

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

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

MAWC'S RESPONSE TO ORDER DIRECTING FILING

Comes Now Missouri-American Water Company ("MAWC") and, in response to the Missouri Public Service Commission's ("Commission") Order Directing Filing, states as follows to the Commission:

I. INTRODUCTION

1. On January 22, 2004, the Commission issued its Order Setting Prehearing Conference and Directing Filing (the "Order") which, among other things, directed that each party prepare and file a pleading setting out its suggestions as to certain questions raised by the Commission in regard to the "issues remanded for more complete findings of fact and conclusions of law."

2. The issues remanded for more complete findings of facts and conclusion of law¹ are as follows:

¹ The Commission also remanded the "premature retirement" issue to the Commission. The premature retirement issue is different in that it was remanded after findings on the merits that "[i]f no consideration is made for the net depreciation related to the old St. Joseph treatment plant, MAWC will suffer a taking or confiscation of its property" and that the "record does not support the Commission's finding/ conclusion that the old St. Joseph treatment plant was the victim of extraordinary supersession." This issue was, therefore, "remanded to the Public Service Commission for further proceedings consistent with [the court's opinion]." The Commission has conducted no such further proceedings.

- Phase-in (a proposal that the rate increase be provided in a number of predetermined steps with carrying costs provided to the company to compensate it for the delay in implementation);
 - Level of rates for the Joplin district (a question as to the propriety of Joplin's rates as cost of service studies performed in this case indicated that Joplin's rates were approximately \$600,000 - \$700,000 greater than its district cost of service); and,
 - Treatment of larger and smaller distribution mains (challenge to the Staff's execution of the Base-extra Capacity ("BXC") method).
3. As to these particular issues the Commission asked:
- *Will these issues be mooted by the Commission's Report and Order in Case No. WR-2003-0500?*
 - *Is it still necessary for the Commission to decide the three remanded issues?*
 - *Can any relief realistically be obtained with respect to the inter-district subsidy drawn from Joplin, the requested phase-in of rates, or the allocation of distribution costs to industrial customers in St. Joseph?*
4. The Commission further asked as follows as to the remaining appellate issues:
- The Commission understands that there are issues decided by the Commission in Case No. WR-2000-281, that have been reviewed by the Circuit Court, but which nonetheless have not yet been reviewed by the Missouri Court of Appeals. These issues include the prudence of the new St. Joseph water treatment plant and the

shift from Single Tariff Pricing to District Specific Pricing.² *What can the Commission do to allow these questions to move forward on appeal more quickly?*

5. MAWC's suggestions are organized to respond specifically to each of the Commission's identified questions.

II. DISCUSSION

A. *Will these issues be mooted by the Commission's Report and Order in Case No. WR-2003-0500?*

The remanded issues likely will be mooted by the rates resulting from WR-2003-0500. The significance of the Case No. WR-2003-0500 filing is that the new rates will supercede those that are the subject of the current appeal, and any error in the current rates will no longer be of any consequence because there is no action which could be taken by way of correction. *State ex rel. Utility Consumers Council, etc. v. P.S.C.*, 585 S.W.2d 41 (Mo. banc 1979); *State ex rel. Gas Service Company v. Public Service Commission*, 536 S.W.2d 491 (Mo. App. 1976) (error cannot be corrected retroactively to give relief for the period of time that the old tariffs here questioned were in effect). Nor could the current tariffs be amended prospectively, because they will have been superseded by subsequent tariffs filed and approved as part of Case No. WR-2003-0500.

"It is because of this inability by the reviewing court to give any relief, that issues under old, superseded tariffs are generally considered moot and therefore not subject to consideration. *State ex rel. Gas Service Company v. Public Service Commission, supra; State ex rel. Mo. Public*

² This list should also include the "premature retirement" issue identified in footnote 1.

Service v. Pierce, 604 S.W.2d 623 (Mo. App. 1980); *State ex rel. Mo. Public Service Co. v. Fraas*, 615 S.W.2d 587 (Mo. App. 1981); *State ex rel. Kansas City Power & Light Company v. Public Service Commission of Mo.*, 615 S.W.2d 596 (Mo.App. 1981); *State ex rel. The Empire District Electric Company v. Public Service Commission of State of Mo.*, 615 S.W.2d 598 (Mo. App. 1981).” *State ex rel. Missouri Public Service Commission v. Fraas*, 627 S.W.2d 882, 885 (Mo.App. 1981).

Some exception has been provided, however. The courts have left open the possibility that an issue may be addressed in certain circumstances even where otherwise “moot.” These circumstances are “where an issue is presented of a recurring nature, is of general public interest and importance, and will evade appellate review unless the court exercises its discretionary jurisdiction. *State ex rel. Laclede Gas Co. v. P.S.C.*, 535 S.W.2d 561 (Mo. App. 1976); *State ex rel. The Empire District Electric Company v. Public Service Commission of State of Mo.*, *supra*; *State ex rel. Laclede Gas Co. v. P.S.C.*, 600 S.W.2d 222 (Mo. App. 1980). If the matter in dispute is simply a question of fact dependent upon the evidence in the particular case, there is no necessity for a declaration of legal principle such as to call the exception into play.” *State ex rel. Missouri Public Service Commission v. Fraas*, 627 S.W.2d 882, 885 (Mo.App. 1981). Likewise, where an issue can be raised in a subsequent case and appellate review obtained at that time, the exception does not apply.

