

**STATE OF MISSOURI  
PUBLIC SERVICE COMMISSION  
JEFFERSON CITY**

**October 24, 2001**

**CASE NO: WA-2001-288**

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**Enclosed find certified copy of ORDER in the above-numbered case(s).**

**Sincerely,**



**Dale Hardy Roberts**  
**Secretary/Chief Regulatory Law Judge**

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

|  |   |                                    |
|--|---|------------------------------------|
| In the Matter of the Application of St. Louis County       | ) |                                    |
| Water Company, doing business as Missouri-American         | ) |                                    |
| Water Company, for Restatement and Clarification of        | ) | <b><u>Case No. WA-2001-288</u></b> |
| Its Certificate of Convenience and Necessity for St. Louis | ) |                                    |
| County, Missouri.  | ) |                                    |

**ORDER DIRECTING FILING**

**Syllabus:**

This order directs the parties to brief the Commission regarding its authority to restate and clarify Applicant "grandfather authority" under its 1902 St. Louis County Court franchise.

**Procedural History:**

On October 31, 2000, St. Louis County Water Company, doing business as Missouri-American Water Company (MAWC or Company), filed its application for restatement and clarification of its Certificate of Convenience and Necessity for St. Louis County, Missouri.

The Missouri Public Service Commission issued its Order Directing Notice on November 14. Therein, the Commission established an intervention period of 30 days, ending on December 14, and directed MAWC to serve its application on each affected municipality and to file proof of service in this case on or before November 24. MAWC filed proof of service on November 22.

Thereafter, the Cities of Winchester and Maryland Heights (Winchester) jointly moved for leave to intervene and moved for a hearing on December 12. The City of Chesterfield (Chesterfield) moved for leave to intervene on December 13. The City of St. Ann (St. Ann) applied to intervene on December 14. On December 15, the Cities and Villages of Ballwin, Bel-Nor, Bel-Ridge, Bella Villa, Bellerive, Bellefontaine Neighbors, Breckenridge Hills, Bridgeton, Clayton, Cool Valley, Crestwood, Des Peres, Green Park, Hazelwood, Manchester, Maplewood, Normandy, Pasadena Hills, Pine Lawn, Richmond Heights, Riverview, Rock Hill, Town and Country, University City, Velda City, and Wildwood (Cities and Villages) jointly filed their application to intervene out-of-time. On December 21, counsel for Company filed a copy of a letter that Company sent to each proposed intervenor herein. On January 11, 2001, the Commission granted intervention to all applicants, set a prehearing conference for January 25, and directed that a proposed procedural schedule be jointly developed and filed by February 1.

On January 25, the prehearing conference was held as scheduled. On February 1, the parties did not file a proposed procedural schedule. Rather, MAWC filed a Motion for Continuance, requesting that the due date for the proposed procedural schedule be reset to February 15. On the same day, the Staff of the Missouri Public Service Commission filed its concurrence with MAWC's motion. However, before the Commission had an opportunity to take up and rule on MAWC's motion and Staff's concurrence, MAWC filed its Unanimous Stipulation and Partial Settlement and Continuance of Remaining Issues on February 7. The Commission approved the Partial Settlement on February 20 and, according to the terms of the Partial Settlement, granted MAWC a certificate of convenience and necessity to serve Valley Park.

The order of February 20 also required the parties to file a proposed procedural schedule by May 31. On May 24, certain intervenors moved to extend that date to September 30. Staff and the Office of the Public Counsel both advised the Commission, on May 30, that they did not object. On June 14, the Commission granted the motion.

On September 28, the parties filed their Unanimous Settlement Agreement. In view of the parties' request for expedited treatment, the Commission on October 4 directed the Staff to file its supporting suggestions by October 12. The Commission also directed all of the parties to cooperate with Staff in developing suggested language for the final order. Staff filed its suggestions on October 12.

## **Discussion:**

### ***Background***

This case arose out of MAWC's proposed acquisition of the water distribution assets of the City of Valley Park in St. Louis County, Missouri, and MAWC's corresponding need for legal authority to operate that system.

