

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

UTILITY WORKERS UNION OF	)	
AMERICA, LOCAL 335,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. WC-2011-0341
	)	
MISSOURI-AMERICAN WATER	)	
COMPANY,	)	
	)	
Respondents.	)	

**MAWC’S ANSWER AND MOTION TO DISMISS**

COMES NOW, Missouri-American Water Company (MAWC), by and through its counsel, and, pursuant to 4 CSR 240-2.070, respectfully states the following to the Missouri Public Service Commission (Commission) as its Answer and Motion to Dismiss the Complaint filed by the Utility Workers Union of America, Local 335 (Local 335 or Complainant):

1. MAWC is a public utility subject to the jurisdiction of the Commission, as provided by law.
2. Correspondence, communications, orders and decisions regarding this matter should be addressed to the undersigned counsel and:

Tracy Elzemeyer  
Missouri-American Water Company  
727 Craig Road  
St. Louis, MO 63141  
(314) 996.2279 (voice)  
(314) 997.2451 (fax)  
[tracy.elzemeyer@amwater.com](mailto:tracy.elzemeyer@amwater.com)

## **ANSWER**

3. MAWC admits the factual allegations contained in Paragraph 1.

4. MAWC is without sufficient information or belief to admit or deny the allegations contained in Paragraph 2, and must, therefore, deny the same. MAWC further states that, over a number of years, MAWC has entered into collective bargaining agreements with Local 335 and has recognized Local 335 as the exclusive bargaining representative of certain employees in St. Louis County. At this time, Local 335 represents approximately 400 bargaining unit employees in St. Louis County.

5. MAWC is without sufficient information or belief to admit or deny the allegations contained in Paragraph 3, and must, therefore, deny the same.

6. Paragraph 4 does not contain a factual allegation to which a response is required.

7. Paragraph 5 does not contain a factual allegation to which a response is required.

8. Paragraph 6 does not contain a factual allegation to which a response is required.

9. Paragraph 7 does not contain a factual allegation to which a response is required.

## **COUNT I**

10. In response to paragraph 8, MAWC hereby incorporates by reference its responses to paragraphs 1 through 7, above.

11. MAWC admits that there are approximately 4,200 miles of mains in MAWC's St. Louis County water system. MAWC denies the remainder of the allegations contained in Paragraph 9.

12. MAWC admits that its mains have valves. MAWC denies the remainder of the allegations contained in Paragraph 10. MAWC further states that there are approximately 87,720 valves (as of last count in fall 2010) in the St. Louis County water distribution system. Valves

are mechanical devices in or attached to pipelines to control flow. When used in a series or in some cases by themselves, valves are used to isolate sections of water mains, isolate fire hydrants, isolate customer connections, isolate pressure zones, regulate pressure, flush mains, remove air, control direction of flow, fill storage tanks, and prevent damage (surge valves and vacuum breaks).

13. MAWC admits the factual allegations contained in Paragraph 11.

14. Some Missouri American Water owned systems and other water utilities use what is commonly referred to as a valve operation or exercising program. These programs are designed to locate and operate valves periodically to make sure they are accessible and functioning properly. Valve programs may be beneficial and may contribute to the reliability and the lifespan of the asset. The benefits are listed in the practice document attached as Exhibit 1 to the Complaint.

In deciding the timing and extent to which preventative maintenance in the form of a valve exercise program is implemented in a particular operation, the operation also considers other factors. Programs such as these on a system the size of St. Louis County comes with a significant cost. Additionally, due to the age of the system and the extent of an existing program, an unpredictable number of valves may be damaged at the onset of the program. Valve failures can create emergency situations depending on the type of failure. Any preventative maintenance on valves, especially large valves, must be coordinated with system operations due to the impact on pressures and flows throughout the system and may need to be restricted during certain times of the year.

MAWC denies the remainder of the allegations contained in Paragraph 12.

15. MAWC admits the factual allegations contained in Paragraph 13. In further response to paragraph 13, MAWC states that equipment other than gas powered machines may be used for this purpose, including hydraulic machines.

16. MAWC admits that, in or about November 2007, American Water Works Company, Inc. produced, a document entitled “Valve Operation, Inspection and Maintenance Practice.” MAWC admits that Exhibit 1 to the Complaint is a true and accurate copy of that document. MAWC denies the remainder of the allegations contained in paragraph 14 to the extent they are inconsistent with that document and its purpose.

17. MAWC states that MAWC has not maintained a dedicated valve exercise crew in St. Louis County. MAWC denies the remainder of the allegations contained in paragraph 15.

18. MAWC denies the allegations contained in paragraph 16. MAWC further states that it continues to exercise valves (as it has done for several years) in the following ways: 1) seasonally and through fill-in work; 2) in the normal course of operations for every main break; and, 3) for construction projects.

