

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

CITY OF O'FALLON, MISSOURI,)	
)	
Complainant,)	
)	
v.)	Case No. WC-2009-_____
)	
MISSOURI-AMERICAN WATER)	
COMPANY and ,)	
)	
PUBLIC WATER SUPPLY DISTRICT)	
NO. 2 OF ST. CHARLES COUNTY,)	
MISSOURI,)	
)	
Respondents.)	

COMPLAINT

COMES NOW, the City of O'Fallon, Missouri (O'Fallon), pursuant to Section 386.390, RSMo, and 4 CSR 240-2.070, and, as its Complaint against Missouri-American Water Company (MAWC) and the Public Water Supply District No. 2 of St. Charles County, Missouri (the District), states as follows to the Missouri Public Service Commission (Commission):

PARTIES

1. O'Fallon is a Missouri Constitutional Home Rule Charter City under Article 6 Section 19 of the Missouri Constitution organized and existing under the laws of Missouri with its principal office located at 100 North Main Street, O'Fallon, Missouri 63366 O'Fallon is located in St. Charles County and has a population of approximately 76,000 residents. As is relevant to this Complaint, O'Fallon is engaged in the distribution of water for the benefit of its citizens and the public in general within a portion of its city limits.

2. MAWC is a Missouri corporation with its principal office and place of business located at 727 Craig Road, St. Louis, MO 63141. MAWC is a “water corporation”, “sewer corporation” and a “public utility” as those terms are defined in Section 386.020, RSMo, and is subject to the jurisdiction and supervision of the Commission as provided by law.

3. The District is a political corporation of the State of Missouri located in St. Charles and Warren Counties organized and existing under Sections 247.010, RSMo, et seq., for the purpose of providing water. The District’s principal office and place of business located at 100 Water Drive, O’Fallon, Missouri 63366.

4. Correspondence, communications, and orders in regard to this Complaint, insofar as Complainant is concerned, should be directed to:

Leland B. Curtis, #20550
Kevin M. O’Keefe, # 23381
130 South Bemiston, Ste. 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789
Attorneys for Defendant
City of O’Fallon, Missouri

BACKGROUND

5. MAWC and the District are authorized by law to provide water service within certain areas of Missouri, including portions of St. Charles County.

6. MAWC and the District entered into a Territorial Agreement dated October 4, 2000, involving the provision of retail water service to customers within certain tracts and subdivisions in St. Charles County, Missouri (Territorial Agreement) (**Exhibit A**). The Territorial Agreement was approved by an order of the Commission issued on May 15, 2001, in Commission Case No. WO-2001-441. (**Exhibit B**). The Territorial

Agreement designated the boundaries of the water service areas of each of the applicants within a portion of St. Charles County (the District's area was identified as Original Sheet No. E-8d and MAWC's area was identified as Original Sheet No. E-8e). However, it did not require the transfer of any existing customers between the District and MAWC.

7. O'Fallon was not a party to the Territorial Agreement. O'Fallon has provided retail water service within its city limits since approximately 1940 in areas located both within and without the areas that are subject to the Territorial Agreement. O'Fallon has approximately 12,500 customers located within the areas subject to the Territorial Agreement and approximately 12,500 customers in areas not addressed by the Territorial Agreement.

8. O'Fallon is seeking a new source of supply of water and desires to take wholesale service from MAWC. O'Fallon has informed MAWC that it desires to take service from MAWC pursuant to MAWC's rates for "Sale to Resale" water service now in effect for the St. Louis Metro District, or at such other rates as may hereafter be in force and effect, subject to the rules and regulations on file with, and approved by, the Commission.

9. MAWC has, thus far, not agreed to provide service because of uncertainty surrounding the Territorial Agreement. The District has taken the position that O'Fallon must take wholesale service from it, at a rate that is much higher than that which is available through MAWC. Both MAWC and the District would have to construct facilities in order to provide the desired service.

10. O'Fallon and the District entered into a Water Supply Agreement dated January 17, 1985 (**Exhibit C**) which was renewed and extended for an additional twenty

years by a First Amendment To Water Supply Agreement dated June 10, 2004 (**Exhibit D**). Under this Agreement the City agreed to extend to the District exclusive rights to provide retail water service within territory outlined in the Agreement, portions of which are located both within and without the areas that are subject to the Territorial Agreement. In seeking to purchase wholesale water from MAWC, O'Fallon has no intention to and will not provide water service to any customer within the area that is subject to its Supply Agreement with the District.

