

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

In the Matter of Missouri-American Water Company    )  
Request for Authority to Implement a General Rate    )  
Increase for Water and Sewer Service Provided in    )  
Missouri Service Areas.                                    )  
**Case No. WR-2017-0285**

**STAFF REPLY**

**COMES NOW** the Staff of the Missouri Public Service Commission (Staff) and states in its *Reply* that the tariffs filed by Missouri-American Water Company (Missouri-American, MAWC, or Company) on May 4, 2018 and May 10, 2018 comply with the May 2, 2018 *Report and Order (Report and Order)* of the Commission. In support of this *Reply*, Staff presents the following:

**Preliminary Legal Considerations**

Empire Electric District Company's (Empire) *Response to MAWC's Motion for Expedited Treatment and Approval of Compliance Tariffs (Response)* essentially raised a contract dispute.<sup>1</sup> Normally, the Public Service Commission "cannot 'enforce, construe nor annul' contracts, nor can it enter a money judgment."<sup>2</sup> Thus, to the extent this dispute "arises over the construction of a contract or of a rate schedule upon which a contract is based," the Commission cannot render a resolution.<sup>3</sup> Any possible contract claim resulting from the rates set at the conclusion of this case is best suited for circuit court.

But, to the extent Empire's *Response* raised the question of whether or not the compliance tariffs filed by Missouri-American adhere to the *Report and Order*, the

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<sup>1</sup> See, Case No. WR-2017-0285, EFIS Item 458, *Empire's Response*, p. 4.

<sup>2</sup> *Wilshire Const. Co. v. Union Elec. Co.*, 463 S.W.2d 903, 905 (Mo. 1971)(internal citation omitted).

<sup>3</sup> *Wilshire Const. Co. v. Union Elec. Co.*, at 905.

answer is yes. The tariffs (and as a result, the Missouri-American worksheet) comply because they implement the results of the Commission's decisions, as well as past Commission-approved stipulations and agreements. The following argument examines that analysis.

**The MAWC and Empire special contract  
allows Empire's volumetric rates to change**

During the 2011-2012 Missouri-American rate case (WR-2011-0337), Empire reached an agreement via special contract (Contract) with Missouri-American to provide a special rate for water service to Empire.<sup>4</sup> The Contract provided for two alternative rate formula mechanisms that, the lower of which, would be Empire's rate for water service.<sup>5</sup> Notably, while the Contract was silent on exactly how and when the special contracted rate would change, paragraph 9 of the Contract acknowledges the rate *could* change, and allowed for contract renegotiations when:

. . . *in any rate proceeding* of [Missouri American] Water Company *before the Missouri Public Service Commission said Commission increases Water Company's [recovery of costs for] producing water for the Joplin district to exceed \$2.00 per CCF of water. . .*<sup>6</sup>

Emphasis added. Thus, despite the Contract's silence as to when and how the Contract's rates may change, the plain language of the Contract—made between two sophisticated, regulated utilities—contemplated that the Contract rate *could* change as a result of a Commission decision. MAWC and Empire, as well as other signatories,

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<sup>4</sup> See, Case No. WR-2011-0337, EFIS Item 153, *Nonunanimous Stipulation and Agreement as to Special Contract*.

<sup>5</sup> *Id.*, p. 2, ¶ 4; *Attachment A*, p. 3-4, ¶ 6.

<sup>6</sup> EFIS Item 153, *Attachment A*, p.5, ¶9.a.

confirmed that Empire's rates *would* change as a result of a rate case in a subsequently filed and approved Stipulation and Agreement (*2011 Stipulation and Agreement*):

**18. The Empire Interruptible Contract.** The Signatories recommend that the Nonunanimous Stipulation and Agreement as to Special Contract (Contract) executed by MAWC and Empire be approved. The Signatories agree that the commodity charge rate component of the Contract will be subject to modification in subsequent MAWC general rate case [sic].<sup>7</sup>

The Commission approved the *2011 Stipulation and Agreement*, and wholly incorporated the terms of both the *2011 Stipulation and Agreement*, and the *Nonunanimous Stipulation and Agreement as to Special Contract* in the ordered paragraphs in its *Order Approving the Stipulation and Agreement*.

**THE COMMISSION ORDERS THAT:**

1. The Non-Unanimous Stipulation and Agreement ("Agreement") filed on February 24, 2012 is approved. The provisions of the Agreement are incorporated into this order, as if fully set forth, unconditionally and without modification. The signatory parties shall comply with the terms of the Agreement. A copy of the Agreement shall be attached to this order as "Attachment A."

2. In conformity with Paragraph 18 of the Agreement, the Commission approves the "Nonunanimous Stipulation and Agreement as to Special Contract" ("Empire Agreement") executed by Missouri American Water Company and The Empire District Electric Company, (filed on January 19, 2012) subject to the conditions delineated in that paragraph. The provisions of the Empire Agreement are incorporated into this order, as if fully set forth. The signatory parties to the Empire Agreement shall comply with the terms of their agreement. A copy of the Empire Agreement shall be attached to this order as "Attachment B."<sup>8</sup>

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<sup>7</sup> Case No. WR-2011-0337, EFIS Item 283, *Nonunanimous Stipulation and Agreement*, p 12, ¶ 18. The rest of paragraph 18 provides that, due to the length of the Contract (25 years) that the Commission may at a later time re-evaluate "whether the alternative rate continues to be in the best interest of all customers in MAWC's service territory" and that the Commission may allow the parties to alter or terminate the Contract. Those questions were not raised by any party in WR-2017-0285.

<sup>8</sup> Case No. WR-2011-0337, EFIS Item 283, *Order Approving the Stipulation and Agreement*, p. 12, ¶1, 2 (internal footnote omitted).

