

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

In the Matter of a Review of the Missouri       )  
Public Service Commission's Standard of       ) Case No. AO-2008-0192  
Conduct Rules and Conflicts of Interest       )  
Statute.

**MISSOURI-AMERICAN WATER COMPANY'S  
RESPONSE AND RECOMMENDATIONS  
CONCERNING REPORT OF REVIEW AND INQUIRY**

**COMES NOW** Missouri-American Water Company (MAWC) and for its response and recommendations concerning the Report of Review and Inquiry, states as follows to the Missouri Public Service Commission (Commission):

1. On January 15, 2008, Chairman Davis filed in this case a document entitled The Chairman's Report on a Review of the Missouri Public Service Commission's Standard of Conduct Rules and Conflicts of Interest Statute. That document contained a Report of Review and Inquiry (Report). The Report directed that this case remain open until at least January 31, 2008, for parties to file additional responses.

2. The Report, among other things, includes a section entitled Chairman's Recommendations that are a combination of steps that the Chairman recommended be taken or considered by the Commission and/or the Missouri General Assembly. Some of these steps would require rules to be promulgated, some would require statutes to be enacted and some would merely require a change of the Commission's current practices.

3. The spirit and intent of the recommendations, to bolster public confidence in the integrity of the ratemaking process, is indeed laudable. However, as discussed in

the examples below, the Report's recommendations are in certain respects unclear and ambiguous and may impede the efficient performance of the Commission's duties.

Accordingly, MAWC urges the Commission to consider the alternative to the Recommendations proposed herein.

## **BACKGROUND**

4. In considering these recommendations the Commission must remember that it is limited by statute. "The Public Service Commission is a creature of statute and can function only in accordance with the statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed." *State ex rel. Monsanto Company, et al., v. Public Service Commission, et al.*, 716 S.W.2d 791, 796 (Mo.banc 1986), citing *State ex rel. Laclede Gas Co. v. Public Service Commission*, 535 S.W.2d 561, 568 (Mo.App.1976). Thus, any change in practice or promulgation of rules must be consistent with the existing statutes which govern the Commission's activities.

5. For purposes of this inquiry, two statutes should be kept close at hand. First, Section 386.210, RSMo, which was amended as recently as 2003, sets forth a fairly complete statement of permitted, if not encouraged, communications with commissioners. The statute reminds us that the question concerning commissioner communications does not just impact public utilities. It includes communications between commissioners and "members of the public, any public utility or similar commission of this and other states and the United States of America, or any official, agency or instrumentality thereof." In making changes, the Commission should be careful to not overly restrict itself in a way that will prevent it from obtaining information from a variety of stakeholders as envisioned by the statute.

6. It must also be remembered that Section 386.480, RSMo creates criminal liability for those Commission and Office of the Public Counsel (Public Counsel) personnel that divulge information provided by a utility without specific order to do so. This statute is important as it encourages the provision of sensitive information to the Commission and Public Counsel so that they can perform their jobs. Section 386.480, RSMo states:

No information furnished to the commission by a corporation, person or public utility, except such matters as are specifically required to be open to public inspection by the provisions of this chapter, or chapter 610, RSMo, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. The public counsel shall have full and complete access to public service commission files and records. Any officer or employee of the commission or the public counsel or any employee of the public counsel who, in violation of the provisions of this section, divulges any such information shall be guilty of a misdemeanor.

7. The Chairman's Report, however, states that information "will be considered open records and available for public inspection unless specifically designated as 'highly confidential'." (Recommendation K – Securities and Exchange Commission Provision; See also Recommendations G and H – Scheduling of Meetings With the Commission). First, in accordance with Section 386.480, no such designation is necessary as the presumption (backed by criminal penalties) is that information furnished by a utility is not to be disclosed. Second, the phrase "highly confidential" seems to invoke the provisions of Commission Rule 4 CSR 240-2.135. However, as currently written that rule only applies without specific order to situations where a case is "pending before the commission." 4 CSR 240-2.135(2)(A). Thus, if the Commission seeks to utilize

such designations in the situations addressed by the Report, it will need to amend 4 CSR 240-2.135.

