

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

In the Matter of the Application of )  
Missouri-American Water Company for an )  
Accounting Order Concerning MAWC's )  
Lead Service Line Replacement Program )

**File No. WU-2017-0296**

# REPLY BRIEF

**COMES NOW** the Staff of the Missouri Public Service Commission, by and through counsel, and for its *Reply Brief*, states as follows:

Missouri-American Water Company (“MAWC”) filed this request for an accounting authority order (“AAO”) to collect an estimated \$8.9 million in costs to fully replace lead service lines (“LSLs”), including the customer-owned portion of the line. For the reasons outlined in its *Post-Hearing Brief* (“Brief”), Staff supports an AAO for MAWC’s expenses in replacing lead service lines from January 2017 until May 2018, and utilizing the short-term debt rate of MAWC’s parent company’s, American Water Works Company (“AWWC”), for carrying costs.

## MAWC IS NOT IN VIOLATION OF ITS TARIFF

In its Brief, the Office of Public Counsel (“OPC”) expresses great concern regarding the legality of MAWC’s proposal, arguing that the proposed program is a tariff violation. According to OPC, it is the only party providing a legal means for the company to continue replacing LSLs.<sup>1</sup> Staff is confused by this assertion. OPC argues that MAWC’s proposal to replace customer-owned LSLs is a tariff violation because the tariff is silent on the subject. OPC’s proposed pilot program would allow MAWC to continue replacing customer-owned LSLs but OPC does not propose a change to the tariff to

<sup>1</sup> See OPC's Post Hearing Brief filed October 19, 2017, p. 22.

allow this. OPC is simultaneously stating that MAWC's actions are a tariff violation, but the same actions under OPC's proposal are not a tariff violation.

Tariff violations are OPC's primary argument concerning the legality of MAWC proposed LSL replacement program. OPC cites PSC MO No. 13 Original Sheet No. R. 12, Rule 4.C which states, "Any change in location and/or size of an existing service connection and/or service line requested by the customer shall be made at the Customer's expense."<sup>2</sup> However, Staff does not read this, as OPC does, to mean that all service line changes are the responsibility of the customer. Importantly, the tariff requires that changes *requested* by the customer must then be paid for by the customer. However, in this case, customers are not requesting that MAWC replace their service lines. MAWC is proactively replacing LSLs to reduce its customers' lead exposure risk.

As outlined in Staff's Brief, the purpose of a tariff is to establish expectations of a company's customers.<sup>3</sup> It governs the obligations between a company and a customer. However, the tariff does not capture everything a utility may do to provide safe and adequate service. For example, utilities rely upon customer call centers, but customer call centers are not outlined in any tariff. Nevertheless, a well-run customer call center assists a utility to provide responsive service. MAWC taking on an obligation to remove lead service lines, including the customer owned portion, does not impede or change the rights and responsibilities of the customer. Once that line is replaced, the customer assumes all obligations as normal. Staff does not believe MAWC is violating its tariff, but Staff would work with the parties to develop clarifying language to add to the tariff to

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<sup>2</sup> *Id.* p. 7.

<sup>3</sup> 4 CSR 240-13.010(4).

define the rights and responsibilities under the lead service line replacement program, if the Commission orders.

**THE RESEARCH AND POLICY RATIONALE REGARDING  
LEAD SERVICE LINES SUPPORTS MAWC'S PROPOSAL**

As outlined in Staff's Brief, there are a multitude of policy reasons, supported by a plethora of evidence, that justify MAWC's actions in replacing lead service lines, including the customer owned portion. In their briefs, opposing parties challenge the sufficiency of this evidence. But as thoroughly explained in testimony, pre-filed and at hearing, and in Staff's brief, these challenges must fail against the volume of research and best practice guidelines from peer reviewed research, federal agencies, and other highly regarded institutions. The negative health effects of lead, the dangers of lead leaching into the water from lead service lines, and the heightened risk of lead leaching when only partial service line replacements are performed are documented and well known. Therefore, Staff will not burden the record to again to show that lead is dangerous to human health<sup>4</sup>, or there's a great deal of research out there that the partial service line replacement is actually detrimental.<sup>5</sup> OPC worries that MAWC plan of full LSL replacement could be a waste, since the Company has not shown that full replacement results in lower water lead levels. However, as shown above, the record already abounds with refutations of this fear.