JURISDICTION

11. Section 247.172.7, RSMo, states in part as follows:

The commission shall have jurisdiction to entertain and hear complaints involving any commission-approved territorial agreement. Such complaints shall be brought and prosecuted in the same manner as other complaints before the commission. The commission shall hold an evidentiary hearing regarding such complaints, except that in those instances where the matter is resolved by a stipulation and agreement submitted to the commission by all the parties, such hearings may be waived by agreement of the parties. If the commission determines that a territorial agreement that is the subject of a complaint is no longer in the public interest, it shall have the authority to suspend or revoke the territorial agreement.

REQUEST

12. MAWC's reluctance to provide sale for resale service to O'Fallon at MAWC's tariff rate is a violation of Section 393.130.3, RSMo, in that it subjects O'Fallon to an undue or unreasonable prejudice or disadvantage. O'Fallon requests that the Commission consider this Complaint and, thereafter, find either that the Territorial Agreement is no longer in the public interest and should be revoked or that the Territorial Agreement is unlawful and with no force or effect as to O'Fallon.

NO LONGER IN THE PUBLIC INTEREST

13. At the time the Territorial Agreement was negotiated, executed and approved, St. Charles County was undergoing great growth in its undeveloped areas. In that circumstance, the parties saw a need to displace competition, in accordance with Section 247.172, RSMo, “in order to avoid wasteful duplication of facilities, stranded investment and underutilized system capacity and to allow orderly development, efficient planning for water system expansion and improvement, effective utilization of existing and future system capacity, efficient service and to minimize disputes which may result in higher costs in serving each party’s respective inhabitants.” Territorial Agreement, p. 1-2.


14. The first factor the Commission considered in deciding the appropriateness of the Territorial Agreement was the extent to which the agreement eliminated or avoided unnecessary duplication of facilities. The Manager of the Commission’s Water and Sewer Department testified at the hearing that the Agreement would preclude any wasteful and costly duplication of facilities and services in the areas that were the subject of the Agreement.

15. The Territorial Agreement was executed on October 4, 2000. In the over eight years that have passed since that time, there has been a substantial change in the character of the areas that were the subject of the Territorial Agreement. Where undeveloped areas once existed, now stand completed subdivisions, roads and businesses. The utility infrastructure has been largely built out in those areas and the potential for destructive competition between MAWC and the District no longer exists.

16. In this substantially changed circumstance, the Territorial Agreement no longer serves the public interest to the extent it could be used to block the purchase of

WHEREFORE, Complainant respectfully requests that the Commission issue its order finding that the Territorial Agreement between MAWC and the District is no longer in the public interest or, alternatively, that the Territorial Agreement is unlawful and has no force and effect as to O'Fallon.

Respectfully submitted,
CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.



Leland B. Curtis, #20550
Kevin M. O'Keefe, # 23381
130 South Bemiston, Ste. 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789

Attorneys for Defendant
City of O'Fallon, Missouri

Certificate of Service

The undersigned certifies that a true and correct copy of the foregoing Complaint was served by electronic mail or U.S. Mail, postage prepaid, this 8th day of July, 2009, upon the following:

Office of the Public Counsel
Governor State Office Building, 6th Floor
Jefferson City, Missouri 65101
gencounsel@psc.mo.gov

Mark C. Piontek
Lewis, Rice & Fingersh, L.C.
1200 Jefferson
P.O. Box 1040
Washington, MO 63090
Attorney for PWSD #2
mpiotek@lewisrice.com

Office of the General Counsel.
Missouri Public Service Commission
Governor State Office Building, 8th Floor
Jefferson City, Missouri 65101
opcservice@ded.mo.gov

Dean Cooper
Brydon, Swearngen, England
312 E. Capitol Ave.
P.O. Box 456
Jefferson City, MO 65102
Attorney for Missouri American Water
dcooper@brydonlaw.com



VERIFICATION

STATE OF MISSOURI)
)ss
COUNTY OF ST. CHARLES)

I, Gregory A. Smothers, state that I am employed by the City of O'Fallon (OFallon), as Assistant City Administrator; that I have read the above and foregoing document; that the statements contained therein are true and correct to the best of my information, knowledge and belief; and, that I am authorized to make this statement on behalf of O'Fallon.

Gregory A. Smothers
Assistant City Administrator

Subscribed and sworn to before me this 6 th day of July, 2009.

Pamela L. Clement
_____, Notary Public

