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.

REPLY BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL

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I. INTRODUCTION

The Office of the Public Counsel ("OPC" or "Public Counsel") requests the Missouri Public Service Commission ("Commission") to issue an order denying the entirety of the Company's request to recover $1,686,210 in costs the Company alleges are associated with the replacement of customer-owned lead service lines, denying the request to order specific accounting treatment for continuing unauthorized replacements, granting approval of the continuation of the current rate design and customer charge, and accept the stipulations to which Public Counsel is a signatory.

Public Counsel is not re-assured by the parties' briefs as to any aspect of the lead service line program. There is a lack of legal reasoning and a lack of citation to legal authority in the briefs of the Missouri-American Water Company ("Company") and of Staff of the Missouri Public Service Commission ("Staff"). Staff and the Company attempt to foment fears, which are unfounded and unsubstantiated. The Company has not met its evidentiary burden and the Company fails to cite to credible statutory authority and credible authority in its tariffs to permit its activity.

Similarly, the Commission should reject the Company's rate design proposal. The Company's proposal unduly harms customers of St. Louis County in the near-term, and burdens all of the Company's customers with hundreds of millions of dollars of unnecessary cost in the long-term. St. Louis County is the only portion of the Company's service territory that pays an infrastructure replacement surcharge ("ISRS") for costs incurred in St. Louis County. Under the Company's proposed single-tariff, St. Louis County will be the only customers required to subsidize the infrastructure costs for District 2 and District 3, while the ISRS shall only be applied to customers in St. Louis County. Requiring these St. Louis County customers to pay both the

single-tariff rate ***and*** an infrastructure replacement surcharge is unjust and unreasonable. While the Commission may not have authority to change the terms of the ISRS statute, it can act in a manner to prevent a non-reciprocal cost-shift between customers in St. Louis County and around the state.

The reason that communities like Riverside and Joplin are agreeable to single-tariff has everything to do with pushing the debt and costs of their communities on to St. Louis County. Such cost-shifting is arbitrary and it places undue burdens on those communities who did not cause the costs and do not benefit from the costs.

Furthermore, under the Company's single-tariff proposal, the risk of investing above the optimal level of investment, or "gold plating" can occur. The lead service line replacement program is a prime example in gold-plating because the Company intends to spend hundreds of millions of unnecessary costs on unauthorized investment. It will spread those costs to customers who do not incur the costs, are not legally responsible for the costs, and do not benefit from the costs. In Staff's words, the lead service lines fail to provide any "future benefit" to the water system.[1] "The primary purpose of public regulation of utilities is the ultimate good of the public." *State ex rel. Pitcairn v. P.S.C.*, 111 S.W.2d 982 (Mo. App. 1937). This Commission should protect the public from further abuse of arbitrary ratemaking which encourages the Company to invest in unreasonable, unauthorized, and imprudent investment.

II. CUSTOMER-OWNED LEAD SERVICE LINE ARGUMENT

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

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

[1] Staff's Initial Brief, Pgs. 16-17.

In the Company's *Initial Brief,* it states, "MAWC's ability to effect change with respect to lead exposure is ***limited***, however, to ensuring our water treatment is effective and by doing what the Company can to eliminate lead service lines ***from the systems it owns.***"[2]

Public Counsel agrees that MAWC's ability is "limited," and that MAWC can only eliminate "lead service lines from the systems it owns." Despite this admission as to the Company's legal limitations, the Company proceeds to argue to engage in -and be rewarded with profits- for activity that is unlawful.

Furthermore, the only argument the Company propounded actually supports Public Counsel's position. The Company asserts that Mo. Rev. Stat. § 393.140(8) gives the Commission the power to prescribe rules, and the 4 CSR 240-50.030 allows the Commission to utilize the Uniform System of Accounts in 1973, as revised July 1976.[3] Public Counsel agrees with that portion of their argument. The Company describes account 345 as permitting "cost installed of service pipes and accessories leading to the customers' premise."[4] Public Counsel, again, agrees. The Company skips an analysis of the significance of the words, "leading to the customers' premise." Had the Company completed the analysis, it would have concluded that it was without the lawful authority to replace customer-owned service lines because the customer-owned service lines are located *on* the customers' premises.[5] As such, the Company does not have the authority to run costs through this account. After omitting a critical requirement of the rule, the Company tries to argue that costs to install customer-owned lead service lines are incidental to main

[2] MAWC's Initial Brief, Pg. 11 (emphasis added).
[3] MAWC's Initial Brief, Pg.19.
[4] MAWC's Initial Brief, Pg. 19-20 (emphasis added).
[5] Ex. 207, Surrebuttal Testimony of Geoff Marke, Pg. 11 (Mar. 23, 2018).

replacement projects.[6] Despite Staff agreeing with many of the Company's proposals and arguments, Staff strongly disagrees with the Company's best and only legal argument.

