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September 22, 2003

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. WR-2003-0500

Dear Mr. Roberts:

Provided herewith for filing on behalf of Missouri-American Water Company ("MAWC"), please find in electronic format MAWC's Response to the Staff Motion to Compel Answers to Staff Data Requests.

A copy of this filing is being provided to all parties of record.

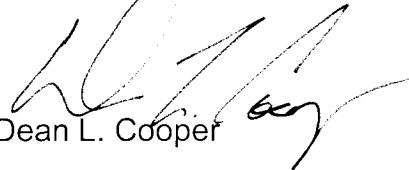
Please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely,

BRYDON, SWEARENGEN & ENGLAND, P.C.

By:


Dean L. Cooper

DLC/lar
Attachment
cc: All parties of record

September 26, 2003. MAWC is now also able to respond to Data Request number 252 and sections 3A (second 3) and 4A of Data Request number 254 and will also do so by September 26, 2003.

4. The remaining data requests generally ask for the following information that remains at issue:

DR No. 144 (sections 1 and 3) - requests MAWC to provide *all* board of directors' *minutes* for *American Water Resources ("AWR") and American Water Works Company, Inc.* from January 1, 2000, through current;

DR No. 252 (Sections 1B, 1D, 2B and 2D¹) - asks MAWC to provide lists of the board of directors and executives/officers of *AWR and American Water Services, Inc. ("AWS")*;

DR No. 254 (Sections 1, 2, 3A, 3D, 3A (the second section 3) and 4A) - asks for a "detailed" description of products provided by AWS; a list of "*all affiliated (regulated and nonregulated) companies*" that transact business with AWS; a detailed description of *all transactions between AWS and American Water and AWR*; and, lists of the AWS directors and officers that serve on the board, or are officers of, American Water;

DR No. 256 - asks for all "expected transactions or changes that [*American Water*] *has discussed* that would impact the operations of [*Missouri-American Water Company and American Water Service Company*] *in any way,*" as well as costs incurred related to *such discussions*; and,

DR Nos. 276 (Section 2) and 277-279 - ask MAWC to provide various studies and analysis which may have been performed by "*any American Water Works entity*"; certain revenue, customer, expense and net income numbers *experienced by AWR*; and, financial information related to *services*

¹ While MAWC's initial letter of objection erroneously cites section "2C," the Company has responded to 2C and, instead it is "2D" that is at issue. This was briefly discussed with counsel for Staff and the RLJ at the discovery conference.

AWR offers in seventeen (17) states, other than Missouri.

5. American Water Works Company, Inc. (“American Water”) is MAWC’s parent corporation in that it owns all the common stock of MAWC. American Water serves millions of customers in 27 states and 4 Canadian provinces.

6. AWR is an American Water subsidiary that offers water and waste water related products and services to residential, government or business consumers. This includes two primary lines of business -- consumer protection programs (primarily water and sewer lines) and carbon services regeneration.

7. AWS is an American Water subsidiary that provides a broad range of water and wastewater services to meet a full spectrum of needs for municipal, industrial and military clients. These services include operation and maintenance contracts for municipal and industrial water and waste water treatment facilities and associated systems; residuals management services such as cleaning, dredging, de-watering and disposal solutions for municipal and industrial residuals with a focus on beneficial reuse; engineering services such as design, design/build and consulting services to municipal and industrial customers as well as affiliated companies and underground infrastructure services such as locating, cleaning, inspecting, repairing, rehabilitating and maintaining waste water collection and water distribution systems.

8. American Water, AWR and AWS are neither water corporations nor public utilities as those terms are defined by chapter 386, RSMo. American Water neither charges to nor receives charges from MAWC related to services. AWR and AWS offer various services not provided by MAWC, to customers other than MAWC.

DISCUSSION

A. Possession, Custody and Control

9. MAWC's objections to this series of data requests generally concern the question of whether and to what extent Staff can use the data request process to obtain information from entities above MAWC in the corporate structure and entities related to MAWC only by common ownership. None of the above data requests ask for information that MAWC has in its possession and MAWC neither has, nor maintains, the information requested by the Staff in the subject data requests.

10. Commission Rule 4 CSR 240-2.090(1) provides that discovery may be obtained by the same means and under the same conditions as in civil action in the circuit court.

11. Missouri Rule of Civil Procedure 58.01(a) states in part that a party may obtain only items that are "in the possession, custody or control of *the party upon whom the request is served*" (emphasis added). MAWC cannot produce what it does not have. Appellate courts have repeatedly held that a party cannot be required to provide documents or information not in its records. *Keefover v. Director of Revenue*, 996 S.W.2d 75, 76 (Mo.App. S.D. 1999). For example, within the context of state government, the courts have said that the Department of Revenue need not answer discovery where the responsive information would be known only by the Missouri Highway Patrol or other agencies. *McDermott v. Director of Revenue*, 725 S.W.2d 143, 144 (Mo.App. 1987). Similarly, MAWC cannot be compelled to provide information that it does not have.

