BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Application 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 Water System and Sewer System in and Around the City of Eureka, Missouri	))))))))	Case No. WA-2021-0376

REPLY POST-HEARING BRIEF

COMES NOW the Office of the Public Counsel (the "OPC") and offers this reply post-hearing brief to further address the effect of RSMo. § 393.320, the appraisal statute, on RSMo. § 393.170, the statute which defines the Commission's power to grant a certificate of convenience and necessity (a "CCN").[1] This case is the Public Service Commission of the State of Missouri's (the "Commission") first opportunity to substantively address the application of the appraisal statute, RSMo. § 393.320. As explained below, the plain language of RSMo. § 393.170 and RSMo. § 393.320 does not conflict. Nothing in the appraisal statute overrides the Commission's duty to determine whether the grant of a CCN is "necessary or convenient for the public service." *See* RSMo. §§ 393.170(3); 393.320. As explained in the OPC's Initial Post-Hearing Brief, given the facts and circumstances of this particular case, Missouri-American Water Company's ("MAWC") intended acquisition of the City of Eureka, Missouri's ("Eureka") water and sewer system for $28 million is not "necessary or convenient for the public service," due to the large acquisition premium that exists in the proposed transaction. *Id.* § 393.170(3). Therefore, the Commission should deny MAWC's request to install, own, acquire, construct, operate, control,

[1] The OPC files this Reply Post-Hearing Brief to address this issue only. Although the OPC maintains the positions taken in its Initial Post-Hearing Brief, for brevity, the OPC does not restate them here. The OPC's silence as to any issue or argument raised throughout this proceeding should not be construed as agreement.

manage, and maintain a water system and sewer system in and around Eureka, as currently proposed.

Issue 1: Is MAWC's provision of water and wastewater service associated with its proposed purchase of the City of Eureka water and wastewater systems "necessary or convenient for the public service" within the meaning of the phrase in Section 393.170, RSMo?

In arguing that its intended acquisition of the Eureka systems promotes the public interest, MAWC asserts, in part, that "[i]n this situation, the public interest has been expressed through statute—that being Section 393.320, the appraisal statute. Utilizing Section 393.320 cannot be contrary to the public interest." (MAWC Initial Br. 11, Doc. 76).[2] This statement appears to contend that because MAWC has chosen to utilize the procedures in RSMo. § 393.320, the Commission need not make a separate determination that the transaction, which requires the Commission to grant a CCN, is in the public interest. Such an interpretation would essentially do away with the Commission's duty to determine whether the CCN "is necessary or convenient for the public service" before the Commission exercises its power to grant the CCN. *See* RSMo. § 393.170(3). Under MAWC's proposed interpretation, MAWC, as the large water public utility who may choose to utilize the procedures in the appraisal statute, would automatically determine that the acquisition is "necessary or convenient for the public service" simply by electing those procedures. RSMo. §§ 393.320(2); 393.170(3). The plain language of the statutes do not support such an interpretation. Rather, it is the Commission, not MAWC, who must determine whether the CCN "is necessary or convenient for the public service." RSMo. § 393.170(3). As explained in the OPC and the Staff of the Commission's (the "Staff") Initial Post-Hearing Briefs, MAWC's acquisition of the Eureka water and sewer systems, as proposed in its Application and Motion for

[2] References to document numbers represent the document numbers assigned in the Electronic Filing Information System ("EFIS").

Waiver (the "Application") (Doc. 1) does not meet that criteria. Therefore, even though MAWC has chosen the procedures described in RSMo. § 393.320, based on the facts presented in the instant case, the proposed acquisition is not "necessary or convenient for the public service" and the Commission should deny MAWC's Application.

A. <u>The Relevant Statutes: RSMo. § 393.170 and RSMo. § 393.320</u>

Two statutes stand at the heart of the issues raised in this matter: (1) RSMo. § 393.170(3) and (2) RSMo. § 393.320. Section 393.170(3) sets forth the standard by which the Commission may grant a certificate of convenience and necessity. Section 393.320, on the other hand, describes the procedures that a "[l]arge water public utility" may choose to utilize when it seeks to acquire a "[s]mall water utility," as those terms are described in the statute. If a large water public utility chooses to proceed under those procedures, the statute describes, in pertinent part, the requirements the Commission must follow in setting the ratemaking rate base of the small water utility.

Specifically, RSMo. § 393.170(3) states, in pertinent part: "The commission shall have the power to grant the permission and approval herein specified whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service."