19. MAWC admits the allegations contained in Paragraph 17, but denies such decision is related to any valve exercise program.

20. On April 10, 2011, a 30” main located under the pavement of Old Bonhomme Rd. failed near the intersection with Shandel Dr. The failure of a 30” main is significant. The first responders and certain supervisors identified a series of seven valves that would have to be closed in order to isolate the broken section of main and stop the release of water. Five valves originally identified to isolate the main operated without issue. The other two valves initially identified were inoperable.

One of the valves that was inoperable was a 30" valve located at Groby, one block north of the break. As a result, the crews "backed up" to redundant valves, just a few feet away. No additional customers were without water as a result of this adjustment. After the break was repaired, a crew repaired the valve, and the valve thereafter functioned properly.

The second inoperable valve was a 30" valve to the south, near the intersection with Gannon. In order to isolate the break, crews had to move three blocks down and operate a combination of three valves. This added approximately 60 more customers to the shutdown. MAWC has investigated repairing the valve, but has not decided whether this valve will be repaired or removed.

MAWC denies the remainder of the allegations contained in Paragraph 18.

21. MAWC admits that Tennessee American Water Company has been ordered to provide reports concerning the identified matters as the result of a general rate case in Tennessee. MAWC is without sufficient information or belief to admit or deny the remaining allegations contained in Paragraph 19, and must, therefore, deny the same. MAWC further states that the Tennessee case in question was a general rate case, not a complaint case. The motion in that case, attached as Exhibit 2 to the Complaint, reveals no finding of a violation of any Tennessee statute, rule or decision. Nor does the motion provide any factual finding as to the reason for the ordered filing of the described reports. This matter appears to be wholly irrelevant as to the sufficiency of MAWC's actions in Missouri.

## **COUNT II**

22. In response to paragraph 20, MAWC hereby incorporates by reference its responses to paragraphs 1 through 7, above.

23. MAWC admits the allegations contained in Paragraph 21. MAWC further states that there are more than 31,000 fire hydrants in St. Louis County. MAWC further states that fire hydrant inspections in St. Louis County are governed by tariff P.S.C. Mo. No. 6, Original Sheet No. R-21.0. That tariff sheet requires MAWC to inspect all public hydrants at least once in every 14 month period. MAWC is in compliance with this requirement.

24. MAWC admits that some of the St. Louis County fire hydrants are more than 50 years old. MAWC is without sufficient information or belief to admit or deny the remainder of the allegations contained in Paragraph 22, and must, therefore, deny the same.

25. MAWC admits the allegations contained in Paragraph 23.

26. MAWC denies the allegations contained in Paragraph 24. MAWC further states that it specifies and uses a dry barrel fire hydrant. The valve to allow flow through the hydrant is located in the base, known as the foot, of the hydrant. Hydrants are operated by turning a nut located on the top of the hydrant. This turns a shaft that runs from the nut, down through the barrel, to the plunger. The plunger seals to the top of the foot when the hydrant is in the closed position. The shaft is threaded and moves the plunger down into the foot as the hydrant is opened to allow water to flow up through the barrel. This valve operation is unique to fire hydrants and different to the various valves utilized in the distribution system.

The specifications for MAWC, and the practice in St. Louis County, has been to install an isolation valve on the 6" hydrant lead at its point of connection to the main feeding it. The purpose is to make it possible to turn off the water source to perform maintenance to the hydrant without interrupting service to customers. Without this valve, mains would need to be valved off and isolated for work on the hydrants to be performed. These valves are identical to the 6" gate valves used in the distribution system. There is no requirement to install these valves, much less

operate them routinely. A program to regularly operate the more than 31,000 hydrant valves in the St. Louis County system is not practical and would provide little benefit to customers.

27. MAWC denies the allegations contained in paragraph 25. MAWC further states that hydrant valves are part of the general valve program.

28. MAWC admits the allegations contained in paragraph 26. MAWC further states that its current hydrant maintenance program utilizes a combination of full-time and temporary employees. The use of temporary employees is contemplated in Section 3.19 of the parties' most recent Collective Bargaining Agreement (CBA). This work is primarily done seasonally (in warmer months) to avoid cold weather issues with ice and freezing. The program requires a thorough inspection that goes beyond pressure testing and spot painting. Among other things, the hydrant inspection includes a visual inspection, inspection for functionality, performing maintenance as needed (such as adding lubricant and replacing missing parts) and sounding for leakage.

29. MAWC denies the allegations contained in paragraph 27. MAWC further states that it is in compliance with the tariff requirements for hydrant inspections.

### **COUNT III**

30. In response to paragraph 28, MAWC hereby incorporates by reference its responses to paragraphs 1 through 7, above.

31. MAWC admits the allegations contained in paragraph 29. MAWC further states that this work has also been performed by outside contractors.

