

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

In the Matter 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 Sewer)
System and Sewer Line in Benton County, Missouri)
Case No. SA-2015-0065

PUBLIC COUNSEL’S RESPONSE TO ORDER AND WITHDRAWAL OF REQUEST

COMES NOW the Office of the Public Counsel (“Public Counsel”) and for its Response to this Commission’s Order of December 30, 2014, and its Withdrawal of Request for Staff Investigation states follows:

1. On September 8, 2014, Missouri American Water Company (MAWC or “Missouri American”) filed with the Commission an application for a certificate of convenience and necessity (CCN) permitting it to complete the acquisition of the assets of the Benton County Sewer District No. 1, which is in federal receivership.¹
2. On September 24, 2014, the Missouri Department of Natural Resources (DNR) applied to intervene,² which the Commission granted on October 7, 2014.³
3. Thereafter, the Commission held a local public hearing at which approximately half of those customers who spoke on the record indicated a desire to install on-site sewage facilities in lieu of connection to a central sewer system.⁴
4. Prior to the local public hearing, the Commission’s Staff made a recommendation to the Commission that the Commission approve Missouri American’s CCN application.⁵

¹ PSC Case No. SA-2015-0065, Doc. No. 1.

² Doc. No. 3.

³ Doc. No. 5.

⁴ Doc. No. 28.

⁵ Doc. No. 16.

5. On December 30, 2014, the Commission ordered the parties to explain whether any provision of law would require sewer district customers to become a customer of Missouri American if the CCN were granted.⁶
6. Public Counsel can find no Missouri American tariff provision which would prohibit a customer in the Benton County service area from using on-site wastewater facilities in lieu of centralized service if the customer is eligible to install and/or maintain such facilities under all applicable laws.⁷
7. Public Counsel further offers that a Benton County local ordinance establishes permitting requirements for the use of on-site wastewater treatment facilities; the ordinance does not appear to impose a requirement that property-owners take service from a central sewer system.⁸
8. Missouri's Clean Water law authorizes the Clean Water Commission to prevent, control or abate pollution of the waters of the state.⁹ Consistent with that authority, the Clean Water Commission has adopted rules which establish the requirements for permitting of wastewater facilities.¹⁰ While the rules ostensibly exempt single-family residences from DNR permitting requirements, the Commission expressly retains the authority to "take

⁶ Doc. No. 32.

⁷ As explained herein, it appears a residential customer may be required to connect to or maintain a connection to centralized service from Missouri American if their property is:

1) neither exempt from regulation nor eligible for on-site wastewater facilities under DHS rule and local ordinance;

2) covered and eligible, but a permit for on-site wastewater facilities has not been issued;

3) covered, eligible and permitted, but the facilities are not operational; OR

4) covered, eligible, permitted and has operational facilities, but the facilities nonetheless have been determined to discharge contaminating effluent which is polluting a water of the state or is injurious to public health.

⁸ <http://benton.lphamo.org/ordinance.htm>

⁹ Mo. Rev. Stat. § 644.026.1 (2000 & Supp. 2013).

¹⁰ 10 CSR 20-6.010

action where a single family residence’s wastewater system violates the Missouri Clean Water Law.”¹¹ As a result, if necessary the DNR/Clean Water Commission appears to have broad authority to require a polluting single-family property owner to abate their pollution, and an appropriate abatement action could include requiring a connection to a non-polluting wastewater system operated by a third-party, such as Missouri American.

9. Even where DNR declines to exercise its authority over single-family residential wastewater treatment under the Missouri Clean Water Law, the Department of Health and Senior Services retains authority under the State’s public health statutes to regulate the disposal of domestic sewage.¹² Section 701.031 states “property owners of all buildings where people live, work or assemble shall provide for the sanitary disposal of all domestic sewage.”¹³ Thereafter, the statute states that domestic sewage may be disposed of either in a centralized sewer system regulated pursuant to the Clean Water Law, or in an on-site sewage disposal system.¹⁴ Local jurisdictions may adopt more stringent requirements.¹⁵
10. Finally, state law expressly permits the use of local ordinances to require property owners to connect to a municipal, publicly-owned or non-profit wastewater system.¹⁶ The General Assembly passed this statute in response to the *Moats* decision, wherein the Missouri Court of Appeals held the Missouri Clean Water Law divested local sewer districts of the power to order a customer to connect to its service.¹⁷ Instead, *Moats* found

¹¹ *Moats v. Pulaski Co. Sewer Dist. No. 1*, 23 S.W.3d 868, 873 (Mo. App. S.D. 2000).

¹² Mo. Rev. Stat. § 701.025, *et seq.*; 19 CSR 20-3.015, 3.060-3.080.

¹³ Mo. Rev. Stat. § 701.031.

¹⁴ *Id.*; the statute exempts certain large-lot residences from regulation.

¹⁵ Mo. Rev. Stat. § 701.047.

¹⁶ Mo. Rev. Stat. § 644.027.

¹⁷ *Moats*, 23 S.W.3d at 873-74.

that authority had been transferred to the Clean Water Commission.¹⁸ Notably, the statute abrogating *Moats* does not state that local ordinances may mandate a customer to connect to an investor-owned utility, presumably leaving that authority at the state level.¹⁹

11. On December 31, 2014, the Office of the Public Counsel requested the Commission to direct its Staff to review and report on the purported viability of on-site sewage facilities in lieu of connection to a centralized sewer system for customers in the Benton County service area.²⁰
12. In response to OPC's Request for Investigation, the Department of Natural Resources states "On-site systems are not a viable option for the majority of residents within the district."²¹ The Department offers that the US District Court – Western District of Missouri heard testimony that "a very low number of properties in Benton County would be able to support an on-site sewer system that complied with state and local ordinances," and relied on this testimony when it held that "[w]ithout continuation of a common sewer system, many residents will not be able to dispose of sewage in conformity with Missouri law."²²
13. In light of the Department's response, and in recognition that there is no independent legal requirement or order that would mandate the small number of eligible customers

¹⁸ *Id.*

¹⁹ Mo. Rev. Stat. § 644.027.

²⁰ Doc. No. 33.

²¹ Doc. No. 37 at 8.

²² *Id.*

take service from Missouri American,²³ OPC withdraws its request for Staff investigation in the above-captioned matter.

WHEREFORE, the Office of the Public Counsel offers the above Response to the Commission's Order of December 30, 2014, issued in the above-captioned case, and further withdraws its request dated December 31, 2014, for a Staff investigation.

Respectfully Submitted,

OFFICE OF THE PUBLIC COUNSEL

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²³ As noted in footnote 7, it may be that the hypothetical impact of several legal requirements operating in tandem may result in a property owner to have no other practical option but to connect to Missouri American in order to dispose of their wastewater safely.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 5th day of January 2015:

/s/ Dustin J. Allison