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<sup>4</sup> See Ex. 1, Direct Testimony of Gary A. Naumick, Ex. 2, Rebuttal Testimony of Gary A. Naumick, Ex. 3, Surrebuttal Testimony of Gary A. Naumick, Ex. 7, Direct Testimony of Bruce W. Aiton, Ex. 10, Direct Testimony of Martin R. Hyman, Ex. 13, Rebuttal Testimony of James A. Merciel, Jr., and Ex. 15, Rebuttal Testimony of Geoff Marke.

<sup>5</sup> *Id.*

As for OPC's claim that MAWC has not shown that full service line replacements will reduce current blood lead levels,<sup>6</sup> OPC mistakes the purpose of MAWC's program. MAWC's lead service line replacement program is aimed at preventing lead from leaching into the water before it can affect blood lead levels. MAWC's program is about mitigation of risk; to remove sources of lead that MAWC has control over, not eliminating lead from all areas of its customers' lives or reducing current blood lead levels. OPC repeats this mistake when expressing the view that the potential \$180,000,000 that MAWC could spend on full lead service line replacements in its service territory could be better spent on other projects.<sup>7</sup> The example of an alternative MAWC project given in OPC's *Initial Post-Hearing Brief* (OPC's Brief) is the danger of lead-based paint; however, it is unclear whether or not OPC believes this money should be spent on research on or the removal of lead-based paint. Furthermore, OPC's suggestion fails to address the fact that MAWC, as a water company, has no control over the paint that could be present in its customers' homes, and moreover, is something completely outside of the Commission jurisdiction to regulate. MAWC can, however, replace lead service lines and reduce its customers' exposure to lead by removing a risk within its control.

OPC also points to water filters as a cost-effective alternative to replacing the customer-owned portion of a lead service line.<sup>8</sup> Staff has already addressed its own concerns about filters in its Brief; Staff sees filters as a short-term solution that is solely the responsibility of the customer. The actions MAWC wants to take allow them to

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<sup>6</sup>See OPC's Post Hearing Brief filed October 19, 2017, p. 1

<sup>7</sup> *Id.* p. 16.

<sup>8</sup> *Id.* p. 18.

reduce its customers' risk of lead exposure in a manner that they can control. Once the lines have been replaced and have been adequately flushed, there is no further risk of lead leaching from a customer's service line.

OPC suggests alternatives for lead service line replacements, as OPC does not believe there is a risk of a lead water crisis. As stated in OPC's Brief, all Missouri water utilities under PSC jurisdiction are currently in compliance with the Lead and Copper Rules. However, when questioned about past compliance with the Lead and Copper Rules guaranteeing future compliance, OPC witness Marke admitted that no such guarantee exists. Even if MAWC continues to treat its water and remain in compliance with the Lead and Copper Rules, the risk of lead exposure still exists.<sup>9</sup>

Regarding federal lead limits, OPC and MCEG have made claims implying there is no actionable level of lead.<sup>10</sup> According to MCEG, "...the EPA has not provided absolute guidelines regarding lead concentration in drinking water."<sup>11</sup> The statement could not be more incorrect. The Lead and Copper Rule states:

The lead action level is exceeded if the concentration of lead in more than 10 percent of tap water samples collected during any monitoring period conducted in accordance with §141.86 is greater than 0.015 mg/L (*i.e.*, if the "90th percentile" lead level is greater than 0.015 mg/L).<sup>12</sup>

Reaching an action level requires the utility to implement source water treatments.<sup>13</sup>

Clearly, the Environmental Protection Agency ("EPA") has provided an absolute

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<sup>9</sup> Unfortunately, Flint, Michigan is not the only water system with lead limit exceedance. For example, York Water in Pennsylvania exceeded the EPA's threshold for lead, which resulted in the Pennsylvania Public Utility Commission approving a lead service line replacement program, which included the customer owned portion. See Ex. 13, Rebuttal Testimony of James A. Merciel, Jr., Schedule JAM r-5,

<sup>10</sup> "neither agency supported that statement with a regulatory action." Ex. 15, Rebuttal Testimony of Geoff Marke, p. 9, line 11.

