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

DISTRICT'S RESPONSE TO REPLY BRIEFS OF STAFF AND MAWC

Comes now the Boone County Regional Sewer District ("District"), by counsel, and provides its *Response to Reply Briefs of Staff and MAWC* ("*Response Brief*"). This *Response Brief* addresses the Staff's and Missouri-American Water Company's ("MAWC") respective *Reply Briefs* as they relate to Issue I identified in the *Joint List of Issues, Order of Openings, Witnesses and Cross-Examination*.

INTRODUCTION

MAWC failed to meet its burden to demonstrate that its CCN application meets the statutory standard of "necessary and convenient for the public service." The City of Hallsville ("City") does not have an absolute right to sell its system to MAWC nor does MAWC have an absolute right to purchase the City's system. Granting MAWC a CCN for the City's system is contrary to the public interest for several reasons. MAWC's ownership and operation of the system is prohibited by the District's valid regulations and interferes with the District's authority because the system is within the District's voter-approved and Clean Water Commission-approved boundaries. In addition, there exists no exception in the Department of Natural Resources ("DNR") permitting regulation that would allow

DNR to issue MAWC a permit for the system. Further, 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. Accordingly, the Commission should deny MAWC's *Application.*

RESPONSE

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?

I. The City Lacks Authority to Sell its System to MAWC.

MAWC asserts that § 88.770, RSMo authorizes the City to sell public utilities like the system at issue here with voter approval and that under *State ex rel. St. Louis v. Public Service Comm'n*, 73 S.W.2d, 393 (Mo. 1934), "owners of property have a constitutional right to determine whether to sell their property or not."[1] The fatal flaw in MAWC's position is that neither § 88.770 nor its case stand for the proposition that the City has an absolute right to sell its system to any particular purchaser or that MAWC has an absolute right to purchase the City's system. All the statute grants is authority to sell. And it is clear from MAWC's case—which involved the sale of stock rather than real property—that there are limits on a property owner's ability to sell its property. The case notes that one such limit is where the sale would be "detrimental to the public."[2] That is the situation presented here because, as discussed in the District's *Initial Brief*, *Reply Brief*, and below, the

[1] MAWC's *Reply Brief*, p. 4.
[2] *Id.*, p. 400.

District's and DNR's regulations preclude MAWC's purchase and operation of the City's facility. In addition, 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.

The District also notes it has not asserted the City could not sell its system or indicated that the City should not receive compensation for its system. In fact, the record in this case clearly shows that the District has been and remains willing to purchase the system from the City if the City no longer wishes to own and operate it.

II. The District's Regulations Are Not Pre-empted.

While both the Staff and MAWC claim that the District's regulations are preempted based on *Moats v. Pulaski County Sewer Dist. No. 1*, 23 S.W.3d 868 (Mo. App. S.D. 2000), their reliance is misplaced. In *Moats,* the Court of Appeals held that Pulaski County's common sewer district's regulation requiring all wastewater facilities in its service area to connect to its sewer lines was preempted by the Missouri Clean Water Law ("CWL"). The court reasoned that the legislature's adoption of the CWL and creation of the Clean Water Commission ("CWC") after the legislature's adoption of Chapter 204 evidenced a legislative intent for the CWL to take precedent over the powers earlier granted to common sewer districts. The legislature soon made it abundantly clear that the court was mistaken, adopting § 644.027, RSMo, effective on April 17, 2001. Section 644.027, provides:

> Nothing in sections 644.006 through 644.150 shall be deemed to restrict, inhibit or otherwise deny the power of any city, town or village, whether organized under the general law or by constitutional or special charter, any sewer district organized under chapter 204 or chapter 249, any public water supply district organized under chapter 247, or any other municipality,

> political subdivision or district of the state which owns or operates a sewer system that provides for the collection and treatment of sewage, to require the owners of all houses, buildings or other facilities within a municipality, political subdivision or district to connect to the sewer system of the municipality, political subdivision or district when such sewer system is available.

(Emphasis added).

The plain language of this statute makes it clear that *Moats* has been legislatively overruled and does not apply to invalidate the District's regulations.

Even if that were not the case, *Moats* is factually distinguishable because the common sewer district at issue there was not a CWC-approved Level 2 Continuing Authority like the District. By approving the District as a Level 2 Continuing Authority, the CWC endorsed the District's regulations and its long-term planning authority in Boone County under Chapter 204 and 250, RSMo. The District's regulations, consistent with the CWC's permitting regulation, 10 CSR 20-6.010, require the District to include the City's system in its long-term plan for the Hallsville area, be given the opportunity to own and operate the City's system should the City no longer wish to do, and allow the District to eliminate the system when it is able to do so. Because the District is available and willing to own and operate the City's system, the District's and the CWC's regulations prohibit a permit from being issued to MAWC for the system.

III. Chapters 204 and 250, RSMo Authorize the District's Regulations.

MAWC claims that neither Chapter 250 nor 204, RSMo support the application of the District's rules to it or the City.[3] Its assertions are belied by the provisions of both

[3] District's *Reply Brief*, p. 7.

