BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company for a Certificate of Convenience and Necessity Authorizing it to Install, Own, Acquire, Construct, Operate, Control, Manage and Maintain a Sewer System in and around the City of Hallsville, Missouri.	)))))))	**File No. SA-2021-0017**

MISSOURI-AMERICAN'S SUPPLEMENTAL BRIEF

COMES NOW Missouri-American Water Company ("MAWC," "Missouri-American" or "Company"), by and through the undersigned counsel, and states the following to the Missouri Public Service Commission ("Commission") as its *Supplemental Brief*. This *Supplemental Brief* will address the Boone County Regional Sewer District's ("District") *Response to Reply Briefs of Staff and MAWC,* as directed by the Missouri Public Service Commission's (Commission) *Order Granting Motion to File Response Brief and Directing Additional Briefing*, issued June 25, 2021.

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SUMMARY

The District's *Response to Reply Briefs* continues the District's invitation that the Commission involve itself in what are fundamentally Missouri Department of Natural Resources ("MDNR") issues and thereby avoid MDNR review of those issues.

As stated previously, the grant of a certificate of convenience and necessity ("CCN") from this Commission is a prerequisite for the decisions to be made by MDNR. (10 CSR 20-6.010(2)(B)3 ("Permits shall not be applied for by a continuing authority regulated by the PSC until the authority has obtained a certificate of convenience and necessity from the PSC.")). The Commission should grant the requested CCN and allow the process to continue before the entity with primary responsibility for permitting - MDNR.

MAWC's proposed purchase of the Hallsville system was overwhelmingly approved by the voters (One Hundred and Thirty-Six (136) votes were cast in favor of the proposition, while Sixty-Four (64) votes were cast against. (Exh. 8)) and a purchase agreement between Hallsville and MAWC is in place. In the absence of a sale of the system to MAWC, the City could decide to continue to operate the system itself. (Tr. 211-212 (Ratermann)). Hallsville has no plan to address the improvements to the system that are needed, no estimated cost of addressing them, no financing, and no idea of the impact on customer rates, if it had to address these issues itself. (Ex. 202, Stith Reb., p. 8, lines 16-19; Tr. 266 (Stith); Tr. 133 (Carter)).

As set out in MAWC's *Initial Brief*, the requested CCN is in the public interest, as that standard is understood and applied by the Commission. Providing a known owner, like MAWC, with the wherewithal to improve the system and the wherewithal to finance improvements to the system, is very much in the public interest. The Commission should grant MAWC the requested CCN.

District's Rules Are Preempted As Applied to Hallsville

The Commission asked that MAWC address the significance of *Moats v. Pulaski County Sewer District No. 1*, 23 S.W.3d 868 (Mo. App. S.D. 2000), to include the subsequent amendments to Chapter 644, RSMo.

Moats has not been overruled, distinguished or otherwise addressed by the courts in any way to indicate it is not still good law.[1]

The District implies that Section 644.027 was enacted in response to *Moats*. (Res. Brf., p. 3). However, the statute does not reference that purpose, Counsel does not find that Section 644.027 has been cited by any appellate court, and as stated above, no court appears to have overruled or distinguished *Moats* after passage of Section 644.027.

Even if we assume that the statute was enacted in response to *Moats*, it does not apply to a permitted sewer system, such as Hallsville's, or in this circumstance. Section 644.027 states as follows:

> Nothing in sections 644.006 through 644.150 shall be deemed to restrict, inhibit or otherwise deny the power of any city, town or village, whether organized under the general law or by constitutional or special charter, any sewer district organized under chapter 204 or chapter 249, any public water supply district organized under chapter 247, or any other municipality, political subdivision or district of the state which owns or operates a sewer system that provides for the collection and treatment of sewage, *to require the owners of all houses, buildings or other facilities* within a municipality, political subdivision or district to connect to the sewer system of the municipality, political subdivision or district *when such sewer system is available*.

(Emphasis added).

The Hallsville sewer system that the District believes it may require "to connect to the sewer system" of the District. It is not a house, building or other facility. It is a "sewer system." Section 644.016(20) defines a "sewer system" as "pipelines or conduits, pumping stations, and

[1] *See Shepards* as to *Moats*.

force mains, and all other structures, devices, appurtenances and facilities used for collecting or conducting wastes to an ultimate point for treatment or handling." Section 644.027 itself distinguishes between "sewer systems" and "houses, buildings or other facilities," using them for different purposes and not interchangeably within the statute.