<sup>11</sup> See MCEG's Initial Post-Hearing Brief, filed October 19, 2017, p. 2.

<sup>12</sup> 40 CFR 141.80(c)(1).

<sup>13</sup> 40 CFR 141.80(e).

guideline for lead concentrations in drinking water. There is an allowable level of lead in water, but exceeding that level must result in actions by the water utility to mitigate the contamination.

Another problematic assertion made by both OPC witness Marke in his rebuttal testimony, and MEEG in its Initial Post-Hearing Brief, is in reference to a 1994 District of Columbia Circuit Court case involving American Water Works Association (“AWWA”) and the EPA.<sup>14</sup> Both OPC and MEEG imply that this case shows the Court limited the EPA’s jurisdiction over the customer-owned portions of service lines. In actuality, the Court concludes that “Because we vacate the rule for ***lack of public notice***, we ***need not reach these substantive issues***” (emphasis added).<sup>15</sup> The case makes no decision about the meaning of the word control or if it is appropriate to expand the EPA’s jurisdiction to cover the customer owned portion of a service line, but only that the EPA did not give notice that it would apply a broad definition of “*control*”. In light of the overwhelming research showing that partial lead service line replacements can increase the risk of lead entering drinking water, a case from 1994 decided on the amount and type of notice given, does not stand for the proposition a utility cannot replace the customer owned portion of a service line.

Customers also seem supportive of the program. Out of 124 customers approached about replacement of their portion of a lead service line, only two customers have refused.<sup>16</sup>

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<sup>14</sup> Ex. 15, Rebuttal Testimony of Geoff Marke, p. 12, lines 22-23, MEEG’s Initial Post-Hearing Brief, filed October 19, 2017, p. 3-4.

<sup>15</sup> 440 F.3d 1266.

<sup>16</sup> Ex. 15, Rebuttal Testimony of Geoff Marke, p. 19, Table 3, Tr. II, 190:10-13. Only two customers refusing is also contrary to OPC’s statement in brief that “at least a few customers have declined”. See OPC’s Post Hearing Brief filed October 19, 2017, p. 11

Finally, contrary to OPC's allegations,<sup>17</sup> Staff has concerns about lead leaching in existing partial replacements, as well as all current lead service lines, which is why Staff is supporting the AAO request. Staff witness Merciel's testimony states, "MAWC is not proposing a comprehensive program to replace all LSLs. MAWC's proposed program in this AAO case is a limited LSL replacement program". The "program" at issue in this case is the replacement of lead service lines from January 2017 to May 2018. Lead service line replacements going forward, including plans to replace existing partial replacements should be considered as part of MAWC's general rate case.

#### **MAWC HAS MEET THE STANDARD FOR AN ACCOUNTING AUTHORITY ORDER**

MECG and OPC appear to conflate MAWC's current request for an AAO with MAWC's overall lead service line replacement program, leading to inaccurate statements about the scope of the work and statements regarding how the overall lead service line replacement program should be structured, which are outside the scope of this proceeding. This is not a "blank check" as OPC repeatedly states.<sup>18</sup> This is a request for a deferral of costs, limited in scope to lead service lines replacements, and in time to January 2017 to May 2018.<sup>19</sup> A final, definite number has not been a requirement of past AAOs. The Commission, in granting an AAO for water main replacements for St. Louis County Water, stated, "Although County Water has assured the Commission of its commitment to the stated level of its infrastructure replacement,

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<sup>17</sup> See OPC's Post Hearing Brief filed October 19, 2017, p. 14, footnote 5.

<sup>18</sup> See OPC's Post Hearing Brief filed October 19, 2017, p. 16, 17, and 18.