In *Staff's Initial Brief*, Staff explains its disagreement with the Company's legal argument. Staff argues the replacement of lead service lines "are not incidental to main replacements," and "taken to its logical conclusion, [such an argument] opens the door for MAWC to deem other costs 'incidental' that have not been considered so in the past."[7] Public Counsel agrees with Staff on this point. The Company's reasoning "when taken to its logical conclusion" would inevitably lead to the ridiculous and absurd conclusion that the Company should be replacing a long menu of customer-owned items, like faucets and bathtubs. The *reductio ad absurdum*, or argument to absurdity, is the same kind of argument that the Commission made in ET-2016-0246.

In that case, in determining that electric vehicle ("EV") charging stations were not defined as electric plant in § 386, the Commission reasoned that just because utilities provide electricity to laundromats does not mean but the laundromat should not be regulated by the Commission.[8] 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."[9] The issue of ownership determining the applicability of a definition of water system is the same as determined by the Commission with regard to electric systems in the EV cases; the only

[6] MAWC's Initial Brief, Pg. 20.
[7] Staff's Initial Brief, Pg. 17.
[8] *Id*.
[9] ET-2016-0246, Commissioner Scott T. Rupp's Dissenting Opinion, Pg. 1 and 3.

difference being that MAWC admits they do not own,[10] and post-replacement will not own,[11] the customer-owned service lines at issue.

Public Counsel further agrees with Staff that the customer-owned service lines are not owned by the Company, and thus "will not provide any future benefit to the Company."[12] Staff even argues that customer-owned service lines are "not a true asset."[13] Public Counsel agrees that customer-owned service lines will never be devoted to the "public service" and are outside the control of the Company. Clearly, the Company has limited authority. Clearly, both parties' arguments recognize the limits of the Company's authority.

Despite these admissions, the Company and Staff propound a legal fiction. Aside from discussing the limits of the Company and concerns over accounting treatment, Staff and the Company fail to cite to any credible legal authority that stands for the principle that customer-owned service lines are within the Commission's purview.

However, if the Commission determines that it has sufficient legal authority, then a pilot program would at least provide a modicum of consumer protection against the blank check associated with replacement of customer-owned service lines. As previously discussed in Public Counsel's initial brief, financing the pilot program with shareholder dollars, just as MAWC's sister corporation New York American Water Company agreed to do, [14] could be a way to mitigate the costs to ratepayers. It is not equitable for Missouri ratepayers to pay for service line program costs that the Company is covering in other states.

[10] Evidentiary Hearing - Vol. 15 3/5/18, Pg. 369, Ln. 19.
[11] Evidentiary Hearing – Vol. 15 3/5/2018, Pg. 290, Lns. 18-19. ("Our recommendation is not to own the 19 customers' side lead service lines.")
[12] Staff's Initial Brief, Pgs. 16-17.
[13] Staff's Initial Brief, Pg. 15.
[14] 2017 N.Y. PUC LEXIS 250, Case 16-W-0259 (March 18, 2017).

In addition to these arguments from Staff and the Company, the Missouri Division of Energy cites to authority that further supports Public Counsel's position. The reason Mo. Rev. Stat. § 393.140(2) supports Public Counsel's position is that the plain language of the statute refers to a "water, or sewer system" and "property of … water corporations." Customer-owned service lines are neither.

As explained in the *Initial Brief of the Office of the Public Counsel*, 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."[15] In fact, during this hearing, the Company's unregulated affiliate continues to induce Missouri customers to purchase service line insurance with the representation 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 . . ."*[16] The Courts have previously agreed with the advertisements of the Company's parent, the American Water Works Association, by 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"). The evidence shows that the Company does not own, operate, control or manage customer-owned service lines. In fact, every party agrees that the Company does not own these customer-owned

[15] Mo. Rev. Stat. § 386.020(60).
[16] Ex. 200-203, Direct Testimony of OPC Witness Geoff Marke, Pg. 14:14-26.

service lines, [17] and it is not seeking to own the lines after replacement.[18] DE's legal conclusion is incorrect, but they have succeeded in further articulating the lack of statutory authority to support the Company's position.

For these reasons, the Commission should deny the Company's request.

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

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." [19] The Commission has stated that a tariff "governs a utility's relationship with its customers…" *Report and Order*, WC-2008-0248, 2008 Mo. PSC LEXIS 854, *17. The Courts have held that the filed tariff doctrine applies to both utility rates and services. Bauer v. Southwestern Bell Tel. Co., 958 S.W.2d 568, 571, (Mo. App. W.D. 1997) ("We have previously observed that the filed tariff doctrine prohibits discrimination based on service as well as price . . . ." Id. (citing Sheldon v. Chicago B. & Q.R. Co., 184 Iowa 865, 870, 169 N.W. 189, 190 (1918)). In this proceeding, the Company seeks recovery for costs related to its replacement of customer-owned lead lines *as if* the service is approved in its tariff.