Section 393.320 states, in relevant part: "The procedures contained in this section may be chosen by a large water public utility, and if so chosen shall be used by the public service commission to establish the ratemaking rate base of a small water utility during an acquisition." RSMo. § 393.320(2). The statute further states that "[t]he lesser of the purchase price or the appraised value, together with the reasonable and prudent transaction, closing, and transition costs incurred by the large water public utility, shall constitute the ratemaking rate base for the small water utility as acquired by the acquiring large water public utility . . . ." *Id.* § 393.320(5)(1).

Further, the statute provides that the Commission "shall issue its decision establishing the ratemaking rate base of the small water utility in its order approving the acquisition." *Id.* § 393.320(5)(2). The statute makes clear that "[t]his section is intended for the specific and unique purpose of determining the ratemaking rate base of small water utilities and shall be exclusively applied to large water public utilities in the acquisition of a small water utility. This section is not intended to apply beyond its specific purpose . . . ." *Id.* § 393.320(8).

B. Applicable Legal Standard

The "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *In re Appl. of Union Elec. Co. v. Mo. Pub. Serv. Comm'n*, 591 S.W.3d 478, 485 (Mo. Ct. App. 2019) (quoting *State v. Johnson*, 524 S.W.3d 505, 510 (Mo. banc 2017)) (hereinafter "*Appl. of Union Elec.*"). "When the words [of a statute] are clear, there is nothing to construe beyond applying the plain meaning of the law." *Id.* (quoting *Johnson*, 524 S.W.3d at 511). Courts "construe statutes only where they are ambiguous." *Id.* (quoting *State ex rel. Mo. Highway & Transp. Comm'n v. Alexian Bros. of St. Louis*, 848 S.W.2d 472, 474 (Mo. banc 1993)).

"Where two statutory provisions covering the same subject matter are unambiguous standing separately but are in conflict when examined together, a reviewing court must attempt to harmonize them and give them both effect." *Id.* (quoting *S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009)).

C. When Applying the Plain Language of RSMo. §§ 393.170(3) and 393.320 No Conflict Exists and the Commission Must Determine Whether the CCN is "Necessary or Convenient for the Public Service" Regardless of Whether MAWC Choose to Utilize the Procedures Found in RSMo. § 393.320

Applying the plain language of RSMo. §§ 393.170(3) and 393.320 shows that the statutes do not conflict. Therefore, even though MAWC has elected the procedures described in the

appraisal statute, the Commission must separately decide whether MAWC's intended acquisition of the Eureka water and sewer systems, as proposed in the Application, is "necessary or convenient for the public service." RSMo. § 393.170(3).

The plain language of RSMo. § 393.170(3) gives the Commission the power to grant a CCN "whenever it shall after due hearing determine that such construction or such exercise of the right, privilege or franchise is necessary or convenient for the public service." Nothing in the language of the appraisal statute overrides the Commission's duty to make that determination prior to exercising its power to grant a CCN. *See generally* RSMo. § 393.320. Rather, the appraisal statute explicitly states "[t]his section is intended for the specific and unique purpose of determining the ratemaking rate base of small water utilities and shall be exclusively applied to large water public utilities in the acquisition of a small water utility. This section is not intended to apply beyond its specific purpose . . . ." *Id.* § 393.320(8).

MAWC's argument that "[u]tilizing Section 393.320 cannot be contrary to the public interest,"[3] which seems to imply that by electing the procedures in the appraisal statute the acquisition is automatically in the public interest, is directly at odds with the plain language of RSMo. § 393.170. (MAWC Initial Br. 11). The Commission must disregard such an interpretation.

[3] In its Initial Post-Hearing Brief, MAWC also states that "[t]he Commission has indicated that positive findings with respect to the other four [Tartan factors] . . . will in most instances support a finding that an application for a CCN will promote the public interest." (MAWC Initial Br. 9). Although the Commission has stated as such, this does not end the analysis. *See In re Appl. of Tartan Energy Co., L.C., for a Certificate of Convenience & Necessity Authorizing it to Construct, Install, Own, Operate, Control, Manage & Maintain Gas Facilities & to Render Gas Serv. In & to Residents of Certain Areas*, 1994 Mo. P.S.C. LEXIS 26, at*41–*42 (1994) (hereinafter "*Tartan*").
Even in its *Tartan* decision, where the Commission made this statement, the Commission proceeded to discuss whether the proposed transaction met the public interest factor. *See id.* at *41–*46. Further the courts of Missouri have made clear that the primary consideration is the "public interest." *See, e.g.*, *State ex rel. Elec. Co. v. Atkinson*, 204 S.W. 897, 899 (Mo. banc 1918); *Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 515 S.W.3d 754, 759–60 (Mo. Ct. App. 2016); *State ex rel. Pub. Water Supply Dist. No. 8 v. Pub. Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. Ct. App. 1980). Therefore, although "[g]enerally speaking, positive findings with respect to the other four [Tartan factors] . . . will in most instances support a finding that an application for a [CCN] . . . will promote the public interest," the Commission's analysis does not stop simply because a proposed CCN meets the first four Tartan Factors. *See Tartan*, 1994 Mo. P.S.C. LEXIS 26, at *41.

