BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas.	))))	Case No. WR-2017-0285, et al.

INITIAL BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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COMES NOW, the Office of the Public Counsel, by and through undersigned counsel, and for its *Initial Brief of the Office of the Public Counsel*, states as follows:

I. INTRODUCTION AND SUMMARY

The Office of the Public Counsel's ("Public Counsel" or "OPC") recommends the Commission deny costs related to the Company's program to replace customer-owned lead service lines. The program is unlawful and lacks evidentiary support. Public Counsel requests the Commission maintain the current rate design scheme and customer charge, and the Commission should reject adopting single-tariff rates in Missouri. Single-tariff rates would be unreasonable and unjust for Missouri customers, in particular the class of customers located in Saint Louis County, Missouri. Public Counsel recommends the Commission adopt those stipulations to which Public Counsel has been a signatory. As to any stipulations that Public Counsel did not act as a signatory, Public Counsel will not object to a Commission order adopting the stipulated terms.

In fashioning its decision, the Commission should be mindful of the legal requirements. The Commission's order is reviewed by the appellate courts for reasonableness or lawfulness.[1]

[1] Mo. Rev. Stat. § 386.510.

Judicial review of an order of the Missouri Public Service Commission involves determination as to whether the Commission's decision was lawful and reasonable.[2]

Public Counsel shows that the lead service line replacement program lacks statutory authority, tariff authority, and is not legally necessary. Public Counsel shows that a single-tariff could give undue preference or undue prejudice, in particular, as it relates to the customers in Saint Louis County, Missouri.

Reasonableness depends on whether the order is "supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the [PSC] abused its discretion."[3]

The burden to prove that costs are just and reasonable is on the utility.[4] A presumption of prudence occurs when a utility has an incentive to be prudent in its expenditures.[5] Because the Company has a non-regulated affiliate who pays out insurance claims on customer-owned service lines, the Company has a financial incentive to encourage ratepayers to act as insurers by replacing service lines that its affiliate would otherwise have to pay a claim on. Therefore, the utility does not have an incentive to act prudently, and no presumption should be assumed by this Commission. However, if the Commission applies a presumption of prudence to the Company's strategy to shift the risk of paying out insurance claims on to captive ratepayers, then the presumption would need to be defeated by a party raising serious doubt.[6]

[2] Mo. Const. Art. V, § 18.
[3] *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 328 S.W.3d 316, 318 (W.D. Ct. App. 2010).
[4] Mo Rev. Stat. § 393.150
[5] *Office of the Pub. Counsel v. Mo. PSC*, 409 S.W.3d 371, 376 (Mo. 2013) ("Atmos").
[6] *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520 (Mo. App. 1997).

Public Counsel shows the lead service line replacement program is not necessary to provide safe and adequate service, and Public Counsel has serious doubts about the prudence of the economics and mechanics of the Company's plan.

Public Counsel is strongly aligned with Staff in that the current rate design and customer charge are a reasonable balance of cost causation and consolidation.

II. SUMMARY OF LEAD SERVICE LINE REPLACEMENT PROGRAM

The Company plans to replace 30,000 customer-owned lead service lines over the course of a ten year timeline.[7] The Company's plan fails to prove that full lead service line replacement results in lower water lead levels or lower blood lead levels. Yet, the plan could cost $219 million without accounting for additional costs of any rate-of-return and increased inputs, like labor inputs.[8] The Company's plan fails to address the question of whether it possesses legal authority to replace customer-owned lines, and is imprudent.

The Company's program is particularly troubling because its non-regulated affiliate stands to make profits that it would not otherwise gain in a competitive market environment because the Company's affiliate currently sells insurance on customer-owned service lines throughout the Company's service territory. By running these replacement costs through the regulated entity, there is a risk that the non-regulated affiliate will *retain premiums, pay out less claims on ratepayer-funded replacements, and grow profits*. Although there is no specific

[7] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-2, Pg. 3:1-13 (5/23); also see Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-4, Pg. 17 (20/49) (the feasibility of replacing "3,000 lead service lines each year or a little more than 8 successful excavations a day for the next 3,650 days" is questionable)

[8] *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule*, Paragraph 2 (average cost multiplied by 30,000 lines).

affiliate transaction rule, the Commission cannot ignore the reality of what justice, reasonableness, and the law require.

LEAD SERVICE LINE ARGUMENT

A. *The Company's program lacks legal authority.*

There is no statutory authority, there is no tariff authority, and there is no legal mandate to justify the Company's lead service line replacement program. As will be further explained below, this program should be denied, and its costs should be disallowed because it is without lawful authority.

1. *The Public Service Commission lacks statutory authority to regulate the Company's program of replacing customer-owned lead service lines.*

Without the proper authority, this Commission must deny the Company's request. The Company seeks a Commissioner order granting recovery of costs of doing business beyond the scope of its regulated activity. The regulated activity of this Company is limited by the statute and the definitional boundaries of a "water system."

The Missouri Supreme Court has struck down Commission decisions that permit utilities to implement programs that are without supporting statutory authority.[9] It is well-established that the "PSC 'is a body of limited jurisdiction and has only such powers as are conferred upon it by statute, and such incidental powers as may be necessary to enable the commission to exercise the powers granted.'" *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823, 828-29 (Mo App. 2015) (citing *Katz Drug Co. v. Kan. City Power & Light Co.*, 303 S.W.2d 672, 679 (Mo. App. 1957) (Commission has no power to "adjudicate and determine individual or personal rights . . .

[9] *State ex rel Utility Consumers Council of Missouri, Inc. v. Pub. Serv. Comm'n*, ("UCCM"), 585 S.W.2d 41 (Mo banc 1979).

because, under the Constitution the Legislature has no power or authority to invest such Commission with judicial powers.").

Missouri law defines a "water system" as including a variety of different items that are "owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use."[10] Clearly, the Company cannot own, operate, control or manage assets that are owned by another party, in this case, a customer.

The Company admits that it does not own customer-owned service lines.[11] The parent of the Company advertises that "*[m]any homeowners are not aware that they are legally responsible for the portion of the water and sewer service lines that extend through their property . . .*"[12] The statements of the parent of the Company plainly declares that the Company is not "legally responsible" for the customer-owned service line. The statement should be weighed against the credibility of the Company's claim that it should have a legal responsibility for customer-owned service lines.

The Commission should be skeptical that the Company's non-regulated insurance affiliate currently runs a "Protection Program" where it offers to insure customer-owned service lines.[13] No evidence was provided by the Company if its affiliate plans to reimburse insurance premiums when its regulated subsidiary replaces a customer-owned service line which is insured through its program. Certainly, if 30,000 customer-owned lead service lines are being rapidly replaced, the non-regulated affiliate would likely have to pay out fewer claims on their

[10] Mo. Rev. Stat. § 386.020(60).
[11] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule BWA-1, Water Service Line Replacement License and Consent Agreement ("The Customer water service line is currently and will continue to be owned and maintained by the Customer.")
[12] Exhibits 200-203, Direct Testimony of OPC Witness Geoff Marke, Pg. 14:14-26
[13] Exhibit 203, Direct Testimony of OPC Witness Geoff Marke, Pg. 14-15

"Protection Program." Retaining premiums means higher profits, and replacing lines means fewer claims being paid out. The Company is literally seeking to use its regulated activity as a surety for its non-regulated activity. This is not the type of regulatory compact that ratepayers, this Commission, and legislators had in mind in designing protections against the powers of monopolies. Insuring greater profits to a non-regulated affiliate is not reasonable, and it is certainly not just. It is yet another reason why seeking recovery from captive customers of an unregulated activity is improper.

In addition to these concerns, the Commission itself has recognized that the Company does not own, operate, control or manage customer-owned service lines when it approved the Company's tariff, stating, in Tariff sheet PSC MO No. 13 1st Revised Sheet No. R 17.H, that "[r]epairs or maintenance necessary on the Customer Water Service Line or on any pipe or fixture in or upon the Customer's premise … **shall be the responsibility of the Customer**." (Emphasis added). The tariff also contains many other statements described in greater detail below that further clarify that a customer-owned service line is the responsibility of the customer.

