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

In the Matter of Missouri-American Water )  
Company's Application 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**

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**REPLY BRIEF OF STAFF**

Respectfully Submitted,

**Travis J. Pringle**  
Associate Counsel  
Missouri Bar No. 71128

Attorney for Staff of the  
Missouri Public Service Commission

June 16, 2021

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CASE NO. SA-2021-0017**

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**COMES NOW** the Staff of the Missouri Public Service Commission (“Staff”) and submits the following Reply Brief in response to the initial briefs of Missouri-American Water Company (“MAWC”) and the Boone County Regional Sewer District (“District”):

**INTRODUCTION**

MAWC’s provision of wastewater service associated with its proposed purchase of the City of Hallsville (“Hallsville”) wastewater system is “necessary or convenient for the public service” within the meaning of the phrase in Section 393.170, RSMo. The Commission should grant MAWC’s request to provide wastewater service to Hallsville, pursuant to the 18 conditions outlined by Staff and agreed to by both MAWC and the District.

The purpose of a Reply Brief is for a party to respond to the opposing arguments made by the other parties to a proceeding. Rather than replying to every individual statement made by the other parties in their initial briefs, having presented and argued its positions in its initial brief, Staff is limiting its replies to those matters which Staff believes will most aid the Commission in its determinations. Therefore, the failure of this Reply Brief to address any matter raised in the initial briefs of the other parties should not be construed as agreement in any way therewith unless otherwise stated herein.

## RESPONSE

### **Response (1): Regulations promulgated by the District are not a bar to the Commission's statutory authority to issue CCNs that are "necessary or convenient for the public interest" per Section 393.170, RSMo.**

The District argues that, because MAWC's acquisition and operation of Hallsville's system would violate the District's regulations, a Commission decision issuing a CCN in this matter would be "contrary to the law and therefore against the public interest."<sup>1</sup>

In its initial brief, Staff outlined the Technical, Managerial, and Financial ("TMF") capacities of MAWC, as well as how MAWC has met all five Tartan Criteria outlined under *In Re Intercon Gas, Inc.*, 30 Mo P.S.C. (N.S.) 554, 561 (1991).<sup>2</sup> The Commission has further held in the past that positive findings with respect to the other four Tartan Criteria will support a finding that an application for a CCN will meet the fifth criteria and promote the public interest.<sup>3</sup> Nothing about this matter differentiates it from previous CCNs issued by this Commission to MAWC for acquisition of existing systems. Further, the vote by the citizens of Hallsville and the role played by its elected representative in negotiating a purchase agreement with MAWC serves to further show that the granting of a CCN in this matter would work to serve the public interest.<sup>4</sup>

As to whether or not a Commission decision issuing a CCN to MAWC would be "contrary to the law," the District argues that its own regulations are a bar to the Commission exercising its exclusive statutory authority to determine what is "necessary or convenient for the public service," per Section 393.170, RSMo. While regulations promulgated by the District can aid the

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<sup>1</sup> District's Post-Hearing Brief, pg. 12 (June 9, 2021).

<sup>2</sup> Initial Brief of Staff, pg. 9 (June 9, 2021).

<sup>3</sup> *Id.*, pg. 15 citing GA-94-127, Report and Order, *In Re Tartan Energy Company, L.C. dba Southern Missouri Gas Company.*

<sup>4</sup> *Id.*

Commission in reaching a decision, those regulations do not usurp Commission authority regarding the issuance of CCNs.

The District's ability to issue its own regulations arise from Sections 204 and 250 of the Revised Statutes of Missouri, in which the Missouri legislature delegated powers to common sewer districts.<sup>5</sup> Section 204 was enacted in 1951, and Section 250 was enacted in 1969. The District argues that, as long as Hallsville owns and operates its system pursuant to Section 250.010.1, RSMo, and under a DNR permit issued to the municipality, the system is exempt from District regulations.<sup>6</sup> However, once Hallsville decided that it no longer wished to operate the system itself, the District asserts that Hallsville cannot sell the system to a private entity such as MAWC, because that would violate the District's regulations.<sup>7</sup>

Missouri case law begs to differ. In *Moats v. Pulaski County Sewer Dist. No. 1*,<sup>8</sup> the Missouri Court of Appeals for the Southern District faced the following question: can a common sewer district, organized and operating pursuant to Section 204, RSMo, promulgate regulations compelling residential customers to connect to the common sewer district?

Similar to this matter, the Pulaski County Sewer District No. 1 ("Pulaski") adopted rules and regulations to "regulate the use of public and private sewers and drains, private sewage disposal, the installation and connection of building sewers, and the discharge of waters and wastes into the public sewer systems..."<sup>9</sup>

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<sup>5</sup> District's Post-Hearing Brief, pg. 8.

<sup>6</sup> *Id.*, pg. 11.

<sup>7</sup> *Id.*, pg. 11-12.

<sup>8</sup> 23 S.W.3d 868 (2000).

<sup>9</sup> *Id.*, 869. See also District's Post-Hearing Brief, pg. 9, citing Section 2.2 of the District's regulations ("These regulations govern the use of public sanitary sewers, the installation and connection of building sanitary sewers, and the discharge of waters and wastes into the public sanitary sewer systems...").