<sup>19</sup> Tr. II; 155:13-20.

the costs associated with the infrastructure replacement program are necessarily speculative.”<sup>20</sup>

Moreover, concerns over the speculative nature of this AAO request have been exaggerated, based on extrapolations from faulty evidence. MAWC testified that the total amount for this AAO would be approximately \$14.7 million.<sup>21</sup> As for the overall cost of replacing lead service lines, which is beyond the scope of this request, an estimate of 30,000 lead service lines at an average of \$6,000 would be \$180,000,000 million over a period of ten years.<sup>22</sup> OPC’s inflated figure of 2 billion dollars<sup>23</sup> is based on estimates of lead service lines that have been refuted. MAWC witness Aiton explained on the stand and in testimony, MAWC’s estimate of service lines is based on its existing data from tap cards and field experience.<sup>24</sup> It is practical, boots on the ground knowledge gained from MAWC’s actual, real world experience,<sup>25</sup> not extrapolated figures by outside, theoretical sources.<sup>26</sup> As MAWC witness Naumick explains in his surrebuttal testimony,

AWWA does not have its own source of data regarding the number of LSLs in any particular water system. As such, in no way can it be considered more valid than the “ground up” count of lead service lines conducted by MAWC. Extrapolating the AWWA data to discredit the MAWC estimate, as OPC witness Marke has done, is steeped in circular logic and therefore, inappropriate. As Company witness Aiton has testified, MAWC’s records of lead service lines are not perfect, but they are far more reliable than an extrapolation of the AWWA data.<sup>27</sup>

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<sup>20</sup> In Re St. Louis Cty. Water Co., WR-95-145, 1995 WL 769951 (Sept. 19, 1995)

<sup>21</sup> Tr. II; 170:20-22. (\$5.8 + \$8.9 = \$14.7)

<sup>22</sup> See Ex. 9, Surrebuttal of Bruce W. Aiton, p. 2, line 7, and p. 4, line 7.

<sup>23</sup> See OPC’s Post Hearing Brief filed October 19, 2017, p. 18

<sup>24</sup> See Ex. 9, Surrebuttal of Bruce W. Aiton, p. 2, lines 10-11.

<sup>25</sup> Tr. II; 190:16-25

<sup>26</sup> Tr. II; 191:13-17.

<sup>27</sup> See Ex. 3, Surrebuttal of Gary A. Naumick, p. 7, lines 7-13.



The source material Dr. Marke relies upon itself warns against the use of the data as accurate state-specific estimates, noting that:

it is important to caution that the analysis in this document was performed by grouped region. In order to convert to state occurrence, the same k and N values were assumed for each state in the grouped region. The state information is presented only to provide relative information on state variability.<sup>28</sup>

Therefore, as the AWWA figures are less than precise, and an extrapolation, OPC's estimate of nearly \$2 billion dollars is flawed and not reliable. Furthermore, all of OPC's proposed numbers are irrelevant, as the AAO, which is the ultimate issue in this case, is limited in scope to the time frame of January 2017 to May 2018, and the replacements done therein.

Approving this deferral request **does not** give MAWC carte blanche to defer all costs relating to lead service line replacements from now until every single lead service line is removed, be that 10 or 20 years from now. Structuring the program going forward, including the potential for including a levelized figure for lead service line replacements versus tracking expenses versus another mechanism for recovering costs and how costs should be divided out among classes and jurisdictions, is an issue for MAWC's rate case.

### **OTHER ALLEGATIONS**

Other parties, unable to refute MAWC's showing of a significant, extraordinary action with a material impact on its earnings, resort to scenarios to try to prop up their reasoning for a denial, labeling MAWC's actions as movement into the competitive market. Fears of a "slippery slope",<sup>29</sup> in which other utilities use an approval in this case

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<sup>28</sup> *Id.* p. 8, lines 6-12

<sup>29</sup> See MECG's Initial Post-Hearing Brief, filed October 19, 2017, p. 5

to justify any type of replacement of customer owned property are unfounded. Without a severe health hazard like lead, gas utilities will not be able to justify replacements of customer-owned gas furnaces and water heaters, nor will electric utilities be able to justify replacement of customer-owned breaker boxes, outlets, lights and electric appliances.<sup>30</sup> Customer owned lead service lines pose a health risk that none of the previously mentioned items do, which supports replacement of the entire lead service line, and thus constitutes a significant, extraordinary action appropriate for an AAO. The health risk lead service lines impose also proves contrary to implications that MAWC is entering the plumbing business,<sup>31</sup> as MAWC is only replacing the customer service lines containing lead. If MAWC was entering the competitive market place as a plumber, the reasonable assumption would be that MAWC would not limit its clientele solely to customers with lead service lines.

