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 REPLY 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 *Reply Brief*. This *Reply Brief* will address the Boone County Regional Sewer District's ("District") *Post- Hearing Brief* as it relates to Issue 1 described in the *Joint List of Issues, Order of Openings, Witnesses and Cross-Examination.* MAWC will not reply to the *Initial Brief of Staff* of the Missouri Public Service Commission ("Commission"), as it is supportive of MAWC's position.

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SUMMARY

The Hallsville system is in place today and is providing service to well over 600 customers. However, there are currently violations of Hallsville's operating permit. The lagoons are not permitted to discharge effluent and are required to land apply the treated wastewater on approved agricultural land. (Exh. 1, Horan Dir., p. 6). Despite this, the main holding lagoon (Lagoon #2) discharged continuously for most of 2020, in violation of the Missouri State Operating Permit. (*Id*.). The discharge eventually enters Waters of the State in violation of the Missouri Clean Water Law. (*Id*.). In previous years, it is likely that even the surface land application has resulted in wastewater entering creeks/drainages, again in violation of the operating Permit. (*Id*.). Additional compliance issues were noted in the Direct Testimony of MAWC witness Horan. (Exh. 1, Horan Dir., p. 6-7).

As a result of the compliance issues documented over the years by the MDNR, the Hallsville facility is currently under enforcement with MDNR's Water Protection Enforcement Section. (Exh. 1, Horan Dir., p. 7). Staff witness Busch described the Hallsville system as a small system with "environmental issues." (Tr. 138-139 (Busch)).

MAWC's proposed purchase of the Hallsville system was overwhelmingly approved by the voters and a purchase agreement agreed to between Hallsville and MAWC. On the other hand, the District does not have an agreed-to contract permitting it to purchase the Hallsville sewer system assets. (Tr. 133, (Carter)).

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)).

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 certificate of convenience and necessity ("CCN").

The District's Initial Brief essentially argues that the Commission cannot grant a CCN because the Missouri Department of Natural Resources ("MDNR") cannot grant a permit to MAWC. MAWC explains herein why the District's arguments are flawed. However, there is no reason for the Commission to insert itself into the MDNR process and guess what MDNR might do as to permitting. The Commission need only recognize that as to the matters within the Commission's expertise, the requested CCN is in the public interest. Granting such a CCN will allow the process to move on to MDNR.

ISSUE 1 – Necessary or Convenient

> ***Is MAWC's provision of wastewater service associated with its proposed purchase of the City of Hallsville wastewater system "necessary or convenient for the public service" within the meaning of the phrase in section 393.170, RSMo?***

Hallsville Has Authority to Sell Its System

As an initial matter, what has seemingly been ignored thus far is the fact that Hallsville owns a sewer system, which has apparent value, and that it has, and should have, a right to sell when the citizens and the City decide it is in the City's best interest to do so.

As a city of the fourth class, Hallsville's statutory authority to sell its sewer system is found in Section 88.770, RSMo. Section 88.770 states in relevant part that the ". . . the board of aldermen may sell, convey, encumber, lease, abolish or otherwise dispose of any public utilities

owned by the city" when, in the case of a water or wastewater system, the sale is "authorized by a simple majority vote of the voters voting on the question."[1]

The owners of property have a constitutional right to determine whether to sell their property or not. "To deny them that right would be to deny them an incident important to ownership of property. *A property owner should be allowed to sell his property unless it would be detrimental to the public*." *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).

The District's arguments not only attempt to prevent Hallsville's desired sale to MAWC, a known safe and compliant provider of water and wastewater service in Missouri, ii further argues that this system must be given to the District, if Hallsville no longer wants to own it. This result would be contrary to both constitutional principles and the public interest.

District Argument as to Public Interest

Specifically, the District argues that a grant of the requested CCN is contrary to the public interest because:

1) It "interferes with the District's exercise of its authority;"

2) "[R]esults in the District and MAWC expending resources on a permit application DNR cannot grant;" and,

3) Likely results in expenditures on "litigation arising from the permitting process - that are better used to protect the environment and public health."

(District Brf., p. 19-20).

MAWC will explain herein why reasons 1 and 2 are not prohibitions to the issuance of the requested CCN.

[1] See also Section 79.010, RSMo. ("Any city of the fourth class in this state . . . may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire . . . .").

MAWC notes that the District's reason 3 – the potential for needless expenditure of funds on litigation – is fully within the District's discretion to prevent.

District's Rules Are Preempted

The District alleges its rules are determinative as to several matters in this case and asserts as follows as to the authority for those rules:

> In Chapters 204 and 250, RSMo, the Missouri legislature delegated a broad grant of powers to common sewer districts like the District.

