

**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,) **File No. SA-2021-0017**
Operate, Control, Manage and Maintain a)
Sewer System in and around the City of)
Hallsville, Missouri)

**STAFF OBJECTION AND RESPONSE TO DISTRICT’S RESPONSE TO
REPLY BRIEFS OF STAFF AND MAWC**

COMES NOW the Staff of the Missouri Public Service Commission (“Staff”), through the undersigned counsel, and for its *Staff Objection and Response to District’s Response to Reply Briefs of Staff and MAWC*, respectfully states as follows:

OBJECTION TO DISTRICT’S MOTION

1. On June 24, 2021, the Boone County Regional Sewer District (“District”) filed its *Motion for Leave to File Response to Reply Briefs of the Staff and Missouri-American Water Company*. That same day, the District also filed its third brief in this matter, titled *District Response to Reply Briefs of Staff and MAWC* (“Third Brief”).

2. The District alleges its Third Brief is necessary “to aid the Commission in evaluating the legal issues in this docket.” However, besides commenting on an appellate case, *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (2000), raised by both Staff and Missouri American Water Company (“MAWC”), the District’s Third Brief is primarily an exercise in repetition, bringing up the same arguments included in its Initial and Reply Briefs.

3. This filing was not in accordance with the Commission’s *Order Reinstating Briefing Schedule*, filed on May 28, 2021. That schedule contemplated two rounds of briefing from the parties, with initial briefs due June 9, 2021 and reply briefs due June 16, 2021. There

was no contemplation of the need for a third round of briefing. No parties objected or requested a change to the Commission's order at that time.

4. However, the Commission granted the District's request and issued its *Order Granting Motion to File Response Brief and Directing Additional Briefing* the next day, June 25, 2021. The Commission further directed Staff and MAWC to file a response to address the arguments put forth by the District in its Third Brief no later than July 2, 2020, seven days after the District's filing.

5. Had Staff been provided the opportunity to respond to the District's request, it would have recommended the Commission deny the District's request to file its Third Brief as being duplicative, out of time, and unnecessary. If the Commission decides that it needs to hear further arguments from the parties, Staff requests the Commission set a date for oral argument rather than a fourth round of briefs.

6. Having stated its objections, Staff responds to the District's Third Brief as follows:

RESPONSE

I. The Commission has primary and exclusive authority to decide matters under Section 393.170, RSMo.

The Missouri Supreme Court has "repeatedly held it is the exclusive jurisdiction of the Public Service Commission, in the first instance, to decide all matters placed within the Commission's jurisdiction by the Public Service Act." *State ex rel. and to use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. banc 1943); see also, *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 317 (Mo. App. W.D. 2011). The question of public convenience and necessity under Section 393.170, RSMo, is squarely within the jurisdiction of the Commission. Therefore, the Commission's authority to decide whether the exercise by MAWC of the franchise

granted to it by the City of Hallsville is necessary or convenient for the public service is exclusively within the jurisdiction of this Commission in the first instance. The District, whether by regulation or otherwise, has no authority to preempt the Commission's decision in this case.

II. The District's authority to implement regulations prohibiting private ownership of sewer systems in specific areas of Boone County are beyond the scope of this case and beyond the authority of the Commission to decide.

The District's authority to implement regulations prohibiting the private ownership of sewer systems within certain areas of Boone County is beyond the scope of this proceeding. The District's authority is also beyond the authority of the Commission to decide. Accordingly, *Moats* and any statutory amendments to Chapter 644 are beyond the scope of this proceeding and beyond the authority of this Commission to decide.

In *State ex rel. Electric Company of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897, 898 (Mo. banc 1918), the Supreme Court of Missouri held that the Commission has no authority to inquire into the validity of a franchise:

The statute empowers the Public Service Commission to issue a certificate of convenience and necessity, or to refuse it, but does not empower it to adjudicate the question of the validity of the franchise.

Id. at 848.

Here, MAWC has presented the Commission with a franchise from the City of Hallsville.¹ MAWC is asking the Commission to authorize it to exercise that franchise.² Under *Atkinson*, the Commission has authority to grant MAWC's request. In contrast, the District asks the Commission to decide that MAWC's exercise of the Hallsville franchise would be unlawful, as a violation of the District's regulations.³ Under *Atkinson*, the Commission has no authority to decide

¹ Exhibit 1, *Direct Testimony of Matt Horan* (Confidential), pg. 4-5, ln. 1-23 and 1-14, and Schedule MH-2.

² *Ibid.*

³ *Post-Hearing Brief of the District*, pg. 8-12 and *District's Response to Reply Briefs of Staff and MAWC*, pg. 3-4,

that MAWC's Hallsville franchise is invalid under the District's regulations. The District asks this Commission to exceed its authority under Section 393.170. The Commission should decline the District's arguments.

