utilities. Further, the OPC has again raised concerns with MAWC’s affiliate transactions in this case—at least the second time it has done so. Yet, because the Commission’s affiliate transactions rules do not apply to water and sewer utilities, the Commission lacks regulatory standards to address these concerns. No reason exists to exempt Missouri’s large water and sewer utilities from the Commission’s affiliate transactions rules.

In this unique case, the Commission need not choose a side. The Commission need not impede upon the progress of the already pending working group docket that considers important—and in some cases controversial—changes to the Commission’s currently effective affiliate transactions rules. Rather, the Commission can allow that docket to proceed and separately open a rulemaking docket that considers affiliate transactions rules that change the word “electric,” “gas,” or “steam heating” in the Commission’s current affiliate transactions rules to “large water” and “large sewer”—with large water and sewer utilities being those who serve more than 8,000 customer connections.

1. Timeline of Events Regarding Affiliate Transactions Rules Applicable to Large Water and Sewer Utilities in Missouri

The story of affiliate transactions rules applicable to large water and sewer utilities in Missouri begins over nineteen (19) years ago, when Ms. Bolin, then an employee of the OPC, filed testimony that raised concerns with MAWC’s affiliate transactions in Case Number WR-2003-0500. (Ex. 216 “Schaben Surrebuttal Testimony,” Schedule ADS-S-6 “Bolin 2003 OPC Surrebuttal Testimony” 5-6, Doc. 162).⁵ That case ended in a Stipulation and Agreement (the “2003 S&A”) in which MAWC, the OPC, and Staff (collectively, the “Rulemaking Parties”) agreed to “use their best efforts to see that a rule regarding affiliate transactions is promulgated by

⁵ Though the Commission has not entered all of the pre-filed testimony into its electronic filing information system (“EFIS”) as exhibits, the Commission entered all of the OPC’s remaining exhibits into evidence during the March 29, 2023 On-the-Record presentation.

the Commission no later than April 16, 2005.” (*Id.*, Schedule ADS-S-1 “2003 S&A” 5-6,⁶ Doc. 162). However, that effort ultimately ended when the Rulemaking Parties could not reach an agreement. (*See id.*, Schedule ADS-S-9 “Staff’s Memorandum” 1-2, Doc. 162).

In its Memorandum to the Commission, Staff described the Rulemaking Parties’ disagreement and recommended that the Commission “proceed with promulgation of an affiliate transactions rule for water utilities.” (*Id.* 2). Specifically, Staff noted that the “Commission has affiliate transactions rules applicable to the other major utilities in the state and similar rules should also apply to the major water utility in the state.” (*Id.*). Referring specifically to MAWC, Staff stated “MAWC’s structure creates the same risk for improper cross-subsidization, resulting in detrimental impacts on customers, as do the structures of other utility companies in the state.” (*Id.*).

The issue of affiliate transactions rules applicable to large water and sewer utilities then lay dormant for a number of years. On November 30, 2017, Dr. Geoff Marke of the OPC filed testimony in MAWC’s 2017 rate case, Case Number WR-2017-0285, requesting that the Commission promulgate rules for water companies of a certain size. (Ex. 200 “Marke Direct Testimony” 8, Doc. 231).

Approximately seven months later, on June 22, 2018, the OPC initiated a rulemaking docket, in which it requested that the Commission promulgate affiliate transactions rules applicable to water utilities. (*See id.*). Specifically, the OPC sought promulgation of a rule that “added the word ‘water’ before the word ‘corporation’ as a new set of rules in 4 CSR 240-50.015.” (*Id.*).

⁶ The 2003 S&A as attached to Ms. Schaben’s testimony includes two sets of page numbers. The page numbers identified throughout this brief correspond to the page number associated with Ms. Schaben’s schedule, which appear after the phrase “ADS-S-1 Page.”

Five days later, on June 27, 2018, Staff initiated two working group cases: (1) Case Number AW-2018-0394, which considered consolidation of electric, gas, water, and sewer utility affiliate transactions rules; and (2) Case Number WW-2018-0392, which considered affiliate transactions rules applicable to water and sewer corporations that serve less than 8,000 customers. (*Id.* 9).

Approximately five days after that, on July 2, 2018, the OPC withdrew its June 22, 2018 rulemaking petition “out of respect for a request from Staff.” (*Id.*).

