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November 3, 2003

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

FILED

NOV 03 2003

Missouri Public
Service Commission

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

Dear Mr. Roberts:

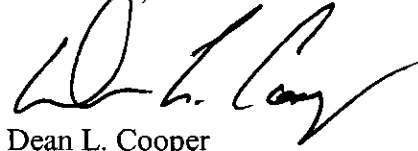
Enclosed for filing in the above-referenced matter are the original and eight (8) copies of Missouri-American Water Company's Suggestions in Support of MAWC's Motion to Dismiss. A copy of the foregoing document has been hand-delivered or mailed this date to each party of record.

Thank you for your attention to this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Dean L. Cooper

DLC/jar

Enclosures

cc: Cliff Snodgrass
Ruth O'Neill
Jan Bond
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Mark Comley

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

In the Matter of the General Rate Increase
for Water and Sewer Service Provided
by Missouri-American Water Company.

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Case No. WR-2003-0500,

Lead case

FILED

NOV 03 2003

Staff of the Missouri Public Service
Commission,

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Complainant,

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**Missouri Public
Service Commission**

v.

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)
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Case No. WC-2004-0168

Missouri-American Water Company,

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)

Respondent.

**SUGGESTIONS IN SUPPORT OF
MAWC'S MOTION TO DISMISS**

COMES NOW Missouri-American Water Company ("MAWC" or "Company"), and states the following as its Suggestions in Support of MAWC's Motion to Dismiss:

INTRODUCTION

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. On October 3, 2003, the Missouri Public Service Commission ("Commission") Staff ("Staff") filed a document entitled "Staff Excessive Earnings Complaint Against Missouri-American Water Company" (the "Complaint"). 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."

2. On October 22, 2003, MAWC filed its Answer to Staff Complaint, Request for Voluntary Mediation and Motion to Dismiss. By order dated October 29, 2003, the Commission directed MAWC to prepare and file by noon on November 3, 2003, a memorandum of law citing legal authorities in support of its Motion to Dismiss.

3. MAWC's motion to dismiss is based upon the following:

- I. The Commission should dismiss the Complaint because it has no jurisdiction to entertain the Complaint in that the purported authorization to bring such complaint was issued without the benefit of any evidence or hearing and there 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.
- II. The Commission should dismiss the Complaint because the Complaint is an unlawful collateral attack on the prior orders of the Commission in violation of Section 386.550, RSMo 2000 in that the Complaint does not allege a substantial change in circumstances since the orders establishing MAWC's current rates.
- III. The Commission should dismiss the Complaint because it fails to state a claim upon which relief may be granted in that 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 and cannot, by definition, be "excessive."

- IV. The Commission should dismiss the Complaint because it has no jurisdiction to entertain the Complaint in that the Commission "Staff" has no standing to bring a complaint and the Commission is prohibited from maintaining an action before itself.
- V. The Commission should dismiss the Complaint because it has no jurisdiction to proceed simultaneously with the Company's proposed tariff sheets and the Complaint in that these matters have irreconcilable burdens of proof.

DISCUSSION

- I. **The Commission should dismiss the Complaint because the Complaint fails to state a claim upon which relief may be granted in that the purported authorization to bring such complaint was issued without the benefit of any evidence or hearing and there 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.**

4. 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."

5. 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. MAWC was not provided notice that the Commission was considering such an authorization nor given the opportunity to respond to the proposal to issue such an authorization. Further, no hearing was conducted as to whether or not the Commission should

issue this authorization concerning MAWC. The Commission had no information upon which to base an authorization for the filing of a complaint.

6. In *State v. Carroll*, 620 S.W.2d 22 (Mo. App. S.D. 1981), the Court of Appeals addressed the question of whether or not the Public Service Commission could authorize its general counsel to pursue a penalty action without first holding a hearing to determine whether or not the respondent motor carrier was operating improperly. The Court of Appeals found that whether or not the respondent was unlawfully operating must first be determined by the Commission after proper hearing. Because the Commission had failed to do so, the penalty action was deemed to fail to state a claim upon which relief may be granted, and dismissed.

7. Similarly, in this case, the Commission has attempted to exercise authority to authorize its general counsel to pursue a complaint action without first determining that such action is warranted after proper hearing. As a result, the 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.

8. In this situation, the proper procedure would be to hear the rate increase request first. If the decision determines that a complaint is justified after hearing the evidence and determining that certain elements of MAWC's rates should be treated differently than they were in MAWC's existing rates, then it would be appropriate to authorize that a complaint be filed. Here, there is no indication, even from the Staff testimony that MAWC is over earning based upon the Commission's existing orders.

II. The Commission should dismiss the Complaint because the Complaint is an unlawful collateral attack on the prior orders of the Commission in violation of Section 386.550, RSMo 2000 in that the Complaint does not allege a substantial change in circumstances since the orders establishing MAWC's current rates.

8. 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." Based upon Staff's filed testimony, these "excessive" earnings are derived from 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

9. 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. In other words, the Complaint in this case is purely speculative. It is based on what the Commission may decide in MAWC's rate case, not upon prior orders and decisions of the Commission.