The Company has testified that, post-replacement, the Company is not interested in owning the replaced lines.[14]

The evidence clearly establishes a lack of jurisdiction and a lack of ownership.[15]

For years, there has been a clear limit on regulated activity of a Missouri water corporation. Rate recovery stops at the property line. Indeed, condemnation powers extend to the

[14] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule BWA-1, Water Service Line Replacement License and Consent Agreement ("The Customer water service line is currently and will continue to be owned and maintained by the Customer.")

[15] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule BWA-1, Water Service Line Replacement License and Consent Agreement ("The Customer water service line is currently and will continue to be owned and maintained by the Customer.")

property line along the right-of-way.[16] The NARUC USoA, as will be discussed later, allows costs in Account 345 ***up to*** the customer's premises.[17] Directly relevant to this proceeding, this Company's parent has already argued that the EPA could not set a ***new line of demarcation*** in the rule making process during the original promulgation of the Lead and Copper Rule. [18]

Explained in greater detail, the American Water Works Association specifically argued that privately owned lead service lines would not be within the "control" of a public water system. The argument stands in strong contradistinction to the Company's current posture.

Courts agreed with the American Water Works Association stating that "it was ***quite reasonable for the regulated industry*** not to perceive any doubt on the EPA's part that its control over a service line ***ends*** at the private property line." *See* American Water Works Ass'n v. EPA, 40 F.3d 1266, 1275 (D.C. Cir. Ct. of App. 1994) (emphasis added) ("we vacate the rule insofar as it deems privately owned lead service lines to be within the 'control' of a public water system for the purpose of obligating the system to replace them").

At least one other affiliate of Missouri American Water, the New York American Water Company (NYAW), has testified as to their opinion that NYAW "does not own, operate or control services or facilities such as indoor plumbing or service lines in private residences, commercial buildings or public facilities and that these services and facilities are the

[16] The power of eminent domain also sets Constitutional and statutory boundaries as to where the Company can make legal takings and expand their regulated water system. First, the taking must be for a "public use," which the Company cannot claim in the instance of a lead service line replacement. Mo. Const. Art. XI, §4 and Art. I, § 26-28 ("when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public"). In Missouri, a water utility has the power of eminent domain "along the right-of-way of any public highways" and shall have the power of eminent domain "along any right-of-way of any railroad company." Mo. Rev. Stat. § 393.020.

[17] Exhibit 217, Surrebuttal Testimony of OPC Witness John Robinett, P. 4: 16-27 (citing NARUC USoA Water Utilities Class A and B 1973 1976 revisiions Balance Sheet Accounts 1. Utility Plant. P. 44)

[18] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-3, Pg. 12 (or Pg. 15/44) Lines 21-23

responsibilities of the owners."[19] However, in New York, Signatory Parties agreed to create a lead service line replacement pilot and collaborative "anticipated to consider *the legality*, availability, costs, benefits and feasibility of on-bill financing for replacement of customer-owned lead services, among other topics."[20] Because the New York pilot program utilizes shareholder proceeds to fund the pilot, they avoid some of the legal challenges associated with forcing captive ratepayers to pay for a non-regulated activity.

In *Bass v. Ledbetter*, 363 S.E.2d 760, (Ga. Sup. Ct. 1988), the Georgia Supreme Court made a similar finding by determining that the Director of the Environmental Protection Division did not have authority to legally order a water system's owner to clean contaminated pipes located on the property of residential consumers because the authority of the director was limited by the term "control" as it related to the collection, treatment, storage, and distribution systems. "Clearly, the private lines running from the service connections of the distribution facilities into the homes of the residents *are not within the control of the operator, and consequently, the EPD is charged with no responsibility for those private lines*." *Ledbetter*, 363 S.E.2d at 761.

Similar to these line of cases, this Commission has recently recognized a limit on its authority in the context of electric vehicle charging stations. Public Counsel's argument related to lead service lines is consistent with the Commission's reasoning in its recent decision regarding electric vehicle charging stations in ET-2016-0246. In that case, the Commission held that electric vehicle charging stations do not constitute "electric plant," and the company could not socialize the costs of the construction of electric vehicle charging stations to ratepayers

[19] See 2017 N.Y. Puc Lexis 250, *143 (2017) (citing to Exh. 31, NYAW Engineering Manager John T. Kilpatrick Rebuttal Testimony, "the Company has never installed customer-owned service lines and does not own, operate or maintain them, or have any records pertaining to their existence or location.").
[20] Id. at *141. (emphasis added).

because the Commission lacks statutory authority to regulate utility-owned and operated charging stations.[21] The Commission made an analogy to the fact that utilities provide electricity to laundromats, but the laundromat should not be regulated by the Commission.[22] In the dissenting opinion of that case, Commissioner Rupp expressed his opinion that charging stations should be regulated in cases where they are "owned and operated by a regulated utility."[23] This case presents another situation where a Company is asking the Commission to go beyond its statutory limits; however, unlike the facts of that case, the Company will ***not*** "own and operate" the service line it replaces. But it incredibly seeks recovery for these costs.

For all of these reasons, the Company's request should be denied because the Company's program lacks statutory authority.

2. *The Commission should deny the Company's request because it is not- and was not-authorized by its tariff.*

Undoubtedly, the spirit of the tariff and the letter of the tariff embody an understanding that the customer-owned service line is the responsibility of the owner.

A tariff "means a document published by a public utility, and approved by the commission, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services."[24] "[I]f a tariff is clear and unambiguous, [the Court] cannot give it another meaning."[25] "In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariff's terms are plan and clear to one of ordinary intelligence."[26] A

[21] ET-2016-0246, Report and Order, Pg. 10-11
[22] *Id*.
[23] ET-2016-0246, Commissioner Scott T. Rupp's Dissenting Opinion, Pg. 1 and 3
[24] 4 CSR § 240-3.010.
[25] *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 37 S.W.3d 287, 293 (Mo. App. W.D. 2000).
[26] *Id*.

reviewing court looks at the interpretation of an unambiguous tariff *de novo* in the same manner that it would review a trial court's interpretation of a statute.[27] If a tariff if ambiguous, such that its intended meaning cannot be definitively resolved by the language of the tariff itself, we will apply tradition rules of 'statutory' construction, and review the PSC's resort to evidence of the tariff's intended meaning as a factual determination entitled to deference.[28]

In this case, it is unambiguous that the Company's tariff does not "set forth the services" of a lead service line replacement because such a service is not – and has never- been a lawfully authorized service "offered by that utility."

Additionally, no "terms and conditions for the use of [lead service line replacement] services" are explained in the tariff because the Company's tariff does not authorize replacement of services of this type. In fact, the tariff's exact and specific language indicates the responsibility of the customer-owned service line is the responsibility of the customer rather than the utility.[29]

Public Counsel has previously articulated its concerns that the Company has violated its tariffs, and meticulously interpreted the many various violations of the Company.[30] A chart showing these violations has been re-produced to illustrate Public Counsel's concern.