B. *Is it still necessary for the Commission to decide the three remanded issues?*

Yes. Until such time as rates have gone into effect as a result of Case No. WR-2003-0500, the Commission continues to have this obligation. However, as a practical matter, whatever new rates are effective as a result of this case will make the import of a Commission

decision as to the Case No. WR-2000-281 remand negligible.

C. *Can any relief realistically be obtained with respect to the inter-district subsidy drawn from Joplin, the requested phase-in of rates, or the allocation of distribution costs to industrial customers in St. Joseph?*

No. Those rates, charges and conditions of service of MAWC which are on file with and approved by the Commission enjoy a statutory presumption of lawfulness and reasonableness.

Section 386.270, RSMo, provides that:

All rates, tolls, charges schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

Moreover, the monies collected pursuant to the tariffs which are now in effect for MAWC are the lawful property of MAWC and cannot be taken or diverted from it without due process of law.

Straube v. Bowling Green Gas Company, 227 S.W.2d 666, 671 (Mo. 1950). *See Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W. 2d 348, 354 (1951) (“We have said that when the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or court action without violating the due process provisions of the state and federal constitutions.”).

An exception lies where a stay has been entered and a suspending bond established by the circuit court pursuant to Section 386.520, RSMo 2000. *See State ex rel. Monsanto Company v. Public Service Commission*, 716 S.W.2d 791, 794 (Mo. 1986). However, no such stay exists in this case. As a result, any remedy obtained as to the remanded issues would only be applicable on a prospective basis and, even then, only until new rates become effective as a result of

MAWC's next rate case (WR-20003-0500).

D. *What can the Commission do to allow the questions previously decided by the Circuit Court to move forward on appeal more quickly?*

Making a decision on the remanded issues is the only option available to the Commission that would have allowed the questions previously decided by the Circuit Court to move forward on appeal. When the parties attempted to take the Circuit Court's decision to the Court of Appeals, the Court of Appeals found that the Circuit Court's decision in this case was not final and appealable and dismissed the appeals.³

The Circuit Court's decision was not final and appealable because it found that certain aspects of the order needed further findings of fact and conclusion of law to allow the Circuit Court to know the basis for the decision and perform its review function.⁴ Only after the order was rewritten would the Circuit Court be in a position to complete its review and, presumably, issue a judgement to which Section 386.510, RSMo 2000 would apply.

While the Commission could have issued a report and order on remand which addressed the issues remanded by the Circuit Court, based upon the existing record,⁵ the day for that

³ See *State ex re. Missouri-American Water Company, et al. v. Public Service Commission*, Order, WD60080 (December 13, 2001).

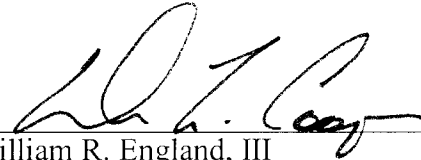
⁴ See *Iron County v. State Tax Commission*, 480 S.W.2d 70 (Mo. 1972).

⁵ It must be remembered that the new commissioners would have been required to certify that they either: (a) "read the full record including all of the evidence," or (b) "personally consider[ed] the portions of the record cited or referred to in the arguments or briefs" before issuing a new report and order. Section 536.080 RSMo 2000; *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 30[8] (Mo.banc 1975) ("[W]e do emphasize that it is a basic and fundamental rule of law that one making a decision be aware by some means of what he is deciding.").

appears to have passed.

WHEREFORE, MAWC prays the Commission consider these suggestions in proceeding with this case and issue such orders as are reasonable in the circumstances and consistent therewith.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. R. England, III", written over a horizontal line.

William R. England, III MBE#23975
Dean L. Cooper MBE#36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
573/635-7166 (phone)
573/635-0427 (facsimile)
dcooper@brydonlaw.com (e-mail)
ATTORNEYS FOR MISSOURI-AMERICAN
WATER COMPANY

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, electronic mail or hand-delivered on this 4th day of February, 2004, to the following:

Mr. Keith Krueger
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Ms. Ruth O'Neill
Office of the Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Mr. Joseph W. Moreland
Blake & Uhlig, P.A.
2500 Holmes Road
Kansas City, Missouri 64108

Mr. Louis J. Leonatti
Leonatti & Baker, P.C.
P.O. Box 758
Mexico, Missouri 65265

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

Mr. Stuart W. Conrad
Finnegan, Conrad & Peterson
1209 Penntower Office Center
3100 Broadway
Kansas City, Missouri 64111

Mr. James M. Fischer
Attorney at Law
101 Madison Street, Suite 400
Jefferson City, Missouri 65101

Mr. James B. Deutsch
Blitz, Bargette & Deutsch
308 E. High, Suite 301
Jefferson City, MO 65101

Ms. Diana M. Vuylsteke
Bryan Cave LLP
OneMetropolitanSqr., Suite 3600
211 N/ Broadway
St. Louis, MO 63102-2750

Mr. Leland B. Curtis
Curtis, Oetting, et al.
130 S. Bemiston, Suite 200
Clayton, Missouri 63105

Mr. Karl Zobrist
Blackwell Sanders, et al.
P. O. Box 419777
Kansas City, MO 64141-9777

Mr. Jeremiah D. Finnegan
Finnegan, Conrad & Peterson
1209 Penntower Office Center
3100 Broadway
Kansas City, Missouri 64111

