

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 ) File No. SA-2021-0017  
it to Install, Own, Acquire, Construct, )  
Operate, Control, Manage and Maintain a )  
Sewer System in and around the City of )  
Hallsville, Missouri. )

**DISTRICT’S REPLY BRIEF**

Comes now the Boone County Regional Sewer District (“District”), by counsel, and for its Reply Brief, states as follows:

**INTRODUCTION**

The Commission should find that MAWC failed to meet its burden to demonstrate that its CCN application meets the statutory standard of “necessary and convenient for the public service.” Substantial and competent evidence in the record shows that granting the CCN does not promote the public interest as required by law because the competition offered by MAWC is undesirable and destructive and will result in duplication of service or unnecessary services that are not in the interest of the public as a whole.

Alternatively, if the Commission accepts MAWC’s improper invitation to grant a CCN, it should impose all five conditions requested by the District to protect the District from MAWC’s undesirable and destructive competition.

**ARGUMENT**

**ISSUE 1 – Necessary or Convenient**

*Is MAWC’s provision of wastewater service associated with its proposed purchase of the City of Hallsville’s wastewater system “necessary or convenient for the public service” within the meaning of § 393.170, RSMo?*

Granting MAWC's CCN application for the City of Hallsville's (City) wastewater system is not "necessary or convenient for the public service" within the meaning of § 393.170.3, RSMo because it will result in undesirable and destructive competition, and duplication of service that does not promote the public interest as required by the statute.

The Staff and MAWC, while implicitly recognizing that MAWC is a competitor of the District's,<sup>12</sup> assert that the Commission may find that granting MAWC a CCN for the Hallsville system is "necessary or convenient for the public service" because the CCN is not detrimental to the public interest.<sup>3</sup> They rely on the standard set forth in the *Intercon* case, which is predicated on the body of Missouri case law cited by the *Intercon* court. A review of the case law and the evidence in this case shows that their reliance is misplaced.<sup>4</sup>

Section 393.170, RSMo (2018) prohibits the Commission from approving a CCN application if it does not meet the standard of "necessary or convenient for the public service." This standard is applied in every CCN application that comes before the Commission. When applying for a CCN, the applicant has the burden of demonstrating that its application is "necessary or convenient for the public service." In applying the standard, the *Intercon* stated<sup>5</sup>:

Additionally, what is necessary and convenient encompasses regulation of monopoly for destructive competition, prevention of undesirable competition, and prevention of duplication of service.

---

<sup>1</sup> Transcript V.2, p. 212, lines 19-24 (Staff's cross-examination of the District's General Manager, Tom Ratermann: "Q. And the District also did enter a proposal to purchase the system from Hallsville. Correct?

A. Yes

Q. But in the end, the City chose Missouri-American Water over the District; is that correct?

A. It appears that way."

<sup>2</sup> MAWC's *Response in Opposition to BCRSD's Application to Intervene*, pp. 4-5, ¶ 13 ("BCRSD states that it sought to acquire the Hallsville system, but instead Hallsville entered into an Asset Purchase Agreement with Missouri-American. Moreover, BCRSD's Application to Intervene fails to state that the citizens of Hallsville voted at the November 5, 2019 municipal election to approve the sale of the system to Missouri-American.")

<sup>3</sup> *Initial Brief of Staff*, p. 9; *Missouri-American's Initial Brief*, pp. 8-9.

<sup>4</sup> *Missouri-American's Initial Brief*, p. 6, citing *In Re Intercon Gas, Inc.* 30 Mo P.S.C. (N.S.) 554, 561 (1991). *Staff's Initial Brief*, pp. 5-6 citing *State ex rel. Intercon Gas, Inc. v. Public Service Com'n of Missouri*, 848 S.W.2d 595, 597-PSC, 528 S.W.2d 390, 394 (Mo. App. 1975).

<sup>5</sup> *Id.*, p 597, citing *State ex rel. Public Water Supply Dist. No. 8 v. Public Serv. Comm'n*, 600 S.W.2d 147, 154 (Mo. App. 1980).

The Missouri Supreme Court declared the premise for this principle in *State ex rel. Electric Company of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897 (Mo. banc 1918), wherein it stated<sup>6</sup>:

This is an era in which we, in a large measure if not fully, realize a necessity for the conservation of energy and of natural resources. Such conservation is better secured by the regulation of public utilities than by their duplication . . . ‘the requirement of a finding of necessity, as well as of public convenience, further implies that if another utility is adequately rendering the service proposed, or is able and willing or may be required to do so, then the necessity would not exist and the certificate should be refused.’