	Tariff Provision	**Company's Action**
1	PSC MO No. 13 Original Sheet No. R. 12, Rule 4.C makes clear "Any change in location and/or size of an existing service connection and/of service line requested by the customer shall be made at the Customer's expense."	Company is assuming the cost of replacing customer-owned service lines.
2	Tariff sheet PSC MO No. 13 Original Sheet No. R 12, Rule 4.I requires that "[f]or service at a new location,	Company is assuming the cost of replacing customer-owned

[27] *State ex rel. Union Elec. Co. v. PSC*, 399 S.W.3d 467, 477 (Mo. Ct. App. W.D. 2013).
[28] *Id*. at 477-78.
[29] PSC Mo No. 13 Original Sheet No. R. 12, Rule 4.C, 4.I, 4.J, 4.N; and R. 16
[30] Exhibit 205, Rebuttal Testimony of OPC Witness Geoff Marke, Schedule GM-1; and Surrebuttal of Geoff Marke, P. 15-16

	a replacement service, or additional service at an existing location, *applicant shall pay, in advance*, a service connection charge in accordance with approved tariff charges or as provided in these rules" (emphasis added)	service lines without requiring advance payment.
3	PSC MO No. 13 Original Sheet No. R. 12, Rule 4.J states, in part, "[t]he Customer's Water Service Line shall be installed by the Customer at that Customer's expense."	Company is assuming the cost of replacing customer-owned service lines.
4	PSC MO No. 13, 1st Revised Sheet No. R. 14, Rule 4.N states: When a service connection or service line is installed by the company "[t]he company will hold title to all such service connections, Service Lines and meter box installations installed by the company."	Schedule BA-SR3 purports to be an agreement between MAWC and the company wherein MAWC "will install a Customer connecting line from the Installation to Customer's residence." Adding the caveat "[t]he Customer connecting line is currently and will continue to be owned and maintained by Customer."
5	MAWC tariff sheet PSC MO No. 13 1st Revised Sheet No. R 16, Rule 6.B specifically addresses "all new or replacement Water Service Lines". At B.2 of the same tariff sheet, the law requires for all service areas (delineated separately in the tariff section based on customer ownership) that "the Customer shall be responsible for construction and maintenance of the Customer's water service line…".	Company is assuming the cost of replacing customer-owned service lines.
6	Tariff sheet PSC MO No. 13 1st Revised Sheet No. R 17.F demands "[c]ustomers at their own expense shall make all changes in their Customer Water Service Line required by changes of grade relocation of mains, or other causes."	Company is assuming the cost of replacing customer-owned service lines in connection with main replacement projects.
7	Tariff sheet PSC MO No. 13 1st Revised Sheet No. R 17.H requires that "[r]epairs or maintenance necessary on the Customer Water Service Line or on any pipe or fixture in or upon the Customer's premise … **shall be the responsibility of the Customer**." (Emphasis added).	Company is assuming the cost of replacing customer-owned service lines.
8	PSC MO No. 13 1st Revised Sheet No. R 9, Rule 2.D requires that all "written agreements shall conform to	Company asks its customers to sign forms containing

	these Rules and Regulations in accordance with the statutes of the State of Missouri and rules of the Commission."	provisions contrary to the approved tariff (those forms can be found attached to MAWC witness Aiton's pre-filed surrebuttal as Schedule BA-SR3, pp. 3-8).
9	PSC MO No. 13 Original Sheet No. R 10, Rule 2.K provides that "[n]o employee or agent of the Company shall have the right or authority to bind it by any promise, agreement or representation contrary to the letter or intent of these Rules and Regulations of law."	Company asks its customers to sign forms containing provisions contrary to the approved tariff (those forms can be found attached to MAWC witness Aiton's pre-filed surrebuttal as Schedule BA-SR3, pp. 3-8).
10	PSC MO No. 13 Original Sheet No. R 11, Rule 3 defines the parameters surrounding MAWC's liability.	Schedule BA-SR3, p. 7 *extends* MAWC's (and its customers) liability with an additional putative agreement wherein MAWC "warrants the workmanship of its installation of its installation of the Customer service line for a period of 12 months ... [.]"
11	PSC MO No. 13 Original Sheet No. R 11, Rule 3.F prohibits the company from entering agreements that assume or assign liability contrary to the parameters in the tariff.	Form agreements include language attempting to limit liability to the company when, in fact, the agreements expose the company to *greater* liability.

This Commission should not give rate recovery to hundreds of past tariff violations. Even if the Commission does not believe a tariff has been violated, it would be misleading to customers to retain the current language. Public Counsel is astonished that the Company has failed to submit amendments to its tariff to authorize this program, especially given the fact that the Company's non-regulated operation continues to sell insurance to customers paying premiums for customer-owned service lines. The Company's representations that the Company

has a legal path to replacing customer-owned service lines is inconsistent with the advertisements of its parent which induce customers to buy insurance based on the principle that the customer is the sole individual with a legal responsibility over their service line.

For this reason, the Commission should deny the Company's request.

3. *The regulatory scheme has no mandate to perform a full lead service line replacement, and the regulatory scheme has a strong preference for partial lead service line replacements.*

This Company would like the Commission to substitute its judgment for that of federal and state agencies that have express subject matter jurisdiction, such as the Environmental Protection Agency and the Missouri Department of Natural Resources. This is an improper request, because there is already an entire regulatory regime at the federal and state level to address the very issue of lead and copper.

There is no legal obligation for the Company to replace service lines that is does not own. The Commission should not authorize a program that countermands the authority of federal and state agencies that have express subject matter jurisdiction over the specific issue of lead and copper.

The Company is in compliance with the entirety of the regulatory regime to protect against the risk of lead contamination, and the Company has a perfect compliance records for multiple decades.[31] The Company's compliance with these rules involves a "well-established history."[32] In the past thirty years, the Company has not triggered the LCR action level requirements in any portion of its system.[33]

[31] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule BWA-1, Pg 5: 5-10
[32] *Id.*
[33] *Id.*

Under existing federal law, the federal rules express a preference for a partial replacement. Company shall replace *Company-owned* lead service lines *if* lead concentration exceeds the action level. However, the Company has never exceeded these levels.[34] But if such a situation occurred, and only in that specific situation, the Company shall "replace that portion of the lead service line that it owns." 40 CFR 141.84.

In its *Report and Order* in Case Number WU-2017-0296, the Commission found that the Environmental Protection Agency recommends full lead service line replacement even though it was not the EPA but a committee, and such a finding mischaracterizes the context of the committee's comments.[35] This determination is erroneous, as the reference in the record relied upon in support of its finding cited to a discussion on a white paper – not a rule. Certainly the Commission is not bound by every white paper produced by Staff; likewise the Commission should not characterize the position of a federal agency.

The Missouri Department of Natural Resources has similar requirements expressing a preference for a partial lead service line replacement. 10 CSR 60-15. Specifically, 10 CSR 60-15.050(5) indicates that a "water system shall replace that portion of the lead service line that it owns" in the situation previously described. Yet again, no such situation has occurred.[36]

There is simply no legal mandate on the part of the Company to provide replacement services, and consequently, the program is not necessary to provide safe and adequate service. For this reason too, the Commission should deny recovery of these costs.

4. *The Company's program appears to be violating the Constitutional and statutory standards relating to condemnation of customer-owned property.*

[34] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule BWA-1, Pg. 5:4-10
[35] *Report and Order,* Pg 6 (Nov. 30, 2017)
[36] *Id*.

In the operation of its program, the Company has seized private property without the consent of ratepayers. In the AAO case and in this proceeding, Company witness Bruce Aiton testified that customer consent would be obtained prior to replacing a service line belonging to the customer. He said, "[i]f the service line is lead, the Company will, with the customer's consent, replace the entire service line from the main to just outside the customer's premise or to the shut off valve within the customer's premise."[37]

However, the Company has ***not*** always obtained consent prior to replacing the customer owned lead service line.[38] The Company's post-hearing admission directly contradicts Company witness Mr. Aiton's testimony previously quoted, which indicates consent would be obtained.

During true-up, Public Counsel learned that "[t]he Company does not have a written policy on how to proceed when customer consent is not given."[39] Their practice is to replace a portion of the customer-owned line - even when the customer is non-responsive or even when a customer refuses.[40]

Replacing customer-owned property without consent raises many civil and criminal concerns such as trespass to property and trespass to chattel. The practice of taking a customer's property without their consent also side-steps the condemnation requirements in the Missouri Constitution and in Chapter 523 of the Missouri Revised Statutes.[41]

Public Counsel believes it is imprudent not to have a written policy on this subject and furthermore believes the Company's post-hearing admisstion to seizing private property is

[37] Exhibit 2, Rebuttal Testimony of Company Witness Bruce Aiton, Schedule, BWA-1, Pg. 6: 3-6.
[38] Stipulation of Fact Related to True-Up, (March 26, 2018), Exhibit A and B
[39] Stipulation of Fact Related to True-Up, (March 26, 2018), Exhibit A and B
[40] *Id*.
[41] Mo. Const. Art. I, § 26-28 and Chapter 523 of the Missouri Revised Statutes

unlawful. For all of these reasons, the Company's program and any costs attendant hereto should be found unlawful and unauthorized.