12. Essentially, Staff seeks the Commission's order "piercing the corporate veil" in regard to these discovery issues. "Ordinarily, two separate corporations are to be regarded as wholly distinct legal entities, even though the stock of one is owned partly or entirely by the other." *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 52 (Mo.App. 1984). "The existence of a corporation may be ignored when it is created or used or an improper

purpose.” *Id.* However, “the mere fact of ownership and control does not of itself authorize piercing the corporate veil.” *Id.* No such reasons to look beyond the corporate entities exist in this situation.

13. If the Commission agrees that the subject information is not within the possession, custody or control of MAWC, the Commission’s inquiry may end because questions of relevance would be moot. The Staff attempts to get around this problem by asking that the Commission order MAWC to make a “reasonable inquiry” to American Water and AWR. Making MAWC ask nicely for the documents and information is an improper and unacceptable outcome. Either the documents and information are within the possession, custody and control of MAWC and can be compelled, or they are not. A decision that they are not will conclude this matter without a need for further review of the issues.

B. Relevance and Breadth.

14. The Staff’s arguments as to relevance are tenuous at best. Most of the Staff arguments recite issues related to affiliate transactions and the Staff’s perceived need to better understand transactions taking place within the American Water corporate structure. MAWC recognizes that the Commission may address issues related to affiliate transactions and the possible impact these transactions may have on MAWC rates. Because of this, MAWC has sought to answer all affiliate data requests that relate to MAWC. Additionally, because MAWC receives regular charges from the American Water Service Company (“Service Company”), MAWC has attempted to answer any and all questions related to the Service Company. This is why in several instances there are only certain sections of the data requests that are at issue. The questions at issue in this motion are those sections that go beyond MAWC or the Service Company to areas that MAWC believes are irrelevant to the decisions to be made in this case, as well as overly broad and unduly burdensome. In the following paragraphs, MAWC will respond to the Staff’s arguments as to each

data request that is at issue.

DR No. 144 (sections 1 and 3)

15. As to the board of directors' minutes sought by Staff in data request 144, the Staff states that it is requesting a review of American Water and AWR minutes "in an effort to determine the scope of the work performed at the parent and affiliate company board level that could affect the level of costs being charged to the operations of MAWC, and ultimately, the ratepayers of MAWC" (p. 3).

16. However, the information sought cannot impact this issue. The test year has been established by the Commission as the 12 months ending December 31, 2002, updated for known and measurable changes through June 30, 2003. There is also a true-up for a list of specific items through November 30, 2003. Any changes affecting the level costs being charged to MAWC are either found in the books of MAWC or will not affect the rates ultimately to be charged to the ratepayers. The "scope of work" performed at the subject entities will not impact MAWC's rates.

17. The Staff additionally indicates that the subject board of directors' minutes may indicate *how* decisions are made (p. 3). Again, this is irrelevant. The question is what impact may result in regard to the revenues and expenses of MAWC. Any changes impacting MAWC during the period relevant to this case will be known by MAWC and can be ascertained through a data request asking for information from MAWC. Any discussions affecting items that do not impact MAWC's costs and rates during the period that is the subject of this case are not relevant. Additionally, even if the minutes might be considered relevant in some way, a request for all board of directors' minutes of two separate corporate entities is overly broad and unduly burdensome for the stated purpose.

18. Lastly, the Staff points to a specific product offering AWR has made in parts of

Missouri and states that Staff “has a right to obtain more information about the specifics of that transaction” (p. 5). If that is the nature of the inquiry, Staff can obtain information as to MAWC’s involvement by asking MAWC. The board of directors’ minutes of American Water and AWR are not relevant, nor necessary, to that inquiry.

DR No. 252 (Sections 1B, 1D, 2B and 2D)

19. Staff indicates that its questions as to what officers and directors of AWR also serve in these capacities for AWW and AWS “function as a ‘road map’ of the decision-making personnel in affiliated companies that exert decision-making influence on relationships that may reasonably affect the regulated business enterprise and its Missouri ratepayers” (p. 5).

20. Having a “road map” of decision making personnel is not a relevant inquiry in a rate case. MAWC doubts that the Commission will increase or decrease MAWC’s rates based upon the road map sought by the Staff. The question is what are just and reasonable rates for MAWC based upon the test year, as updated, and the true-up hearing. Again, no matter what the decision making personnel look like at these separate corporations, the questions come back to MAWC’s revenues and expenses during the relevant time period. Those matters can be explored fully through data requests looking for information held and known by MAWC. A road map of decision making personnel at separate corporations is not relevant to this case.

21. This having been said, MAWC believes that it now has information within its possession sufficient to supplement and complete the answer to this data request and will provide this supplemental answer by September 26, 2003.

DR No. 254 (Sections 1, 2, 3A, 3D, 3A (the second section 3) and 4A)

22. Staff’s explanation for the information it seeks in data request 254 is that because “the American Water Service Company (Service Company or AWSC) is charging AWS for service and

is also charging MAWC for services” the Staff must “gain a better understanding of the services and products AWS offers” to “attempt to determine if AWS is paying its fair share of AWSC costs and is not being subsidized by the regulated utility” (p. 7).