See Appl. of Union Elec., 591 S.W.3d at 485 (stating that the "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." (citation omitted)).

Applying the plain language of the statutes shows that they do not conflict. In deciding whether to grant the CCN, the Commission need only apply the statutes' plain language and need not attempt to interpret them further.[4] *See id.* (stating that "[w]hen the words [of a statute] are clear, there is nothing to construe beyond applying the plain meaning of the law"). It is the Commission, not MAWC who must determine whether the acquisition is "necessary or convenient for the public service." RSMo. § 393.170(3).

D. MAWC's Acquisition of the Eureka Water and Sewer Systems as Proposed, is Not "Necessary or Convenient for the Public Service"

As explained in the OPC and the Staff's[5] Initial Post-Hearing Briefs, because MAWC seeks to acquire the Eureka systems with an approximately $10 million acquisition premium, the acquisition as proposed is not "necessary or convenient for the public service." RSMo. § 393.170(3), (*see generally* OPC Initial Br., Doc. 74; Staff Initial Br.).

The appraisal statute simply provides a procedure to set the ratemaking rate base of the small water utility after a large water public utility acquires it. Because the acquisition requires the Commission to issue a CCN, the Commission must determine whether the intended acquisition is in the public interest under RSMo. § 393.170(3) prior to setting the ratemaking rate base of the small water utility. However, because the appraisal statute requires the Commission to "issue its

[4] In the alternative, if the Commission concludes that the statutes are ambiguous or in conflict when examined together, it "must attempt to harmonize them and give them both effect." *Appl. of Union Elec.*, 591 S.W.3d at 485 (citation omitted). Construing the statutes as the OPC describes here complies with that mandate.

[5] In its Initial Post-Hearing Brief, the Staff argued that MAWC's proposed transaction to acquire the Eureka systems "is not necessary or convenient for the public service, because MAWC seeks to purchase the Eureka systems at an inflated price." (Staff Initial Br. 7–10, Doc. 75). The Staff also makes several other arguments as to why the proposed transaction is not necessary or convenient for the public service. (*Id.* 10–20).

decision establishing the ratemaking rate base of the small water utility in its order approving the acquisition," RSMo. § 393.320(5)(2), the Commission should consider the proposed price of the acquisition in making its decision under RSMo. § 393.170(3). *See Office of Pub. Counsel*, 515 S.W.3d at 759 (stating that "in matters of public convenience and necessity there must be consideration of the future." (citation omitted)).

As further explained in the OPC and the Staff's Initial Post-Hearing Briefs, as proposed in MAWC's Application,[6] MAWC's intended acquisition of the Eureka water and sewer systems is not "necessary or convenient for the public service." *See* RSMo. § 393.170(3). The Commission should deny MAWC's Application as currently proposed.

[6] In making its public interest argument, MAWC points to several factors that show that the proposed transaction is in the public interest. (*See* MAWC Initial Br. 9–11). These include the fact that Eureka's citizens voted to sell the Eureka water and sewer systems to MAWC and that MAWC "can provide economies of scale and a high level of efficiency." (*Id.* 11). The OPC does not contend that such factors fail to promote the public interest. However, on the facts as presented in this case, these factors simply do not outweigh the large acquisition premium at issue. *Cf. State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 735–36 (Mo. banc 2003) (concluding that when the Commission considers a merger under the similar "detrimental to the public" standard found in RSMo. § 393.190.1, the Commission must consider "the acquisition premium . . . as a relevant and critical issue . . . ."). It cannot be that the Commission allows such promotions of the public interest to come at any cost.

Conclusion

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission deny MAWC's request for CCNs to install, own, acquire, construct, operate, control, manage, and maintain a water system and sewer system in and around the City of Eureka, Missouri, as currently proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 28th day of February 2022.

/s/ Lindsay VanGerpen