Throughout the next year, interested parties filed comments and participated in a workshop in Staff’s working group docket, Case Number AW-2018-0394. (*Id.*) However, “out of concern from inactivity in” that case, the OPC initiated a second rulemaking docket on June 4, 2019. (*Id.*) In that rulemaking petition, the OPC again requested that the Commission promulgate a rule that simply added the word “water” before the word “corporation” as a new set of rules in 4 CSR 240-50.015. (*Id.*) The next day, Staff responded to the OPC’s rulemaking petition and, referring to the comments filed in the working group case, stated that “Staff continues the internal review process and could produce final drafts in the next few months.” (*Id.*) The Commission ultimately denied the OPC’s second rulemaking petition following Staff’s response. (*Id.*)

Over three months after the OPC initiated its second rulemaking case, Staff filed draft affiliate transactions rules in Case Number AW-2018-0394. (*Id.*) Staff noted three possible outcomes for the Commission’s consideration: (1) continue the working group case and request comments from stakeholders regarding the draft rules; (2) engage in an Order of Proposed Rulemaking utilizing the draft rules; or (3) make changes to the draft rules in an Agenda and use those revised rules to produce an Order of Proposed Rulemaking. (*Id.* 9-10). The Commission chose the first option and parties then filed additional comments in the working group case. (*See id.* 10). During the next approximately five months, interested stakeholders filed additional

comments in the working group case and Staff twice filed revised rules, with the latest revised rules being filed on February 18, 2020. (*Id.*). Three utilities filed additional comments on March 20, 2020. (*Id.*). This was the last substantive activity in Case Number AW-2018-0394. (*See id.*).

Over eight months later, on November 24, 2020, Dr. Marke filed testimony in MAWC's 2020 rate case, Case Number WR-2020-0344, again requesting that the Commission promulgate affiliate transactions rules applicable to large water and sewer utilities. (*Id.* 11).

Nearly two years later, Dr. Marke made a similar request in filed testimony in the instant case. (*See id.* 1-13).

To summarize, the OPC has requested that the Commission promulgate affiliate transactions rules applicable to certain water and sewer utilities in the last three (3) MAWC rate cases. (*See id.* 8, 11, 13). The OPC has also twice filed rulemaking petitions asking the Commission to promulgate rules that "added the word 'water' before the word 'corporation' as a new set of rules in 4 CSR 240-50.015." (*See id.* 8-9). The OPC withdrew one of those petitions out of respect for Staff's working group case and the Commission denied the other after Staff filed a response referencing its working group case. (*Id.* 9). Finally, although the OPC remains committed to participating in Staff's working group case, Case Number AW-2018-0394, it has been over three (3) years since there has been *any* substantive activity in that case. (*See id.* 8-11).

2. Concerns Regarding Affiliate Transactions Apply with Equal Force to Missouri's Large Water and Sewer Utilities

Concerns regarding transactions between regulated entities and their unregulated affiliates are not new. The Missouri Supreme Court has recognized these concerns in at least two en banc cases. Though a time may have once existed when Missouri's water and sewer utilities should not have been subject to affiliate transactions rules, that time has passed, at least with regard to Missouri's large water and sewer utilities. As evidence of that, in at least two rate cases, the OPC

has raised concerns regarding MAWC's affiliate transactions, in particular. To ensure that Missouri's large water and sewer utilities, including MAWC, are subject to the same affiliate transactions standards as Missouri's electric, gas, and steam heating utilities, the Commission must promulgate an affiliate transactions rule applicable to these utilities.

The Missouri Supreme Court has recognized that the Commission enacted the current affiliate transactions rules to account for improper cross-subsidization that could occur between regulated entities and their unregulated affiliates. *See State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 763-64 (Mo. banc 2003) (hereinafter "*Atmos*"). The *Atmos* Court explained cross-subsidization as occurring when "utilities abandon their traditional monopoly structure and expand into non-regulated areas. This expansion gives utilities the opportunity and incentive to shift their non-regulated costs to their regulated operations with the effect of unnecessarily increasing the rates charged to their utilities' customers." *Id.* (citation omitted). The *Atmos* Court continued stating that

To counter this trend, the new rules - and in particular, the asymmetrical pricing standards - prohibit utilities from providing an advantage to their affiliates to the detriment of rate-paying customers. In addition, to police compliance, the rules require the utilities to ensure that they and their affiliates maintain records of certain transactions.