B. *The Company's program is not necessary to provide safe and adequate service*

Mo Rev. Stat. 393.150.2 provides that the "burden of proof to show that the increased or proposed increased rate is just and reasonable shall be upon the . . . water corporation or sewer corporation." All charges for water service must be just and reasonable. 393.130. The Company carries the burden in this regard, and the Company has failed its burden related to its customer-owned lead service line replacement program.

1. *There is no lead contamination crisis in Missouri*

Staff witness Jim Merciel, confirms that service lines are not a primary source of lead contamination. Mr. Merciel testified to a conversation he had with the Department of Natural Resource, and to their opinion that lead contamination is, in general, not a problem in Missouri because utilities are following the lead and copper rule and produce noncorrosive water.[42] Public Counsel witness Dr. Geoff Marke included the full copy of Staff's report on the subject of lead that included the quotation examined with Mr. Merciel during the evidentiary hearing. In that report, it states that "lead contamination is, in general, not a problem in Missouri."[43]

2. *The Company provides safe and adequate service without a customer-owned lead service line replacement program.*

The Company is capable of and currently is providing safe and adequate service under its prior protocol of partial-replacement. During the evidentiary hearing, Company witness Mr. Jim Jenkins testified as follows:

[42] Evidentiary Hearing – Vol. 16 3/6/2018, Pg. 407;
[43] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-2, Pg. 21/23

"Q. Do you believe the Missouri-American Water Company has provided safe and adequate service for the last decade?

A. I do."[44]

Company witness Mr. Jenkins' answer was unqualifiedly yes. There was no qualification about how service was inadequate in the nine years the Company under its partial-lead service line replacement program. The Company was able to provide safe and adequate service the entire time period. The Company did not re-direct their witness on his answer.

Therefore, in the Company's expert opinion, customer-owned lead service line replacement is not necessary to meet the requirement of providing safe and adequate service. Consequently, the Commission should find that the Company's proposal is not necessary to provide safe and adequate service.

3. *The Company cannot prove that its replacement program will decrease blood lead levels or decreased water lead levels.*

The Company cannot prove that full replacement program will decrease blood lead levels or water lead levels. To the extent the Company had additional evidence, none was produced. At hearing, Dr. Marke's testimony was admitted, and the testimony that he had with Company witness Dr. Lachevillier is that he was told the Company's research on the difference between partial and full replacements "was unable to determine any difference; that their researchers 'really wanted' to show something statistically significant, but it just did not happen."[45] Company witness Mr. Naumick's speculation claimed that the studies he was familiar with ***failed to study this issue***.[46] In other words, the studies produced no evidence that there is a difference

[44] Evidentiary Hearing- Vol. 17 3/7/2018, P. 632:5-8
[45] Exhibit 207, Surrebuttal Testimony of OPC Witness Geoff Marke, Pg. 22:1-5
[46] Evidentiary Hearing – Vol. 15, 3/5/3018, Pg. 337

between a partial and a full service line replacement. This corroborates Dr. Lachevillier's statement that the Company was unable to find evidence of a difference. Regardless, as explained previously, the rule has a strong preference for partial replacement, and the Company has failed to satisfy their burden to show that its replacement program will actually result in decreased blood lead levels or decreased water lead levels.

4. *Lead pipes are not a primary source of lead contaminant.*

Lead service lines are not a primary source of lead contaminant. Public Counsel witness Dr. Geoff Marke went through tremendous lengths, worked tremendous hours, and produced substantial and competent evidence on the health risks relevant to the debate. Dr. Marke's testimony is interested in the science. Historically, in the 1970s, over 70% of children tested nationwide had blood lead levels over 10 micrograms per deciliter, but by 2001 nationwide, it was less than 1% who of children at this level.[47] The decrease in blood lead levels is primarily attributed to a phase-out of other sources of lead, such as[48]:

- Telephones
- Ice boxes
- Vacuums
- Irons
- Washing Machines
- Dolls
- Painted Toys
- Bean Bags

[47] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-4, P. 35-36 (38/49 and 39/49)
[48] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-3, Pg. 4 or (7/44) to Pg. 5 (8/44)

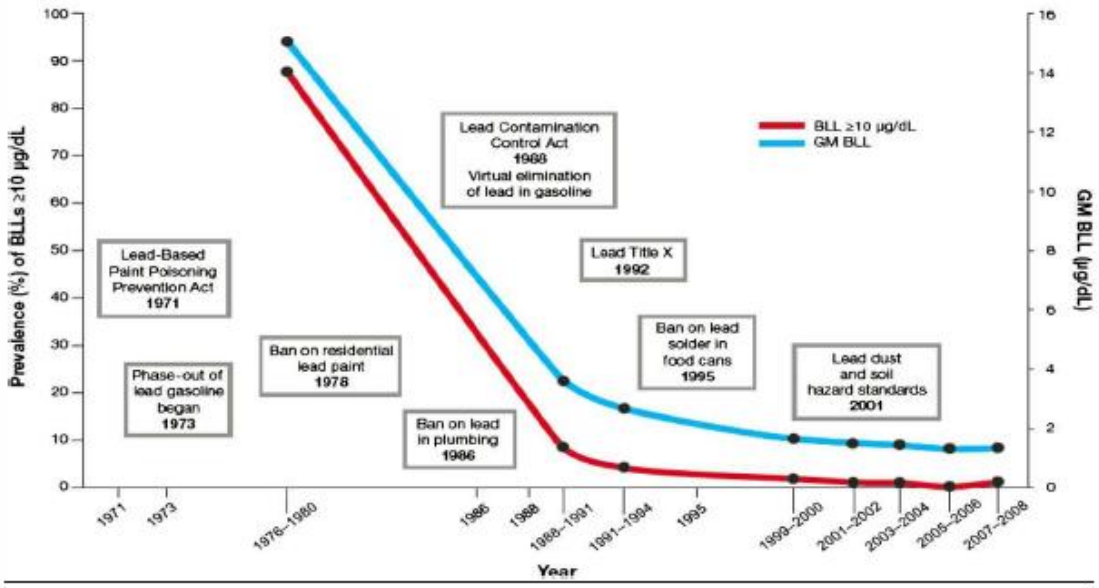
- Baseballs
- Solder
- Fishing Lures
- Gasoline
- Paint

The primary source of lead exposure in the United States has been engine exhaust, and before it was banned, engine fuel exhaust from the use of tetraethyl lead and tetramethyl lead resulted in the largest concentrations of lead released in the U.S. environment.[49] However, through the late 1970s to the mid-1990s, leaded gasoline was phased out.[50]

Today, the most common hazardous source of lead exposure for most U.S. citizens is in the form of lead-contaminated dust from lead-based paint largely found in older homes.[51] As previously explained, blood lead levels have dramatically dropped. Overall, the eradication of lead in blood lead levels has been largely a success story.

[49] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-3, Pg. 5 (8/44)
[50] *Id.*
[51] *Id.*

Figure 10: BLL "reference levels" considered harmful by CDC over time[76]



The Company testified to its knowledge that the program would not address the primary source of lead contamination – lead paint and soil. During the evidentiary hearing, the Company witness Mr. Aiton to a conversation he had with the Department of Health as follows:

"Q. What about blood levels? Are those measured prior to installing a lead service line?

A. Not specifically. We did have a conversation with the Department of Health where they have high blood lead levels. We told them what we were going to be doing. And they basically said that they don't view that our water as being a particular source [of lead]; so drive on and replace the lines. They thought it was a good idea, but not – they didn't feel like they had any particular . . .