No party cites to any provision of the Company's tariff that "sets forth the services offered" relating to the replacement of customer-owned service lines. However, Public Counsel has identified a litany of infringements this proposed program inflicts to MAWC's existing tariff.[20] The tariff was violated in each instance the Company took responsibility for the

[17] Evidentiary Hearing - Vol. 15 3/5/2018, Pg. 369, Ln. 19.
[18] Evidentiary Hearing – Vol. 15 3/5/2018, Pg. 290, Lns. 18-19.
[19] 4 CSR § 240-3.010(28).
[20] Initial Brief of the Office of the Public Counsel, Pg. 14; Ex. 204, Rebuttal Testimony of Geoff Marke, GM-1, Pgs. 10-12 (Jan. 17, 2018).

replacement of a customer-owned service line. This Commission should not reward the Company for violating the law in providing unauthorized services beyond its tariff.

Throughout Public Counsel's testimony and throughout the briefing of WU-2017-0296 case, Public Counsel has strongly advocated that the Company's tariffs are deficient. Public Counsel is under no obligation or burden to re-write the Company's tariff. Staff is entitled to its opinion, but it is not entitled to misstate the facts. Public Counsel *has* recommended that the Company change its tariffs.

Staff inappropriately suggests that the Commission dismiss any filed testimony of Dr. Marke "discussing legality ought to be given no weight." Staff's request to give his testimony "no weight" would be the same as moving to strike, which Staff failed to do during the evidentiary hearing. Staff Counsel's failure to raise this issue timely has waived their ability to object. Delacroix v. Doncasters, Inc., 407 S.W.3d 13, 41 (Mo. App. E.D. 2013) ("If a question exists as to whether the proffered opinion testimony of an expert is supported by a sufficient factual or scientific foundation, the question is one of admissibility. It must be raised by a timely objection or motion to strike."), *see* McGinnis v. Northland Ready Mix, Inc., 344 S.W.3d 804, 816 (Mo. App. W.D. 2011) (stating that an "objection cannot be raised for the first time…" in filing subsequent to the proceeding) (internal quotation omitted).

Further, Staff mistakes Dr. Marke's citation to the authorized tariff and testimony to facts as a legal argument. Public Counsel argues that the plain language of the tariff which expressly identifies the customer-owned lead lines as the property of the customers prohibits the Company from seizing them and requiring customers to pay the costs of replacement plus a profit for property the Company does not own. It is Staff and the Company that must, and have failed to,

make a legal argument interpreting the Company's tariff that expressly allows this service and substantiates recovery.

Staff's argument is also insincere, as their own witness provided prefiled testimony discussing legality. If Staff wishes for all legal analysis be left to attorneys, including its own witnesses, then Staff Counsel should have provided its own legal analysis defending its position that the Company's tariffs "set forth services" of replacing a customer-owned lead service line. It did not because it cannot. The tariff fails to set forth such a service, which is why the Company's proposal must not go forward.

Staff asserts that the Commission cannot approve a pilot program without a tariff submitted in the case.[21] A curious critique, considering that the Company has not submitted a tariff sheet for its customer-lead line replacement program. Staff's offense at Public Counsel's omission surely extends to the Company's failure to submit a tariff for its activities.

For these reasons, the Company's proposal lacks authority and should be denied.

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

It goes against the Company's credibility to claim that a proposed pilot study "is not necessary"[22] when the entirety of the Company's program to replace customer-owned lines is "not necessary." There is no legal mandate requiring the Company to replace customer-owned service lines, and Public Counsel argues there is no statutory or tariff authority to proceed with the Company's proposal.

[21] Staff's Initial Brief, Pg. 13.
[22] MAWC's Initial Brief, Pg. 11.

Staff similarly fails to understand the existing regulatory regime. For example, Staff states their concern that past compliance with federal and state laws "does not guarantee future compliance."[23] If Staff is arguing that future laws or regulations may be developed to justify spending $200 million – then Staff's position recommends that the Commission usurp the jurisdiction of the federal and state agencies with express delegated authority to make a finding the federal and state standards for lead are insufficient.

On the other hand, if Staff is arguing that if the Company were to cease replacing lead pipes all together, and no changes occur in federal or state laws, the system eventually will deteriorate to the point of noncompliance. Such an argument is absurd, because the Company still must comply with federal and state regulations. Furthermore, the Company has an ISRS, and will be required to provide safe and adequate service *for the water system it owns*. Nothing decided by the Commission on this issue in this case will inhibit the Company from making necessary installations and repairs *to the water system it owns*. The Company even agreed that they have been capable of providing safe and adequate service with its partial service line replacement program, and without the its customer-owned lead service line replacement proposal.[24] Unreasonable fears such as these ignore the mitigating existence of an entire regulatory regime to handle future compliance violations.