Because Section 644.027 is silent as to "sewer systems" and does not address the interaction of Chapter 644 with the powers of a sewer district organized under chapter 204, the principles of *Moats* still apply as to Hallsville's sewer system.

The Court of Appeals found that the sewer district, as to the subject property owner, were preempted by Section 644.06, RSMo. and the regulations codified in 10 CSR 20, Chapter 6 - the requirements for obtaining construction and operating permits for wastewater facilities. *Id*. at 873. In doing so, the Court noted that the general permit provision under 10 CSR 20-6.010(1)(A) reads, in pertinent part, as follows: "All persons who build, erect, alter, replace, operate, use or maintain existing point sources . . . or wastewater treatment facilities shall apply to the department for the permits required by the Missouri Clean Water Law and these regulations. The department issues these permits in order to enforce the Missouri Clean Water Law." *Id*.

The Court's decision summarized that:

> . . . by requiring a homeowner to connect to its sewer lines, Appellant may completely eliminate an individual home sewage system that is in compliance with the requirements of the Missouri Clean Water Law. This amounts to an absolute prohibition of that which state law permits.

Id. at 873-874. Section 644.027 did not address sewer systems such as Hallsville's. The District's suggestions "amounts to an absolute prohibition of that which state law permits." Accordingly, the District's Rules are preempted as to the Hallsville system.

District Not "Available"

Moreover, even if applicable, the statute limits itself to only situations when a district "sewer system is available." The District's *Response to Reply Briefs* suggests a definition of "available," but provides no authority for its definition. (Resp. Brf., p. 7-8). MDNR does not seem to provide an express definition in this case. However, the regulations cited by MAWC that reference availability in these situations do imply a standard.

MDNR Rule 10 CSR 20-6.010(B) states, in part, as follows:

> (B) Continuing authorities are listed in preferential order in the following paragraphs. A level three (3), four (4), or five (5) applicant may constitute a continuing authority by showing that the authorities listed under paragraphs (B)1.–2. of this rule *are not available*; do not have jurisdiction; are forbidden by state statute or local ordinance from providing service to the person; *or that it has met one of the requirements listed in paragraphs (2)(C)1.–7. of this rule*.

(emphasis added).

MDNR Rule 10 CSR 20-6.010(C) further states, in part, as follows

> (C) Applicants proposing use of a lower preference continuing authority, *when the higher level authority is available*, must submit one (1) of the following for the department's review, provided it does not conflict with any area-wide management plan approved under section 208 of the Federal Clean Water Act or by the Missouri Clean Water Commission:
>
> * * * * *
>
> 3. A to-scale map showing that all parts of the legal boundary of the property to be connected are beyond two thousand feet (2000') from the collection system operated by a higher preference authority; [or]
>
> * * * * *
>
> 6. Terms for connection or adoption by the higher authority that would require more than two (2) years to achieve full sewer service, or . . . .

(emphasis added).

It appears from the above regulations that MDNR has focused on both the proximity of the higher level authority's facilities, as well as the ability to provide service within a reasonable time.

This is similar to the approach that Missouri courts have taken in regard to when entities have "made service available" for the purpose of 7 U.S.C. 1926(b), a federal law that shields certain rural water associations from competition. One of the prongs for such protection is whether the subject water association "has provided or *made available service* to the disputed area." *In re Detachment of Terr. From Pub. Water Supply Dist. No. 8 v. Pub. Water Supply District No. 8*, 210 S.W.3d 246, 249 (Mo.App. 2006) (emphasis added). In that situation, it must be shown both that the entity has "adequate facilities within or adjacent to the Subject Property" and that it has the "capacity to provide the requisite service within a reasonable time. . . ." *Id*. at 250-251.

Thus, both within the MDNR permitting regulations and the Missouri courts' interpretation of 7 U.S.C. 1926(b) there has been a recognition that "available" means more than a willingness to provide service. In this case, the District has no facilitates capable of providing service to Hallsville and no plan or financing in place that would allow it to do so within a reasonable period of time.

Given this understanding of availability, the District cannot be said to be "available." The District is not "available" in that it has no collection system located with 2000' of Hallsville from which to provide service to Hallsville. District witness Ratermann stated that "the only viable long-term solutions are to construct a new treatment facility or to transport the waste to a different treatment facility." (Ex. 200, Ratermann Reb., p. 14). Obviously, the District has no currently available facilities.