In applying the *Intercon* standard, “[t]he underlying public interest is and remains the controlling concern...”<sup>7</sup> Missouri courts apply a balancing test when considering whether a competing utility should be issued a CCN, “giving weight to adequacy of service and desirability of competition.”<sup>8</sup>

The *Public Water Supply Dist. No. 8 of Jefferson County* court explained:

“Public convenience and necessity is not proven merely by the desire for other facilities. It must be clearly shown there is failure, breakdown, incompleteness or inadequacy in the existing regulated facilities in order to prove the public convenience and necessity requiring the issuance of another certificate. The fact that one does not desire to use present available service does not warrant placing in the field a competing utility.”<sup>9</sup>

The court further stated “[T]he ultimate interest is that interest of the public as a whole.”<sup>10</sup> Missouri courts have also indicated that it is appropriate for the Commission to consider evidence of future needs and benefits when evaluating necessity and public interest.<sup>11</sup>

Here, the question of public need for MAWC to provide services using the Hallsville system raises two issues: whether the CCN would result in undesirable or destructive competition and whether the CCN would result in duplication of facilities.

---

<sup>6</sup> *State ex rel. Public Water Supply Dist. No. 8*, 600 S.W.2d at 154.

<sup>7</sup> *Id.* (citations omitted).

<sup>8</sup> *Id.* at 155, citing *Ozark Electric Cooperative v. Public Service Commission*.

<sup>9</sup> *Id.*, citing *People’s Telephone Exchange v. Public Service Commission*, 186 S.W.2d 531, 536 (Mo. App. 1945).

<sup>10</sup> *Id.* at 156 (citations omitted).

<sup>11</sup> *Matter of Application of KCP&L Greater Missouri Operations v. Public Service Commission*, 515 S.W.3d 754, 760 (Mo. App. 2016).

**The CCN would result in undesirable or destructive competition.**

Under the applicable balancing test for determining whether to grant District competitor MAWC a CCN, the Commission must weigh MAWC's desire for a CCN with the impact on the public as a whole of granting the CCN.<sup>12</sup> While the Staff and MAWC cite to evidence of the City's voters approving the sale as proof that a CCN would promote the public interest, they ignore facts showing that the opposite is true.<sup>13</sup> The evidence shows that the District was created by the public as a whole—all voters of Boone County—as opposed to the small subset of the City's registered voters, 136, who voted in favor of selling the City's system on November 5, 2020.<sup>14</sup> These voters comprise just 8.5% of Hallsville's total population of 1,586.<sup>15</sup> Therefore, the public as a whole to be considered in the Commission's analysis is all Boone County residents, not the 136 Hallsville residents that voted on the sale of the City's system.

It is clear from the evidence that the District acts for the greater good of the public as a whole while MAWC does not, and that MAWC presents undesirable and destructive competition that does not promote the public interest but rather is detrimental to the public interest. As discussed in the *District's Post-Hearing Brief*, the undisputed evidence shows that the District is a common sewer district organized under Chapter 204, RSMo, and a political subdivision of the State of Missouri whose boundaries are all of Boone County.<sup>1617</sup> The District's mission is to protect the public health and environment now and in the future by eliminating wastewater discharges to the waters of the State within Boone County in a manner that is as cost effective to Boone County

---

<sup>12</sup> *State ex rel. Public Water Supply Dist. No. 8*, 600 S.W.2d at 154.

<sup>13</sup> *Initial Brief of Staff*, pp. 6-7; *Missouri-American's Initial Brief*, p. 3-4.

<sup>14</sup> *District's Post-Hearing Brief*, p. 4.

<sup>15</sup> Transcript V.2, Schedule e TR-1, p. 10. *See also* Exhibit 8.

<sup>16</sup> *District's Post-Hearing Brief*, p. 4.

<sup>17</sup> *District's Post-Hearing Brief*, p. 5.

residents as possible.<sup>18</sup> The evidence shows that since formation in 1973, the District has had long-term planning authority for Boone County under Chapter 204, RSMo which it has exercised by adopting regulations precluding the operation of private wastewater treatment systems in its boundaries in areas where the District is willing to own and operate a facility.<sup>19</sup> Under its Chapter 204, RSMo and Level 2 continuing authority, the District also has for decades developed long-term plan for various areas of the County, including the area surrounding and including the City.<sup>20</sup> It is undisputed that the City's entire wastewater treatment facility, and a portion of the collection system, is in the District's boundaries as a common sewer District and Level 2 continuing authority.<sup>21</sup> It is also undisputed that the remainder of the City's collection system is in the District's boundaries as a common sewer district.<sup>22</sup> Further, District's evidence demonstrates it is willing to own and operate the City's system until it is able to implement its facility plan for the Hallsville area and eliminate it such that the District's regulations prohibit MAWC from owning and operating the system.<sup>23</sup>