First, the Environmental Protection Agency and the Missouri Department of Natural Resources already have an entire legal regime for enforcing a stricter set of rules when a Company fails to comply.[25] That regime does not mandate the unnecessary actions being

[23] Staff's Initial Brief, Pg. 9.
[24] *See* Evidentiary Hearing - Vol. 17 3/7/2018, Pg. 632:5-8.
[25] 40 CFR 141.84 (federal) and 10 CSR 60-15 (state).

recommended by Staff and the Company. Instead, the rules specifically authorize the Company to conduct partial service line replacements.[26]

Second, Staff's fear is unreasonable because the Company's compliance with these rules involves a "well-established history."[27] In the past thirty years, the Company has not triggered the lead and copper rule ("LCR") action level requirements in any portion of its system.[28] For these reasons, the Commission should deny the Company's ill-informed program and disregard Staff's unreasonable fears.

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

Public Counsel opposes cost recovery related to the Company's unlawful seizure of private property. In the *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule* (3/26/2018), the Company and Public Counsel stipulated that the costs related to customer-owned service line replacement are either Company's proposal $1,686,210 or Staff's proposal $1,668,796.

The $17,414 difference between the Company's figure and Staff's figure is the Company's insistence to include costs related to the Company's nonconsensual seizure of private property. Despite testifying to securing consent from customers before replacement,[29] and despite the terms of its proposed plan stating the company will not replace customer-owned service lines without the consent of the homeowners: it already has. This is a perfect example of why there is a

[26] 40 CFR 141.84 (a "water system shall replace that portion of the lead service line that it owns…A water system that does not replace the entire length of the service line also shall complete the following tasks…") and 10 CSR 60-15.050(5) (a "water system shall replace that portion of the lead service line that it owns...A water system that does not replace the entire length of the service line also shall complete the following tasks…"). Both regulations permit partial replacement.
[27] *Id.*
[28] *Id.*
[29] Evidentiary Hearing - Vol. 15 3/5/18, Pg. 354, Ln. 6.

need for a tariff; because in its absence, what authority does the Commission have to disallow or discourage the Company from engaging in theft? Absent any authority, how would the Commission assess a penalty in the event of a transgression against the Company's policy?

Staff agrees to exclude such costs in Staff's Initial Brief.[30] It is curious as to what basis Staff has to disallow a portion of cost on which there are no laws, regulations or rules authorizing the activity or permitting recovery of any costs associated therewith.

Public Counsel recommends exclusion of the remainder of the unlawful and imprudent costs for the many reasons provided in testimony, in the *Initial Brief of the Office of the Public Counsel* and for the reasons stated herein.

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

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

The Company confirmed on cross-examination that there are no known instances of water-borne lead poisoning in its service area. In this proceeding no evidence of lead poisoning from a customer-owned lead line has been presented. The exploitation of fear by parties is irresponsible and can spur unintended consequences, such as a devaluation in home prices.[31] For multiple decades, the Company has complied with federal and state safety standards. Justice requires the truth rather than unreasonable fears. In Staff's view, hundreds of millions of dollars are justified because the unfounded fear that "dangers of LSL in general is extensive and well-established."[32] In the Company's view, hundreds of millions of dollars are justified because of the unfounded fear that there is some sort of "benefit" if the Company "can eliminate the risk of even

[30] Staff's Initial Brief, Pg. 14.
[31] Direct Testimony of Dr. Geoff Marke, Schedule GM-4, Pg. 44 (47/49), Ln. 15-16.
[32] Staff's Initial Brief, Pg. 8.

one person developing this condition."[33] These fears are unrealized, unfounded, and unreasonable because there has not been one documented case of lead poisoning in the Company's service area.[34]

Public Counsel agrees with the assessment of the Missouri Department of Natural Resources ("DNR") as was quoted by Staff witness Jim Merciel. 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.[35] Mr. Merciel carried forward his research and incorporated in a report submitted to the Commission that states that "lead contamination is, in general, not a problem in Missouri."[36] The evidence of Staff's witness directly contradicts the conclusion of Staff's counsel that the dangers of LSL "in general is extensive and well-established."[37] To the contrary, "in general, [water-borne lead contamination] is not a problem in Missouri."[38]

For this reason, the unrealized, unfounded, and unreasonable fears of the Company and of Staff should not prevail over the truth. The Commission should reject the Company's proposal.