Q. I'm sorry. Did you just say that – who did you speak with?

A. We spoke to the Department of Health.

Q. And they told you it wouldn't have any impact on blood lead levels?

A. They - - they told us that the primary – they believed that the primary source of high blood levels in Missouri was paint, not our pipe, because again, we haven't had any negative results in our- - in our lead testing."[52]

Mr. Aiton went on to agree that, to the extent there is any risk with disturbances, a low-cost filter could mitigate against temporary risk.[53]

Mr. Aiton also testified that there has been no waterborne lead poisoning of a customer of Missouri-American Water Company.[54] Therefore, the Company pursued its program with the knowledge that it would not address the primary source of lead and that none of its customers were in danger of contamination through water.

In fact, either the Company has been reckless for the last decade or there has been so low of a risk of lead contamination that the Company failed to update its tap records of customer-owned lead service lines when it went through and replaced water mains.[55] If the harm of lead exposure was really as great as parties may argue, then the Company should have maintained adequate records evidencing the location of customer-owned lead service lines. But, they did not. Even today, if the Company observes a lead service line owned by a customer, it will not update their records unless they actually make a replacement.[56]

Additionally, to the extent the goal of this program is to eliminate health concerns, the prioritization of removing lead service lines has nothing to do with those customers who are the most at-risk. Instead, the Company's proposal replaces lead service lines based on its

[52] Evidentiary Hearing – Vol. 16 3/5/2018, Pg. 357:1-25
[53] *Id*. at 358:11-21.
[54] Evidentiary Hearing – Vol. 15 3/5/2018, Pgs. 358-359
[55] Evidentiary Hearing – Vol. 15 3/5/2018, Pg 374:1 – 376:1-9
[56] Evidentiary Hearing – Vol. 15 3/5/2018, Pg. 376:1-9

prioritization of mains. Whether the main replacement program is itself prudent should surely be explored in greater detail in a future investigation, ISRS proceeding, and/or in a future rate case. In fact, Public Counsel learned that Staff witness Mr. Merciel had not seen a copy of the Company's main replacement program for several decades.[57]

5. *Missouri is Not Flint, Michigan.*

There is no viable comparison between Flint, Michigan, and the Company's safe and adequate operation of its water system in Missouri. The Company is in compliance with all applicable federal and state lead-level regulations. The Company treats its water, which will prevent lead leaching. The Company is not pulling water directly into its system without processing from the Mississippi or Missouri rivers. There are no instances of lead contamination in the Company's service territory. So long as the Company intends to continue its responsible operation of its water system, there is no comparison between the service rendered by the Company and the circumstance in Flint, Michigan. Public Counsel contends, based on evidence and research, that the link between lead service lines and blood lead levels in tenuous. Dr. Marke researched the events of Flint, Michigan, and his research revealed that in a worst case scenario where a water provider fails to treat water and corrosive water gets into the system, there is no "spike" of blood lead levels, and even if there were, you would also need to account for other variables, such as other sources of lead that could explain differences in blood lead levels.[58]

In summary, the evidence as to any putative health benefits is not what it may seem, and the Company has failed in their burden to show that the health benefits justify the program and the costs. For this reason, the Commission should reject the Company's proposal.

[57] Evidentiary Hearing – Vol. 15 3/5/2018, Pg. 412:6-18 (I haven't seen one since the mid '90s).
[58] Exhibits 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-4, P. 42 (45/49)

C. *The Commission should reject the Company's proposal because it is imprudent on grounds that the activity is unlawful and beyond the scope of its tariff.*

1. *The Commission's accounting authority order indicated that it would not make a finding related to rate recovery.*

The Commission's order in WU-2017-0296 authorizing the Company to defer and books costs related to its replacement of customer-owned lead service lines to Account 186 has no precedential weight or authority in the determination of the prudence of the costs incurred. The Commission's order in WU-2017-0296 states "[n]othing in this Order shall be considered a finding by the Commission of the value or prudence for ratemaking purposes the properties, transactions and expenditures herein involved."[59] Public Counsel argues that costs booked to Account 186 that are incurred through an unlawful act or contrary to the Company's tariff are imprudent.

The Commission has previously denied rate recovery for costs that were the subject to a deferral through an accounting authority order.[60] "Ratepayers are not the insurers of [a company's] profits."[61] The fact that an AAO has been granted to defer costs does not entitle a utility to their recovery, is not ratemaking, and creates no expectation of recovery.[62] The same is true in this case, and an AAO is not evidence in support or against the granting of rate recovery.

2. *The costs are excessive*

[59] WU-2017-0296, Report and Order, Pg 10
[60] ER-2014-0258, 2015 Mo. PSC LEXIS 380, 320 P.U.R. 4th 330, In the Matter of Union Electric Company, d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Electric Service, At 60-68 (2015).
[61] *Id.*
[62] *Id.*

One reason the Commission should reject rate recovery is the costs are too high. Mr. Bruce Aiton has produced evolving cost estimates. Initially, he estimated the cost per line to be $3,000 lines to $5,500.[63] His initial cost estimate gave him a wide margin of error, but it was much too low compared to his next estimate. Mr. Aiton indicated that a quote with refined estimates of the costs would be $6,000 per replacement.[64] That is double the low-end of his previous estimate or $500 higher than the high-end of his estimate. In Mr. Aiton's surrebuttal in this case, he revealed that the Company had spent over $1.75 million on 250 lines. While he remained silent on the quotient of those two numbers, a quick calculation reveals that the new cost calculation would be $7,000 per line.[65] At the evidentiary hearing, Mr. Aiton's number again changed. Mr. Aiton testified that the "1.7 million should be 1,420,494.91"[66] Mr. Aiton continued, "1.7 million, I'll say is a mistake. I asked the wrong accountant."[67] Mr. Aiton explained he "looked at the data and [he] agree[s] with it."[68] The day before true-up direct testimony was due, the Company dumped the data that Mr. Aiton had reviewed for Public Counsel to review for the first time. The Company and Staff immediately brokered agreement filed as *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule.* In that document, Staff and the Company stipulated that the correct cost would be $1,757,869 from the replacement of 240 lines.[69] The quotient of these numbers would result in costs over $7,300 per line. Public Counsel was not satisfied with these evolving figures, and undertook a more thorough review of the underlying data. Public Counsel discovered that Staff and the Company originally sought inclusion of costs related to meter relocations, lines that were

[63] Exhibit 2, Rebuttal Testimony of Company Witness Bruce W. Aiton, Schedule BWA-1, Pg. 10: 4-11
[64] Exhibit 2, Rebuttal Testimony of Company Witness Bruce W. Aiton, Schedule BWA-3, Pg. 4:1-7
[65] Exhibit 3, Surrebuttal Testimony of Company Witness Bruce W. Aiton, Pg. 6:3-6.
[66] WR-2017-0285, Evidentiary Hearing – Vol. 15, 3/5/2018, P 343:1
[67] *Id*. at P. 344: 11-12
[68] WR-2017-0285, Evidentiary Hearing – Vol. 15, 3/5/2018, P 344 -345
[69] *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule,* Paragraph 2

not lead service lines were included in the tally of lead service lines replaced, errors associated replacements, and several lines that were replaced without the consent of the customer. After accounting for these issues, OPC was comfortable stipulating that 228 service line removals resulted in costs of $1,668,796. The number arrived it was approximately the same average cost of just over $7,300 per line. It is persuasive and goes to the credibility of Public Counsel that the final figure closely matches the $7,500 cost estimate cited by OPC witness Dr. Geoff Marke.[70] The Company has projected that it will replace approximately 30,000 service lines in its territory. Customer's risk exposure sits at $219 million currently.

However, the $219 million figure does not contemplate everything. For one, it does not contemplate the rate of return, if any, for which the Company and Staff seek a full weighted average cost of capital. As another consideration, the $219 million figure does not contemplate any additional service areas acquired by the Company. As this Commission is aware, the Company believes a single-tariff would help it acquire distressed systems, and any lead service lines associated with those systems would presumably add to the tally. Finally, this figure assumes costs remain constant and inflation or other inputs, like labor, remain the same.[71] In other words, this would be a blank check. This is all the more reason to substantiate numbers going forward and to engage in a pilot that would study the issues and perform a better cost-benefit analysis to protect ratepayers from the blank check for further unauthorized and ill-informed activity.