Id. at 764. Ultimately, the Missouri Supreme Court upheld the Commission's promulgation of affiliate transactions rules applicable to electric, gas, and steam heating utilities against a variety of challenges. *See generally id.*

In *Office of the Public Counsel v. Missouri Public Service Commission*, the Missouri Supreme Court again recognized the risks associated with affiliate transactions. 409 S.W.3d 371, 377 (Mo. banc 2013). In that case, the Missouri Supreme Court stated

This greater risk inherent in affiliate transactions arises because agreements between a public utility and its affiliates are not "made at arm's length or on an

open market. They are between corporations, one of which is controlled by the other. As such they are subject to suspicion and therefore present dangerous potentialities.”

Id. (citation omitted).

Though the Missouri Supreme Court recognized the dangers associated with affiliate transactions, given water and sewer utilities’ “much more local and . . . less complex regulatory service,” there may once have been a time when the concerns regarding affiliate transactions did not apply with the same force to these utilities. (Marke Direct Test. 3). However, that time has passed. American Water, MAWC’s parent company, has grown and expanded, including in Missouri, so that it is now “a textbook example of a utility the Commission had in mind when it drafted its existing affiliate transactions rules.” (*See id.* 3-4). In fact, American Water describes itself as “the largest and most geographically diverse U.S. publicly traded water and wastewater utility company.” (*Id.* 3 (quoting Am. Water: About Us. (2022) <https://www.amwater.com/corp/about-us/>)). Even more than seventeen years ago when Staff filed its memorandum describing the Rulemaking Parties’ inability to agree on affiliate transactions rules, Staff stated that “MAWC’s structure creates the same risk for improper cross-subsidization, resulting in detrimental impacts on customers, as do the structures of other utility companies in the state.” (Staff’s Mem. 2). In this case too, “Staff agrees that water and sewer utilities with over 8,000 customers should have affiliate transactions rules.” (Ex. 115 “Bolin Rebuttal Testimony” 24, Doc. 230).

As further evidence that Missouri’s large water and sewer utilities should be subject to affiliate transactions rules, the OPC raised concerns regarding MAWC’s affiliate transactions in at least two rate cases. First, in her testimony in the 2003 rate case, Ms. Bolin raised concerns related to MAWC’s interactions with American Water Resources. (Bolin 2003 OPC Surrebuttal

Test. 5-6). Specifically, in that case, the OPC was concerned because MAWC “allowed American Water Resources to use[] its customer’s names and addresses in mailing . . . letters [promoting a water service line protection program], which were sent on Missouri-American Water letterhead and signed by the president of Missouri-American Water Company.” (*Id.* 6). Similarly, in the instant case, the OPC raised concerns about the interactions between MAWC and American Water Resources.⁷ (*See, e.g.*, Ex. 214 “Schaben Direct Testimony” 3-13, Doc. 81; Marke Direct Test. 1-8).

Given the concerns related to affiliate transactions, which now apply with equal force to large water and sewer utilities such as MAWC, it is important for the Commission to expeditiously promulgate an affiliate transactions rule that is applicable to these utilities.

3. The Commission Can Both Open a Rulemaking Docket to Promulgate Rules that Apply to Missouri’s Large Water and Sewer Utilities and Continue Considering Changes in Staff’s Working Group Docket

Both Staff and MAWC oppose the OPC’s request for the Commission to open a new rulemaking docket on the ground that the Commission should continue considering the changes proposed in Staff’s working group case, Case Number AW-2018-0394.⁸ (*See* Bolin Rebuttal Test. 23-24; Ex. 14 “LaGrand Rebuttal Testimony” 26, Doc. 228). However, the OPC is not asking the Commission to make an “either/or” decision. Rather, the Commission should *both* continue considering the important—and in some cases controversial—changes to the Commission’s current affiliate transactions rules in the working group case *and* open a rulemaking docket to

⁷ At this time, the OPC is not asking the Commission to impose its proposed disallowance to account for the similarity between MAWC’s logo and American Water Resources’ logo as it appeared on the letters promoting American Water Resources’ service line protection services. (Schaben Surrebuttal Test. 13-17). However, the OPC maintains the concerns regarding MAWC’s interactions with American Water Resources raised throughout its pre-filed testimony in this case. (*See, e.g.*, Schaben Direct Testimony 3-13; Marke Direct Test. 1-8).