(District Brf., p. 8).

The Court of Appeals, however, in *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (Mo. App. S.D. 2000), found that the rules of a similar public sewer district, based on the same cited statutory authority, are not without exception and may be preempted by state law and regulations as to permitting.

Moats concerned a property that was located within the boundaries of the Pulaski County Sewer District ("Pulaski County Sewer"), which was described as a "common sewer district lawfully organized and operating pursuant to chapter 204," like the District in this case. *Moats* at 869. The Pulaski County Sewer regulations required "all owners of houses and buildings located within the sewer district to connect any toilet 'facilities directly with the proper public sewer in accordance with the provisions of these rules and regulations, within ninety (90) days after date of official notice to do so, provided that said public sewer is within three hundred (300) feet of the owners' property line.'" *Id.*

MDNR asserted in a motion before the trial court that it had jurisdiction over the subject wastewater treatment facilities under Missouri's Clean Water Law. *Id*. at 870. Pulaski County Sewer argued that its regulations "were remedial in nature and were authorized by Chapters 204

and 250 of the Revised Statutes of Missouri" and, thus, applied exclusively to the subject property within the Pulaski County Sewer boundary. *Id.* at 871.

The Court of Appeals found that the District's rules, 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.

Similarly, in this case, the District argues that its own rules are superior to the MDNR regulations concerning the requirements for obtaining construction and operating permits for wastewater facilities. They are not and, to the extent they conflict with the MDNR permit regulations, they are preempted as explained in *Moats*.

District's Statutory Authorization Does Not Address This Situation

Even if those District's rules were not preempted by the Missouri Clean Water Law, neither Chapter 250, nor Chapter 204, support their application to the situation at hand.

Chapter 250 applies primarily to the interaction of municipal systems with sewer districts, and their combination in certain situations. "Under the 1951 Act [Sections 250.010 to 250.250, of the 1951 Supplement to RSMo. 1949, and VAMS, (House Substitute for House Bill 45 of the 66th General Assembly] any city is authorized to combine its waterworks and sewerage systems, operate them as one combined system, and, if four-sevenths of the voters voting at a special election approve, it may issue its revenue bonds for improvements and additions payable from the revenues to be derived from the operation of such combined system." *City of Maryville v. Cushman*, 363 Mo. 87, 94, 249 S.W.2d 347, 349-50 (1952); *See also* Section 250.010.1, RSMo.

The Chapter 204 authority cited by the District in support of its rules and their applicability to all properties in Boone County, is Section 204.330, RSMo. (District Brf., p. 8, FN 37). More particularly, Section 204.330.7 states

> 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 <u>which discharge into the collection system of the district's sewer system or treatment facilities</u>.

(emphasis added).

Hallsville's system does not "discharge into the collection system of the district's sewer system or treatment facilities." After the proposed acquisition of the system by MAWC, it still will not "discharge into the collection system of the district's sewer system or treatment facilities." Section 204.330 does not support the application of the District's rules to either Hallsville or MAWC.

MDNR Must Act for Itself

The District further argues that a CCN should not be granted by this Commission because "DNR cannot issue MAWC a state operating permit for the City's system without violating its own regulation." (District Brf., p. 19). This Commission need not, and should not, insert itself into the MDNR permit process, or try to discern what MDNR can, or cannot do.

As described in the *Moats* case, permitting is a question for MDNR, as, pursuant to the grant of powers in Section 644.026, MDNR "has promulgated regulations codified in 10 CSR Chapter 6 concerning construction and operating permits for wastewater facilities." *Moats* at 872. Those same rules indicate that the grant of a 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.")).

Accordingly, the Commission should grant the requested CCN and allow the process to continue before the entity with primary responsibility for permitting - MDNR.

MDNR May Grant MAWC a Permit

If the Commission were to decide that it wants to assess the permitting allegations made by the District, those issues have been addressed in this case for the Commission's review.

The District is Not a Level 2 Authority as to Hallsville

Much of the District's position is based upon its claimed status as a Level 2 Authority under MDNR regulations and as to the Clean Water Commission ("CWC"). However, the District did not request, nor was it granted Level 2 Authority by the CWC as to Hallsville.

Further, the Boone County Commission did not support any request that the District's Level 2 Authority apply to Hallsville.