3. *The Company's plan to replace lead service lines lacks substance and competence.*

a. *The Company's timeframe is unrealistic.*.

[70] Exhibits 200-203, Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule GM-3, P. 17 (citing a Flint, Michigan Rowe Professional Service Company Water Service Inventory and Pilot Replacement Report)
[71] Exhibits 200-203, Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule GM-3, Pg. 17:15-29 and Pg. 18:1-9.

The Company's plan lacks substance and competence because its time frame to complete 30,000 lead service lines is unrealistic. Public Counsel has evidence which shows the pace of the Company's replacement plan is unrealistic. The Company's ten year plan is very aggressive, and to date, the Company has shown that the speed of their replacement is less than one-twelfth of its projected 3,000 lines per year.[72] Second, Public Counsel cited to the situation in Madison, Wisconsin in which it took seventeen years to complete 6,000 lead service lines on the utility-side and 5,000 service lines on the homeowner side.[73] The Company's projections do not have a basis in fact.

b. *The Company refused to study benefits to develop the very record the Company fails to produce in this matter.*

The Company has not agreed to the pilot program proposed by Public Counsel, which would have helped create a record of evidence to show the benefits. Public Counsel proposed a cost-benefit study, but the Company has not provided one in this case.[74]

Unlike in Missouri, the New York subsidiary did not refuse such an opportunity. In New York, Signatory Parties agreed to create a lead service line replacement pilot and collaborative "anticipated to consider the legality, availability, *costs, benefits* and feasibility of on-bill financing for replacement of customer-owned lead services, among other topics."[75]

And, the New York pilot was used with shareholder dollars rather than ratepayer dollars.[76] Public Counsel's pilot project recommendation was inspired in part, and taken directly

[72] *Stipulation of Fact* between OPC and Company (less than 250 lines compared to the projected 3,000 have been replaced)
[73] Exhibits 200-203, Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule Gm-4, P. 14 ("These large costs underscore the importance of the need to perform a cost-benefit analysis and explore all available options.")
[74] Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule Gm-3, P.
[75] *New York American Water Order*, at *141. (emphasis added).
[76] *Id.*

from, the Lead Service Line Collaborative's Getting Started introduction.[77] The Company's argument that Public Counsel's pilot program is redundant to what is occurring at the national level by the Lead Service Line Replacement Collaborative is categorically incorrect.[78]

c. *The Company failed to meaningfully engage with stakeholders, document their findings, and incorporate their findings in a written plan.*

The need for stakeholders would help inform the Company's plan. OPC believes a prudent utility would be seeking input from diverse stakeholders to determine a written plan. It is telling that, in the hearing room, other stakeholders indicated that lead contamination in drinking water was generally not a problem. That is precisely why more stakeholders could help inform the plan, including whether the Company should truly be engaging in the significant costs of removal of a line it does not own.

d. *The Company's written plan is deficient, and the Company has yet to fully vet a host of considerations.*

Public Counsel's statement of position indicated that a prudent utility would be exploring issues such as:

- should a detailed, written plan be put in place,
- how increased demand may impact the price of contract labor,
- should stakeholders be included or interviewed and their input documented,
- should the company keep records when it observes a customer-owned service line in addition to when it replaces such a line,
- who receives priority,
- when and how to disclose lead service lines,
- whether test kits should be provided to members of the public,

[77] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-4, Pg.s 11 (14/49) to 13 (16/49)
[78] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-4, Pg.s 11 (14/49) to 13 (16/49)

- whether testing should be done prior to and after LSL replacements,
- the different effects of different cuts (saw versus pipe cutter);
- whether a detailed cost-benefit study needs to occur,
- what guidance the Company should be giving related to OSHA,
- how to handle unusual site restoration work, trash days, unexpected weather, changing labor inputs,
- how to coordinate with local stakeholders,
- whether vacant homes should have lead service lines removed,
- what to do when a customer refuses consent or is non-responsive, and
- whether another service line of differing material warrants replacement.

As explained, Public Counsel believes a prudent utility would be asking these questions, answering them, building a robust record, and putting forward a detailed plan. As previously cited, the New York American Water pilot is anticipated to consider the legality, availability, *costs*, *benefits* and feasibility of on-bill financing for replacement of customer-owned lead services, among other topics. The NYAW Pilot program would be funded by shareholders, would gather information regarding the accuracy of available data on the extent and location of lead pipe on its system, would coordinate and educate the New York Department of Health is the legislatively authorized administer of a grant program that would allocate clean water infrastructure funds toward those communities of lower income and evidencing higher blood lead levels, would include stakeholder collaborative to include municipalities, would develop a targeted notice to customers with lead service lines, and would provide sufficient customer notice including flushing protocols and whereby customers might mitigate any potential health risks. Id. at *137-1147.

In summary, the company's plan is imprudent and lacks substantial and competent evidence.

D. *The accounting treatment supports a decision to reject recovery of these costs.*

1. *The NARUC USoA supports a decision to deny recovery for the utility's proposed lead service line replacement program.*

a. *Account 101 does not support the Company's proposal.*

The assets for which recovery and a return is sought do not qualify under NARUC USoA account 101 Utility Plant in Service.[79] **101. Utility Plant in Service.** *A. This account shall include the original cost of utility plant, included in the plant accounts prescribed herein and in similar accounts for other utility departments, owned and used by the utility in its utility operations, and having an expectation of life in service of more than one year from date of installation, including such property owned by the utility but held by nominees. Separate subaccounts shall be maintained hereunder for each utility department.* [80] (Emphasis added).

The Commission has recently held that assets owned by another entity are not the type of property for which the utility should earn a profit. [81] Public Counsel's position is consistent with the Commission's recent Indian Hills decision. A water company sought rate base treatment and capitalization of costs associated the installation and operation of electric power line owned by an electric cooperative. The Commission denied the request, stating that a utility company cannot rate bate a cost and earn a return on assets it does not own. Based on the plain language of Account 101, the accounting authority supports denying the Company's requested relief.

[79] Exhibit 217, Surrebuttal Testimony of John Robinett, P. 4: 16-27 (citing NARUC USoA Water Utilities Class A and B 1973 1976 revisions Balance Sheet Accounts 1. Utility Plant. P. 44)
[80] *Id*.
[81] *Id*. at P. 10-26

b. Account 345 does not support the Company's proposal.

The Company's request to include the costs of replacement of customer owned service lines fails to meet the requirements of NARUC USoA account 345. "This account shall include the cost installed of service pipes and accessories leading to the customers' premises."[82] The Company seeks to include "cost recovery of customer-owned lines that are on the customers' premise rather than 'leading to the customers' premise.'"[83] Account 345 supports denying the Company's requested relief.

2. *The Company's service line replacement program should not receive a return because it is not used and useful and it does not provide for the public service.*

Mo. Rev. Stat. § 393.270.5 allows for a reasonable average return upon the value of the property actually used in the public service. This is not property devoted to the public service. Instead, it is entirely devoted to the private benefit of private individuals. After the property of another is replaced, it will not be "actually used in the public service." Therefore, no return is appropriate.

Additionally, the Courts have held that property that is not actually used and useful would not qualify for rate base treatment, and the "used and useful concept provides a well-defined standard for determining what properties *of a utility* can be included in rate base."[84] A utility company is entitled to a rate of return *only on investments included in its rate base.*"[85]

For this reason, the Company's request to earn a profit on assets that will not be "used and useful" and will not be devoted to the public service is unlawful.

[82] *Id.* at P. 3: 22-28
[83] *Id.* at P. 4: 9-13
[84] *State ex rel. Mo. Office of the Pub. Counsel v. PSC of Mo.*, 293 S.W.3d 63, 75-76 (S.D. Mo. Ct. App. 2009) (emphasis added).
[85] *Id.*

3. *The Commission should need not allocate costs that it disallows.*

If no costs are recovered, no allocation determination need be made. However, Public Counsel is generally supportive of continuation of the principles of cost causation unless the Commission orders a single-tariff, in which case it would reject cost causation principles for purposes of designing rates. In that instance, Public Counsel does not see why industrial customers should be shielded from these costs.

