BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company's Tariff Sheets Designed to Implement General Rate Increases for Water and Sewer Service Provided to Customers in the Missouri Service Area of the Company.	))))))	Case No. WR-2000-281, et al.

CITY OF JOPLIN'S APPLICATION FOR REHEARING OR RECONSIDERATION OF REPORT AND ORDER ON REMAND ISSUED MAY 27, 2004

COMES NOW Intervenor, City of Joplin, pursuant to Section 386.500, RSMo, and 4 CSR 240-2.160, and respectfully seeks rehearing or reconsideration of the May 27, 2004 Report and Order on Remand issued in this case on the following grounds:

The Commission's Report and Order on Remand states that the question of the Joplin revenue requirement and rates is now moot, since new tariffs were adopted and went into effect on April 21, 2004 and there is no procedure to recoup overpayments. The Commission's Order fails to address the issue of undue discrimination and the prejudice to the rate payers in Joplin. This issue continues forward and is not mooted by the April 21, 2004 tariffs or by the improper over-collection of revenue by Missouri American Water Company.

The decision of the Commission on the Joplin issue is arbitrary and capricious as well as unlawful, unjust and unreasonable. The Order of May 27, 2004 adopts, by inference, the findings and Order issued on August 31, 2000 by the Commission, which was found insufficient and remanded for decision.

The Commission's August 31, 2000 Report and Order at page 58 stated that "the Commission will move away from STP and toward DSP...MAWC, therefore, must set its rates separately for each service area in order to recover the appropriate revenue requirement for each

service area." Having correctly concluded that DSP and not STP should be the basis for the rate design upon which the Company should set its rates separately for each district, however, the Commission then stated "in moving toward DSP, however, the Commission will adhere to the principle that no district will receive a rate decrease." The City of Joplin, Intervenor, sought judicial review of this last statement. Such sentence created internal inconsistency in the Report and Order, and made the Commission's otherwise valid Order unlawful, unjust and unreasonable by discriminating in rates against rate payers in Joplin. The Circuit Court reversed and remanded. The Commission's decision fails to comply with the Circuit Court's Order of Remand.

Under the Report and Order on Remand, there is still no basis for and no evidence supports the Commission's hybrid concoction of a rate design. The issues presented to the Commission required a choice between STP and DSP. (August 31, 2000, Report and Order, pp. 57-58.) The Commission, consistent with the overwhelming weight of the evidence, chose DSP because it is the superior rate design. No evidence in the case on DSP or STP supported singling out one district (Joplin) to overpay rates in comparison to all other districts; and requiring this calls into question what the Commission Order actually does. If the Commission means what it says about moving to cost-based rates (DSP), the single sentence excluding Joplin is contrary to that statement of principle. If the Commission insists on the exclusion of Joplin, that is <u>not</u> DSP but is a new and heretofore unannounced version of STP. The sincerity of the Commission's movement to cost-based rates is in serious question if one district is left to continue to subsidize all or some others. No party has proposed or sponsored evidence supporting a shift to a new type of STP, where Joplin alone supports everyone. Rehearing or reconsideration should be granted to decide these issues and to remove the single sentence denying DSP rates to Joplin.

The Commission's formulation has required only the Joplin district to pay more than for the service it receives - - by approximately $880,000.00 per year since 2001. No evidence in the record supports this result; nor is there any evidence in the record to support the conclusion that the rates ordered by the Commission under DSP can only apply if there is no decrease for Joplin to the appropriate DSP rate. The requirement imposed upon Joplin by the last sentence of the second paragraph on page 58 of the Report and Order is therefore arbitrary and capricious, as well as unlawful, unjust and unreasonable.

The Commission's decision violates Section 393.130, RSMo 1994. The Commission's erroneous conclusion that all districts except one must pay only for the service they receive, and that Joplin will subsidize either all or some of the other districts, is still unaddressed. This ignoring of the issue is, in one sense, understandable. No evidence supports the denial of the decrease in rates requested by Joplin. The Commission's own decision to utilize DSP requires such a decrease for Joplin. The burden placed upon Joplin with the commensurate benefit bestowed upon the other districts, is specifically declared to be illegal under Section 393.130, RSMo.

The Commission's decision raises a strawman argument for mootness - - that no "refund" is available. What the Commission fails to note is that no refund has been requested in the current matter. Instead, it is the effect of the discriminatory practice which continues that is sought to be remedied. The Commission should address the issue presented. Future rate cases can then assure that Joplin rate payers do not continue to be the subject of such unlawful discrimination and are compensated for past unlawful overcharges by adjustment of future rates.