Schedule MH-6 to the Surrebuttal Testimony of MAWC witness Horan (Ex. 3) is the transcript from the July 2009 CWC agenda meeting when the District's Level 2 request was first discussed. The particulars of the Level 2 request were discussed by Mr. David Shorr, an attorney with Lathrop and Gage that has served on the District's Board as a Trustee since 2004. (Ex. 3, Horan Sur., p. 9). Mr. Shorr explained the District's request to the CWC as follows: "Those white zones are existing, incorporated cities within the boundary of Boone County that have their own systems and have their own independence and their own councils and they are not included in the Tier 2 request because they have their own option of what to do." (Ex. 3, Horan Sur. Sched. MH-6, p. 95, line 24 – p. 96, line 5) (emphasis added).

Schedule MH-7 to the Surrebuttal Testimony of MAWC witness Horan (Ex. 3) is the agenda for the CWC meeting on January 6, 2010. Item 7 of that agenda is the District's Level 2 Continuing Authority Request. (Ex. 3, Horan Sur., p. 9).[2] This agenda reveals that the MDNR Staff, in recommending CWC approval of District's Level 2 Continuing Authority, stated that under the Level 2 Continuing Authority, "[t]he District will provide regional services in the unincorporated areas of Boone County as they exist at the date of this Commission's approval." (*Id*.) (emphasis added).

Attached as Schedule MH-8 to the Surrebuttal Testimony of MAWC witness Horan (Ex. 3) is the transcript from the same January 6, 2010 CWC agenda meeting. (Ex. 3, Horan Sur., Sched. MH-8, pp. 18-31). Again, Mr. Shorr discusses the request for level 2 authority with the CWC. Mr. Shorr stated:

[2] It is worth noting that the CWC agendas are unique. While at the PSC the Staff's recommendation is contained in its own separately filed report, the CWC agenda typically includes MDNR Staff's recommended action for the CWC for each discussion item. (Ex. 3, Horan Sur., p. 9).

> . . . the goal and objective here was not to interfere with local governments. So Centralia's not included in this. Harrisburg's not included in this. All the incorporated small towns that have their own responsibility unless they want us to assume their responsibility under our rights as a District they are still autonomous.

(Ex. 3, Horan Sur., Sched. MH-8, p. 29, lines 12-19) (emphasis added).

The limitation to the unincorporated areas of Boone County was recognized by the District for many years. Schedule MH-9 to the Surrebuttal Testimony of MAWC witness Horan (Ex. 3) is a copy of the District's website discussing its history. (Ex. 3, Horan Sur., p. 10). Among other things, the District's website stated "[t]he District has continuing authority over all of unincorporated Boone County (areas outside of city boundaries)." (*Id*.). This is consistent with the CWC request for, and grant of, authority discussed above.

The Boone County Commission's position at the time of the request is also relevant as the District is controlled and operated by a five-member Board of Trustees who are appointed by the Boone County Commission. (Ex. 200, Ratermann Reb., p. 5). A review of the Boone County Commission's actions also lead to an understanding that the District did not request Level 2 authority within Hallsville.

Exhibit 5 is the Boone County Commission's Order providing support for the District's pursuit of Level 2 authority (Order 353-2009). (Tr. 218-219 (Ratermann)). That Resolution was issued on July 30, 2009, and states:

> It is therefore resolved by the Boone County Commission to support the Boone County Regional Sewer District and the City of Columbia in filing a joint application for Tier 2 continuing authority with the Clean Water Commission for the Clean Water Commission's approval. The application shall request that the Boone County Regional Sewer District be approved by the Clean Water Commission as the Tier 2 continuing authority in *unincorporated* Boone County and that the City of Columbia be approved by the Clean Water Commission as the Tier 2 continuing authority inside the corporate limits of the City of Columbia.

(Tr. 219 (Ratermann); Ex. 5) (emphasis added).

The discussion before the Boone County Commission that preceded the issuance of Order 353-2009 provides valuable context as to the language found in the Resolution and the intent of both the District and the Boone County Commission. Exhibit 6 is a copy of the Boone County Commission Minutes from July 30, 2009, where the District sought the support of the Boone County Commission. District witness Ratermann identified Lesley Oswald (or "Ms. Oswald") to have been the finance manager of the District and a person involved in the effort to get the Boone County Commission's support for the level 2 continuing authority. (Tr. 220-222 (Ratermann)).