32. MAWC denies the allegations contained in paragraph 30. MAWC further states that, since 2003, certain work it performs is funded by an Infrastructure System Replacement Surcharge ("ISRS work"). Depending on a number of factors, some ISRS work is performed by

Local 335 and some ISRS work is performed by outside contractors. The assignment of ISRS work to outside contractors is permissible under section 1.07 of the CBA.

33. MAWC admits that on or about February 7, 2011, MAWC advised Local 335 that it believed assignment of ISRS work was governed by the parties' CBA and relevant bargaining history. In response to a claim by Local 335 that ISRS work was governed by a standalone agreement, MAWC gave notice to Local 335 that it was terminating such agreement and provided 60 days notice. MAWC denies the remainder of the allegations contained in paragraph 31.

34. MAWC admits the allegations contained in paragraph 32, except for the use of the word "subcontract." The proposal gives the Company the right to "contract out" ISRS work without the restrictions contained in the most recent CBA.

35. MAWC does pre-employment background checks prior to employment. MAWC denies the remaining allegations contained in paragraph 33.

36. MAWC admits the allegations contained in paragraph 34.

37. MAWC is without sufficient information or belief to admit or deny the allegations as to the Union's understanding contained in Paragraph 35, and must, therefore, deny the same.

38. MAWC denies the allegations contained in paragraph 36. MAWC further states that the Company did contract out certain work consistent with section 1.07 of the most recent CBA. This work is not regularly performed by Local 335. These contractors are retained through a bidding process.

39. MAWC denies the allegations contained in paragraph 37.



### **AFFIRMATIVE DEFENSES**

40. Further answering and as an affirmative defense, MAWC states that the Complaint fails to state a claim upon which relief may be granted in that the Complainant is not a party authorized to bring a complaint under Section 386.390, RSMo and Commission Rule 4 CSR 240-2.070.

41. Further answering and as an affirmative defense, MAWC states that the Complaint fails to state a claim upon which relief may be granted in that the Complaint does not allege a violation of any provision of law or of any rule or order or decision of the Commission.

42. Further answering and as an affirmative defense, MAWC states that the Complaint fails to state a claim upon which relief may be granted in that the Complaint requests relief that is beyond the Commission's jurisdiction.

43. Further answering and as an affirmative defense, MAWC states that it has acted in accordance with its tariffs and applicable statutes and regulations.

### **MOTION TO DISMISS**

44. The Commission should dismiss the Complaint because none of the identified counts allege a violation of any provision of law or of any rule or order or decision of the Commission.

45. The Commission has recently described the standard it will apply to motions to dismiss as follows:

The Commission has the authority to decide this matter on the pleadings pursuant to Commission Rule 4 CSR 240-2.117(2), which states:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to the public interest.

The Commission's rules do not establish standards for when it is appropriate to dispose of a case on the pleadings, so the Commission will instead look to Missouri's civil procedures for guidance.

In indicating when a case may be disposed on the pleadings, the Missouri Supreme Court has stated that for purposes of the motion, all facts stated in the challenged pleading are accepted as true. If those assumed facts are insufficient as a matter of law, the trial court may properly grant a motion for judgment on the pleadings. *State ex rel. Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 134 (Mo 2000).

*Staff of the Commission v. Laclede*, Order Regarding Laclede's Motion to Dismiss, File No. GC-2011-0098 (January 26, 2011).

46. Section 386.390, RSMo states, in part, as follows:

Complaint may be made . . . setting forth any act or thing done or omitted to be done by any corporation, person or public utility, including any rule, regulation or charge heretofore established or fixed by or for any corporation, person or public utility, *in violation, or claimed to be in violation, of any provision of law, or of any rule or order or decision of the commission.* . . .

(emphasis added).

47. Thus, at a minimum, a complaint must allege some violation of a “provision of law, or of any rule or order or decision of the commission.” Even if all facts stated in the challenged pleading are accepted as true, as suggested by the above standard, the Complaint has failed to satisfy this element.

48. The Complaint generally, and accurately, states that MAWC is required to provide “safe and adequate” service in accordance with Section 393.130, RSMo. However, there is no allegation that MAWC has failed to provide such service to its customers. At best, the allegations and requests for relief ask that the Commission investigate MAWC's practices to determine if those practices might, at some point in the future, lead to the possibility of inadequate service.

49. Such allegations are not sufficient to maintain a complaint. Complaints are serious matters carrying with them the potential for substantial penalties. Accordingly, it is bad policy to allow a party to maintain a complaint where in reality that party is merely asking the Commission to exercise its investigatory powers and “look into” a matter. This is something the Commission could do at any time, at its own discretion, without a pending case.

### **Count I**

50. Count I provides no allegation of a violation of any “provision of law, or of any rule or order or decision of the commission.”