4. *The Commission need not decide a recovery period if it disallows costs.*

Public Counsel argues that zero recovery of the dollars booked to account 186 – miscellaneous deferred debits, because these costs have been incurred unlawfully and the service lines are not owned by MAWC.[86] Furthermore, the Company failed – and fails in this case- to seek a waiver of the NARUC USoA prior to taking its arguably unlawful actions. These costs should not be included in plant in service, as they do not meet the definition of account 101 – utility plant in service as defined by the National Association of Regulatory Utility Commissioners Uniform System of Accounts, which is required to be followed by all water companies under the jurisdiction of the Commission.[87]

If the Commission wishes to order OPC's pilot, OPC had proposed to include up to $8 million (or $4 million per year over a two-year period) of prudently incurred costs in conjunction with OPC's proposed pilot program with a ten year recovery period and a short-term debt rate.

[86] *Id.*
[87] Exhibit 211-212, Rebuttal Testimony of OPC Witness Keri Roth, page 12, lines 10 – 25 and page 13, lines 1 – 6; Exhibit 217, Surrebuttal Testimony of OPC Witness John Robinett, page 5, lines 27 – 29, and page 6, lines 1 - 2

If the Commission orders rate recovery, an amortization period is a reasonable option provided that the amortization period matches the life of the asset. The Commission has previously ordered an amortization period of 47.7 years for KCPL equipment to match the remaining life of the asset.[88] In the situation at hand, a service line could be amortized over a period of 65 years consistent with the life of the asset.[89] Assuming cost recovery, a similar amortization is what Public Counsel would recommend.

For these reasons, the Commisison does not need to consider accounting treatment of these costs.

III. RATE DESIGN

The Commission should maintain the existing water district tariff structure[90], as there has not been substantial evidence presented establishing the Company's need for a move to Single Tariff from the existing consolidated tariff districts, substantial evidence has not been submitted proving Single Tariff to be necessary or any more effective at encouraging the acquisition of small distressed systems, Single Tariff statewide cost socialize further dilutes the principles of setting rates to match cost causation and may encourage overbuilding on smaller systems exposing ratepayers to inflated rates to pay for services they do not use.

Public Counsel in the past has argued in support of rate designs that best match cost causation with revenues, on the assertion that the price singles incurred by the customer or the company will best assure economical utility operation through market-force, rather than

[88] EO-2012-0340, In the Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for the Issuance of a Depreciation Authority Order relating to their Electrical Operations, "Order Granting Application," Pg. 4 (July 7, 2012).
[89] Exhibit 217, Surrebuttal Testimony of OPC witness John Robinett, Pg. 3:1-14
[90] Ex. 207, Pg. 11.

regulation.[91] Public Counsel is not recommending in this proceeding a return to many water districts.

A. *The Commission should reject the company's proposal because it will not send correct price signals and may encourage "gold-plating."*

The Commission should not support a Single Tariff rate, as the socialized rates will not reflect actual cost of service of a customer, represents rate making inviolate of cost causation principles, mutes market-force price signals and may encourage "gold-plating".[92]

Single Tariff pricing socializes costs across non-contiguous systems, meaning that the rates paid by customers are not likely to reflect the actual cost to serve their locality.[93] Cost causation principles in ratemaking are important in the rate setting process because it is responsive to price signals to the customer and the company.

Single Tariff rates may have the unintended effect of muting price signals.[94] The Commission stated as much in its *Report and Order* in Case Number WR-2015-0301, "[h]owever, that ability to spread costs [Single Tariff] also carries with it the risk that Missouri-American will have an incentive to overbuild its water and sewer systems to maximize shareholder profits if the constraints of customer affordability are reduced."[95] (Emphasis added).

In WR-2015-0301, the Commission moved from eight districts to three districts, and addressed this concern by establishing a capital expenditure plan.[96] By moving from three districts to one district in such a short amount of time, the market-force price signals are further

[91] *Initial Brief of the Office of the Public Counsel*, WR-2015-0301, Pg. 17 (Apr. 8 2016).
[92] Exhibit 201, Pg. 9.
[93] *Id*. Pg. 6.
[94] *Id.*, Pg. 7.
[95] *Report and Order*, WR-2015-0301, Pg. 15 (5/26/2016)
[96] *Id*.

removed, meaning that more government and more regulation may be necessary to replace a natural market force.

In the absence of natural market forces, Single Tariff pricing can encourage overinvestment in infrastructure, known as the Averch-Johnson and Willisz effect, or "gold plating."[97] Absent appropriate localized price signals, the regulated utility's tendency is to expand its rate base, regardless of an optimal level of capital investment.[98]

For these reasons, the Commission should reject the Company's proposal.

B. *Single Tariff Is Not Necessary to Encourage Distressed System Acquisition*

A single tariff is not necessary to encourage distressed system acquisition. In the last rate case, WR-2015-0301, the Commission examined the impact of 393.320, RSMo, in the context of moving to consolidating tariffs. The Commission found that the statute tends to undercut one argument presented in favor of consolidated pricing."[99] The Commission further found that "the statute already allows for consolidation of newly acquired water systems into larger districts, [and] . . . it appears that no further reassurance of potential buyers is required."[100] It would seem that the Commission has already recognized this is an argument against as unpersuasive in the matter of tariff consolidation.

In this case, Public Counsel agrees that no further action is necessary to help incent the Company to acquire small and distressed systems because it already has sufficient incentives through statutes, rules, and existing rate design structure.

[97] Exhibit 201, Pg. 9
[98] *Id.*
[99] WR-2015-0301, Report and Order (5/26/2016), Pgs. 25-26
[100] WR-2015-0301, Report and Order (5/26/2016), Pgs. 25-26

Public Counsel is in agreement with Staff witness James Busch, who observed about the existing rate design structure that, "Staff would point out that the Company continues to increase revenues through its robust acquisition strategies."[101] Mr. Busch goes on to state that the current rate consolidation set-up has already accomplished incentivizing the Company to purchase small and under-performing utilities.[102]

Additional consolidation is not needed for this purpose, and the Commission should not rely on this reasoning.

C. *Single Tariff Unduly Burdens Ratepayers of District 1*

According to Exhibit 136, the outstanding proposals for either a district tariff or Single Tariff and either Staff's proposed customer charge or the Company's proposed customer charge, every ratepayer across classes in District 1 will experience a rate increase. Under Staff's customer charge, while the difference for residential rates between district specific and single-tariff may appear nominal, the rate increases for the commercial customers are upwards of 25%-30% volumetric rate hike.[103] Under the Company's proposed customer charge, Single Tariff rate increase across all customers are more pronounced.[104] When we discuss the topic of the benefit of acquisitions, it is often overlooked that the "benefit" is primarily enjoyed by the system being acquired. When a new system is acquired by Missouri-American, the vast majority of existing ratepayers see increased rates. The Commission's duty is to set just and reasonable rates for existing ratepayers. The commission should recognize the cumulative impact of single-tariff on customers in Saint Louis. Furthermore, the entire discussion of rate differentials between the

[101] Exhibit 116, Rebuttal Testimony of Staff Witness James Busch, Pg. 10:10-12
[102] Id. at Pg. 15:7-11.
[103] Exhibit 136.
[104] *Id.*

districts avoids a present cost that only applies to customers in St. Louis County: the Infrastructure System Replacement Surcharge ("ISRS").

