

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

In the Matter of the Application of Missouri-)
American Water Company, for the)
approval of an Agreement with the City of)
Kirkwood, Missouri to Construct Transmission) **Case No. WO-2005-0286**
Mains and Points of Delivery and to Sell and) Tariff No. JW-2002-0137
Deliver Water for Resale and Related Tariff Sheets) Tariff No. YW-2005-0662

**DISSENT OF COMMISSIONER
ROBERT M. CLAYTON III**

This Commissioner dissents from the Order Granting Application in favor of Missouri-American Water (Company) and the City of Kirkwood (City). While this Commissioner does not necessarily oppose the plan presented by the Company, a number of questions have been raised which require further discussion and resolution. First, there is no agreement among the parties. The Commission is faced with deciding a contested case having an impact on the Company, the City and the ratepayers, and this Commissioner questions whether this matter can proceed without an evidentiary hearing or other presentation of factual evidence and legal posture of the case. Additionally, issues were raised by a concerned citizen, through the Local Public Hearing process, and it is not clear whether those issues have been addressed. Lastly, Staff has raised some proposed conditions, offered very late in the process, which require more thorough discussion.

This case was filed in February as an Application for the Approval of Agreement and Tariff involving the sale of wholesale water from Missouri-American Water Company to the City of Kirkwood. The Commission allegedly has jurisdiction over wholesale agreements and tariffs pursuant to Section 393.150, RSMo. In addition, Commission scrutiny may also be necessary because of the possible inclusion of construction costs and off system sales into Missouri-American's rates.

Several parties, including a concerned citizen, sought intervention. Although the Commission denied the citizen's request, a Local Public Hearing was held in Kirkwood to hear the citizen's concerns on April 28, 2005. Since that time, very little activity has occurred, other than Staff asking for repeated continuances, and it is unclear why Staff needed the case continued four times.

The proposed Order was distributed only one day ahead of the scheduled Agenda meeting, and the Commission was advised that immediate action was necessary because the tariff had an effective date for the following week. This Commissioner believes that this matter should have been brought to the Commission's attention earlier, which might have allowed for resolution of the issues raised in this opinion.

In light of the fact that Missouri-American Water has experienced a significant amount of adversarial litigation since it entered the utility business in Missouri, the Commission should be especially diligent in evaluating each case before it and prepared to fully explain its reasoning. Various cases have been argued regarding cost allocations among districts and customers including one especially contentious case involving a new water treatment facility in St. Joseph. It should also be noted that significant cost distribution and cost recovery issues can arise when communities convert from municipal

systems to private water utilities. Our experiences in similar cases require that this Commission carefully review the implications of any large contracts entered into by this utility.

First of all, no Stipulation and Agreement among the parties has been submitted. While the only parties to the case involve the Company, the City of Kirkwood, Staff and the utility workers' union, there appears to be no agreement other than between the City and the Company. Staff raised issues regarding the cost of the project, the potential for overruns, potential cost of service, supposed authorized rates of return and different options for the allocation of costs among Kirkwood and Missouri-American customers. The averments made by the Staff and the responses by Missouri-American have not been verified. No testimony has been filed nor have any parties been cross-examined. Very little record, if any, has been established and no evidence has been adduced either supporting or discrediting the various allegations. Because there are property rights involved, this Commissioner does not believe the Commission can proceed without establishing some sort of record to support its decision in this contested case.

Secondly, this Commissioner is concerned that questions raised by a concerned citizen have not been fully addressed. At the Kirkwood Local Public Hearing, the citizen offered an itemized list of issues, complete with references to the City of Kirkwood Code, Missouri Revised Statutes and the Missouri Constitution. Without addressing whether his points are well-taken, nothing in the record indicates whether his questions and concerns were satisfied or addressed, even though Staff, the Office of Public Counsel and the Company offered to make themselves available to answer questions and to provide information. The citizen deserved answers to his questions even if the answers were

contrary to his opinion. Although it advocated on behalf of the citizen for the Local Public Hearing, the Office of Public Counsel made no additional filings in the case.

Lastly, this Commissioner requires additional information and discussion regarding the financial nature of the plan. It has been suggested by Staff that Missouri-American will receive approximately \$250,161 per year above its cost of providing the service. That cost estimate includes a portion of the construction costs of the project and an authorized rate of return. The Company may propose in its next rate case that the capital expenditures made in this project be included in the next rate base analysis. Staff argues that if there are cost overruns prudently incurred, those costs may be included in rate base, allowing for the company to fully recover the investment as well as a return on the investment. Until then, Staff argues the Company will receive a contract profit margin in excess of its authorized rate of return. Staff believes that the contract profit margin received in the short run, should be used to offset potential costs incurred in the long run. The Commissioners should have an opportunity to fully evaluate that claim, and determine whether any accounting safeguards are necessary.

The majority was comfortable moving forward without the information suggested herein. This Commissioner believes that a more prudent approach would have been to take the time necessary to review and evaluate the potential affects of the "deal" on all relevant parties, establish a defensible record and address the concerns of a citizen who felt strongly enough to seek intervention. The Commission should insist that it have the information necessary to conduct a thorough public interest analysis in the record prior to rendering a decision.

For the foregoing reasons, this Commissioner dissents from the majority opinion.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert M. Clayton III". The signature is written in a cursive style with a horizontal line underneath it.

Robert M. Clayton III
Commissioner

Dated this 19th day of August 2005.