It is apparent from the following minutes that the pursuit of the level 2 authority did not include the incorporated areas of Boone County:

> Ms. Oswald stated the BCRSD and the City are both going to the Clean Water Commission to ask for Tier 2 Continuing Authority for *specific territories*. She stated the City's territory would be the city limits, and the BCRSD territory would be the entire County in the *unincorporated areas*. *She stated we would not have authority in the small municipalities*.
>
> Ms. Oswald stated Tier 2 Authority gives us authority over our territory. The benefit to the District is that we would have the ability to acquire private sewer systems to connect to public sewer when it becomes available. The benefit to that is both environmental and financial. The private facilities often aren't operated and maintained as well as they should be.
>
> Ms. Oswald stated the City is interested in Tier 2 Authority because they will be able to do their own construction permits and they won't have to go through DNR for construction permits for their sewer system. She stated applying for Tier 2 was recommended by Lathrop and Gage, which is representing both the City and the District. One reason we are doing it is because DNR is unable to force these private citizens to join public sewer, so getting this authority would give us that. Part of the application requires cooperation of effected entities, which is why she is here today. She stated the County's support of this resolution would show the Clean Water Commission that the County is supportive of the District becoming Tier 2.
>
> Commissioner Miller moved on this day the County Commission of the County of Boone does hereby adopt the following policy statement and resolution regarding continuing authority.

Policy Statement

The rules of the State of Missouri's Clean Water Commission and Department of Natural Resources applicable to construction and operating permits designate continuing authorities as permanent organizations "for the operation, maintenance and modernization of the facility for which the application is made." (Please see Title 10, Code of State Regulations, Division 20, Chapter 6). Currently, the regulations in Chapter 6 establish different tiers of continuing authority with higher preference given to publicly owned utilities since publicly owned utilities are best positioned to modernize facilities when modernization is needed. State Revolving Fund planning requires that the Boone County Regional Sewer District plan for population growth and existing facilities in need of modernization when the Sewer District plans its capital improvements.

Furthermore, it has been the Sewer District's experience that few privately owned and operated wastewater collection and treatment systems can be adequately maintained from a financial and environmental standpoint on a long term basis under current mandatory federal and state environmental regulations. It is therefore the Sewer District's policy that privately owned and operated wastewater collection and treatment systems are required to connect to the Sewer District's system where collection and treatment capacity is available. On July 21, 2009 the Board of Trustees of the Boone County Regional Sewer District adopted a policy statement and resolution to this effect and said policy statement and resolution is attached to this Boone County Commission policy statement and resolution.

Tier 2 continuing authority will facilitate the connection of privately owned and operated wastewater collection and treatment systems to the Sewer District's wastewater collection and treatment system.

Resolution

It is therefore resolved by the Boone County Commission to support the Boone County Regional Sewer District and the City of Columbia in filing a joint application for Tier 2 continuing authority with the Clean Water Commission for the Clean Water Commission's approval. The application shall request that the Boone County Regional Sewer District be approved by the Clean Water Commission as the Tier 2 continuing authority in *unincorporated* Boone County and that the City of Columbia be approved by the Clean Water Commission as the Tier 2 continuing authority inside the corporate limits of the City of Columbia.

Commissioner Pearson seconded the motion.

There was no discussion and no public comment.

The motion passed 2-0 **Order 353-2009.**

(emphasis added)

The District's Level 2 authority was not intended to extend to Hallsville and, as granted, does not extend to Hallsville. The goal was to "not to interfere with local governments" and to allow them to remain "autonomous." The Commission should not allow allegations to the contrary to disrupt a grant of the requested CCN.

Exceptions to the Continuing Authority Hierarchy

Moreover, regulatory support exists for MDNR to issue MAWC a permit, even if District were a Level 2 Authority as to Hallsville. Simply stated, the MDNR regulations provide for exceptions to the Continuing Authority hierarchy.

For example, where treatment facilities are not available within a reasonable distance, a permit may be issued to a level 3 (or lower) authority. 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;
>
> * * * * *
>
> 6. Terms for connection or adoption by the higher authority that would require more than two (2) years to achieve full sewer service. . . .

(emphasis added).

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)).

The size of the project is illustrated by Schedule TR-5 to the Rebuttal Testimony of District witness Ratermann. (Ex. 200, Sched. TR-5, p. 2 of 2). Mr. Ratermann described this document as a "map to illustrate [the District's) plan for wastewater flows from the Hallsville system." (Ex. 200, Ratermann Reb., p, 11).

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.

Further, as stated above, 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. MAWC asserts this is primarily because they cannot have an area management plan for an area where the District is not a Level 2 continuing authority. Thus, the District's currently approved facility plan does not include Hallsville. (Tr. 238) (Ratermann)). In

fact, 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)).

A statement that MDNR "cannot grant" MAWC a permit ignores many deficiencies in the District's position.

CONCLUSION

MAWC's application satisfies the standard the Commission has used traditionally when considering the issuance of a CCN (the "*Tartan Factors*"[3]). 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 *Reply 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 16th day of June, 2021.