Finally, comparisons between MAWC's AAO request in this case, and the Commission's decision in ER-2016-0285 regarding electric vehicles and Kansas City Power and Light Company's ("KCPL") Clean Charge Network are inapt. The Commission found KCPL's foray into electric vehicle charging to be an entry into the competitive marketplace and the charging stations not be "electric plant", limiting the Commission's jurisdiction.<sup>32</sup> In contrast, lead service line replacements are squarely in the Commission's safety jurisdiction granted by RSMo 386.310.1.<sup>33</sup> The Commission

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* p. 6

<sup>32</sup> Report and Order, Case No. ER-2016-0285, issued May 3, 2017, at page 43

<sup>33</sup> "The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules or regulations, or otherwise, to require every person, corporation, municipal gas system and public utility to maintain and operate its line, plant, system, equipment, apparatus, and premises in such manner as to promote and safeguard the health and safety of its

has the jurisdiction to approve service line replacements to help safeguard the public from lead exposure. Furthermore, the closest analogous cases to the present proceeding are the gas main safety replacements, discussed in Staff's *Post-Hearing Brief*, and St. Louis County Water's AAO for water main replacements. In *In Re St. Louis Cty. Water Co.*, the Commission granted St. Louis County Water an AAO for its expenditures in replacing dilapidated water mains.

The Commission is of the opinion that the infrastructure program represents a significant and unusual increase in County Water's business-as-usual construction expenditures, and is extraordinary in nature. Thus, the Commission finds that County Water should be granted an AAO allowing deferral of its capital expenditures associated with its infrastructure replacement program.<sup>34</sup>

The Commission is no stranger to granting AAOs for main and service line replacement programs, be it for safety reasons,<sup>35</sup> or as the above case illustrates, just a significant uptick in expenditures. The Commission has ample historical support to grant MAWC's AAO request in this case, along with the compelling policy reasons.

### **CONCLUSION**

The Commission only has two questions before it in this proceeding. Should MAWC be granted an AAO? As Staff's *Post Hearing Brief* shows, MAWC undertook a **significant, extraordinary** action due to policy considerations regarding the safety of lead service lines, and incurred costs that would have a **material** impact on its earnings. Therefore, MAWC should be granted an AAO. Second, what carrying costs

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employees, customers, and the public, and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety and other devices or appliances, to establish uniform or other standards of equipment, and to require the performance of any other act which the health or safety of its employees, customers or the public may demand."

<sup>34</sup> *In Re St. Louis Cty. Water Co.*, WR-95-145, 1995 WL 769951 (Sept. 19, 1995)

<sup>35</sup> See In GR-99-315, *In the Matter of Laclede Gas Company's Tariff to Revise Natural Gas Rate Schedules*, *In the Matter of Missouri Gas Energy's Tariff Sheets Designed to Increase Rates for Gas Service in the Company's Missouri Service Area*, Case No. GR-98-140, *Missouri Gas Energy v. Pub. Serv. Comm'n, State of Mo.*, 978 S.W.2d 434, 436 (Mo. Ct. App. 1998).

should be used? American Water Works Corporation's ("AWWC"), MAWC's parent company, short-term debt rate is appropriate. MAWC acquiesced to this condition in its *Initial Brief*.<sup>36</sup> Therefore, the Commission should answer the first question in the affirmative, and grant the AAO with AWWC's short-term debt rate used to calculate carrying costs.

**WHEREFORE**, on account of all the foregoing, Staff prays that the Commission will issue its findings of fact and conclusions of law as recommended by the Staff herein; and granting such other and further relief as is just in the circumstances.

Respectfully submitted,

**/s/ Nicole Mers**

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<sup>36</sup> See MAWC *Initial Brief*, filed October 19, 2017, p. 11

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served by electronic mail, or First Class United States Postal Mail, postage prepaid, on this 30<sup>th</sup> day of October, 2017 to all counsel of record.

**/s/ Nicole Mers**