The Commission's reliance on *Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41 (Mo. banc 1979) is misplaced, as the fuel adjustment clause at issue

there had neither discriminatory nor forward looking affect. This case is not moot simply because time has marched on. Recently, the Missouri Supreme Court reversed a decision of this Commission where a merger had been approved and accomplished, where acquisition premiums had not been properly addressed by this Commission. *State ex rel. AG Processing v. Public Service Commission,* 120 S.W.3d 732, 735-736 (Mo. banc 2003). The Court held that recoupment of the acquisition premium had to be addressed by the Commission, *Id* at 737, even though the merger had been approved and revenue had been collected in rates. Inconvenience to the Commission in correcting mistakes is not a consideration.

The Commission's Order of May 27, 2004, if not reconsidered, will allow the mere process of delay (over four years since filing) to negate the requirement that unlawful actions be redressed. The Commission rewards discrimination and then makes its decision "appeal proof" by simply allowing so much time to expire that a new rate case is filed. This is absurdly unjust, especially where the new tariff (in Case WR-2003-0500) specifically states that the new rates are to have no such effect upon the issues in this case (WR-2000-0281). The Commission's own Order adopting the Joint Stipulation in WR-2003-0500 has either been overlooked, or it has been implicitly overturned and rejected by the May 27, 2004 Order.

The rates charged to Joplin rate payers since 2001 were never charged under an "approved tariff." This Commission's Order of August 31, 2000 was specifically reversed with respect to Joplin rates. In a nearly identical case in principle, the Missouri Supreme Court in *Utility Consumers* held that unlawful assessment of a similar "surcharge" for fuel allocation must be remedied; to not do so would prevent consumers having any remedy for such an illegal charge.

> The result [of the surcharge] was to require consumers to pay monies which should not have been paid. The utilities had no vested right to or legitimate expectation in monies collected in this manner. To permit them to keep these monies would be a windfall to them and would leave these consumers without a remedy for recovery of this unlawfully collected surcharge.

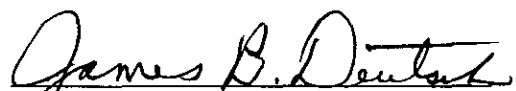
Id. at 59. The Court required the utilities in that case to "restore these benefits." *Id.* at 60. The Court did not and would not allow withholding and retention of the improperly ordered surcharge. This Commission should rule similarly in the current matter that the unlawful "surcharge" imposed on Joplin rate payers must be remedied and restored.

The Commission's denial of DSP to Joplin district customers and perpetuation of unlawful discrimination under the aegis of mootness should be reconsidered and withdrawn from the Report and Order. A rehearing of this issue relating to Joplin should be granted.

WHEREFORE, Intervenor City of Joplin requests rehearing or reconsideration of the Commission's May 27, 2004, Report and Order on Remand in this case.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By: 

James B. Deutsch, #27093
Marc H. Ellinger, #40828
308 East High Street
Suite 301
Jefferson City, MO 65101
Telephone No.: (573) 634-2500
Facsimile No.: (573) 634-3358
Attorneys for City of Joplin

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing document were sent U.S. Mail, postage prepaid, to the following parties of record on this 4th day of June, 2004:

General Counsel
Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Brian Head
City Attorney
303 East Third Street
Joplin, MO 64801

James Fischer
Attorney At Law
101 Madison Street, Suite 400
Jefferson City, MO 65101

Joseph W. Moreland/Martin Walter
Blake & Uhlig, P.A.
2500 Holmes Road
Kansas City, MO 64108

Louis J. Leonatti
Leonatti & Baker
P.O. Box 758
Mexico, MO 65265

Lisa Robertson
City of St. Joseph
City Hall - Room 307
1100 Frederick Avenue
St. Joseph, MO 64501

Shannon Cook/John B. Coffman
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102-7800

Dean L. Cooper/W.R. England, III
Brydon, Swearengen & England
P.O. Box 456
Jefferson City, MO 65102-0456

Stuart Conrad
Finnegan, Conrad & Peterson, L.C.
3100 Broadway, Suite 1209
Kansas City, MO 64111

Leland B. Curtis
Curtis, Oetting, Heinz, Garrett & Soule, P.C.
130 South Bemiston, Suite 200
St. Louis, MO 63105

Charles Brent Stewart
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, MO 65201

Diana Vuylsteke
One Metropolitan Square
211 North Broadway
St. Louis, MO 63102-2750

Karl Zobrist
Blackwell Sanders Peper Martin, LLP
2300 Main Street, Suite 1100
Kansas City, MO 64108

James B. Deutsch

(TSV0816.WPD;1)