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November 21, 2001

FILED[2]
NOV 21 2001
Missouri Public Service Commission

Missouri Public Service Commission
Attn: Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
200 Madison Street, Suite 100
P. O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. WA-2001-288

VIA EXPRESS MAIL

Dear Secretary Roberts:

Enclosed for filing please find an original and eight copies of the Brief of the Applicant in the above cause in response to the Commission's Order Directing Filing dated October 24, 2001. Thank you for your assistance and cooperation.

Very truly yours,

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Certificate of Service
Copies of this transmittal and its attachment have on the date below indicated been provided to the Office of Public Counsel, to the General Counsel to the Commission and to all parties of record.

11/21/01

ORIGINAL

FILED[2]
NOV 21 2001
Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application of St. Louis County Water Company, d/b/a Missouri-American Water Company, for Restatement And Clarification of its Certificate of Convenience and Necessity for St. Louis County, Missouri	))))))	Case No. WA-2001-288

BRIEF
OF ST. LOUIS COUNTY WATER COMPANY
d/b/a MISSOURI-AMERICAN WATER COMPANY IN RESPONSE TO
ORDER DIRECTING FILING

The Commission's Order Directing Filing raises profound questions; but due to negotiations and consequent changes to the relief requested in the Unanimous Settlement Agreement, perhaps those questions are more profound than necessary under the circumstances now existing. The relief requested in the Application has been significantly simplified by the Unanimous Settlement Agreement.

It is axiomatic that a public utility cannot engage in the business of a "water corporation" as defined in Chapter 386 RSMo unless it either has a Certificate of Convenience and Necessity to do so in a specified area awarded by the Missouri Public Service Commission, or it is exempt from the requirement for a Certificate. Only the Commission can award a Certificate of Convenience and Necessity. But conversely, a utility exempt from the requirement for a Certificate of Convenience and Necessity needs nothing at all from the Commission. Implications in the Application that some declaration was requested from the Commission with respect to the "perpetual franchise" held by the Applicant (hereinafter explained), have been eliminated. What is requested now, is simply a Certificate of Convenience and Necessity without regard to the presence or absence of any other rights which may or may not be held by the Applicant.

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The words "Restatement and Clarification" can be colloquial as well as technical, depending on the circumstances and the intent. Section 392.410 (5) RSMo cited by the Commission as authority to restate and clarify telephone certificates, actually authorizes the Commission only to "alter" or "modify" those certificates. The point is not that this statute fails to authorize restatement and clarification, but rather that this too is a colloquial and logical utilization of the terms.

In actuality, the word "restatement" was chosen for the instant Application because it is common in corporate governance, where a corporation may "restate" its previously amended articles into one document in the interest of housekeeping. See §351.106 RSMo 2000. The word "clarify" was used to indicate that no declaration about the past status was necessary. The word was borrowed from the telephone statutes as it appears in §392.530 RSMo. There, the purpose of the chapter is described through the use of the word "clarify" to indicate that the authority granted in the chapter did not to constitute an implication that the authority did not already exist. The language is as follows:

> §392.530. Sections 392.361 to 392.520 are enacted in part to clarify and specify the law existing prior to September 28, 1987. Any specific grant of authority to the commission contained in those provisions shall not be construed as indicating or meaning that the commission did not possess such authority under the law existing prior to September 28, 1987.

"Clarify" speaks to the status going-forward, and deliberately says nothing about the past. Accordingly, the words "restate and clarify" were a perfect fit for the Applicant's dilemma.

What is sought in this case, is a pronouncement from the Commission that the Applicant has now been afforded all the authority from the Commission that is necessary *regardless of any pre-existing rights,* for the Applicant to provide service in the areas described in the Application. Asking the Commission to pronounce that a Certificate of Convenience and Necessity is unnecessary in certain areas of the County would be impractical. It would also probably be unavailable under the principle recited in the Commission's Order Directing Filing with respect to the absent authority of administrative agencies to issue declaratory judgments. So we speak to the future only.

As stated in the Application, all the Company actually needed was Commission authority to serve in several areas where the Company itself conceded no exemption or prior rights existed. A practical method of obtaining those rights was needed. As also stated in the Application, the opportunity for housekeeping seemed expedient to both the Company and the Staff.

Once the decision was made to reference entirety of the County in the Application, this dictated some reference to the complex issue of municipal franchises. In hindsight, the Commission's present expressed concerns over terminology could have been avoided in the initial Application had the Applicant simply requested a "grant" of a Certificate of Convenience and Necessity. That is effectively where we are now. But this was deemed ill-advised at the time the Application was filed because it might have been construed to be a concession that the "perpetual franchise" rights were inadequate. If the perpetual franchise rights were inadequate for State purposes, it might follow that they were inadequate for municipal purposes too. Thus, a "clarification" which made no statement whatsoever about prior rights, was preferable to the request for a "grant" which could provoke municipalities onto concerns over franchises. In other words, if the Applicant were to intimate a concession that grandfather rights were insufficient to avoid a request for PSC authority, what would that say about those same grandfather rights with respect to the need for municipal franchises?

Consequently the wording in the Application was chosen to avoid the request for the grant of a Certificate due to its implications of prior necessity, and to attempt to distinguish (and thus avoid) potential municipal fights over franchise rights. Accordingly, the prayer in the Application (which no doubt in part causes the Commission's present concerns) was written as follows:

> **WHEREFORE,** Applicant prays 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 limit Applicant's existing authority under its perpetual franchise from the St. Louis County Court. ...