⁸ MAWC also opposes the OPC’s request on the ground that it “does not believe that water and sewer utilities should be subject to affiliate rules.” (Ex. 15 “LaGrand Surrebuttal Testimony” 26, Doc. 229). MAWC provides no support for this proposition.

expeditiously adopt affiliate transactions rules that simply change the word “electric,” “gas,” or “steam heating” to “large water” and “large sewer.”

Importantly, Staff does not dispute the OPC’s ultimate goal, which is to ensure that Missouri’s large water and sewer utilities are subject to affiliate transactions rules. Rather, “Staff agrees that water and sewer utilities with over 8,000 customers should have affiliate transactions rules.” (Bolin Rebuttal Test. 24).

Staff, however, “*prefers* continuing to work with the other parties and stakeholders in Case No. AW-2018-0394 to draft new affiliate transactions rules for qualifying water utilities.” (*Id.* (emphasis added)). Staff asserts that it “is aware of changes to the current rules for electric and gas utilities that need to be made to provide clarity to the affiliate transaction rules, and should also be reflected in draft water affiliate transaction rules language.” (*Id.*).

However, it is simply not enough to *only* continue Staff’s working group docket. Inferring from the past filings in the working group case, even if Staff were to file a further revised proposed rule in the working group case soon, it is likely that the Commission’s consideration of the rule in a rulemaking docket would continue to be delayed by parties filing additional comments in the working group case. (*See* Marke Direct Test. 8-11). Then, after considering any comments likely received in response to Staff’s proposed rule, there would be further delay as the statutory rulemaking process proceeded. During that time, the Commission’s affiliate transactions rules would still not apply to Missouri’s large water and sewer utilities—an outcome for which no reason exists. (*See id.* 2-4 (“there is no regulated utility in the United States like American Water and the lack of Commission oversight regarding MAWC’s affiliate transactions is both disconcerting and regrettably long overdue.”)).

Only continuing the working group case, Case Number AW-2018-0394, is further insufficient because another rulemaking must proceed in tandem with any new affiliate transactions rules and it is not clear that it will do so. Namely, the customer information privacy rule, pending in Case Number AW-2018-0393. (Tr. 74-79). Currently, the Commission's affiliate transactions rules in, for example 20 CSR 4240-20.015(2)(C), provide that

Specific customer information shall be made available to affiliated or unaffiliated entities only upon consent of the customer or as otherwise provided by law or commission rules or orders. General or aggregated customer information shall be made available to affiliated or unaffiliated entities upon similar terms and conditions. The regulated electrical corporation may set reasonable charges for costs incurred in producing customer information. Customer information includes information provided to the regulated utility by affiliated or unaffiliated entities.

Ms. Bolin testified at the hearing that the current draft affiliate transactions rules do not contain a provision granting these same protections. (Tr. 78). Ms. Bolin also testified that she assumes that this is what is pending in the other working group docket, Case Number AW-2018-0393. (*Id.* 75). Staff does not plan to file draft rules in that working group docket simultaneously with the filing of revised affiliate transactions rules. (*Id.* 78-79).

If the Commission were to promulgate a revised affiliate transactions rule—one that supersedes the currently applicable affiliate transactions rules—that does not include a customer privacy provision, such as 20 CSR 4240-20.015(2)(C), then customers would have no means by which to limit the sharing of their customer information between regulated utilities and the utilities' unregulated affiliates. Although Staff stated that it plans to file a draft rule in the working group case that considers such a customer privacy rule, it does not plan to do so simultaneously with the filing of revised affiliate transactions rules. (*Id.*). The Commission cannot allow customers to lose the protection over their customer information found in rules such as 20 CSR 4240-20.015(2)(C). Rather, if the Commission is to consider substantive changes to its current

affiliate transactions rules that include deleting the customer privacy provision, it must ensure that it considers a customer privacy rule at the same time.