In its application, MAWC states that its predecessor-in-interest obtained, in 1902, a perpetual franchise from the no-longer-existing County Court of St. Louis County, Missouri, to provide public water service in the county. In the six existing incorporated cities of the county, Kirkwood, Webster Groves, Ferguson, Bridgeton, Pacific, and Florissant, a municipal franchise was also required. Likewise, a municipal franchise was also required in any subsequently incorporated city except to the extent that MAWC's predecessor served the residents of that city prior to its incorporation. With the creation of this Commission in 1913, a certificate of convenience and necessity from the Commission was also required for MAWC's predecessor to expand its services.

Valley Park was incorporated in 1917, subsequent to the County Court franchise granted in 1902. At that time, MAWC's predecessor did not serve any customers in Valley Park. In 1982, MAWC's predecessor sought and obtained limited authority which authorized it to serve a single housing development in Valley Park.<sup>1</sup> Since 1982, Valley Park has annexed certain unincorporated sections of the county served by MAWC. Today, MAWC provides all of the water used by the residents of Valley Park and directly serves some of those residents. However, MAWC believed that it needed a certificate of convenience and necessity from this Commission in order to operate the water distribution system previously belonging to the City of Valley Park and, thereby, to serve the whole of that city. Valley Park granted the requisite municipal franchise to MAWC on November 20, 2000, and the Commission granted the requested certificate on February 20.

### ***The Unanimous Settlement Agreement***

The Valley Park acquisition is not the only issue in this case. MAWC explains, in its application, that "[i]n discussions between the Company and the Commission Staff over the years, it has often been suggested that the Company should seek to restate and clarify its grandfather authority." The benefits of this undertaking are identified as "permit[ting] the Applicant's authority to be represented in the Commission's records in a manner that is traditional for other utilities within the state" and "eliminat[ing] administrative confusion and uncertainty with respect to the interpretation of the perpetual County Court franchise[.]" Additionally, it would eliminate "the pragmatic necessity for piecemeal applications[.]" It is this aspect of the application that has resulted in the intervention herein of numerous St. Louis County municipalities.

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<sup>1</sup> *In the Matter of St. Louis County Water Company*, Case No. WA-82-141 (Order, issued April 23, 1982).

In the Unanimous Stipulation and Partial Settlement and Continuance of Remaining Issues filed on February 7, 2001, the parties sought to bifurcate this matter. They proposed that the Commission grant the necessary certificate of public convenience and necessity to MAWC so that the acquisition of the Valley Park distribution system might be consummated. They further proposed that the due date for the proposed procedural schedule be extended so that they might attempt to resolve the remaining issues by negotiation. The Commission accepted the parties' plan and granted the Valley Park Certificate of Convenience and Necessity on February 20, 2001.

The parties have been successful in negotiating a resolution of the remaining issues. In their Unanimous Settlement Agreement of September 28, the parties state that the passage of Senate Bill 369 during the last legislative session addressed some of the intervenors' concerns.<sup>2</sup> Their remaining concerns were addressed by the development of a generic franchise agreement and MAWC's offer to enter into that agreement with any requesting intervenor.

### ***Staff's Suggestions***

On October 12, Staff filed its Suggestions in support of the Unanimous Settlement Agreement. In its pleading, Staff states that the Commission should approve the Unanimous Settlement Agreement and grant the requested restatement of MAWC's authority because it will permit convenient specification of MAWC's authority in the Commission's records; it will resolve ambiguity and confusion attending the perpetual franchise granted in 1902; and it will obviate the need for future litigation. Staff further

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<sup>2</sup> Relating to municipal control of utility rights-of-way and codified as Sections 67.1830, 67.1832, 67.1834, 67.1836, 67.1838, 67.1840, 67.1842, 67.1844, and 67.1846, RSMo Supp. 2001.

recommends that the Commission include MAWC's Jefferson County service area in the restatement of MAWC's authority as requested by the parties. Finally, Staff offers certain suggested language for the Commission's use.

### ***The Commission's Authority***

None of the parties have addressed the question of the Commission's authority to grant the requested relief. This is an issue that may be raised at any time, *sua sponte*, and which an administrative tribunal has an obligation to examine.<sup>3</sup> The Missouri Court of Appeals, Western District, has said:<sup>4</sup>

A basic tenet of administrative law provides that "an administrative agency has only such jurisdiction or authority as may be granted by the legislature." If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency's subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.