Unfortunately, this language proved to be ineffective in assuaging the municipalities to accept the fact that nothing the Commission might do or not do could affect the existence of or need for municipal franchises. Had matters stopped there, the Order Directing Filing might have been more difficult to address.

Fortunately, negotiations with the Intervenor Cities, the Staff and OPC produced a Settlement Agreement that had fortuitous side-benefits: Now that the cities are satisfied that they can all acquire franchises with the Applicant with agreed-upon terms if and when they so desire, the issues of grandfather rights, the perpetual franchise and what those rights may or may not mean has become moot for the issues in this case. It was Applicant's belief that such issues were irrelevant to this case from the beginning; but the combination of the Unanimous Settlement Agreement and Senate Bill 369 with respect to franchise requirements gave the cities the comfort level they needed to withdraw their objections to the Commission's ability to grant the requested Certificate. The negotiated settlement, as in any rate case, enabled the parties to structure a grant of relief acceptable to all. The relief now sought is as follows:

> **WHEREFORE**, the undersigned being the attorneys of record for all of the parties in the instant case, herewith Stipulate and Agree that the Commission may issue its Order restating and clarifying Applicant's Certificate of Convenience and Necessity for St. Louis County, Missouri, and those portions of Jefferson County previously authorized in Case No. 15,297. Intervenors have no objection to inclusion of the Intervenor Cities identified herein within the certificated area or to inclusion of the remainder of St. Louis County and those other Cites who did not choose to intervene following receipt of notice as directed by the Commission's Order of November 24, 2000...

Gone are references to the perpetual franchise, and gone is the language designed to address municipal franchise concerns that said that the Commission authority should be granted, "....where Applicant is legally permitted to provide service consistent with its legal relationship with each respective incorporated municipality." What is left could have been consistent with an initial request for a "grant" of a Certificate of Convenience and Necessity over the entirety of the areas. There is no longer any concern by anyone that a "grant" of a certificate might dilute the significance of pre-existing rights under the

perpetual franchise and what such a "grant" might mean with respect to municipal franchises.

The prayer as it has been modified by the Unanimous Settlement Agreement uses lower-case references to a request for an "Order restating and clarifying Applicant's Certificate of Convenience and Necessity..." and includes the pronounced withdrawal of any objection to the inclusion in the certificated area of literally every city in St. Louis County .

So, all the authority needed for the Commission to act in this regard is contained in the citations and references in the Commission's own Order Directing Filing. If the words "restate or clarify" give the Commission pause, these words should be considered to be advisory and colloquial and more similar to restating the Articles of Incorporation of a corporation which is done in the interest of combining amendments into a uniform readable compilation. It should not be interpreted to be an attempt to come under provisions similar to Section 392.410 which appear designed to permit the Commission to "modify" a previously issued certificate. In this case, the Applicant would recommend using wording from Section 393.170 such as, "the Commission issues its permission and approval for the Applicant to operate as a water corporation within the following described areas....[the legal descriptions in the Staff's memorandum]"

With respect to the expressed concern over the sequential references in the statute about a company "first having obtained..." the approval, the fact that service was provided by Applicant in certain areas prior to the Applicant's request in this case can obviously not be cured. But neither is it critical. The logical purport of this sequential ordering is to make it unlawful for an entity to provide service before obtaining permission. To conclude the inverse, i.e. that "if" an entity provided service prior to requesting permission, the entity would be forever barred from obtaining subsequent permission, would not benefit the public interest in any logical way. The entity may have liability for prior unauthorized indiscretions, but it would not make sense that it would be thereafter forever barred from eligibility for a Certificate. And, of course, the Applicant is insulated from such allegations by its perpetual franchise arguments.

In conclusion, the Commission need no longer address or even mention the perpetual franchise issue, as references to it have been superseded by the new prayer in the Unanimous Settlement Agreement. All of the requirements for the award of an initial Certificate required by 4 CSR 240-2.060 were met in the Applicant's verified Application. The relief requested by the Unanimous Settlement Agreement, i.e. permission to serve the legally described areas of all of St. Louis County, should be easily within the Commission's authority to authorize. More importantly, and most pertinent to the Commission's concerns that it not be asked to act improperly, the relief requested is detrimental to the interests of no one. Every municipality in the County was individually served with a copy of the Application pursuant to Order of the Commission, and the concerns of all those Cities that responded were addressed by the Unanimous Settlement Agreement. Also, the alternative, which would be the necessity for piecemeal requests for isolated areas such as Webster Groves and Valley Park, would serve the interests of no one.

Critical to this analysis, is the fact that this filing was precipitated by the Company's potential acquisitions of municipal systems owned by the Cities of Valley Park and Webster Groves. The Certificate was issued in this docket for Valley Park and that acquisition has been completed. But acquisitions of the systems of both Webster Groves and Florissant are presently pending, and certification from the Commission for the Company to serve those areas is a critical precondition to the completion of those transactions. If, regardless of the reason, the Commission does not feel comfortable issuing an Order defining the Company's certificated area to include the totality of St. Louis County, it should at least authorize certification for the cities of Florissant and Webster Groves. All the preconditions for initial grant of authority to those cities have been met by the verified Application. Both cities were formally notified of the request, and no opposition was expressed. Webster Groves has already executed a franchise. The authority for these two cities, at least, is necessary and appropriate in the circumstances of this docket.

Accordingly, the Applicant respectfully suggests that the Commission can and should grant the relief requested by the Unanimous Settlement Agreement, and that such relief is both lawfully permissible and appropriate in the circumstances.

Respectfully submitted,

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Copies of the foregoing, with counterparts bearing all signatures have on the date below written been either hand delivered or sent by prepaid U.S. Mail to all parties of record.

11/21/01