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. Staff "is unaware that MAWC has not met standard water

[33] MAWC's Initial Brief, Pg. 9.
[34] Evidentiary Hearing – Vol. 15 3/5/2018, Pgs. 358-359.
[35] Evidentiary Hearing – Vol. 16 3/6/2018, Pg. 407.
[36] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-2, Pg. 21/23.
[37] Staff's Initial Brief, Pg. 8.
[38] Exhibit 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-2, Pg. 21/23.

quality in all of its systems and would be shocked to find out MAWC's standards would deteriorate without further consolidation."[39] Public Counsel agrees. In other words, the replacement of customer-owned lead service lines is unnecessary to provide safe and adequate service. The Company's witness, Jim Jenkins, also agreed that a single tariff and the replacement of customer-owned lead service lines are not a conditions precedent for the provision of safe and adequate service.[40]

The Company goes a step in the wrong direction in its briefs. The Company makes a trilogy of threats which occur at pages 5, 15, and 22 of its brief. The Company argues it will avoid areas with lead service lines and postpone main replacement projects if its shareholders cannot extract their requested profits from the pockets of its ratepayers. These threats should not – and ***must not*** – be the subject of barter and bullying. The Company has a statutory obligation to provide safe service, which it has proven capable of through its existing partial-replacement program and its years compliance with federal and state regulations.

For these reasons, the Commission should deny the Company's request.

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. Mr. Naumick indicated that the Company's studies failed to show evidence that there is a difference in blood lead levels and water lead levels related to the different types of line replacements.[41] Whether the Company has a partial or a full customer-owned service line

[39] Staff's Initial Brief, Pg. 24.
[40] Evidentiary Hearing - Vol. 17 3/7/2018, Pg. 632: Ln. 5-8.
[41] Evidentiary Hearing – Vol. 15, 3/5/3018, Pg. 337.

replacement, the line will be flushed.[42] Staff admits that any "danger" of lead service lines becomes "stable" (or dissipates) in a short period of time. This stability results from the flushing of the line, but a low-cost water filter could further mitigate against any perceived risk during that short period of time.[43] The Company never presented any evidence or anecdotes of providing water filters to mitigate the unreasonable fears that dominate this docket. Staff and the Company admit a filter would mitigate against perceived risk during the short time period of concern.[44] What the record reflects is that both partial and full line replacement unsettle particulates that necessitate flushing, and if that is the Commission's chief concern, then filters would be the expeditious and comparably affordable remedy.

For the failure to meet its burden, the Commission should deny the Company's request.

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

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.[45] The Company's plan fails to target the primary source of lead. 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.

The Staff's brief is only partially correct in stating that "MAWC, a water utility, can only reasonably control one source of potential lead contamination." The Company can treat its water and remove Company-owned service lines and Company-owned mains. In the Company's own words, "MAWC's ability to effect change with respect to lead exposure is ***limited***, however, to

[42] Ex. 40, Data Information Request, Pg. 8 of 14 (describing the Company's protocol to sample's water "post flush" for full lead service line replacements).
[43] Staff's Initial Brief, Pg. 8-9.
[44] Staff's Initial Brief, Pg. 9.
[45] *Id*.

ensuring our water treatment is effective and by doing what the Company can to eliminate lead service lines *from the systems it owns.*"[46] Customer-owned service lines are not within the "control" of the Company. Courts agree.[47]

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

5. *Missouri's Blood Lead Levels Have Decreased 16-fold Since 2000*

Public Counsel is the only party that has submitted evidence compiled by the Missouri Department of Health and Senior Service Childhood Lead Poisoning Prevention Programs, whose 2016 annual report found:

> "Of the children tested, the percentage found to have elevated blood lead levels (IO μg/dL or greater) **has declined from 11.1 percent in 2000 to 0.69 percent in 2016**. This decrease mirrors a nationwide decrease in children's blood lead levels."[48] (Emphasis added)

During the period of time that the Company was operating its partial lead-service line replacement program, blood lead levels have decreased across the state. There is no evidence in the record that blood lead levels in Missouri are rising, and there is no evidence presented that partial lead service line replacement, which is permitted under 40 CFR 141.84 and 10 CSR 60-15.050(5), are ineffective in protecting Missourians.

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.*

[46] MAWC's Initial Brief, Pg. 11 (emphasis added).
[47] *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").
[48] Ex. 202, Direct Testimony of OPC Witness Dr. Geoff Marke, GM-3, Pg. 33.

In the WU-2017-0296 case, the Commission expressly stated that "[n]othing in this Order shall be considered a finding by the Commission of the value or prudence for ratemaking purposes of the properties, transactions and expenditures herein involved. The Commission reserves the right to consider any ratemaking treatment to be afforded the properties, transactions and expenditures herein involved in a later proceeding."[49] Staff's brief assumes the Commission's order as pre-determining replacement of customer-owned lines as "good policy." The Commission has not pre-determined this issue. The Commission's Order further indicated that the "other issues some parties have raised, such as regulatory asset treatment of the costs, alleged tariff violations, and the necessity of the LSLR itself, can be addressed in MAWC's pending rate case…The recovery of those costs is in no way guaranteed by the Commission granting an AAO."[50]

Because all of these issues are live issues and there was no pre-determination by the Commission, the Commission should take this opportunity to deny the Company's request.