### **COMMUNICATION WITH THE COMMISSIONERS**

8. The recommendations with the most potential for “chilling” discussion between the Commission and the many parties that appear before it or are interested in its work are those found in Recommendations G and H -- “Scheduling of Meetings with the Commission.” These recommendations call for public notice, broadcast and recording of all matters a party or potential party may want to discuss with a commissioner, even where no case is pending before the Commission. Such an approach is contrary to Section 386.210 and ignores the dual nature of the Commission’s responsibilities as both an adjudication and policy making body.

9. While the Commission may have a need to control and provide notice as to matters that may be adjudicated by it, the Commission has a broad duty to listen to those parties while performing in a regulatory and policy making capacity, such as in matters involving rulemaking, which is an exercise of a legislative function pursuant to authority delegated to it by the Missouri legislature. In fact, those parties have a right to contact their representatives and to communicate with those representatives. The notice and other requirements the recommendations would impose would constitute an unwarranted restriction on such rights.

10. MAWC would suggest that rather than trying to formalize all of these communications that a better approach would be a “bright line” test related to cases that are ultimately filed with the Commission. The state of Indiana has such a rule that could

be modified for use in this state. 170 Indiana Administrative Code 1-1.5-5, states as follows:

Sec. 5. If, within thirty (30) days before a proceeding begins, a member of the commission, administrative law judge, or technical employee receives a communication, which: (1) would be ex parte if there was a proceeding before the commission; and (2) is intended to persuade or advocate a position; the member or employee of the commission shall disclose the communication as described in section 6 of this rule promptly after the proceeding begins. In addition, a member or employee of the commission who has received a prior communication, which, given its timing and content, that person reasonably believes was intended to circumvent this section may disclose the communication as described in section 6 promptly after the proceeding begins.

11. Use of a similar rule in Missouri would provide the opportunity for the communications encouraged by Section 386.210, RSMo, and provide a simple test for determining what communications prior to the opening of a contested case should be treated as if they are ex parte contacts.

12. Recommendations G and H appear to be similar to Section 58-3-260 of the South Carolina Code of Laws – state where a separate docket is maintained just for ex parte communications. However, in making this comparison, it should be noted that the South Carolina Public Service Commission (South Carolina PSC) structure is much different from that of Missouri. South Carolina has created a separate Office of Regulatory Staff (ORS) to transfer away from its commission some of the traditional regulatory commission duties. The ORS is responsible for many of the non-adjudicative functions associated with utility regulation that formerly fell under the auspices of the South Carolina PSC.

13. Prior to this change, the South Carolina PSC handled all aspects of utility regulation. The creation of the ORS provided a revised structure for addressing the

public interest that separates the adjudicative function (which remains with the South Carolina PSC) from the investigative, legal, prosecutorial, and educational roles. The South Carolina PSC's web site ([www.psc.sc.gov](http://www.psc.sc.gov)) describes its function as follows:

On January 1, 2005, The South Carolina Public Service Commission began the new year as a restructured quasi judicial body, as the result of legislation passed the previous year. Act 175 of 2004 brought about major changes in the agency's operations. Under the new law, the Public Service Commission's principal duty is to hear cases involving the State's regulated utilities.

The Public Service Commission essentially functions as a court for cases involving utilities and other regulated companies. The Public Service Commission has broad jurisdiction over matters pertaining to the investor owned electric and gas utility companies; water companies, telecommunications companies, motor carriers of household goods, hazardous waste disposal, and taxicabs.

14. Trying to implement a similar ex parte provision in Missouri by rule where the Commission remains responsible for adjudicating cases, establishing policy and a variety of other duties is a difficult proposition at best. If such a drastic step is pursued, it is something that should be done by the General Assembly in coordination with a restructuring of the Commission and its duties, not something that should be done in a piecemeal fashion.