Thus, the parties' agreement that the Commission may grant the application is meaningless if the legislature has not authorized the Commission to grant the requested relief.

What is the relief sought by MAWC? In its prayer, MAWC asks that the Commission "issue its order stating that Applicant has a Certificate of Convenience and Necessity to provide retail water service to areas of Jefferson County previously defined in Case No. 15,297, as well as to all areas of St. Louis County, Missouri where Applicant is otherwise legally permitted to provide service consistent with its legal relationship with each respective incorporated municipality, and that such grant of authority does not restrict or

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<sup>3</sup> *Clay v. Dormire*, 37 S.W.3d 214, 222 n. 20 (Mo. banc 2000).

<sup>4</sup> *Livingston Manor, Inc., v. Dept. of Social Services, Div. Of Family Services*, 809 S.W.2d 153, 156 (Mo. App., W.D. 1991).

limit Applicant's existing authority under its perpetual franchise from the St. Louis County Court."<sup>5</sup> Paragraph 6 of the Application states:

In discussions between the Company and the Commission Staff over the years, it has often been suggested that the Company should seek to restate and clarify its grandfather authority. This would permit the Applicant's authority to be represented in the Commission's records in a manner that is traditional for other utilities within the state. It would also eliminate administrative confusion and uncertainty with respect to the interpretation of the perpetual county court franchise, as well as the pragmatic necessity for piecemeal applications as is deemed necessary at this time for clarification of Applicant's authority to serve the City of Valley Park.

The words "restatement" and "clarification" used in the title of its Application for Restatement and Clarification of its Certificate of Convenience and Necessity also suggest that MAWC seeks an action with respect to its 1902 franchise.

Based on these considerations, the Commission understands MAWC's application to seek a declaration from the Commission to the effect that its 1902 St. Louis County Court franchise, plus the Commission's order in Case No. 15,297, together constitute a certificate of convenience and necessity authorizing MAWC to serve all of the comprehended area without any need for further action of the Commission.<sup>6</sup> This interpretation corresponds with MAWC's announced goal, in Paragraph 6, of avoiding "piecemeal applications" and also gives meaning to its use of the words "restatement" and "clarification" in the title of its application.

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<sup>5</sup> The prayer, also called the "ad damnum clause," "demand" or "wherefore clause," is an un-numbered, final paragraph of a petition in which the litigant demands judgment for all of the relief to which he believes he is entitled. J.R. Devine, *Missouri Civil Pleading and Practice*, Sections 12-9, 13-8 (1986).

<sup>6</sup> However, contrary to the scope of relief sought in the prayer, Paragraph 7 of the Application states, "Areas specifically defined in Jefferson County by prior order of this Commission are unaffected by this application, as this Application refers only to St. Louis County."



Is the Commission authorized to grant the relief sought by MAWC? The Commission's practice rules require that every pleading include "specific reference to the statutory provision or other authority under which relief is requested."<sup>7</sup> In its Application, MAWC cited Sections 386.250(3) and 393.170, RSMo 2000, as the provisions under which it brings this action and seeks relief.<sup>8</sup> For convenience, those sections are set out below:

**Section 386.250(3):**

The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter:

\* \* \*

(3) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state, except that nothing contained in this section shall be construed as conferring jurisdiction upon the commission over the service or rates of any municipally owned water plant or system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality[.]

**Section 393.170:**

1. No gas corporation, electrical corporation, water corporation or sewer corporation shall begin construction of a gas plant, electric plant, water system or sewer system without first having obtained the permission and approval of the commission.

2. No such corporation shall exercise any right or privilege under any franchise hereafter granted, or under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year, without first having obtained the permission and approval of the commission. Before such certificate shall be issued a certified copy of the charter of such corporation shall be filed in the office of the commission, together with a verified statement of the president and secretary of the

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<sup>7</sup> Rule 4 CSR 240-2.080(3).

<sup>8</sup> All references to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 2000.

corporation, showing that it has received the required consent of the proper municipal authorities.

