

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

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

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).

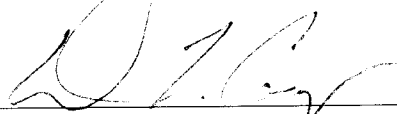
PROPOSED RULE

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,



Dean L. Cooper MBE#36592
William R. England, III MBE#23975
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
P. O. Box 456
Jefferson City, MO 65102
573/635-7166 (phone)
573/635-0427 (facsimile)
dcooper@brydonlaw.com
ATTORNEYS FOR MISSOURI-AMERICAN
WATER COMPANY

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 13th day of August, 2005, to the following:

Lera Shemwell
Missouri Public Service Commission
Governor State Office Building, 8th Floor
Jefferson City, MO 65101

Lewis Mills
Office of the Public Counsel
Governor State Office Building, 6th Floor
Jefferson City, MO 65101

Jan Bond
Diekemper, Hammond, et al.
7730 Carondelet Ave, Suite 200
St. Louis, MO 63105

Stuart Conrad
Finnegan, Conrad & Peterson, L.C.
1209 Penntower Office Center
3100 Broadway
Kansas City, MO 64111

Leland Curtis
Curtis, Oetting, et al.
130 S. Bemiston, Suite 200
Clayton, MO 63105

Lisa C. Langeneckert
911 Washington Avenue
St. Louis, MO 63101-1290

Mr. Karl Zobrist
Sonnenschein Nath & Rosenthal LLP
4520 Main Street, Suite 1100
Kansas City MO 64111

Mr. Charles B. Stewart
Stewart & Keevil, L.L.C.
1001 Cherry Street, Suite 302
Columbia, Missouri 65201

Mr. James B. Deutsch
Blitz, Bargette & Deutsch
308 E. High, Suite 301
Jefferson City, MO 65101

Mr. Jeremiah D. Finnegan
Finnegan, Conrad, et al.
Penntower Office Center
3100 Broadway, Suite 1209
Kansas City, MO 64111

Ms. Diana M. Vuylsteke
Bryan Cave
211 N. Broadway, Suite 3600
St. Louis, MO 63102

James M. Fischer
Fischer & Dority
101 Madison Street, Suite 400
Jefferson City, MO 65101

Mark W. Comley
Newman, Comley & Ruth P.C.
601 Monroe, Suite 301
P.O. Box 537
Jefferson City, MO 65102