Importantly, while the formula for *how* Empire’s rate is calculated may not change, the Contract, the contemporaneous stipulation and agreement, and the Commission approval, all articulated that the Contract rate itself was not immutable, and could change as a result of a Commission order setting new rates.<sup>9</sup>

**The WR-2017-0285 case proceedings require that  
Empire’s volumetric rate must change**

The 2018 Stipulation and Agreement

On June 30, 2018, MAWC filed its case-in-chief requesting to increase rates.<sup>10</sup> That request included an increase to Empire’s special contract rate.<sup>11</sup> As a result of extensive negotiations, on March 1, 2018, the parties executed and filed a Stipulation and Agreement (*2018 Stipulation and Agreement*) that settled the vast majority of the issues in the case, including an agreed-upon increase to MAWC’s revenue requirement.<sup>12</sup> The *2018 Stipulation and Agreement* also included a provision regarding special contracts:

**20. Special Contracts:** The Signatories agree that the special contracts currently in effect *should continue without any material changes*, with the exception of the contract with Triumph Foods, LLC, in which the commodity charge will be revised consistent with the confidential Rebuttal Testimony of Staff Witness Matthew J. Barnes.<sup>13</sup>

Emphasis added. However, the *2018 Stipulation and Agreement* did not resolve two major rate design questions—1) whether to remain three rate districts, consolidate into

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<sup>9</sup> A rate change as a result of a rate case actually occurred after the 2015-2016 rate case, WR-2015-0301. After the resolution and decision, Empire and MAWC negotiated a new rate under the terms of the Contract, and that is the rate Empire currently pays.

<sup>10</sup> Case No. WR-2017-0285, EFIS Item 2, *Transmittal Letter and Tariff Revisions*.

<sup>11</sup> EFIS Item 4, *Direct Testimony of Brian LaGrand*, p. 127, CAS 11 & 12; *Exhibit 22, Direct Testimony of Brian LaGrand*, p. 127, CAS 11 & 12.

<sup>12</sup> See, EFIS Item 261, *Stipulation and Agreement*. While Empire was not a signatory to the *2018 Stipulation and Agreement*, it did not object.

<sup>13</sup> *2018 Stipulation and Agreement*, p. 7, ¶ 20.

one rate district, or, return to eight rate districts, and, 2) in any of those scenarios, what should be the appropriate customer charge.

Thus, by the parties agreeing to an increase in rates but without rate design settled, the parties left for the Commission's determination how that rate increase would be spread among the various customers. As a practical result, the provision regarding special contracts, then, necessarily considered that rates would change, but that the contracts themselves should continue without any material changes (i.e., how the formula for determining the rate would operate).<sup>14</sup>

#### The Commission's Rate Design Decision

After an evidentiary hearing on the above questions (and others), on May 2, 2018, the Commission issued its *Order Approving Stipulations and Agreements*, and *Report and Order* (together, *Orders*).<sup>15</sup> The *Orders* first approved the *2018 Stipulation and Agreement*, and then reached a decision on district consolidation opting for two districts, rather than eight, three, or one.<sup>16</sup> With the Commission-approved agreement on the revenue increase, coupled with the Commission's decision on rate design (which set the cost of service for the new districts) and finally on customer charges,<sup>17</sup> the Commission thus ultimately approved the volumetric charges that would be applied to

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<sup>14</sup> The *2018 Stipulation and Agreement* specifically mentions the change to Triumph Foods, LLC's commodity rate because Staff was obliged review the terms of that special contract as result of case negotiations. See, WR-2015-0301, EFIS Item 398, *Joint Motion for Approval of Addendum No. 3 to Missouri-American Water Company's Special Contract with Triumph Foods LLC*; and, EFIS Item 405, *Order Approving Addendum No. 3 to Missouri-American Water Company's Special Contract with Triumph Foods LLC*.

<sup>15</sup> Case No. WR-2017-0285, EFIS Items 445 and 446, respectively.

<sup>16</sup> EFIS Item 446, *Report and Order*, p. 30-31.

<sup>17</sup> *Id.*, p. 32, ¶ 67.

the customers served by MAWC.<sup>18</sup> Those decisions affected all customers, including Empire. The Commission directed Missouri-American to file tariffs that complied with its *Report and Order*.<sup>19</sup> The Company did, on May 4, 2018 and May 10, 2018.<sup>20</sup>

The Missouri-American worksheet—referenced by Empire, provided extra-record to all of the participating parties—is not a unilateral change to Empire’s special contract rate. It is merely showing the necessary mathematical results of the decisions by the Commission in its *Report and Order* as applied to the Contract.

### **Conclusion**

Missouri-American’s compliance tariffs adhere to the Commission’s *Report and Order*, and in so doing, are further consistent with the plain language of the Empire Contract, as well as the *2011 Stipulation and Agreement*, and the *2018 Stipulation and Agreement*. As a result, the Commission should approve the filed tariffs. If Empire believes a contract dispute remains, that issue is appropriate for circuit court, and not the Commission, to resolve.<sup>21</sup>

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<sup>18</sup> Case No. WR-2017-0285, EFIS Item 446, *Report and Order*, p. 36, ¶67 “The parties do not dispute how that calculation is performed. From a recommended rate design and customer charge, an appropriate volumetric charge can be calculated.”

<sup>19</sup> *Report and Order*, p. 36, ¶ 3.

<sup>20</sup> EFIS Item 454, 456.

<sup>21</sup> ***Wilshire Const. Co. v. Union Elec. Co.***, 463 S.W.2d 903, at 905 (Mo. 1971).

Respectfully submitted,

**/s/ Jacob T. Westen**

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand-delivered, transmitted by facsimile, or electronically mailed to all parties and or counsel of record on this 11<sup>th</sup> day of May, 2018.

**/s/ Jacob T. Westen**