Although the undisputed evidence shows that the manner and operation of the City's system impacts the District's planning, treatment costs, and rates, MAWC nevertheless seeks to invade the District's territory and operate the City's system as a private facility without regard to the District's planning or adverse impact on the District. MAWC's witness, Matt Horan, unabashedly testified that MAWC does not intend to involve the District in decisions about the future of the City system.<sup>24</sup> And it is clear MAWC does not care if it operates the City's system in

---

<sup>18</sup> *Id.*, pp. 5-6.

<sup>19</sup> *Id.*, pp. 5, 9-10.

<sup>20</sup> The District disagrees with the Staff's assertion on page 13 of *Initial Brief of Staff* that "nothing has been provided that demonstrates that the District definitively has Level 2 continuing authority within Hallsville's corporate boundaries." See *District's Post-Hearing Brief*, pp. 15-16.

<sup>21</sup> *Id.*, p. 11.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, pp. 6-7.

<sup>24</sup> *Id.*, p. 24.

a manner that interferes with the District's planning or mission, or whether harm results to the District's customers in Boone County. To wit, MAWC's entire plan to own and operate the system directly conflicts with the District's plan to eliminate the system for the greater good of Hallsville and the surrounding areas of Boone County.<sup>25</sup> Even worse, the evidence shows that MAWC is considering multiple long-term solutions for the system that would convert the system from a no-discharge system to a discharge system in direct contravention of the District's mission and long-term planning for the future of Boone County.<sup>26</sup>

Application of the case law cited by the Staff and MAWC to these facts mandates a conclusion that the competition proposed by MAWC is undesirable and destructive and not in the interest of the public as a whole. There simply is no need for the CCN because the District already has a plan that is in the interests of all residents of Boone County and not just the 136 Hallsville residents that voted on the sale of the City's system. And it is clear the CCN will result in interference with the District's territory and long-term plans, and likely will result in harm to the District's customers outside of the corporate boundaries of the City.

**The CCN Application will result in duplication of service or unnecessary service.**

Similarly, application of the other parties' case law to these facts warrants a conclusion that the competition proposed by MAWC will result in duplication of services. The evidence here demonstrates there will be no need for the City's system in the future because the District will be eliminating it to promote cost efficient service in the areas surrounding Hallsville.<sup>27</sup> Under these circumstances, issuing a CCN allowing MAWC to operate a system that will no longer be needed

---

<sup>25</sup> *Id.*, p. 6, 21-22.

<sup>26</sup> *Id.*, pp. 22-23.

<sup>27</sup> *Id.*, p. 22.

results in duplicative or unnecessary services, is not in the interest of the public as a whole such that the CCN is not necessary for the public service.

### **Conclusion**

When applied to the balancing test concerning the public interest, weighing MAWC's desire to offer service using the City's system against the desirability of competition and the impact on the District's plan and operations, the substantial and competent evidence shows that the CCN does not promote the public interest and, in fact, is detrimental to the public interest. Consequently, the Commission cannot find that the evidence shows the CCN application is "necessary and convenient for the public service" as required by § 393.170.3, RSMo such that it should deny MAWC's CCN application.<sup>28</sup>

### **ISSUE 2 - Conditions**

*If the Commission grants MAWC's application for the CCN, what conditions, if any, should the Commission impose?*

If the Commission grants the CCN application over the District's objection, it should impose the conditions requested by the District to address the District's concerns about infringement upon its long-term planning authority and protect the environment and public as a whole.

**District Condition 1 -           The CCN should contain a condition to ensure continued service to the District's customers.**

The Staff and MAWC agree this condition is appropriate.

**District Condition 2 -           The CCN should contain a condition requiring MAWC to obtain a state operating permit within 2 years of CCN issuance.**

---

<sup>28</sup> This argument is in addition to those in the *District's Post-Trial Brief*. As noted in that brief, the Commission also should deny the CCN as against the public interest and not "necessary or convenient for the public service" as required by § 393.170.3, RSMo because doing so would violate the District's regulations and the DNR cannot lawfully issue MAWC a state operating permit for the City's system without violation DNR's regulations. It should not grant the CCN and force DNR to unnecessarily waste resources on a permit application and resulting litigation.