2. *The costs are excessive*

Public Counsel calculates cost exposure to ratepayers in excess of $219 million.[51] The figure does not contemplate a rate of return, acquisition of water systems with additional lead service lines, and/or changing price inputs.[52] These costs are staggering, yet the Company argues a cost-benefit analysis is not "necessary in this situation."[53] Public Counsel argues that a prudent utility would be considering the costs and benefits of its proposal. New York American Water

[49] WU-2017-0296, Report and Order, Pg. 10 (Nov. 30, 2017).
[50] *Id.*
[51] Initial Brief of the Office of the Public Counsel, Pg. 26-27.
[52] *Id.*
[53] MAWC's Initial Brief, Pg. 8.

Company is considering costs and benefits in its shareholder funded pilot program.[54] Ratepayers want to know that their hard-earned dollars are going to be spent prudently and lawfully. The Company only becomes conscious of costs related to the pilot and considers those costs unnecessary. Indeed, under the current statutory and legal regime removing customer-owned service lines is not required. If the Commission orders the Company to move forward with its proposal, however, the Commission needs consumer protections to mitigate the risk of giving the utility a blank check. The enormous scale of the Company's proposal should give this Commission concern that the Company failed to produce evidence substantiating its claim that full lead line replacement will reduce the blood lead levels of its customers, and do so in a manner discernibly superior to its existing partial-replacement program.

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

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

If the Staff, DE, and the Company are truly interested in a budget without a "cost ceiling" , the Company could possibly accomplish its ambitious ten year time frame. Even if the Company has a blank check, its timetable is ambitious. 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.[55] In this case, MAWC proposes to replace six times more service lines in a little over half of the time-span. The pace of replacements itself is imprudent and not grounded in evidence. Moreover, absent a tariff, what is the consequence should the Company fail to achieve its timetable, and what authority would the Commission have to enforce it?

[54] 2017 N.Y. PUC LEXIS 250, Case 16-W-0259 (March 18, 2017).

[55] Exs. 200-203, Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule GM-4, Pg. 14 ("These large costs underscore the importance of the need to perform a cost-benefit analysis and explore all available options.").

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

The Company opposed the pilot program proposed by Public Counsel, which would have helped examined the purported the benefits of full service line replacement and developed evidence that may have substantiated the Company's claim. Public Counsel proposed a cost-benefit study, but the Company has not provided one in this case.[56] Without any such baseline analysis, the Commission is being asked to authorize at least $219 million of spending without any metrics to determine whether the program is accomplishing anything.

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

The Company agrees that additional stakeholder input could be helpful, but it prefers to engage stakeholders in a dialogue in which stakeholders cannot "mandate program implementation details."[57] Public Counsel believes a prudent utility would want honest feedback, which means the Company is willing to listen to many suggestions including those that it may not agree with or act on. If the Commission gives approval to the Company's program, stakeholder feedback should be documented by the Company to help inform this Commission in future proceedings as to the justification for why the Company adopted or rejected the feedback of other stakeholders. Instead of documenting communications, the Company appears to be keeping mental records. This is not sufficient.

[56] Ex. 202, Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule GM-4, Pg. 17.
[57] MAWC's Initial Brief, Pg. 11.

At the evidentiary hearing, Public Counsel learned about the mental records of one of the Company's witnesses who had reached out to the "Department of Health," which indicated the Company's proposal is not necessary.[58] Mr. Aiton testified as follows:

> "They [Department of Health]- - 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."[59]

Also at the evidentiary hearing, the record reflects that the Department of Natural Resources told Staff that lead contamination in water is generally not a problem in Missouri. Public Counsel recognizes these stakeholders gave honest feedback that failed to stop the Company's imprudent action, and therefore, Public Counsel believes better documentation could explain how the Company's plan developed and inform the Commission on the viability of further implementation. To date, the Company has not engaged in a robust dialogue and Missouri stakeholders have offered their opinion that the Company's plan is not necessary. For these reasons, the Commission should reject the Company's proposal.

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

The Company's "written plan" is deficient. Public Counsel provides, among other reasons expressed in testimony, the following observations as to why the plan is deficient:

- There is no recordkeeping requirement to document which of the customers who receive replacements also own service line insurance from its affiliate.[60]
- There is no plan relating to whether to reimburse or credit customers who have recently paid to replace their own customer-owned lead service line.
- The plan gives no clear direction on how to handle a situation where the customer refuses to give consent or is non-responsive.

[58] Evidentiary Hearing – Vol. 16 3/5/2018, Pg. 357:1-25.
[59] *Id.*
[60] Ex. 40, Data Information Request.