Moreover, the validity of the District's regulations have been brought to the Commission's attention in these proceedings. Again, the Commission has no authority to decide this question. The Commission is not a court. State ex rel. GS Technologies Operating Co., Inc. v. Public Service Commission, 116 S.W.3d 680, 696 (Mo. App. W.D. 2003). Nor can the Commission do equity or grant equitable relief. *Id.* Nothing in the Commission's authorizing legislation authorizes it to decide the validity of an ordinance passed by a local political subdivision.⁴ If the District wishes to enforce its ordinance, or if any other party wishes to challenge the District's ordinance, it must do so in the proper forum. And this Commission is not the proper forum.

Finally, the District is misconstruing Staff's argument: Staff is not arguing that the District's regulations are invalidated; instead, regulations and procedures of the Department of Natural Resources ("DNR") for granting operating permits govern in this case. The statute cited by the District in its Third Brief, Section 644.027, RSMo, did close off the cause of action in *Moats* by requiring owners of all houses, buildings, or other facilities within a municipality to connect to the sewer system of that municipality, **when available**. Section 644.027, RSMo does not state that all regulations promulgated by a sewer district pre-empt those of the Clean Water Commission ("CWC") and DNR.

⁴ To the extent it would be relevant, the District's reliance on its general rulemaking authority does not necessarily grant it authority to prohibit private ownership of sewer systems. State agencies and political subdivisions have no authority to modify or extend the statutes. *Associated Industries of Mo. v. Angoff*, 937 S.W.3d 277, 282 (Mo. App. W.D. 1996). Such powers are "limited to those conferred by [statute], either expressly, or by clear implication as necessary to carry out the powers specifically granted." *State ex rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979) (abrogated on other grounds). The District has pointed to its general authority to promulgate rules, but not to a statute authorizing the District to prohibit private ownership of sewer systems. (CITE).

For the Commission’s knowledge, “available” is defined as “present or ready for immediate use.”⁵ In this situation, the District is simply not available to provide service to Hallsville. Moats dealt with a house that was within 300 feet of a sewer district’s existing property lines.⁶ In this matter, the District is proposing to build over eight miles of connecting sewer to serve Hallsville at its Rocky Fork Wastewater Treatment Facility.⁷ The District has nothing “present or ready for immediate use” in order to serve Hallsville. To the extent those regulations and procedures, which were *not* part of the legislative changes to Chapter 644 subsequent to the *Moats* decision, conflict with the District’s rules and regulations, DNR’s regulations and procedures must take precedent.

Nothing in Chapter 204, 250, or 644 gives the District the power to unilaterally decide if an entity may receive an operating permit from DNR or, as in this matter, decide was is “necessary or convenient for the public interest” as contemplated under Section 393.170, RSMo. The Commission has the exclusive authority to decide what is “necessary or convenient for the public interest,” and the District does not have the power to implement any regulation that would preempt the Commission authority. Further, it is clear that any regulations put forward by the District do not apply to Hallsville because (1) Hallsville is not within the service territory of the District,⁸ and (2) Hallsville is not a part of any District facility plan approved by DNR.⁹

⁵ [Available | Definition of Available by Merriam-Webster](#)

⁶ *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (2000) at 869.

⁷ Exhibit 200, *Rebuttal Testimony of Tom Ratermann*, pg. 12, ln. 8-13. See also Exhibit 3, *Corrected Surrebuttal of Matt Horan* (Confidential), pg. 12, ln. 4-10.

⁸ *Initial Brief of Staff*, pg. 14

⁹ *Reply Brief of Staff*, p.6, footnote 17.

III. DNR has the SOLE authority to grant MAWC a permit for the City of Hallsville's system.

The District has argued that DNR lacks the authority to grant MAWC an operating permit for the Hallsville system ad nauseam at this point. However, as Staff has repeatedly stated, no party can predict what DNR will decide.¹⁰ This is an issue that DNR has sole jurisdiction over, and will be decided in front of the CWC.

WHEREFORE, or the reasons set forth herein and in Staff's initial and reply briefs, 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
Associate Counsel
Missouri Bar No. 71128
P.O. Box 360
Jefferson City, MO 65102
573-751-4140 (Voice)
573-751-9285 (Fax)
travis.pringle@psc.mo.gov

Attorney for the Staff of the
Missouri Public Service Commission

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 on this 2nd day of July 2021.

/s/ Travis J. Pringle

¹⁰ *Initial Brief of Staff*, pg. 13. See also *Reply Brief of Staff*, pg. 6.