3. The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service. The commission may by its order impose such condition or conditions as it may deem reasonable and necessary. Unless exercised within a period of two years from the grant thereof, authority conferred by such certificate of convenience and necessity issued by the commission shall be null and void.

The first section cited by MAWC, Section 386.250(3), is a general statement of the authority of the Commission over water corporations. It contains no language that expressly authorizes the Commission to grant the relief sought herein by MAWC. The Missouri Supreme Court has said, "The Public Service Commission is an administrative agency or committee of the Legislature, and as such is vested with only such powers as are conferred upon it by the Public Service Commission Law, by which it was created."<sup>9</sup> "It has no authority beyond the express and literal terms of the Public Service Commission Act."<sup>10</sup>

The second section relied on by MAWC, Section 393.170, does authorize the Commission to grant service authority to a water corporation. It is under this section that the Commission issues certificates of convenience and necessity to electric, gas, water, and sewer utilities. Subsection 1 of Section 393.170 prohibits the construction of utility plant without prior approval of the Commission. The application presently pending before the Commission does not seek authority to construct any utility plant. Subsection 3 of

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<sup>9</sup> *State ex rel. Laundry, Inc. v. Public Service Commission*, 327 Mo. 93, \_\_\_, 34 S.W.2d 37, 43 (Mo. 1931).

<sup>10</sup> *State ex rel. Rutledge & Snyder v. Public Service Commission*, 316 Mo. 233, 239, 289 S.W. 785, 787 (Mo. 1926).

Section 393.170, in turn, specifies *how* the Commission shall exercise the authority granted in Subsections 1 and 2; it does not independently confer any additional authority on the Commission.<sup>11</sup>

Subsection 2 of Section 393.170 prohibits the “exercise [of] any right or privilege under any franchise hereafter granted . . . without first having obtained the permission and approval of the commission.” The intent of the legislature as expressed in a statute must be determined from the language used, giving the words their plain and ordinary meaning.<sup>12</sup> The plain and ordinary meaning of a word is found in the dictionary.<sup>13</sup> “Hereafter” means “after this”; and “hereafter granted” therefore refers to a franchise granted *after* the effective date of Section 393.170.2.<sup>14</sup> According to the “historical and statutory notes” in Vernon’s Annotated Missouri Statutes, this section originated in Missouri Laws of 1913.<sup>15</sup> The franchise granted by the St. Louis County Court to MAWC’s predecessor was not, therefore, “hereafter granted.”

Subsection 2 also requires the “permission and approval” of the Commission prior to the exercise of any right or privilege “under any franchise heretofore granted but not heretofore actually exercised, or the exercise of which shall have been suspended for more than one year[.]” “Heretofore” means “previously”; and “heretofore granted” therefore refers

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<sup>11</sup> Except, that is, the authority to impose “reasonable and necessary” conditions upon grants of authority under Subsections 1 and 2.

<sup>12</sup> *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997); *Blue Cross and Blue Shield of Kansas City, Inc., v. Nixon*, 26 S.W.3d 218, 228 (Mo. App., W.D.2000) (en banc).

<sup>13</sup> *Curry v. Ozarks Electric Corp.*, 39 S.W.3d 494, 496 (Mo. banc 2001).

<sup>14</sup> *American Heritage Dictionary, Second College Edition* (1985), at 607.

<sup>15</sup> At page 610.

to a franchise granted *before* the effective date of the Section 393.170.2.<sup>16</sup> As has been shown, MAWC's franchise, granted in 1902, was indeed granted before the statute became effective in 1913. However, this authority is not a blanket authority with respect to such prior franchises, but is limited, by the plain language of the statute, to only those franchises (1) not "heretofore" actually exercised or (2) the exercise of which has been suspended for more than one year.