- The plan will not deliver test kits. The Company believes test kits are unnecessary despite admitting its "tap card information is not precise."[61]
- The Company's plan fails to account for at-risk populations.[62]
- The Company's plan relating to disclosure of lead service lines is not comprehensive (e.g., written plans on how to disclose known lead service lines that will not be replaced in the near-term).
- The Company's plan fails to consider both the costs and the benefits of lead service line replacement.
- No cost-benefit study will be performed in the future.
- The plan fails to engage stakeholders.
- The plan fails to include a scoping analysis to get a more accurate estimate of the number of lead service lines costs.
- The plan fails to create a procedure for how to review and modify the current policy.[63]
- The Company's policy fails to detail how it will comply with Occupational Safety and Health Administration (OSHA) standards.[64]
- The Company's plan fails to comprehensively discuss how the Company will handle garbage days or how to mitigate against adverse weather conditions.
- The Company's plan fails to show how it will be coordinating activity with other pertinent entities. The Company claims that it has been successful in coordinating with pertinent entity and cites to an example on East Capitol. However, Dr. Marke specifically testified to the failures of such coordination:
    - Dr. Marke posed the question of whether roadwork should merit customer notification of an enhanced risk of lead contamination? The Company's plan does not address the issue.[65]
    - Dr. Marke posed the question of whether municipal construction workers should be made aware of known lead service lines? The Company's plan is similarly uninformative on this question.[66]
- The Company's plan fails to discuss comprehensive record-keeping practices to document the location of lead service lines to update records beyond imprecise tap cards.[67]

[61] MAWC's Initial Brief, Pg. 7.

[62] MAWC's Initial Brief, Pg. 6.

[63] Ex. 40 and MAWC's Initial Brief, Pg. 8.

[64] Ex. 40.

[65] Direct Testimony of OPC Witness Dr. Geoff Marke, Schedule GM-4, Pg. 21.

[66] *Id.*

[67] Ex. 40, Data Information Request.

The Company admits that its plan is "not a perfect system."[68] Public Counsel argues their plan is imprudent, and for these reasons, the Commission should deny the Company's request.

Public Counsel also argues that Staff's reporting recommendation is insufficient. In Staff's view, consumers would be adequately protected if only the Company reported the "footage of main, number of customer connections, and estimated number and costs of customer-owned lead service lines for that year."[69] Footage of main is not the type of information that will mitigate harm to customers. Customers want to know that this Company is acting prudently, and Staff's revisions do not provide the Commission with sufficient reporting to protect the concerns of ratepayers. For these reasons, the Commission should deny the Company's imprudent policy.

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.*

The NARUC USOA does not support recovery of costs for the replacement of customer-owned service lines. Staff agrees with Public Counsel that Account 345 is inconsistent with the Company's request.[70] However, no account of the NARUC USOA should be utilized. These costs do not qualify for a return of and on because they are unauthorized and are imprudent. The plain language of Account 101 and Account 345 contemplate property owned by the utility, and therefore, the NARUC USOA further supports Public Counsel's position to deny the Company's request. For this reason the Commission should deny the Company's proposed program.

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.*

[68] MAWC's Initial Brief, Pg. 12.
[69] Staff's Initial Brief, P. 11.
[70] Staff's Initial Brief, Pg. 15.

Assets that are not used and useful to the Company and not devoted to public service should not be entitled to a return on investment. Staff agrees that the customer-owned service lines are not used and useful and will not provide for the public service, but they proceed to recommend a rate of return.[71] Public Counsel submits that Staff's conclusions are inconsistent with its reasoning, and this Commission should not give a return to a Company on assets owned by the customer.

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

Public Counsel maintains its position that cost allocation is a decision that this Commission need not decide if it disallows these costs for the many reasons contained herein and heretofore. However, Public Counsel generally supports allocating costs along cost causation principles. If those principles no longer apply and if the Commission finds the program to be lawful and prudent, then it would seem industrial customers should share in the costs of further replacements.

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

Public Counsel maintains its position that the Commission need not decide a recovery period if it disallows costs. If the Commission rules otherwise, an amortization period of longer than ten years is appropriate under the facts of this case. In other cases, costs have been amortized over many decades, which may help ease the burden/impact of rate shock from hundreds of millions of dollars of imprudent and unlawful planned expenditures.[72]

E. Future Rate Recovery

[71] Staff's Initial Brief, Pgs. 16-17.

[72] EO-2012-0340, In the Matter of the Application of the 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).

This Commission should not be granting an order related to future rate recovery of customer-owned service lines. Staff Counsel appears to have recommended an automatic-renewal of the Company's accounting authority on a going-forward basis into perpetuity. Such an approach is not supported by the Commission's order in WU 2017-0296. Furthermore, the Commission need not direct the Company how to account for its costs. This Commission should make a specific finding in its Order that it makes no judgment on future costs related to this program as it cannot bind a future Commission. For this reason, this Commission should not grant any order that could be misinterpreted to apply into the future.