Mr. Ratermann further identified that the Rocky Fork wastewater treatment facility was the facility to which the District proposes to transport Hallsville's wastewater. (Ex. 200, Ratermann Reb., p. 15). Transporting Hallsville's wastewater to Rocky Fork for treatment is not a viable option. (Ex. 3, Horan Sur., p. 11-12). The District would be required to build over eight (8) miles of connecting sewer just to be able to transport Hallsville' wastewater to the Rocky Fork treatment facility. (Id.). This distance far exceeds the 2,000 feet referenced in the MDNR permit regulations. Lastly, it is significant that this plan was first introduced by the District in December 2020. (Tr. 238 (Ratermann)).

To provide the described service to Hallsville, the District would need to finance and construct several new lines to cover the 8 mile distance:

- from Cedar Gate to Richardson Acres;

- From Richardson Acres to Brown Station; and,

- Brown Station to a gravity connection sewer within 2 miles of Rocky Fork.

(Ex. 200, Sched. TR-5, p. 2 of 2).

This over 8 miles of connecting sewer would start with the Cedar Gate wastewater treatment facility on the north. The Cedar Gate facility is not capable of treating additional wastewater as it has a compliance schedule related to ammonia and E. Coli issues. (Tr. 215 (Ratermann)).

None of the needed lines (Cedar Gate to Richardson Aces; Richardson Acres to Brown Station; or, Brown Station to the gravity connection sewer within 2 miles of Rocky Fork) are in service or in use today. (Tr. 214, 215, 216-27 (Ratermann)). Nor were they a part of the District's facility plan prior to the December 10, 2020 amendment. (Tr. 215 (Ratermann)).

As to financing, the District states that it is dependent on the MDNR State Revolving Fund in order to be able to finance the construction of the eight (8) mile connecting sewer. (Tr. 217 (Ratermann); Ex. 3, Horan Sur., p. 12)). The District has not indicated that any of this financing has been confirmed or received.

The District's facilities are not available or in any way prepared to address the deficiencies that exist in the Hallsville system today.

Inclusion of Hallsville in the District's Long-Term Plan

The District alleges that permitting regulations "require the District to include the City's system in its long-term plan for the Hallsville area. . . ." (Res. Brf.,p. 4). As outlined in MAWC's *Reply Brief* (p. 8-13), this is contrary to what the District told its governing body (the Boone County Commission) and the Clean Water Commission. Further, it is contrary to the evidence in this case.

The District has no "area-wide management plan approved under section 208 of the Federal Clean Water Act or by the Missouri Clean Water Commission" that includes this project. The District's currently approved facility plan does not include Hallsville. (Tr. 238) (Ratermann)). Even an August 10, 2020 draft of the plan did not include Hallsville. (Tr. 240 (Ratermann)). The draft plan that does include Hallsville only resides in a December 2020 draft of the plan that has not yet been approved. (Tr. 237-238 (Ratermann)).

There was no plan, or even a proposed plan to include Hallsville, until approximately thirteen (13) months after the citizens of Hallsville voted to sell the system (November 5, 2019) to MAWC and approximately five (5) months after this case was filed (July 20, 2020).

No "Competition" By MAWC

The District alleges that "competition" offered by MAWC could "result in duplication of service or unnecessary services that are not in the interest of the public." (Res. Brf., p. 3). The language used by the District is found in some past certificate cases. However, it is not applicable to the circumstance at hand. That issue of "competition" and "duplication" concerns situations where it is possible for two utilities to provide service to the same geographic territory and create two systems in the same area. *See State ex rel. Public Water Supply Dist. No. 8 v. Public Service Com.*, 600 S.W.2d 147, 154, (Mo.App 1980).

Here, the Hallsville system is in place today and is providing service to well over 600 customers. Those customers are not customers of the District. There is no allegation that the District and MAWC will compete for those individual customers or that either of the entities will duplicate, or overbuild, the Hallsville sewer system. MAWC's purchase of the Hallsville system will not result in any danger of duplication of facilities or "competition" as to the Hallsville customers. In fact, MAWC's purchase will provide the Hallsville customers long-term rate stability due to its economies of scale, rate structure, and industry expertise. (Exh. 1, Horan Dir., p. 9-11; Tr. 93 (Horan)).

District's Statutory Authority Under Chapters 204 and 250 Does Not Address This Situation

The District alleges that MAWC "cherry picks one clause out of subsection 7 of [Section] 204.330, RSMo and ignores the rest of that statute and [Section] 204.320." (Res. Brf., p. 6).