Chapters, as well as § 644.027, RSMo, discussed *supra*. MAWC claims "Chapter 250 applies primarily to the interaction of municipal systems with sewer districts, and their combination in certain situations."[4] Regardless of whether this is true, an examination of the provisions in Chapter 250 shows the legislature intended them to confer broad authority on sewer districts that support the application of the District's regulations to the City's system and MAWC. Section 250.240, RSMo states:

> It is the purpose of this chapter to enable cities, towns and villages and sewer districts to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water, and to these ends every such municipality and sewer district shall have the power to do **all** things necessary or convenient to carry out such purpose, in addition to the powers conferred in this chapter. This chapter is remedial in nature and the powers hereby granted shall be liberally construed.

(Emphasis added).

Section 250.250, RSMo provides, in part that:

> This chapter, without reference to any other chapter, shall be deemed sufficient authority for the exercise of any powers granted herein, and all powers necessary to effectuate the purposes of this chapter shall be deemed to be granted hereby.

The language used in sections 250.240 and 250.250 clearly authorizes sewer districts to do all things "necessary or convenient" "to protect the public health and welfare by preventing or abating the pollution of water and creating means for supplying wholesome water." This includes adopting regulations allowing for the District to choose whether to own and operate or eliminate discarded, antiquated municipal sewer systems within their boundaries.

[4] *Id.*, p. 7.

As to Chapter 240, RSMo, MAWC argues that the District's regulation doesn't apply to the City's system or by extension the City or MAWC because the system "does not 'discharge into the collection system of the district's sewer system or treatment facilities.'"[5] To reach this conclusion, MAWC cherry picks one clause out of subsection 7 of § 204.330, RSMo and ignores the rest of that statute and § 204.320. This MAWC cannot do because the rules of statutory construction require all language in related statutes to be read together. Section 204.330 provides in part:

> 1. It shall be the duty of the board of Trustees to make the necessary surveys, and to lay out and define the general plan for the construction and acquisition of land, rights-of way and necessary sewers and treatment facilities and of **any** extensions, expansions, or improvements thereof within the district. …
>
> 7. The board of trustees shall have **all** of the powers necessary and convenient to provide for the operation and maintenance of its treatment facilities … including the adoption of rules and regulations to carry out its powers with respect to all …users which discharge into the collection system of the district's sewer system or treatment facilities. *These powers include, but are not limited to:*
>
> *(1) The promulgation of **any** rule, regulation or ordinance; …*

(Emphasis added).

Section 204.320.1 provides:

> The board of trustees of any common sewer district shall have power to pass **all** necessary rules and regulations for the proper management and conduct of the business of the board of trustees, and of the district, and for carrying into effect the objects for which the district is formed.

(Emphasis added).

[5] *Id.*

These two statutes expressly grant the sewer district the power to promulgate "any" regulation needed to carry out the District's purpose of protecting the public health and welfare in Boone County. Contrary to MAWC's position, nothing in these provisions limits the District's rulemaking authority to users who "discharge into the collection of the district's sewer system or treatment facilities." Rather, the District's rulemaking authority extend to any regulation necessary "for carrying into effect the objects for which the district is formed." § 204.320.

IV. DNR Lacks Authority to Grant MAWC a Permit for the City's System.

MAWC claims that DNR may grant MAWC a permit for the City's system because the District is not a Level 2 Continuing Authority inside the City's corporate limit and exceptions to the continuing authority hierarchy apply. MAWC is incorrect. While the parties clearly disagree about whether the District's Level 2 Continuing Authority territory includes land within the corporate boundaries of the City, it is undisputed that the District's boundaries include all areas of unincorporated Boone County and that City's treatment system lies entirely within unincorporated Boone County. Because the City's treatment system is undisputedly within the boundaries of District's Level 2 Continuing Authority, the District may exercise its Level 2 Continuing Authority over the City's system if the City no longer chooses to own and operate it.

There are no applicable exceptions to the continuing authority hierarchy that would allow DNR to issue MAWC a permit for the City's system. MAWC asserts that 20 CSR 6.010(B) and (C) allow DNR to issue it a permit for the City's system because the District is not "available" because the City's system is not close enough to one of the District's

existing facilities. MAWC misconstrues the term "available." As indicated in the District's *Initial Brief*, it is willing and able to own and operate the City's system such that it is "available" under the regulation. In addition, as noted in the District's *Initial Brief*, the record contains substantial and competent evidence showing that the District's current facility plan includes the Hallsville area and elimination of the City's system and that DNR is the approving entity under the regulation and it has indicated approval of this plan. Accordingly, the availability exception is inapplicable.

CONCLUSION

The Commission should deny MAWC's *Application* for a CCN because it failed to meet its burden to demonstrate that its acquisition and operation of the City's system is "necessary and convenient for the public service."

WHEREFORE, the District respectfully requests the Commission to consider its *Response Brief*.

Respectfully Submitted,

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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 all counsels of record this 24th day of June 2021.

/s/ *Jennifer S. Griffin*