III. RATE DESIGN

The Company's proposal unduly prejudices customers of St. Louis County in the short-run, and unduly prejudices all of the Company's customers in the long-run. In the short-run and in the long-run, the Company unduly benefits from a single-tariff. In the Company's words, "in the short term [further consolidation of rates] will be seen by some as unfair, but, over the long term, the effects of consolidation will even out across the state."[73] Public Counsel agrees that the Company's proposal will be "unfair" - for the majority of the Company's customers - those living in St. Louis County. Public Counsel partially agrees that, "over the long term, the *effects* of consolidation will even out across the state." Public Counsel argues that the "effects" that will be felt over the long-term are customers having to pay more than what is necessary to provide safe and adequate water service. The Company has already given a preview of the unreasonable behavior to follow with further consolidation, such as spending ratepayer dollars on unauthorized, unnecessary, and imprudent lead service line replacement program. The Commission should not abandon the reasonableness of cost causation in exchange for the arbitrariness of single-tariff. The

[73] MAWC's Initial Brief, Pg. 28.

Commission must deny the Company's request, and it should grant Public Counsel's and Staff's recommendation.

A. *The Commission should not consider the Company's late proposal to consolidate Rates B and J.*

The Company changed its position for Rates B and J.[74] The change in position was buried in the page 28 of the Company's initial brief. The new proposal is not supported by the Company's testimony.[75] In reviewing the Company's *Statement of Positions As* [sic] *All Issues*, Rate B is only referenced one time and identified as exclusive from Rate J.[76] The Company's approach, in particular in relation to Rate J, interjects an entirely new position into this case. Public Counsel has not been afforded the opportunity to present evidence or cross-examine witnesses on the appropriateness of this position. For due process reasons and because the Company has waived its opportunity to argue new issues such as these, the Commission must deny the Company's new request. On April 6, 2018, MIEC moved to strike the Company's offending language. Public Counsel supports MIEC's motion.

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

The Company is incorrect that OPC's concern for over-investment is "purely speculative." The Company is engaged in an unnecessary and unauthorized replacement of customer-owned lead service lines, for which its parent has argued is not within the "control" of a public water system. The cost exposure will be hundreds of millions of dollars. Staff also raises the point, and

[74] MAWC's Initial Brief, Pg. 28.
[75] Exhibit 15, Heppenstall Direct, pages 10-11 (recommending "a volumetric rate for … Rate J for two rate zones").
[76] *Statement of Positions*, Missouri-American Water Co., Pg. 38 (Feb 21. 2018).

Public Counsel agrees, that "no conclusions can be drawn from the 2017 plan that over-investment concerns are not still valid."[77] Staff would be "shocked" to find out MAWC's standards to meet water quality would deteriorate without further consolidation.[78] For these reasons, the Commission should deny the Company request.

C. Single Tariff Is Not Necessary to Encourage Distressed System Acquisition.

Public Counsel agrees with Staff that the Company "continues to increase its number of service territories" and continues to invest in "these small systems."[79] Public Counsel also agrees with the evidence cited to by Missouri Industrial Energy Consumers ("MIEC"), who pointed out that Public Counsel's witness Dr. Geoff Marke testified that he is unaware of a single instance in which the Company "declined to acquire [a small troubled water or sewer company] under the current three-zone rate structure solely because they don't have a single tariff pricing."[80] MIEC also pointed out that Staff witness Jim Busch testified as to his opinion that the zones sufficiently allows the Company to absorb those distressed systems.[81] Public Counsel agrees this evidence further supports an order denying the Company's request. For these reasons, Public Counsel requests that the Commission deny the Company request and order the continuation of its current rate design structure.

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

The Company's proposal for single-tariff would further burden the majority of the Company's customers in the short-run and in the long-run. In the long-run, all of the customers will be unduly burdened because of the over-investment practices of this Company.

[77] Staff's Initial Brief, Pg. 23.
[78] Staff's Initial Brief, Pg. 24.
[79] Staff's Initial Brief, Pg. 22.
[80] Initial Brief of Missouri Industrial Energy Consumers, Pg. 9.
[81] *Id.*

The customers in St. Louis County already pay an ISRS surcharge, pursuant to §393.1003, RSMo, which could be as high as ten percent of the Company-wide revenues. Further consolidation would place additional burdens on the customers in St. Louis County because they will absorb the infrastructure costs for District 2 and District 3 and also pay for the costs it does cause through the ISRS surcharge. For these reasons, the Commission must deny the Company's request and order the continuation of its current rate design structure.

IV. CONCLUSION

WHEREFORE, for these reasons, OPC requests the Commission to issue an order denying the entirety of the Company's request to recover $1,686,210 in costs it alleges are associated with customer-owned lead service lines, denying the request to order specific accounting treatment for continuing unauthorized replacements, granting approval of the continuation of the current rate design and customer charge, and accept the stipulations to which Public Counsel is 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 April 9, 2018 to all counsel of record.

/s/ Ryan D. Smith