

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

|                                            |   |                       |
|--------------------------------------------|---|-----------------------|
| In the Matter of the General Rate Increase | ) |                       |
| for Water and Sewer Service Provided       | ) | Case No. WR-2003-0500 |
| by Missouri-American Water Company.        | ) |                       |

**MAWC’S RESPONSE TO STAFF’S MEMORANDUM**

COMES NOW Missouri-American Water Company (MAWC or Company), and, in response to Staff’s Memorandum to the Commission Concerning the Affiliate Transactions Rule for Water Utilities (Staff’s Memorandum), states as follows to the Missouri Public Service Commission (Commission):

**SUMMARY**

MAWC is concerned that the description of compromise and settlement communications contained in Staff’s Memorandum is contrary to public policy encouraging settlement and free exchanges among parties for this purpose. Further, because MAWC’s positions thus far have been taken in the context of negotiation, the Commission should not assume that the issues identified by the Staff are a comprehensive list of the issues that will be presented to the Commission in the context of a rulemaking. Lastly, MAWC will file, as directed by the Commission, a proposed rule that will address the affiliate transaction concern, as well as MAWC’s issues.

**BACKGROUND**

1. This case originated on May 19, 2003, with MAWC’s filing of proposed tariff sheets intended to implement a general rate increase for water and sewer service. The Stipulation and Agreement as to Revenue Requirement filed in this case on February 24, 2004, contained, among other things, an agreement that the Company, the Staff of the Commission (Staff) and the Office of the Public Counsel (Public Counsel) would use

their best efforts to see that a rule is promulgated by the Commission regarding affiliate transactions.

2. The Commission's April 6, 2004, Order Approving Stipulations and Agreements approved the Stipulation and Agreement as to Revenue Requirement. Pursuant to that Stipulation, the parties were originally were to make a filing in regard to an affiliate transaction rule by April 16, 2005. However, on April 13, 2005, the parties involved in this process filed a Unanimous Request for Extension of Time to File the Affiliate Transactions Rule for Water Utilities. The parties thereby requested a four month extension (until August 15, 2005) to allow for further discussion concerning the wording of a proposed rule. On April 14, 2005, the Commission issued its Order Directing Filing wherein it granted the request and directed that the Company, Staff and Public Counsel jointly file a proposed affiliate transaction rule for water corporations on or before August 15, 2005.

3. On August 15, 2005, Staff filed its Memorandum and MAWC filed its Response to Order Directing Filing. Both pleadings indicated that the parties had been unable to reach agreement and asked the Commission to provide further direction.

### **NEGOTIATIONS**

4. Of concern is the fact that the Staff's Memorandum went further and purported to describe MAWC's negotiation positions communicated during the parties' negotiations. Unlike a Commission rulemaking proceeding, this was a negotiation entered into by the parties as the result of a rate case settlement. Proceedings have taken

place as a continuation of the rate case docket. MAWC believes that these discussions should not have so easily found their way into the record of this case.

5. If this was to be a traditional rulemaking process and the parties were merely to propose a water version of the Commission's natural gas rule as indicated by the Staff (Staff's Memorandum, p. 2-3), there would have been no purpose for the parties to discuss and negotiate an affiliate transaction rule (and no reason for MAWC to provide copies of all the statutes and rules concerning affiliate transactions applicable to MAWC affiliates in other jurisdictions, as required by the Stipulation). The Commission could unilaterally promulgate a water/natural gas affiliate transaction rule at any time. Thus, MAWC believed that the parties were truly involved in an attempt to reach a compromise through negotiation.

6. The general rule in a litigation context is that evidence and argument concerning settlement negotiations are to be excluded from trial or hearing based upon "public policy, which favors the settlement of disputed claims out of court, and the courts treat a party's offer of compromise as an effort to obtain peace rather than as an admission of liability or of the validity of the other party's claim." *Vinyard v. Herman*, 578 S.W.2d 938, 942 (Mo.App.S.D. 1979), *quoting* 29 Am.Jur.2d, Evidence, section 629, p. 681. The Western District Court of Appeals has also applied this rule to administrative matters stating that "[t]he desire to encourage settlements is fully applicable to settlement of administrative actions." *Malan* at p. 428.

7. The absence of this rule would chill negotiations and the prospects of settlement in many contexts. "No one would make offers if the risk of their being before the jury were a necessary corollary of the offer." *State ex el Malan v. Huesemann*, 942

S.W.2d 424, 428 (Mo.App.W.D. 1997), *quoting J.A. Tobin Constr. Co. v. State Highway Commission*, 697 S.W.2d 183, 186 (Mo.App. 1985).

8. Because Case No. WR-2003-0500 is a contested case; the negotiations between Staff and the Public Counsel and MAWC were conducted as a result of a stipulation settling a part of that contested case, MAWC believes that specific negotiation positions should not have been attributed to it in the Staff's pleading.

9. MAWC is in the best position to describe its own positions. This is especially true in this case where the communications between the parties have taken place as a part of a negotiation and the parties have not taken public positions in pleadings, hearings or otherwise.

10. The Commission's August 16, 2005, Order Directing Filing stated, in part, that the Staff's Memorandum provided a "useful summation . . . of the major points of disagreement between the parties." The Commission should not assume too much based upon the negotiation communications revealed by the Staff. There is a give and take present in negotiations that is based upon different considerations from those positions that might be taken before the Commission. For this reason, the positions taken by MAWC in the negotiation will not necessarily be identical to those concerns that will be presented to the Commission in the context of a rulemaking (i.e., there could be more or less).

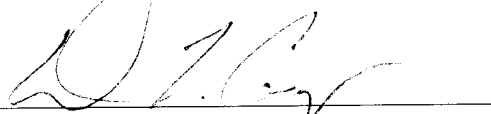
### **PROPOSED RULE**

11. The Commission's Order Directing Filing directed MAWC and the Staff to file a proposed affiliate transaction rule for water corporations on or before September 16, 2005. MAWC understands the concerns that have been expressed in regard to

affiliate transactions. Accordingly, MAWC will file a proposed rule designed to address this concern as well as MAWC's concerns regarding such a rule.

WHEREFORE, MAWC respectfully requests that the Commission consider this response to the Staff's Memorandum.

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 13<sup>th</sup> day of August, 2005, to the following:

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