15. Research with regard to statutes in other Midwestern states such as Indiana, Iowa, Illinois, and Arkansas does not reveal any ex parte prohibition that is similar to that recommended in the Report. The referenced states, whose commissions are similar in responsibility to that of the Missouri Commission, all have provisions much more similar to the current statute which governs Missouri communications.

## **CONTACTS WITH PUBLIC SERVICE COMMISSION STAFF AND OTHER PARTIES**

16. The Report further contains two recommendations (E – Required Disclosure of Meetings & Communications with All Parties to Pending Cases and F- Prior Public Notice of PSC Employee Meetings) that will likely be unworkable in practice and impact the ability of utilities to communicate with the Staff and parties to cases before the Commission.

17. Recommendation E appears to require 72 hour notice of any meeting involving a Commission employee, the Public Counsel or parties to cases pending before the Commission. The recommendation is ambiguous and unclear as to what exactly it would apply. However, it appears that three days public notice would be required before counsel for a utility, or any utility representative, could pick up the telephone and call counsel for other parties to a case, or any of their representatives, in order to discuss any item related to the case (for example, a proposed procedural schedule, exploration of consent to motions, discussions concerning discovery matters, settlement, etc.). In fact, as written, the recommendation arguably applies even to matters that are not just related to a particular case, as it broadly applies to “communications related to the performance of the Commission’s duties” once any case is filed. The likely result of this would be that parties would only communicate through pleadings. Such a result will not aid judicial efficiency or economy.

18. Recommendation F is similarly unclear and ambiguous. It would require twenty-four hours public notice before a meeting between commissioners or Staff members and persons “likely” to become parties to Commission cases or proceedings. Since every utility, the Commission staff, and the consumer counselor are, by their

nature, not just “likely”, but required to become parties to Commission cases and proceedings at some point, the recommendation would, on its face, apply to any meetings whatsoever between the utility and any commission employee. The recommendation would also require a utility to make some determination as to what “persons” might possibly be interested in the subject matter of the contact, with, presumably, some sort of penalty if the utility should leave out some person(s) who later claim(s) they are “interested”. MAWC currently has any number of communications with the Commission and its Staff that MAWC believes are very helpful and necessary to the regulation of MAWC and the welfare of its customers. For example, on a regular basis MAWC will communicate to the Commission and its Staff as to water quality issues, implementation of its low income assistance program, resolution of customer complaints and other issues that impact public safety, health and welfare.

19. This information is provided in the normal course of business, many times by merely picking up the telephone and calling the responsible Staff member. It is not clear what goal would be served by requiring the bureaucratic step of providing public notice that MAWC personnel will be calling the Water and Sewer Department the next day in order to tell them that there is a boil order or main break in a particular community.

20. Recommendation I is also unclear as to its intended scope and contains some potentially troubling ambiguities. It appears to apply to all communications that are not statutorily defined “ex parte” communications. Therefore it seems to apply to all other communications. It also appears to apply to commissioners. Since commissioners are decision makers on every case before the Commission, the



Recommendation would seem to encompass any “communications” that could relate in any way to every “substantive policy issue” involved in any proceeding before the Commission. This may prohibit commissioner attendance, at a panel presentation at meetings or training programs of the National Association of State Utility Consumer Advocates or the National Association of Regulatory Utility Commissioners, dealing, for example, with low income assistance programs, infrastructure replacement issues, or a host of other substantive regulatory policy issues routinely discussed in educational regulatory forums.

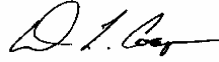
### **CONCLUSION**

21. MAWC understands the importance of the public having confidence in the process by which the Commission performs its duties. MAWC also believes that equally important is the Commission’s ability to have communications with the various entities that are impacted by the Commission’s policies. These interests can be more easily balanced with a “bright line” test such as that proposed herein. The use of the Report’s recommendations, in their current form, would not recognize the importance of the Commission’s communications and may also hamper its Staff’s ability to perform its designated functions.

**WHEREFORE**, MAWC requests the Commission consider the response

contained herein.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI-AMERICAN  
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### **CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 31<sup>st</sup> day of January, 2008, to:

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