The OPC has already prepared the proposed rule that “add[s] the word ‘water’ before the word ‘corporation’” and it has twice filed rulemaking petitions with that proposed rule. (*See Marke Direct Test. 8-9*). The OPC could file its proposed rule in a rulemaking docket immediately after the Commission issues its Report and Order in this case. The time necessary to complete the statutory rulemaking process would then be the only delay to large water and sewer utilities being subject to affiliate transactions rules. Completing this process ensures that MAWC’s affiliate transactions are subject to Commission rules while the Commission considers the substantive changes to the existing affiliate transactions rules in the working group case.⁹

In this unique circumstance, the Commission can find for both Staff and the OPC. If the Commission opened a rulemaking docket to promulgate an affiliate transactions rule applicable to large water and sewer utilities, nothing precludes the Commission from considering the changes Staff references in the working group case. The Commission can simply do both.

4. The Commission Must Enact Affiliate Transactions Rules Applicable to Large Water and Sewer Utilities Now

Both Staff and the OPC agree that the Commission should promulgate affiliate transactions rules applicable to Missouri’s large water and sewer utilities. (*See id. 13*; *Bolin Rebuttal Test. 24*). The time for the Commission to do so is now. It has been over nineteen years since the

⁹ If the Commission were to later promulgate a revised affiliate transactions rule applicable to all types of regulated utilities, then similar to the other currently applicable affiliate transactions rules, the revised combined rule would simply supersede the rule that would apply to large water and sewer utilities. Though this may seem redundant, in that circumstance, MAWC’s customers would be protected during the time when the Commission enacted the rule applying to large water and sewer utilities only and the newly revised rule applicable to all types of utilities—an important outcome. (*See Marke Direct Test. 4* (“there is no regulated utility in the United States like American Water and the lack of Commission oversight regarding MAWC’s affiliate transactions is both disconcerting and regrettably long overdue.”); *Bolin Rebuttal Test. 24* (“Staff agrees that water or sewer utilities with over 8,000 customers should have affiliate transactions rules.”)).

Commission first heard concerns related to MAWC's affiliate transactions and nearly eighteen years since the deadline agreed to by Staff, MAWC, and the OPC to promulgate these rules. (*See* Bolin 2003 OPC Surrebuttal Test. 5-6; 2003 S&A 5-6). The OPC has requested that the Commission promulgate these rules in MAWC's last three (3) rate cases and even twice attempted to promulgate these rules in rulemaking dockets. (*See* Marke Direct Test. 8-9, 11, 13). Though Staff's working group case remains pending, it has been over three years since any substantive activity occurred in that case. (*See id.* 8-13). The Commission must end this process now by opening a rulemaking docket to consider affiliate transactions rules that apply to Missouri's large water and sewer utilities.

B. The Commission Should Also Require MAWC to file a CAM

The second question the Commission must consider in deciding the lone remaining issue is whether it should require MAWC to file a CAM. (*See* List of Issues 3). In approving the 2003 S&A, the Commission has previously ordered MAWC to provide a yearly CAM to Staff and the OPC.¹⁰ (2003 S&A 6; Schaben Surrebuttal Test., ADS-S-7 "Order Approving Stipulations and Agreements" 9, 12, Doc. 162). However, if the Commission promulgates affiliate transactions rules that "add[] the word 'water' before the word 'corporation'" it would necessarily require MAWC to file a yearly CAM before the Commission, much like the electric, gas, and steam heating utilities. *See, e.g.*, 20 CSR 4240-20.015(4); (Marke Direct Test. 8, 13). Therefore, the Commission should both open a rulemaking docket to promulgate affiliate transactions rules that apply to Missouri's large water and sewer utility and also require MAWC to file a yearly CAM.

¹⁰ The OPC, Staff, and MAWC agree that MAWC has a CAM. (Marke Direct Test. 4; Tr. 58; LaGrand Rebuttal Test. 25-26). However, as Dr. Marke pointed out in testimony, "because the Commission's affiliate transaction rules do not apply to MAWC, its CAM lacks any enforceable standards and, thus, provides minimal protection, if any." (Marke Direct Test. 4). To ensure that MAWC's CAM is subject to the same requirements as the CAM of other regulated utilities, the Commission should require MAWC to file a CAM after it promulgates affiliate transactions rules applicable to large water and sewer utilities.

III. Conclusion

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission open a rulemaking docket to promulgate an affiliate transactions rule applicable to Missouri's large water and sewer utilities and require MAWC to file a yearly CAM, thereby affirmatively answering both questions in the lone remaining issue in this case.

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 31st day of March 2023.

/s/ Lindsay VanGerpen