Under the existing tariff district structure, District 1 contains 84% of Missouri American's approximately 400,000 water customers.[105] Of those, the majority live in the St. Louis area.[106] These customers are also the only customers in Missouri-American's service territory eligible for an ISRS, pursuant to §393.1003, RSMo.[107] The surcharge could be as high as ten percent of the Company-wide revenues. On December 6, 2017, the Commission authorized the Company to increase its ISRS by $5.5 million.[108] The ISRS surcharge incorporates costs associated with projects in District 1 exclusively; the surcharge contemplates cost-causation. In other words, a Company is less likely to overspend or engage in expensive and aggressive growth through investment and acquisition because the natural market force of cost-causation does not allow the company to mask excessive costs by socializing them. It is important to remember that the rate differential, and namely the increase experienced by District 1, that Single Tariff will inflict is *exclusive* of consideration of the ISRS surcharge. When the Commission set rates for District 2 and District 3 in WR-2015-0301, presumably they were designed to cover the costs to provide services to those territories. Under its proposal in this case, we see a shift in cost from District 2 and District 3 to District 1. That means that in addition to being the only district paying an ISRS charge, District 1 will now be required to bear the burden of Joplin and St. Joseph. However, because of the ISRS, Joplin and St. Joseph will

[105] Exhibit 225, Rebuttal Testimony of Lena Mantle, Pg. 3, Line 22
[106] Exhibit 15, Direct Testimony of Constance Heppenstall, (Missouri American Water has about 437,235 customers. 404,643 are residential)
[107] The title of the statute conspicuously identifies St. Louis County as the intended area of operation of this surcharge, "393.1003. Rate schedules, procedures to establish or change (St. Louis County)". The statute requires a water corporation to provide water service in a county with "more than one million inhabitants…" *Id.* No other county in the State of Missouri has an applicable ISRS.
[108] *Order Approving Stipulation and Agreement*, WO-2018-0059, Pg. 1 (Dec. 6 2017).

not be exposed to costs from District 1 recovered under the ISRS. That means that customers in St. Louis are having to pay their share, plus ratepayers across the state; while they are statutorily unable to receive reciprocal treatment under the law. While the Commission cannot avoid the statutory constraints of the ISRS law, it can act to mitigate the inequity that would be inflicted on St. Louis ratepayers by rejecting Single Tariff, and maintaining the existing tariff rate district structure.

There are some parties in this case supporting Single Tariff as a means to enjoy the benefit of shifting costs for improvements made to their systems to St. Louis: Public Counsel believes, should the Commission authorize Single Tariff rates and approve the Company's lead service line proposal, and considering many of the lead service lines are located within District 1, the=ose parties may oppose the socialization of the $219 million of expense associated with lead service line replacement.[109]

For these reasons, the Commission should maintain the current rate design and customer charge, and the Commission should reject the Company's proposal.

IV. CHAIRMAN'S SCENARIO AND CHAIRMAN'S REPORTING REQUIREMENT EXHIBIT

A. *During the hearing, Public Counsel agreed to supply the Chairman with an exhibit to its* testimony that would include the types of reporting requirements our office would recommend associated with lead service line replacement. Public Counsel provides that information attached to its brief.

[109] *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule,* Paragraph 2 (average cost multiplied by 30,000 lines) (the estimate does not include profits/debt costs, and the Company's future test year initial proposal had predicted the cost of prices for expenses as trending upward)

B. *At the conclusion of the hearing, the Commission asked the parties to address the idea of utilizing a long-term debt rate and an amortization period shorter than ten years.*

If, and only if the Company's practice is found to be lawful and prudent, then Public Counsel would recommend an amortization period. There are several reasons Public Counsel would argue against accelerated recovery. First, expense items like attorneys fees that often receive an amortization or normalization of several years are distinguishable from an asset with a lengthy useful life. For example, the Commission has previously ordered an amortization period of 47.7 years for KCPL equipment to match the remaining life of the asset.[110] In the situation at hand, a service line could be amortized over a period of 65 years consistent with the life of the asset.[111] Second, Public Counsel recommended a ten-year amortization only in the context of its pilot program in WU-2017-0296, but in exchange for giving them accelerated recovery for an unprecedented request, the Company would receive a short-term debt rate. Public Counsel would have also been afforded protections for ratepayers in the context a richer study that truly scrutinizes the costs and benefits of the program. However, Public Counsel would not recommend any recovery given the Company's current program. In addition, Public Counsel believes cost recovery is a tertiary concern to a lawfulness determination and a prudency determinations.

C. *The Commission also asked the parties to address the possibility of a lower customer charge in the context of single-tariff rates.*

[110] EO-2012-0340, *In the Matter of the Application of Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company for the Issuance of a Depreciation Authority Order relating to their Electrical Operations*, "Order Granting Application," Pg. 4 (July 7, 2012).
[111] Exhibit 217, Surrebuttal Testimony of OPC Witness John Robinett, Pg. 3:1-14

Related to the customer charge proposal, Public Counsel has generally supported lower customer charges to allow customers to have greater control over their bill; however for the reasons already explained, a single tariff is not appropriate.[112] Furthermore, the hypothetical assumes that changing to a single-tariff would result in a change in the cost of service associated with the fixed customer charge, which may not be true. As Dr. Marke has testified, customer charges should generally try to match the customers they serve. For example, urban customers are likely to have a lower customer charge because they are not as spread out, and therefore, the cost to serve as generally cheaper. For these reasons and others, Public Counsel does not support a single – tariff even if accompanies by a different customer charge.

V. LEAD SERVICE LINE REPLACEMENT TRUE-UP

For the reasons explained previously, Public Counsel argues no costs should be recovered related to the deferral of costs authorized by the Commission in Case No. WU-2017-0296. However, Public Counsel wishes to get the facts accurate should the Commission decide to give the Company cost recovery.

As explained previously, the Company has produced evolving cost estimates.[113] Public Counsel was not satisfied with these evolving figures, and undertook a more thorough review of the underlying data.

Public Counsel discovered that Staff and the Company originally sought inclusion of costs related to meter relocations, lines that were not lead service lines were included in the tally of lead service lines replaced, errors associated replacements, and several lines that were

[112] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke
[113] Exhibit 2, Rebuttal Testimony of Company Witness Bruce W. Aiton, Schedule BWA-1, Pg. 10: 4-11; *also see* Exhibit 2, Rebuttal Testimony of Company Witness Bruce W. Aiton, Schedule BWA-3, Pg. 4:1-7; Exhibit 3, Surrebuttal Testimony of Company Witness Bruce W. Aiton, Pg. 6:3-6; WR-2017-0285, Evidentiary Hearing – Vol. 15, 3/5/2018, P 343-345.

replaced without the consent of the customer. These facts were stipulated, but the consequence of these facts were not the subject of stipulation.

Of particular importance, Public Counsel has additional concerns that the Company is now seeking to include costs related to the replacement of lines belonging to non-responsive customers or customers who have refused to participate in the Company's lead service line program.[114] "The Company does not have a written policy on how to proceed when customer consent is not given."[115] For the reasons explained previously and for those discovered in the true-up process, this Commission should deny recovery of costs related to the unlawful and imprudent replacement of customer-owned service lines.

VI. STIPULATIONS

Several stipulations have been filed in this matter. On March 1, 2018, Public Counsel joined signatories in filing a *Stipulation and Agreement,* which settled many of the contested issues in the case including matters relating to the Tax Cuts and Jobs Act of 2017, the revenue stabilization mechanism, rate of return, billing determinants with improved surveillance reports, almost all of the revenue-related issues, and other issues. Public Counsel was also a signatory to a *Stipulation and Agreement Regarding Rate Design* filed March 6, 2018. Public Counsel has not objected to the *Stipulation and Agreement Regarding Inclining Block Pilot Program* filed March 8, 2018, and Public Counsel has not objected to *Stipulation Jefferson City Issues* filed February 28, 2018.

Public Counsel has lodged a response and objection to a *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule* filed on March 14, 2018. Public

[114] Stipulation of Fact Related to True-Up, (March 26, 2018), Exhibit A and B
[115] *Id*.

Counsel has since been able to come to agreement with the Company related to the objections it filed, and Public Counsel became a signatory on a second *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule.* No party has objected to the stipulation of facts reached.

For these reasons, Public Counsel supports or will not stand in the way of a Commission order adopting these stipulations.

VII. CONCLUSION

WHEREFORE, for these reasons, OPC requests the Commission to issue an order denying costs associated with customer-owned lead service lines, order a continuation of the current rate design and customer charge, and accept the stipulations to which Public Counsel was a signatory.

Respectfully submitted,

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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 March 30, 2017 to all counsel of record.

/s/ Ryan D. Smith