The Staff agrees that this condition is appropriate. MAWC's asks that this condition be modified to require it to apply for rather than obtain a permit. The District objects to the requested modification as contrary to the law. As discussed in Section I.B of the *District's Initial Brief*, under § 393.170.3, RSMo, MAWC must exercise the CCN within a period of two years from it being granted or it is null and void. Missouri law prohibits the operation of a wastewater system without a DNR-issued state operating permit such that MAWC cannot lawfully operate the City's system and thereby exercise the CCN merely by applying for a permit. Because MAWC must obtain a permit to operate the City's system and thereby exercise the CCN, this condition should not be modified as requested by MAWC.<sup>29</sup>

**District Conditions 3, 4 and 5 - The Commission should impose several conditions in The CCN to minimize interference with the District's planning authority in Boone County, and protect the environment and public.**

MAWC and the Staff object to the District's Condition 3 and 4. Condition 3 requires MAWC to obtain the District's consent for any plan to address the sewer system's capacity and compliance issues before submitting applications for construction or operating permits to DNR. Condition 4 prohibits MAWC from submitting to DNR applications for permits that convert the wastewater system from a no discharge facility to a discharge facility. The Staff assert that both conditions "fall under the jurisdiction of DNR" and are "best addressed by DNR." MAWC asserts that Condition 3 would grant the District indefinite "veto power" regarding any plan proposed by MAWC to address the system's capacity and compliance issues and would prevent MAWC from applying for a DNR issued state operating permit.

As discussed above, MAWC's CCN Application is detrimental to the interest of the public as a whole because it presents undesirable and destructive competition to the District by interfering

---

<sup>29</sup> Sections 393.170.3, 640.710, and 644.026 RSMo and 10 CSR 20-6.010.



with the District's mission and future plan for Boone County. This Commission certainly has the authority to impose conditions like this one to protect the public interest. Given MAWC's cited intention not to coordinate its planning with the District and consideration of long-term solutions that are contrary to the District's mission of eliminating discharges, this condition is needed to prevent interference with the District's exercise of its long-term planning authority and damage to the District. In addition, despite MAWC's representations to the contrary, nothing in this condition would require MAWC to obtain the District's approval of a permit application. Similarly, nothing in this condition would prevent the District from opposing any permit application that MAWC submits to DNR.

As to Condition 4, MAWC asserts it "would mandate a certain treatment process for Hallsville." The District disagrees because the condition does not prescribe any particular treatment process. Rather it merely serves to prohibit MAWC from choosing a treatment process that results in wastewater discharges that conflict with the District's mission to eliminate wastewater discharges within Boone County and the District's exercise of its long-term planning authority to accomplish this mission.

The Commission should exercise its authority to impose Conditions 3 and 4 to protect the public interest because these conditions are needed to eliminate or minimize MAWC's interference with the District's long-term planning authority.

Condition 5 requires MAWC, in any long-term solution involving an irrigation system, to own any land used for land application of wastewater flow collected by the Hallsville system. The MAWC objects, contending "there is no need for the Commission to regulate what type of treatment should be used." MAWC's cited basis for objection is nonresponsive. The District's proposed condition does not seek to dictate the type of treatment ultimately chosen by MAWC.

Rather the condition requires MAWC to own land application fields if it chooses a treatment option involving an irrigation option. The entire purpose of this condition is to ensure that MAWC has adequate control over land application fields used in any system operation by MAWC. Imposing this condition is entirely appropriate given the substantial and competent evidence in the record of there being a lengthy history of illegal wastewater discharges on the land application fields leased from farmers due to an interminable inability to control the farmers' land application and other activities.<sup>30</sup> Staff, having indicated no objection, apparently agrees that this condition is appropriate based the evidence. The Commission should impose this condition.

### **CONCLUSION**

The Commission should deny MAWC's CCN application, or alternatively, impose all five conditions requested by the District

**WHEREFORE**, the District respectfully submits its *Reply Brief*.

Respectfully Submitted,

LATHROP GPM LLP

*/s/ Jennifer S. Griffin*

\_\_\_\_\_  
Jennifer S. Griffin, Mo. #44406

314 E. High Street

Jefferson City, MO 65101

T: (573) 893-4336

F: (573) 893-5398

jennifer.griffin@lathropgpm.com

Attorney for Boone County

Regional Sewer District

### **CERTIFICATE OF SERVICE**

---

<sup>30</sup> *District's Post-Hearing Brief*, p. 22-23.

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

*/s/ Jennifer S. Griffin* \_\_\_\_\_