51. The allegations in Count I concern the sufficiency/existence of MAWC’s valve maintenance program.

52. No violation of a technical requirement of statute or rule is alleged. Further, the general allegations come nowhere close to supporting a finding that MAWC has failed to provide safe and adequate service to its customers. Moreover, this conclusion is further supported by Local 335’s request for relief. It does not ask for a finding of violation. Local 335 instead requests that the Commission “investigate MAWC’s valve maintenance program.” These allegations are not sufficient to support a complaint under the Commission’s statutes and Count I should be dismissed.

### **Count II**

53. Count II also provides no allegation of a violation of any “provision of law, or of any rule or order or decision of the commission.”

54. The allegations in Count II concern the existence of a valve exercise program for hydrants and hydrant maintenance.

55. Local 335 alleges that MAWC doesn't have sufficient manpower to perform maintenance on the hydrants. However, similar to Count I, there is no allegation of violation of any specific statute or rule and no allegation as to how MAWC has failed to provide safe and adequate service to its customers. The relief sought by Local 335 is that "the Commission investigate MAWC's hydrant maintenance program." This sort of general request to investigate is not sufficient to maintain a complaint under the Commission's statutes. Count II should be dismissed.

### **Count III**

56. Count III has an even more fundamental flaw. It requests the Commission entertain a matter and grant relief that is clearly beyond the subject matter jurisdiction of the Commission in regard to a complaint action.

57. Count III alleges that ISRS work being performed by outside contractors should instead be performed by Local 335 members. Local 335 thereafter requests "that the Commission investigate MAWC's subcontracting of the ISRS work with regard to training, qualifications, safety record and the bid process pursuant to RSMo [section] 393.140 and, upon completion of the investigation, issue any appropriate relief."

58. As with Counts I and II, there is no allegation of violation of any "provision of law, or of any rule or order or decision of the commission" and no facts that would support a finding that MAWC has failed to provide its customers with safe and adequate service.

59. More importantly, MAWC's decision to either use or not use outside contractors is beyond the Commission's jurisdiction. In an AmerenUE rate case decided in 2009 (Case No. ER-2008-0318), the Commission was presented with a similar issue. In that case, several unions representing AmerenUE employees asked the Commission, among other things, to order

AmerenUE to take specific steps to increase its internal workforce so that it would use fewer outside contractors. In determining that it did not have the authority to address the use of internal workforce as opposed to outside contractors, the Commission stated as follows:

The Commission has the authority to regulate AmerenUE, including the authority to ensure the utility provides safe and adequate service. However, the Commission does not have authority to manage the company. In the words of the Missouri Court of Appeals,

The powers of regulation delegated to the Commission are comprehensive and extend to every conceivable source of corporate malfeasance. Those powers do not, however, clothe the Commission with the general power of management incident to ownership. The utility retains the lawful right to manage its own affairs and conduct its business as it may choose, as long as it performs its legal duty, complies with lawful regulation, and does no harm to public welfare. [*In the Matter of Kansas City Power & Light Company's Tariffs Increasing Rates for Electric Service*, 28 Mo. P.S.C. (N.S.) 228, 270 (1986).]

Therefore, *the Commission does not have the authority to dictate to the company whether it must use its internal workforce rather than outside contractors to perform the work of the company.*

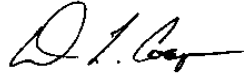
*In the Matter of Union Electric Company d/b/a AmerenUE*, Report and Order, Case No. ER-2008-0318 (issued January 27, 2009) (emphasis added).

60. Count III does not allege any violation of statute, rule and order and requests that the Commission address matters that are beyond its jurisdiction. The Commission should dismiss Count III immediately before additional state and utility resources are expended without purpose.

**WHEREFORE**, having fully answered and set forth its affirmative defenses, Missouri-American Water Company prays the Commission dismiss the Complaint and grant such other

relief as the Commission deems reasonable and just.

Respectfully submitted,



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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  
(573) 635-3847 facsimile  
[dcooper@brydonlaw.com](mailto:dcooper@brydonlaw.com)

ATTORNEYS FOR MISSOURI-AMERICAN  
WATER COMPANY

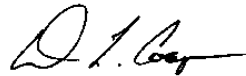
### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on May 18, 2011, to the following:

Office of the General Counsel  
Governor Office Building  
Jefferson City, MO 65101  
[gencounsel@psc.mo.gov](mailto:gencounsel@psc.mo.gov)

Office of the Public Counsel  
Governor Office Building  
Jefferson City, MO 65101  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)

Michael A. Evans  
Hammond and Shinnars, P.C.  
7730 Carondelet Avenue, Suite 200  
St. Louis, MO 63105  
[mevans@hstly.com](mailto:mevans@hstly.com)



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