23. It is unclear why it is necessary to know this level of detail about AWS. The Service Company provides services to approximately twenty-seven (27) entities and yet, as to only AWS does the Staff seek detailed information about its operations. One must wonder if the purpose of this data request is to paint MAWC as uncooperative, rather than to obtain information of value to the Staff for the purposes of this case because MAWC conducts no transactions with AWS and has stated this previously.

24. This is the case because even if one thinks that some information as to AWS is relevant, the actual information sought by the Staff should still be deemed overly broad and unduly burdensome. The Staff does not just seek a “better understanding.” It asks for:

“A list of *all* affiliated (regulated or nonregulated) companies under [American Water] that AWS conducts *any transactions* with;”

“A detailed description of *all transactions* between AWS” and American Water and AWR, to include how these transactions are recorded on the books and records (without any limitation as to time period).

25. These items are far beyond what the staff needs to gain an “understanding” of AWS sufficient to analyze the reasonableness of the expenditures MAWC makes to the Service Company.

26. As stated in paragraph 3 above, MAWC believes it now has sufficient information in its possession to answer the sections of this data request concerning directors and officers (3A (the second section 3) and 4A) and will do so by September 26, 2003.

DR No. 256

27. What the Staff states that it is looking for in regard to this data request has changed significantly from what the data request itself asks for. Data Request No. 256 asks for all “expected transactions or changes that [*American Water*] *has discussed* that would impact the operations of [Missouri-American Water Company and American Water Service Company] *in any way*,” as well as costs incurred related to such discussions (emphasis added).

28. Staff now states that what it is looking for is “any directive or decision that AWW has informed the regulated entity of that will affect the operation of the Company” (p. 8). MAWC can and will provide an answer to the data request as modified by the Motion to Compel by September 26, 2003.

DR No. 276 (Section 2)

29. Staff states that it seeks studies or analysis performed “by AWW”² that determined the value of the MAWC customer list utilized by AWR in the marketing of its service line protection program (p. 10). Staff further states that “if value was determined and that amount was not paid to MAWC, then the regulated entity was not properly compensated for its property (customer list)” (*Id.*).

30. MAWC has previously stated that there was no payment for the use of its customer list in the situation identified by the Staff. The question of what the consequences of this should be, if any, is presumably one the Commission will be asked to decide within the context of this case. MAWC has no such study or analysis pertaining to the value of this customer list. Whether or not American Water or another affiliate has or does not have such a study is not relevant or necessary

² This is a modification of the actual section 2 of data request 276 which asks for studies and analysis “performed by *any American Water Works entity*” (emphasis added).

to the Commission's ultimate decision as to this issue. It appears likely that such a study will be performed by parties to this case before the conclusion of the evidence.

DR Nos. 277-279

31. The Staff describes these data requests as seeking "any studies by [American Water] that would show total expenses, total revenues, number of customers served, and net profits on an annual basis that AWR *expected to experience* by offering the service line protection to MAWC customers *during 2003 through 2006*" (p. 10) (emphasis added). The Staff further states that its "rationale here is to obtain any studies done by the corporate parent that related to the value of the customer list furnished to MAWC and used by AWR" (p. 10).

32. As an initial matter, it is unclear what prospective expenses, revenues, numbers of customers, etc. have to do with the value of a customer list. A customer list may have a value. However, it has nothing to do with the risk being undertaken by the purchaser or the possible profit that may be earned by the purchaser of the list. On the other hand, the information sought by the Staff is extremely sensitive from a competitive point of view.

33. Further, it needs to be remembered that the actual wording of data requests numbers 277-279 do not ask for studies performed by American Water, as stated in the Motion to Compel. Rather, Data Request 277 asks for studies and analysis performed by "*any American Water Works entity*." Data Requests 278 and 279 ask for the actual experiences for the services territories of Missouri American, New Jersey American, Long Island American, Pennsylvania American and Ohio American. Data Request 279 further asks for studies and analysis performed by "*any American Water Works entity*" (emphasis added) related to protections plans offered in the following service territories:

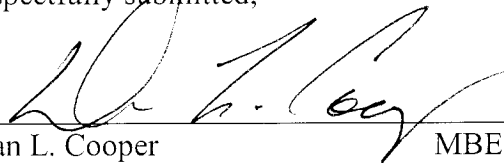
Tennessee American;

Iowa American;
Illinois American;
West Virginia American;
Kentucky American;
California American;
Arizona American;
New Mexico American;
Virginia American;
Maryland American;
Texas American;
Michigan American; and,
New Jersey American.

34. Actual information and speculative information for the years 2003-2005 from seventeen states has nothing to do with establishing the value of a single customer list. Such information is not relevant for the stated purposes and, further, is overly broad and unduly burdensome.

WHEREFORE, MAWC respectfully requests that the Commission issue its order denying the Staff's Motion to Compel Answers to Staff Data Requests.

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 22nd day of September, 2003, to the following:

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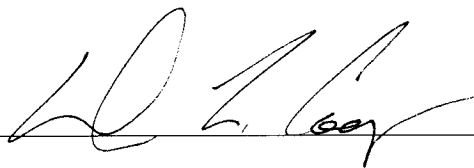
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A handwritten signature in black ink, appearing to read 'M. W. Comley', is written over a horizontal line.