BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application 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 Water System and Sewer System in and Around the City of Eureka, Missouri	))))))))	Case No. WA-2021-0376

INITIAL POST-HEARING BRIEF

COMES NOW the Office of the Public Counsel (the "OPC") and offers this initial post-hearing brief addressing the three issues in this matter.

Issue 1: Is MAWC's provision of water and wastewater service associated with its proposed purchase of the City of Eureka water and wastewater systems "necessary or convenient for the public service" within the meaning of the phrase in Section 393.170, RSMo?

No, the transaction as proposed in Missouri-American Water Company's ("MAWC") Application and Motion for Waiver (the "Application") (Doc. 1) is not "necessary or convenient for the public service" as that phrase is used in RSMo. § 393.170(3). Therefore, the Missouri Public Service Commission (the "Commission") should deny MAWC's request to obtain a certificate of convenience and necessity (a "CCN") to install, own, acquire, construct, operate, control, manage, and maintain a water system and sewer system in and around the City of Eureka, Missouri ("Eureka") as currently proposed.

A. Relevant Factual Background[1]

MAWC seeks to acquire Eureka's water and sewer systems for $28 million. (*See* Tr. 56–57, Docs. 50–51[2] (Mr. Sean Flower, mayor of Eureka, testifying that "the ballot language that we

[1] In the interest of brevity, the OPC does not describe all the facts in evidence in this section. Rather, it includes only those facts most pertinent to its argument regarding Issue 1.

[2] The OPC notes that the hearing transcript was filed as two documents, Documents 50 and 51. The transcript is continuously paginated between the two documents. Therefore, the OPC will refer to the transcript in general.

prepared was that the sale price was based on the appraisal"); Ex. 1: Flower Direct Test. 6–7, Doc. 55 (identifying the ballot language, which specified the price as $28,000,000.00); *see also* Ex. 11: LaGrand Direct Test. 9, Doc. 65 (stating that "[t]he acquisition of the Eureka water and wastewater systems would increase MAWC's rate base by $28.0 million.")). The Staff of the Missouri Public Service Commission (the "Staff") concluded that "the net book value" of system assets MAWC proposed to purchase from Eureka is "approximately $7,096,878 for the sewer system, and $10,709,736 for the water system; $17,806,614 combined." (Ex. 100: Staff Report ¶ 17, Doc. 67).

It appears that MAWC bases its purchase price on an appraisal price. (*See* Tr. 56 (Mr. Flower testifying that "the ballot language that we prepared was that the sale price was based on the appraisal"); *see also* Tr. 186–87 (Mr. Jeffrey Kaiser, MAWC Vice President of Operation, stating "[t]hat's my understanding" in response to a question that asked "[s]o the sale price was decided by the appraisal price; is that what I'm hearing?")).

However, the appraisers who valued the Eureka systems prepared two appraisals for this case: (1) a January 20, 2020 Appraisal and (2) a March 23, 2020 Appraisal. (*Compare* Ex. 300: January 20, 2020 Appraisal, Doc. 49, *with* Ex. 3: Batis Direct Test. Schedule JEB-2: March 23, 2020 Appraisal, Doc. 57). It appears that MAWC bases the purchase price of the Eureka systems on the March 23, 2020 Appraisal. (*Compare* Tr. 56–57 (Mr. Flower explaining that the "sale price was based on the appraisal" and that ballot language included "the $28 million number"), *with* Mar. 23, 2020 Appraisal 2 (identifying the market value of the water delivery system as $18,000,000 and the market value of the wastewater collection system as $10,000,000)).

Both the January 20, 2020 Appraisal and the March 23, 2020 Appraisal specify that they are "prepared subject to the Special Assumptions and Limiting Conditions" addressed in the reports. (Jan. 20, 2020 Appraisal 2; Mar. 23, 2020 Appraisal 2). Both appraisals specify that "[t]he

Special Assumptions and Limiting Conditions address several significant issues that impact the analysis and conclusions presented in the attached report" and list several items. (*Id.*). Specifically, both appraisals reference "[t]he Flinn Engineering Report." (*Id.*).

Similar to the appraisals, Flinn Engineering also prepared two engineering reports: (1) the January 18, 2020 Engineering Report and (2) the March 16, 2020 Engineering Report. (LaGrand Direct Test. 11–12 (explaining that two versions of the Flinn Engineering Report exist); *Compare* Ex. 11: LaGrand Direct Test. Schedule BWL-3 January 18, 2020 Flinn Engineering Report 25–47,[3] *with* Ex. 11: LaGrand Direct Test. Schedule BWL-3 March 16, 2020 Flinn Engineering Report 3–24). Ms. Kelly Simpson, the engineer who prepared the Flinn Engineering Reports testified that she considered both the January 18, 2020 Engineering Report and the March 16, 2020 Engineering Report to be a final document. (Tr. 222).

It appears that the January 18, 2020 Engineering Report supports the January 20, 2020 Appraisal and the March 16, 2020 Engineering Report supports the March 23, 2020 Appraisal. (Tr. 152 (Mr. Joseph Batis, one of the appraisers who valued the Eureka systems, explaining the difference between the January 20, 2020 Appraisal and the March 23, 2020 Appraisal and stating, in pertinent part, that the appraisers "adjusted [their] report once we received revised work from Flinn Engineering."); Ex. 3: Batis Direct Test. 4, Doc. 57).

The identified market value listed in the March 23, 2020 Appraisal is vastly different than the market value listed in the prior January 20, 2020 Appraisal. (*Compare* Jan. 20, 2020 Appraisal 2, *with* Mar. 23, 2020 Appraisal 2). Similarly, the Estimated Depreciated Book Value identified in the January 18, 2020 Engineering Report and the March 16, 2020 Engineering Report are significantly different. (*Compare* Jan. 18, 2020 Engineering Report 30, *with* Mar. 16, 2020

[3] Several page numbers appear on the two engineering reports. The page number referenced throughout the OPC's brief is the page number assigned as a part of Schedule BWL-3, as opposed to the page number of the specified report.

Engineering Report 8). The suggested value of the systems as expressed in the two appraisals and the two engineering reports are described in the tables below:

Appraisal (Market Value)	
January 20, 2020 Appraisal[4]	Water: $12,500,000 Sewer: $5,500,000 **Total: $18,000,000**
March 23, 2020 Appraisal[5]	Water: $18,000,000 Sewer: $10,000,000 **Total: $28,000,000**

Engineering Reports (Estimated Depreciated Book Value)	
January 18, 2020 Engineering Report[6]	Water: $10,565,695.54 Sewer: $5,521,205.06 **Total: $16,086,900.61**
March 16, 2020 Engineering Report[7]	Water: $18,155,170.19 Sewer: $13,293,844.11 **Total: $31,449,014.30**

The changes in the underlying Engineering Reports arose when the engineer modified the assumption she "used to estimate the age of the buried assets." (Tr. 211; Ex. 9: Simpson Direct Test. 6–7, Doc. 63 (explaining the difference between the January 18, 2020 Engineering Report and the March 16, 2020 Engineering Report). In explaining "[w]hat was different in the March report," Ms. Simpson explained that she "was made aware of the existence of certain GIS data that was relevant to this question." (Simpson Direct Test. 7). Ms. Simpson testified that a MAWC employee made her aware of the GIS data. (Tr. 201).

In its pre-filed testimony, MAWC states that if the Commission awards it a CCN and it acquires the Eureka systems, it plans investments in both the Eureka water and sewer system. (Ex.

[4] Jan. 20, 2020 Appraisal 2.

[5] Mar. 23, 2020 Appraisal 2.

[6] Jan. 18, 2020 Engineering Report 30.

[7] Mar. 16, 2020 Engineering Report 8.

7: Kaiser Direct Test. 5, 8, Doc. 61). Importantly, as to the water system, MAWC "plans to construct a 20-inch transmission main approximately 5 miles long to transfer water from MAWC's existing St. Louis County service area to the Eureka system." (*Id.* 5). MAWC estimates that the construction of the pipeline will be $9 million and states that this is "the lowest long term cost approach to meeting the water needs of the City." (*Id.*). MAWC asserts that it considered other options, including "increased treatment levels at Eureka's wells." (*Id.* 6). However, "[t]he proposed improvements for the well treatment systems" had a "capital cost of over $10 million." (*Id.*). MAWC asserts that once it "can supply the Eureka system with water from MAWC's St. Louis County water system, the existing wells in Eureka will be placed in standby mode to serve as a back up to the single pipeline from St. Louis County." (*Id.*). MAWC maintains that some of the equipment at the well sites will be utilized under "normal (non-emergency) operations." (*Id.* 7).

B. Applicable Legal Standards

Section 393.170(2) of the Revised Statutes of Missouri states that "[n]o 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." The statute requires, in pertinent part, that "[t]he 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." RSMo. § 393.170(3). Nothing in RSMo. § 393.320 alters the Commission's statutory duty to determine whether a requested CCN is "necessary or convenient for the public service." *Compare* RSMo. § 393.320 (setting forth the procedures to be followed when a "[l]arge water public utility" seeks to acquire a "[s]mall water utility," including

the establishment of the ratemaking rate base), *with* RSMo. § 393.170(3) (requiring the Commission to determine whether a CCN "is necessary or convenient for the public service").

The courts of Missouri have recognized that "[t]he determination of what is necessary and convenient has long been, and continues to be, a matter of debate." *State ex rel. Pub. Water Supply Dist. No. 8 v. Pub. Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. Ct. App. 1980) (hereinafter *PWSD#8*"); *Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 515 S.W.3d 754, 759 (Mo. Ct. App. 2016) (hereinafter "*Office of Pub. Counsel*"). The statute does not specify any criteria that the Commission must consider when deciding what is "for the public service." *See* RSMo. § 393.170; *State ex rel. Ozark Elec. Coop. v. Pub. Serv. Comm'n*, 527 S.W.2d 390, 394 (Mo. Ct. App. 1975) (hereinafter "*Ozark Elec. Coop.*"); *Office of Pub. Counsel*, 515 S.W.3d at 759. Rather, whether the grant of a CCN would be "for the public service" lies within the Commission's discretion. *See Office of Pub. Counsel*, 515 S.W.3d at 759 (citing *State ex rel. Intercon Gas, Inc. v. Pub. Serv. Comm'n*, 848 S.W.2d 593, 597–98 (Mo. Ct. App. 1993)).

The Commission has identified five criteria that it uses to guide its determination as to what is necessary and convenient: "(1) [t]here must be a need for the service; (2) [t]he applicant must be qualified to provide the service; (3) [t]he applicant must have the financial ability to . . . provide the service; (4) [t]he applicant's proposal must be economically feasible; and (5) [t]he service must promote the public interest." *In the Matter of the Appl. of Confluence Rivers Util. Operating Co., Inc., to Acquire Certain Water & Sewer Assets, & For Certs. of Convenience & Necessity*, 2020 Mo. PSC LEXIS 107, at *10 (2020) (citing *In re Tartan Energy Co.*, 3 Mo. P.S.C. 173, 177 (1994)) (hereinafter "*Appl. of Confluence Rivers*"). These factors or their iterations have become known as the "Tartan Factors," "Tartan Criteria," or "Tartan Energy Criteria." *See, e.g., Osage Util. Operating Co. v. Mo. Pub. Serv. Comm'n*, 2021 Mo. App. LEXIS 302, at *45 (Mo. Ct. App. Mar.

9, 2021) (identifying a similar set of factors as the "Tartan Energy Criteria"); *Appl. of Confluence Rivers*, 2020 Mo. PSC LEXIS 107, at *10.

Although the Commission has applied the Tartan Factors in deciding whether to grant a CCN, Missouri court cases addressing the award of a CCN make clear that the primary consideration is the "public interest." *See, e.g., State ex rel. Elec. Co. v. Atkinson*, 204 S.W. 897, 899 (Mo. banc 1918); *Office of Pub. Counsel*, 515 S.W.3d at 759–60; *PWSD#8*, 600 S.W.2d at 154. For instance, in 1918, when affirming the Commission's grant of a CCN, the Supreme Court of Missouri, en banc, tellingly stated that "the act establishing the Public Service Commission, defining its powers and prescribing its duties is indicative of a policy designed, in every proper case, to substitute regulated monopoly for destructive competition. The spirit of this policy is the protection of the public. The protection given the utility is incidental." *Atkinson*, 204 S.W. at 899. Similarly, in *PWSD#8*, the Court of Appeals of Missouri, Western District stated that "[t]he underlying public interest is and remains the controlling concern, because cut-throat competition is destructive and the public is the ultimate party which pays for such destructive competition."[8] 600 S.W.2d at 154.

Further, "in matters of public convenience and necessity there must be consideration of the future." *Office of Pub. Counsel*, 515 S.W.3d at 760 (citing *Ringo v. Pub. Serv. Comm'n*, 132 S.W.2d 1080, 1082 (Mo. Ct. App. 1939), *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 458 (Mo. Ct. App. 1983)). The Commission should also consider any acquisition premium. *Cf. State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 736 (Mo. banc 2003) (concluding that when the Commission considers a merger under the analogous

[8] The OPC acknowledges that because the City of Eureka desires to sell its water and sewer systems to MAWC, no competition results if the Commission grants MAWC's requested CCNs. (Flower Direct Test. 4). However, the principles espoused in these statements remain applicable to the instant case.

"detrimental to the public" standard found in RSMo. § 393.190.1, the Commission must consider "the acquisition premium . . . as a relevant and critical issue").

C. Granting MAWC's Request for a CCN to Operate a Water and Sewer System in Eureka Is Not Necessary or Convenient for the Public Service

Because, as explained below, MAWC has chosen the statutory procedures set forth in RSMo. § 393.320, if the Commission grants MAWC's requested CCNs, it must establish the ratemaking rate base for the Eureka systems as the "lesser of the purchase price or the appraised value, together with the reasonable and prudent transaction, closing, and transition costs incurred by the large water public utility." *See* RSMo. § 393.320(5)(1). Here, the appraisal price is the same as the purchase price. (*See* Tr. 56–57 (Mr. Flower testifying that "the ballot language that we prepared was that the sale price was based on the appraisal"); Flower Direct Test. 6–7 (identifying the ballot language, which specified the price as $28,000,000.00)). Based on MAWC's decision to utilize the second, higher appraisal price, granting MAWC's requested CCNs is not "necessary or convenient for the public service." *See* RSMo. § 393.170(3).

Although the meaning of that phrase remains unclear, the primary focus is the "public interest." *See Atkinson*, 204 S.W at 899; *Office of Pub. Counsel*, 515 S.W.3d at 759–60. The facts as presented in the prepared testimony that has been entered into evidence and at the hearing shows that MAWC seeks to pay more than a $10 million acquisition premium in acquiring the Eureka systems. (*Compare* Staff Report ¶ 17 (identifying the "net book value" of the sewer system as $7,096,878 and of the water system as $10,709,736, with a combined total of $17,806,614), *with* Tr. 56–57 (Mr. Flower testifying that "the ballot language that we prepared was that the sale price was based on the appraisal"); Flower Direct Test. 6–7 (identifying the ballot language, which specified the price as $28,000,000.00)). Such a large acquisition premium is not "necessary or convenient for the public service." RSMo. § 393.170(3); *see AG Processing, Inc.*, 120 S.W.3d at

736 (construing a similar public interest standard found in RSMo. § 393.190 and concluding that the Commission must consider an acquisition premium in making the initial determination, even though it could be considered in a subsequent rate case). Further, MAWC seeks to purchase the assets from Eureka at an inflated price, even though it plans to construct a new pipeline, at a cost of $9 million, to serve the citizens of Eureka. (Kaiser Direct Test. 5). MAWC plans to use the existing Eureka wells as back-up systems only. (*Id.* 6). The high cost associated with the sale coupled with this future use is not "necessary or convenient for the public service." RSMo. § 393.170(3); *see Office of Pub. Counsel*, 515 S.W.3d at 760 (stating that the Commission should consider the future as "part of a *comprehensive* evaluation of whether the public convenience and necessity would be served." (emphasis in original)).

Considering MAWC's future use of the Eureka water system and the substantial acquisition premium at issue, the required price of the transaction makes any grant of a CCN under these circumstances not necessary or convenient for the public service.[9] Therefore, the Commission should deny the requested CCNs.[10]

[9] The OPC acknowledges that the Commission typically cites to the Tartan factors in deciding whether to issue a requested CCN. *See Appl. of Confluence Rivers*, 2020 Mo PSC LEXIS 107, at *10. Although Missouri courts have acknowledged the Commission's use of the Tartan Factors, it does not appear that the courts require their use. *Compare Osage Util. Operating Co.*, 2021 Mo. App. LEXIS 302, at *45 (recognizing that the Commission applied the "Tartan Energy Criteria"); *with Office Pub. Counsel*, 515 S.W.3d at 759–60 (discussing the standard the court applied in reviewing the Commission's decision to grant a CCN pursuant to RSMo. § 393.170 and not referencing the Tartan Factors).

[10] Section 393.320 of the Revised Statutes of Missouri does not change this result. Although the Commission should consider the ratemaking rate base established for the systems as a part of its analysis in deciding whether to award the CCNs, setting that amount must follow as the second step of the analysis, after the Commission has determined whether it will grant the requested CCNs. To do otherwise would effectively allow MAWC, as a "large water public utility," to replace the Commission's duty to determine whether a CCN is "necessary or convenient for the public service" with MAWC's decision to proceed with the acquisition procedure described in RSMo. § 393.320. *Compare* RSMo. § 393.170(3), *with* RSMo. § 393.320.

Issue 2A: If the Commission grants MAWC's application for the CCNs: What conditions, if any, should the Commission impose?

The Commission should deny MAWC's application for the CCNs. However, if the Commission grants MAWC's requests, the OPC takes no position on this issue.

Issue 2B: If the Commission grants MAWC's application for the CCNs: Of which existing service areas should the Eureka water and wastewater systems become a part?

The Commission should deny MAWC's application for the CCNs. However, if the Commission grants MAWC's requests, RSMo. § 393.320(6) speaks for itself. RSMo. § 393.320(6) (stating that "[u]pon the date of the acquisition of a small water utility by a large water public utility . . . the small water utility shall, for ratemaking purposes, become part of an existing service area . . . of the acquiring large water public utility that is either contiguous to the small water utility, the closest geographically to the small water utility, or best suited due to operational or other factors.").

Issue 3: Does Section 393.320, RSMo, require the Commission to establish the ratemaking rate base in this case for the Eureka water and wastewater systems? If so, what is the ratemaking rate base that should be established?

Yes, if the Commission grants MAWC's requested CCNs, because MAWC has chosen the procedures described in RSMo. § 393.320 (LaGrand Dir. Test. 6), the plain language of the statute requires the Commission to establish the ratemaking rate base for the Eureka water and sewer systems in this case. RSMo. § 393.320(5)(2) (stating that "[t]he public service commission shall issue its decision establishing the ratemaking rate base of the small water utility in its order approving the acquisition."). The ratemaking rate base should be "[t]he lesser of the purchase price or the appraised value, together with the reasonable and prudent transaction, closing, and transition costs incurred by the large water public utility." *Id.* § 393.320(5)(1).

IV. Conclusion

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission deny MAWC's request for CCNs to install, own, acquire, construct, operate, control, manage, and maintain a water system and sewer system in and around the City of Eureka, Missouri, as currently proposed.

Respectfully submitted,

/s/ Lindsay VanGerpen

Lindsay VanGerpen (#71213)
Associate Counsel

Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5565
Facsimile: (573) 751-5562
E-mail: Lindsay.VanGerpen@opc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 18th day of February 2022.

/s/ Lindsay VanGerpen