The record does not show that the exercise of MAWC's franchise has ever been suspended for more than a year. The record does show that, although the St. Louis County Court in 1902 granted a franchise extending to "all public highways as they now exist, or as hereafter may be laid out or open within the present limits of St. Louis County," MAWC's predecessor had not, by 1913, actually extended water service to all parts of St. Louis County. It is a reasonable interpretation of the statute, with respect to those still unserved portions of the county, to consider that MAWC's franchise had not yet been "actually exercised." This view is preferable over the alternative, which would limit the condition to only those franchises not exercised at all by 1913, given the apparent legislative intent that the new Public Service Commission supervise all activities of water utilities.<sup>17</sup> Therefore, those parts of St. Louis County to which service had not been extended by 1913 may be considered as a "franchise heretofore granted but not heretofore actually exercised[.]" However, in that case, under the plain language of Section 393.170.2, it appears that MAWC must indeed seek Commission approval prior to extending water

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<sup>16</sup> *American Heritage Dictionary, supra.*

<sup>17</sup> This alternative is examined below.

service to any part of St. Louis County it did not already serve in 1913. According to the pleadings filed in this case, that has been the practice actually followed.

It appears that Section 393.170.2, relied on by MAWC as authority for the relief it seeks, instead expressly prohibits that relief. As stated above, Section 393.170.2 can be construed to apply only to those franchises, granted prior to 1913, which had never been exercised at all by that date. In that case, however, under the maxim *expressio unius est exclusio alterius*, Subsection 2 must still be regarded as prohibiting the relief sought by MAWC.<sup>18</sup>

Support for this conclusion is found in a review of Chapter 392, RSMo, pertaining to telecommunications. In Subsection 5 of Section 392.410, the legislature has made a specific grant of authority to the Commission to restate and clarify certificates of convenience and necessity with respect to telecommunications companies:

The commission may review and modify the terms of any certificate of public convenience and necessity issued to a telecommunications company prior to September 28, 1987, in order to ensure its conformity with the requirements and policies of this chapter. Any certificate of service authority may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected. Unless exercised within a period of one year from the issuance thereof, authority conferred by a certificate of service authority or a certificate of public convenience and necessity shall be null and void.

It is a rule of statutory construction that the legislature is not presumed to have intended a meaningless act.<sup>19</sup> Therefore, the enactment by the legislature in 1987 of Subsection 5 of Section 392.410 must be understood to have conferred on the Commission a power it did

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<sup>18</sup> "The expression of the one is the exclusion of the other"; *Black's Law Dictionary, Deluxe Sixth Edition* (1990), at 581. Relied on as a rule of construction by the Missouri Supreme Court, e.g., *Greenbriar Hills Country Club v. Director of Revenue*, 2001 WL 267334 (Mo. banc 2001), slip op. at \*4.

<sup>19</sup> *Murray v. Missouri Highway & Transportation Comm'n*, 37 S.W.3d 228, 233 (Mo. banc 2001).

not previously possess. The absence of any similar provision in Chapter 393, pertaining to electric, gas, water, and sewer corporations, suggests that the legislature has withheld that authority from the Commission.

A further difficulty arises from the nature of the Commission action sought by MAWC. MAWC's Application does not request that the Commission grant it a Certificate of Convenience and Necessity, but rather requests that the Commission acknowledge that it already has one. This would appear to violate the prohibition on declaratory judgments by administrative tribunals.<sup>20</sup>

**IT IS THEREFORE ORDERED:**

1. That St. Louis County Water Company, doing business as Missouri-American Water Company, shall, and the other parties herein may, within 30 days of the issue date of this order, file a brief or memorandum of law addressing the questions raised in this order and, in particular, stating the exact relief sought and the Commission's authority to grant that relief.

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<sup>20</sup> *State Tax Commission of Missouri v. Administrative Hearing Commission*, 641 S.W.2d 69, 75-76 (Mo. banc 1982).

2. That this order shall become effective on November 3, 2001.

**BY THE COMMISSION**

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

**Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge**

( S E A L )

Kevin A. Thompson, Deputy Chief  
Regulatory Law Judge, by delegation  
of authority pursuant to  
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,  
on this 24th day of October, 2001.

**STATE OF MISSOURI**

**OFFICE OF THE PUBLIC SERVICE COMMISSION**

I have compared the preceding copy with the original on file in this office and  
I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,  
Missouri, this 24<sup>th</sup> day of Oct. 2001.

*Dale Hardy Roberts*

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Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge

