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December 12, 2000

FILED³

DEC 13 2000

Dale Hardy Roberts, Secretary
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

Missouri Public
Service Commission

Re: 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

Dear Mr. Roberts:

Enclosed please find an original and nine (9) copies of a Motion For Leave To Intervene in the above-styled cause of action. Please file the original and return one copy, file-stamped, in the enclosed postage pre-paid envelope.

Thank you very much for your assistance and consideration of this matter. Should you have any questions or concerns, do not hesitate to contact the undersigned.

Very truly yours,

Frank B. Curtis

FBC/jrc

Enclosures

FILED³

BEFORE THE PUBLIC SERVICE COMMISSION DEC 13 2000
OF THE STATE OF MISSOURI

MISSOURI PUBLIC
SERVICE COMMISSION

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

MOTION FOR LEAVE TO INTERVENE

Comes now the City of Chesterfield and pursuant to the provisions in Sections 386.410 RSMo and 4 CSR 240-2.075 and for its Motion for Leave to Intervene states as follows:

Chesterfield's interest in the case. The City of Chesterfield (Chesterfield) is a 3rd class city incorporated in 1988 under Chapter 77 RSMo. Under its grant from the state of Missouri, Chesterfield has general police powers and is responsible to construct and maintain public roads and rights of way within Chesterfield city limits. Under Chapter 71.520 RSMo a city may by ordinance authorize any company to set and maintain necessary equipment and operate same along, across or under any public road within such city for a period of twenty years, subject to such rules, regulations and conditions as shall be expressed in such ordinance. Therefore, Chesterfield has the authority to require adherence to reasonable rules, regulations, and conditions for the excavation, installation and maintenance of water mains within the city limits.

Reasons for seeking intervention. St. Louis County Water Company, doing business as Missouri-American Water Company (Company) claims it has easements for all of its water mains to run along and underneath Chesterfield's streets, as a result of a

franchise awarded by the County Court of St. Louis County in a 1902 decision. Company Exhibit A. The Company further claims the 1902 decision is explained in a legal opinion. Company's Exhibit B. However, the opinion states that the franchise [granted to the Company] may not apply to streets in cities incorporated subsequent to June 1902, which were never county highways. The opinion goes on to say, where a city is incorporated and subsequently constructs streets within the city, they are not county highways but rather are city streets, and, in our opinion, the county franchise of the Water Company would not apply to such streets. Company Exhibit B page 33 of 37 Caption C.

Further, according to 393.170(2) V.A.M.S., No water corporation shall exercise any right under any franchise hereafter granted with out first having obtained permission and approval of the commission. Before such certificate shall be issued, a verified statement of the president and the secretary shall be filed in the office of the commission showing that it has received the required consent of the proper municipality. Chesterfield has not given the Company the required consent. These opinions are supported by an En Banc Supreme Court of Missouri, opinion in Missouri Utilities Company v. Scott-New Madrid-Mississippi Electric Cooperative 475 S.W.2d 25, 29-30 (Mo 1971).

Chesterfield and the Company do not have a franchise agreement which would grant the Company authority to place their mains along city streets, and, in fact, when Chesterfield presented the Company with a proposed franchise intending to regulate the excavation, installation and maintenance of water mains, the Company declined to negotiate, relying on its alleged 1902 County Court franchise agreement.

Intervener opposes the relief sought. Chesterfield opposes the Company's request for relief because, at best, the Company's prayer is disingenuous. In its prayer, the

Company requests the Commission to issue an order stating that the Company has a Certificate of Convenience and Necessity to provide retail water service to **all** areas of St. Louis County where the Company is otherwise legally permitted to provide service consistent with its legal relationship with each incorporated municipality. Chesterfield does not challenge the Company's position as the sole provider of water to Chesterfield, but it is concerned that the Company, through its Application for Restatement and Clarification, is seeking to avoid its responsibility and obligation to enter into a franchise agreement with Chesterfield. See Missouri Utility Co. v. Scott-New Madrid-Mississippi Elec. 475 S.W.2d. 25, 29-30 (Mo. 1971).

It is unclear what the Company is requesting the Commission to do. It appears the Company claims it has legal authority. If so, then it does not need a Commission order for the legal authority they claim they have. Further, the Company does not define what legal authority they currently believe they have. It appears the Company is asking for authority to provide service to all of St. Louis County, bypassing the need to deal with those cities where they do not already have a franchise agreement. Section 393.170 (2) states that no such corporation shall exercise any right of privilege under any franchise 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 corporation showing that it has received the required consent of the proper municipal authorities.

The second part of the Company's prayer says the Company wants to provide service consistent with the Company's legal relationship with each incorporated

municipality. Again, from the Company's Application, it is unclear what the Company's legal relationship is with each municipality. The Company does not define this legal relationship with Chesterfield in its Application. Without a franchise it does not have a legal relationship.

By way of specific response to the Application as filed by the Company, Chesterfield states as follows:

Section I

1. Chesterfield admits that the Company's franchise authority granting it sole authority to provide water has been generally accepted by the Company, the Commission, St. Louis County, and the municipalities within St. Louis County. As noted above, the Company asserts that they obtained a perpetual franchise from the County Court of St. Louis in 1902. Company's Exhibit A. They claim a legal opinion, Company's Exhibit B, provides an interpretation of the 1902 franchise.

However, the Company does not provide any evidence for this assertion. The Company cites no legal authority, except the 1902 decision, under which the Company makes this assertion. To our knowledge, the Company has never tested the grant of this franchise in court. Did the Company conduct surveys of the affected parties? The City of Chesterfield, a municipality within the County, does not agree with the Company's assertion that they do not need franchise with Chesterfield.

Therefore, Chesterfield denies the remaining assertion of paragraph 1.

2. In the second paragraph of the Application, the Company asserts that the franchise (provided by the County Court), and its accompanying legal opinion, states

that the "Company may legally provide water service throughout the entirety of what was at that time unincorporated St. Louis County ... without further governmental approvals, excepting only five then incorporated cities and those streets in subsequently incorporated cities which were first dedicated to public use subsequent to the incorporation of such cities." It is impossible to reconcile the Company's position in the first part of the sentence "without further governmental approvals," with the second part of the sentence, "excepting ... those streets in subsequently incorporated cities which were first dedicated to public use subsequent to the incorporation of such cities." The Company is admitting that the franchise from the County Court does not extend to those portions of a municipality that are incorporated subsequent to the County Court's decision and has streets dedicated to public use after that incorporation. Chesterfield is such a City. At the time of the County Court's decision, what is now Chesterfield was unincorporated St. Louis County. However, some of the streets in this subsequently incorporated City were first dedicated to public use subsequent to the incorporation of the City. Therefore, the Company has conceded that it does not, in fact, have a blanket franchise in the City of Chesterfield.

3. In the third paragraph of the Application, the Company states that if the Company could provide service to an area before it became incorporated, no further authority was acquired. They do not state that no further authority was required. It is unclear what the Company means by this statement. This statement may have to do with the Company's policy towards franchises. This statement does not address whether the franchises were required.

4. Chesterfield is without sufficient knowledge or belief to respond to the allegation contained in paragraph 4, and therefore makes no response.
5. Chesterfield is without sufficient knowledge or belief to respond to the allegation contained in paragraph 5, and therefore makes no response.
6. The Company is seeking to restate and clarify its County-wide grandfather authority with the Commission. This authority would then be represented in the Commission's records in a manner that is traditional for other utilities within the state. The Company is asking the Commission to ratify the Company's alleged County-wide authority in order to eliminate administrative confusion and uncertainty with respect to the interpretation of the County Court's 1902 franchise, and to avoid piecemeal applications as are deemed necessary at this time. The Application is inconsistent. In this paragraph the Company is seeking a restatement and clarification of its asserted grandfather authority with the Commission, yet, in Section I, paragraph 2, the Company admits it does not have County-wide authority. The only conclusion that can be drawn from the Company's position would be that it is, in effect, asking the Commission for such County-wide approval. However, the legislative mandate to the Commission does not grant the Commission such authority. V.A.M.S. 393.170(2) and Missouri Utility Co. v. Scott-New Madrid-Mississippi Elec. 475 S.W.2d 25, 30 (Mo. 1971). Only the State of Missouri can grant such authority. The municipalities, as agents of the State, have authority to grant this power under a franchise agreement. V.A.M.S. 71.520 and Missouri Utility Co. v. Scott-New Madrid-Mississippi Elec. 475 S.W.2d 25, 29 (Mo. 1971).

7. The Company seeks to restate and clarify its authority in paragraph seven, i.e. to serve the entirety of St. Louis County. It is unclear whether it requests is to be the sole provider of water only, or to restate that they have the power to install, maintain and repair mains under the 1902 order without the need to have a franchise with Chesterfield.
8. The Company suggests it is seeking the grant of authority in order to eliminate future administrative complication, expense and uncertainty for the Company. This would eliminate the Company's need to cooperate with the Public Works departments of the municipalities such as Chesterfield, who do not have a franchise with the Company.

Section II

1. In response to the Company's information required under 4 CSR 240-2.060 (1), Chesterfield states as follows:
 - A. Chesterfield makes no response as to the information contained in paragraph A.
 - B. Chesterfield makes no response as to the information contained in paragraph B.
 - C. Chesterfield makes no response as to the information contained in paragraph C.
 - D. Chesterfield makes no response as to the information contained in paragraph D.
 - E. Chesterfield makes no response as to the information contained in paragraph E.
 - F. Chesterfield makes no response as to the information contained in paragraph F.
 - G. Chesterfield makes no response as to the information contained in paragraph G.
 - H. Chesterfield makes no response as to the information contained in paragraph H.
 - I. Chesterfield makes no response as to the information contained in paragraph I.

- J. Chesterfield makes no response as to the information contained in paragraph J.
- K. Chesterfield makes no response as to the information contained in paragraph K.
- L. Chesterfield makes no response as to the information contained in paragraph L.
- M. Chesterfield makes no response as to the information contained in paragraph M.
2. Chesterfield admits the information set forth in paragraph 2.
3. Chesterfield admits the information set forth in paragraph 3.
4. In response to the information set forth in paragraph 4, Chesterfield states as follows:
- 4.1(A)1. Chesterfield admits the information contained therein.
- 4.1(A)2. Chesterfield admits that under the 1902 County Court, the Company is the sole provider of water service, known under the authority of Chapter 71.520. As to the administrative process related to the installation, maintenance, and repair of water mains, the Company must seek a franchise from Chesterfield.
- 4.1(A)3. Chesterfield admits the information contained therein.
- 4.1(A)4. Chesterfield admits the information contained therein.
- 4.1(A)5. Chesterfield admits the information contained therein.
- 4.1(B) Chesterfield admits the information contained therein.
- 4.1(C) Chesterfield denies the Company's assertion that they do not need approval of the affected governmental municipal bodies or that franchises for all 91 municipalities in St. Louis County are not legally necessary. This is another example in which the Company's statement of their legal position is, at best, unclear. In Section I, paragraph 2, of their Application Company **admits** it does not have County-wide authority, yet in paragraph 4.1(C) they claim they do.

Further, in paragraph 4.1(C), the Company states that they endeavor to acquire franchises from all municipalities. It claims these endeavors stem largely from the fact that municipal franchises are expected by institutional Bond purchasers and acquisition of the franchises are more convenient than an explanation of why those franchises are unnecessary. This again is in conflict with Section I, paragraph 2, in which the Company admits it does not have authority in some cities that it currently serves. The Company then complains that some municipalities resist granting franchises to the Company because these municipalities seek "concessions" from the Company. Chesterfield denies that these alleged concessions would not be in the best interest of its customers. The Company attempts to place their perceived self-interest above that of the legally constituted municipal authorities in the respective cities. Reading between the lines, the real reason the Company does not want to bargain with the cities is that the Company may have to change the arbitrary manner in which it deals with the cities' Public Works departments relative to, but not limited to, notification when the Company digs a street; provide more warning to the public that there is an open trench along the side of a road; or assuring that water leaks are resolved before they may create dangerous ice conditions in the winter; provide reasonable time frames in which maintenance and open excavations are to remain unfinished and other reasonable administrative requirements.

4.1(D) Chesterfield makes no response as to the assertions contained in paragraph 4.1(D) as it relates to Valley Park. However, the City of Chesterfield also does not have a municipal franchise with the Company. Chesterfield therefore agrees with

the Company's assertion that the acquisition of the Certificate of Convenience and Necessity is a condition **subsequent** to the Company's obligation to obtain a municipal franchise from the City of Chesterfield.

4.1(E)

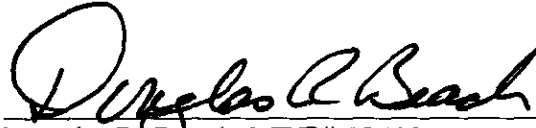
- a) Chesterfield admits the information contained therein.
- b) Chesterfield admits only that Company holds itself out to be covered by grandfather rights, but not that they have such rights.
- c) Chesterfield admits the information contained therein.
- d) Chesterfield admits that no purpose would be served and therefore requests that the Company be directed to obtain franchise agreements in those areas that have incorporated since 1902.
- e) Chesterfield admits the information contained therein.
- f) Chesterfield denies that this Certification would grant authority to address and resolve administrative authority over cities such as Chesterfield.

5. By way of further defense, Chesterfield states that in today's environment there are more than the traditional four utilities. The limited space in a "right of way" becomes crowded as each utility company, telecommunications provider, and cable company, seeks to gain access to this space, making it increasingly more difficult for the various entities to operate in this limited space. The Federal Telecommunications Act of 1996 recognizes the Cities' authority to regulate the use of its right of way. The City of Chesterfield, with its increasing population, receives requests from various communications companies seeking to lay fiber optic cable. These cables require separation to avoid damage to the other cables. Companies need access to this

space to upgrade their various lines for improved service or because of an infrastructure program. Therefore, as technology levels increase there will be additional demands put on these crowded rights of way. The costs of mistakes due to accident and neglect increase as more companies crowd in. To avoid costly accidents, to avoid public health and safety issues, and to allow Chesterfield to govern its own affairs, Chesterfield endeavors to obtain franchises from the various utilities under the authority delegated to it by the State of Missouri. Chesterfield has not been able to successfully negotiate a franchise with the Water Company.

WHEREFORE, the City of Chesterfield prays that the Commission approves Chesterfield's motion for leave to intervene, that the Commission denies the Company's Application for Restatement and Clarification of its Certificate of Convenience and Necessity for St. Louis County, as it relates to the administrative rules for installation, repairs maintenance, and other reasonable regulations which should be left up to the City. That the Commission will direct the Company to negotiate with the City of Chesterfield for a franchise in Chesterfield.

For the City of Chesterfield
Beach, Stewart, Heggie & Mittleman LLC




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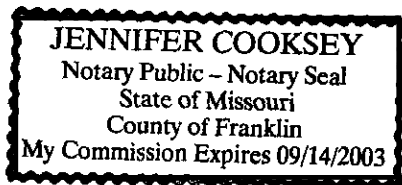
State of Missouri)
) ss
County of St. Louis)

VERIFICATION

I, Douglas R. Beach, do herewith swear that I am City Attorney for the City of Chesterfield, that I am duly authorized by the City of Chesterfield to file the foregoing Motion, and that the facts contained therein are true to the best of my knowledge, information and belief.


Douglas R. Beach

Subscribed and sworn to before me on this 12th day of December, 2000.


Notary

CERTIFICATE OF SERVICE

The undersigned certifies that an original and eight (8) copies of the foregoing was mailed via overnight Federal Express this 12th day of December, 2000 to:

Dale Hardy Roberts, Secretary
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101; and

one copy was sent via regular mail, postage pre-paid, to each of the following:

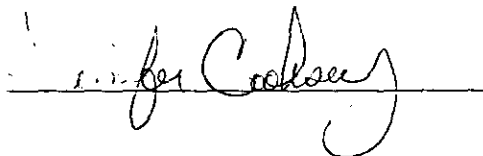
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A handwritten signature in cursive script, appearing to read "Jennifer Cooksey", is written over a horizontal line.