Pulaski further argued, as the District does here, that the rules and regulations “were authorized by Chapters 204 and 250 of the Revised Statutes of Missouri.”<sup>10</sup> Pulaski argued, and the District argues now, “these statutes delegated the ‘sovereign powers of the state’ to sewer districts and empowered it to compel Respondents to connect to its sewer lines.”<sup>11</sup>

However, since the passage of Sections 204 and 250, RSMo, the Missouri legislature has enacted Section 644 in 1972, which created the Missouri Clean Water Law and the Missouri Clean Water Commission (“CWC”), which is a part of the Missouri Department of Natural Resources (“DNR”).<sup>12</sup> The CWC was entrusted to “exercise general supervision of the administration and enforcement” of the Missouri Clean Water law.<sup>13</sup> The CWC is also charged with developing ‘comprehensive plans and programs for the prevention, control and abatement of new or existing pollution of the waters of the state.’<sup>14</sup> The CWC has since promulgated regulations to further its statutory responsibilities under DNR Rule 10 CSR Chapter 6.

The Southern District focused on a key distinction between regulations put forward by the CWC, and those of Pulaski: exemptions. The only remedy put forward by Pulaski was that the residential customer had to connect to its system; DNR could potentially order the same thing, or issue a maintenance permit for a continued operation of the existing system, per DNR Rule 10 CSR 20-6.010(1)(C).<sup>15</sup> The Southern District found this to be a clear conflict between state law and the Pulaski regulations, and affirmed the trial court ruling that the Pulaski regulations were preempted by the Missouri Clean Water Law.<sup>16</sup>

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<sup>10</sup> *Id.*, 871. See also District’s Post-Hearing Brief, pg. 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, 871-872.

<sup>13</sup> Section 644.026.1(1), RSMo.

<sup>14</sup> Section 644.026.1(2), RSMo.

<sup>15</sup> 23 S.W.3d 868, 873.

<sup>16</sup> *Id.*, citing *Borron v. Farrenkopf*, 5 S.W.3d 618, 622 (1999).

And that is where the District's argument falls flat: though the District's own regulations may not provide an exemption for municipalities that do not want to connect their systems to the District, the CWC does provide the opportunity for such a process. This all ties into the application for an operating permit, and the exemptions outlined under DNR Rule 10 CSR 6.010(2)(C).

Here, besides the CWC having clear jurisdiction over the waters of the state of Missouri, the Missouri Public Service Commission has clear jurisdiction over deciding what is "necessary or convenient for the public service." The District's regulations make no mention of a CCN, and even if the District did, Section 393.170 is clear: no water or sewer corporation may exercise any right or privilege without first receiving the permission and approval of the Commission. And the only statutory guidance as to how that can be decided is whether the CCN is "necessary or convenient for the public service." The District's regulations are not a bar to the Commission's statutory authority to issue CCNs that are "necessary or convenient for the public interest" per Section 393.170, RSMo.

**Response (2): The ability of DNR to transfer Hallsville's operating permit to MAWC is a decision to be made by DNR, not the District.**

The District argues in its initial brief that DNR cannot do many things. Allegedly, DNR regulations preclude it from issuing a state operating permit to MAWC for the Hallsville's system because (1) the District is the CWC-approved regional wastewater provider for Boone County; (2) the Hallsville system is inside the District's boundaries; and (3) MAWC's operation of the Hallsville system would conflict with the District's CWC-approved plan for Boone County.<sup>17</sup>

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<sup>17</sup> District's Post-Hearing Brief, pg. 2. Regarding CWC's approved plan for Boone County, it is clear from Ex. 6, *Boone County Commission Minutes* (30 July 2009), pg. 2, that the District's Continuing Authority applies only to specific unincorporated territories in Boone County, and that the District has no authority over small municipalities.

The District adopted a new facility plan on December 10, 2020 that includes Hallsville (Ex. 200, *Rebuttal Testimony of Tom Rattermann*, pg. 11, ln. 8-10). This plan was adopted and submitted to DNR after MAWC and Hallsville had entered into a purchase agreement on July 14, 2020. This plan has not yet been approved, but the District did receive

Just as it is impossible for Staff or MAWC to predict how DNR may rule regarding MAWC’s application for an operating permit to serve Hallsville, the same applies to the District. All three of the District’s arguments pertain to issues under the jurisdiction of DNR. DNR can only hear these issues once this Commission issues a CCN.<sup>18</sup> And since Staff has concluded that MAWC’s application to install, own, acquire, construct, operate, control, manage and maintain a sewer system in and around the City of Hallsville, Missouri is “necessary or convenient for the public service” as contemplated by Section 393.170, RSMo, the Commission should issue a CCN to MAWC and permit this process to continue.

**WHEREFORE**, for the reasons set forth herein and in Staff’s initial brief, Staff prays that the Commission will issue an order finding in Staff’s favor on each issue in this case and granting such other and further relief as the Commission deems just in the circumstances.

Respectfully Submitted,

**/s/ Travis J. Pringle**

Travis J. Pringle  
Missouri Bar No. 71128  
Associate Counsel for the Staff of the  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, Mo 65102-0360  
(573) 751-4140 (Telephone)  
(573) 751-9285 (Facsimile)  
(Email) travis.pringle@psc.mo.gov

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an email from a DNR review engineer that DNR is “amenable to approving it.” (District’s Initial Brief, pg. 7). The email itself was not an exhibit, and there is no other evidence of such communication in the record. To Staff’s knowledge, DNR has not yet approved the plan.

<sup>18</sup> 10 CSR 20-6.010(2)(B)3.



**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing have been mailed, hand delivered, transmitted by facsimile or electronically mailed to all parties and/or counsel of record this 16th day of June, 2021.

**/s/ Travis J. Pringle**