10. Section 386.550, RSMo 2000 states that "in all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive." "This statute is indicative of the law's desire that judgments be final. *State ex rel Harline v. Public Service Commission*, 343 S.W.2d 177, 184 (Mo.App. 1960). A judgment of a court having jurisdiction cannot be impeached collaterally. *Id.* This statutory provision makes a decision of the Commission immune to collateral attack. If a complaint does not allege a change in circumstance it would be in

conflict with this section providing for finality.” *State ex rel Ozark Border Electric Coop. v. Public Service Commission*, 924 S.W.2d 597, 601 (Mo.App.W.D. 1996).

11. Although the complaint at issue in *Ozark Border* concerned a territorial agreement, the application of Section 386.550 is equally appropriate. As stated above, the allegations in the Complaint as to excessive earnings are not an application of the decisions made in the Commission’s prior orders. The substantive allegations are instead based upon proposed changes to those prior Commission orders. No allegation of a substantial change in circumstances pertaining to these proposals since the orders establishing MAWC’s current rates is found in the Complaint. Thus, the Commission does not have jurisdiction over this matter because the Complaint is an unlawful collateral attack on the prior orders of the Commission.

III. The Commission should dismiss the Complaint because it fails to state a claim upon which relief may be granted in that 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 and cannot, by definition, be “excessive.”

12. Similarly, the Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

13. The Complaint contains the following as a summation of its allegations:

WHEREFORE, the Staff submits that its audit of Missouri-American Water Company indicates that MAWC’s current rates for water and sewer service, on a total Company basis, are excessive, not just and reasonable

(Complaint, p. 7).

14. As an initial matter it should be noted that the Complaint exceeds even the purported authorization of the Commission. The Commission purported to authorize the Staff to file a

Complaint “if its audit reflects that Missouri-American Water Company’s earnings are *excessive*” (emphasis added). As identified above, MAWC’s current rates are not “excessive.” Thus, the purported authorization does not provide a lawful basis for the pursuit of the Complaint.

14. Furthermore, MAWC’s current rates are presumed to be just and reasonable. See Section 386.270, RSMo 2000. There is no allegation that MAWC is charging anything other than its rates that have been authorized by Commission order.

15. 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.”

16. These statutes are not applicable because there is no violation of order, decision or law. 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.

IV. The Commission should dismiss the Complaint because it has no jurisdiction to entertain the Complaint in that the Commission “Staff” has no standing to bring a complaint and the Commission is prohibited from maintaining an action before itself.

17. The Complaint filed in this matter was captioned by the Staff as “Staff of the Missouri Public Service Commission, Complainant, v. Missouri-American Water Company” and the party bringing the Complaint was described as “the Staff of the Missouri Public Service Commission.”

18. 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. Section 386.390.1 provides that a “Complaint may be made by the commission of its own motion,

or by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation.” The “Staff” is not one of those parties.

19. Nor is the “Staff” one of the enumerated parties listed in Section 386.240, RSMo 2000, which can be authorized by the Commission to undertake such acts. Section 386.240 states that “the commission may authorize any person employed by it to do or perform any act, matter or thing which the commission is authorized by this chapter to do or perform.”

20. 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.

21. 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*, 591 S.W.2d 134, 139 (Mo.App.W.D. 1979) (emphasis added).

- V. **The Commission should dismiss the Complaint because it has no jurisdiction to proceed simultaneously with the Company's proposed tariff sheets and the Complaint in that these matters have irreconcilable burdens of proof.**

22. The Commission may not simultaneously hear the Complaint and MAWC's request for rate increase. This is because to do so would require the Commission to utilize and apply two competing and inconsistent burdens of proof.

23. "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. Thus, as to Case No. WR-2003-0500, MAWC carries the burden of proof.

24. 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. Therefore, as to the Complaint initially identified as Case No. WC-2004-0168, the Commission carries the burden of proof.

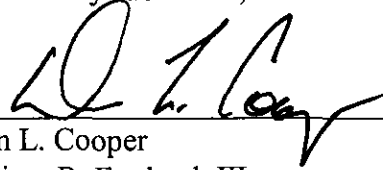
25. These burdens are irreconcilable in the matters at hand. The Commission should dismiss the Complaint until the conclusion of the rate increase request has been decided.

26. The other possibility would be to treat these matters as a civil court would when faced with an answer presenting an equitable defense that is not triable to a jury. "When an equitable defense is presented to a claim triable by a jury . . . a separate trial shall be conducted by the court

to determine the equitable defense. A jury trial on the underlying cause is not available at that point and does not become available unless the equitable defense fails." *State ex rel Rope v. Borrron*, 762 S.W.2d 4276, 429 (Mo.App.W.D. 1988). In this case, MAWC's rate increase request is essentially a defense to the Commission's Complaint. Similar to the equitable defense in *Rope*, if MAWC is successful in its rate increase request, there is no need for the Commission to hear the Complaint. Therefore, the Complaint, as an alternative, should be continued pending the outcome of MAWC's rate increase request.

WHEREFORE, MAWC respectfully requests that the Commission dismiss the Complaint.

Respectfully submitted,



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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 3RD day of November, 2003, to the following:

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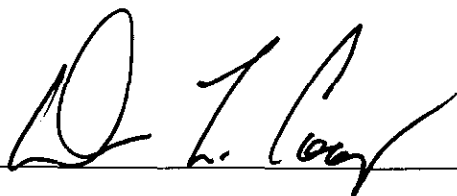
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A handwritten signature in black ink, appearing to read "D. T. Comley", is written over a horizontal line.