In support of this statement, the District, in part, points to Section 204.330.1 and Section 204.330.7(1). Section 204.330.1 is not helpful to the District as it contains no rulemaking authority. Section 204.330.7(1) is also not helpful to the District because it is necessarily limited by the restriction found in the introductory provision found in Section 204.330.7:

> The board of trustees shall have all of the powers necessary and convenient to provide for the operation and maintenance of its treatment facilities and the administration, regulation, and enforcement of its pretreatment program, including the adoption of rules and regulations, to carry out its powers with respect to all municipalities, subdistricts, districts, and industrial users which discharge into the collection system of the district's sewer system or treatment facilities.

(emphasis added). While Section 204.330.7(1) may have broad language as to rules ("promulgation of any rule"), that provision must be necessarily no broader than the limited purpose found in Section 204.330.7.

The District's reliance on Section 204.320.1 is also misplaced as it ignores the fact that the cited rulemaking authority is not limitless, nor superior to statutes and rules of the federal and state government. Section 204.320.4 states as follows:

> The authority granted to the board by this section is in addition to and not in derogation of any other authority granted pursuant to the constitution and laws of Missouri, any federal water pollution control act, or the rules of any agency of federal or state government.

(emphasis added).

In support of its reliance on Chapter 250, the District cites general authority to do "all things necessary or convenient" (Section 250.240) and "all powers necessary" (Section 250.250). The problem with relying on these statutes for rulemaking authority is that they contain no express rulemaking authority. Further, similar to the above Section 204.320.4 limitation, Section 250.250, in a portion not cited by the District, expressly states that:

> This chapter shall be construed as a cumulative and additional grant of power to cities, towns and villages and shall not be construed to repeal or modify any other act or statute nor shall it be construed to repeal or modify any power granted by the Constitution or statutes of the state of Missouri or by any special charter or constitutional charter.

(emphasis added).

Again, Chapter 250 does not provide the District with unlimited powers to ignore other laws of the state of Missouri and "choose whether to own and operate of eliminate discarded, antiquated municipal sewer systems within its boundaries" as alleged by the District.

Hallsville Has Authority to Sell Its System

The District alleges that MAWC has indicated that "the City has an absolute right to sell its system to any particular purchaser or that MAWC has an absolute right to purchase the City's system." (Res. Brf., p. 2). MAWC has alleged neither.

Hallsville, as set out in Section 88.770, need only the permission of its board of aldermen and its voters (both of which have been obtained). However, in this case, it is MAWC's need for a certificate to operate those assets that requires the Commission's approval. Without such approval, Hallsville may not sell to MAWC and MAWC will not be able to purchase Hallsville's system.

MAWC's point instead is that while the District alternately told the Boone County Commission and the Clean Water Commission that the goal was to "not to interfere with local governments" and to allow incorporated areas of the county to remain "autonomous" (*See* MAWC Rep. Brf., p 8-13), the District's arguments here are used in an attempt to prevent Hallsville's desired sale to MAWC, a known safe and compliant provider of water and wastewater service in Missouri. This result would be contrary to both constitutional principles of property ownership[2] and the public interest.

[2] *State ex rel St. Louis v. Public Service Commission*, 73 S.W.2d 393, 400 (Mo. 1934), *citing City of Ottawa v. Public Service Commission*, 288 Pac. (Kan.) 556 (emphasis added).

CONCLUSION

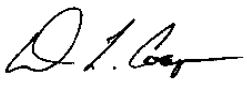
MAWC's application satisfies the standard the Commission has used traditionally when considering the issuance of a CCN (the "*Tartan Factors*"[3]).

The objections of the District should be viewed with the context of its purpose. One of the statutes cited by the District, Section 250.240, indicates, in part, that it is the purpose of that chapter to enable "sewer districts to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water." The best way to protect the public health and welfare in a timely and efficient manner in this case is to enable MAWC to move forward with the purchase and rehabilitation of the Hallsville system.

Accordingly, the Commission should grant MAWC a CCN to provide wastewater service within the proposed service area, subject to the conditions described by Staff.

WHEREFORE, Missouri-American respectfully requests the Commission consider its *Supplemental Brief*.

Respectfully submitted,



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[3] See Report and Order, *In re Application of Tartan Energy Company, L.C., d/b/a Southern Missouri Gas Company, for a Certificate of Convenience and Necessity*, Case No. GA-94-127, *3 Mo. P.S.C. 3d 173 (September 16, 1994)*.

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent to all counsel of record by electronic mail this 2nd day of July, 2021.