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 in Benton County, Missouri.	))))))	Case No. SA-2015-0065

MISSOURI DEPARTMENT OF NATURAL RESOURCES' RESPONSE TO RECENT MOTION AND ORDER

The Missouri Department of Natural Resources ("DNR") by and through its undersigned counsel, the Missouri Attorney General's Office, respectfully requests the Commission to deny the *Motion for Reconsideration*, and responds to the Commission's Order and to the Office of Public Counsel's *Request for Staff Investigation* ("Request"). In support of its filing, the Department states as follows:

I. Procedural History

1. On September 8, 2014, Missouri-American Water Company ("MAWC") filed its *Application* for approval from the Public Service Commission to purchase, manage, and run the wastewater treatment system ("System") and other assets of the Benton County Sewer District No. 1 ("District").

2. On September 10, 2014, the Commission issued its *Order Directing Notice and Setting Date for Submission of Intervention Requests*, requiring motions to intervene to be filed by October 1, 2014.

3. On November 16, 2014, George M. Hall filed his *Motion for Out Of Time Intervention and, if Necessary, Original Formal Compliant or, in the Alternative, Motion for Leave to File an Amicus Curiae Brief* ("Motion").

4. On November 24, 2014, the Commission held a local public hearing and heard testimony from residents of the District. Proposed intervenor George Hall testified at the hearing.

5. On December 17, 2014, the Commission issued an Order that denied proposed intervenor's *Motion*, finding that he failed to meet the criteria of 4 CSR 240-2.075 because the putative intervenor's stated interests were no different from the general public. Nevertheless, the Commission's Order granted Mr. Hall's request for leave to file a brief *amicus curiae* in the matter. The Commission directed Mr. Hall to file the brief by January 9, 2015.

6. On December 26, 2014, George Hall moved the commission to reconsider the December 17 Order. The motion for reconsideration argues it meets the criteria of 4 CSR 240-2.160(2) because A) Mr. Hall's interests differ from the general public's and B) Mr. Hall asserts error in the definition of the "interests of the general public."

7. On December 30, 2014, the Commission issued an Order Directing Response to Motion for Reconsideration ("Order for Response") to its question of whether there are any Public Service Commission statutes, tariffs or regulations, or any local, state, or federal statues or regulations that would require an individual to connect to the System.

8. On December 31, 2014, Office of Public Counsel ("OPC") filed a *Request for Staff Investigation* ("*Request*"), stating in support, in part, that OPC's review of the comments:

> provided to the Commission indicates a belief by many of the customers, rightly or wrongly, that a vote to dissolve the sewer district meant specifically a vote for the customers to have their own private sewer systems. Since the vote to dissolve the system prevailed, customers appear to expect a return to private sewer systems.

(OPC *Request* 2 ¶ 6). OPC further alleges that "no substantial and competent evidence" is present demonstrating that private sewer systems are not a viable option.

II. Response to Motion for Reconsideration

The Commission should deny the Motion for Reconsideration for all the same reasons the original Motion was denied. No facts are alleged that identify how the movant's interest are any different from the general public who wish to install or return to on-site systems. The use of on-site systems is an interest shared with other members of the District and the general public

within Benton County. See, EFIS Doc. 28. Moreover, use of on-site systems is regulated by Benton County Wastewater Treatment Systems Ordinance 1991-1, which places certain minimum criteria to issue a permit for an on-site system.[1] These requirements *and* the District's current connection ordinance apply to anyone interested in installing an on-site system or to restart using a previously disused system.[2]

The assertion that the Commission's Order is unlawful, unjust, or unreasonable is without merit. The public interest is a matter of policy to be determined by the Commission.[3] The putative intervenor proposes no "correct" definition to be used by the Commission for "interest of the general public." He makes no argument how the Commission misapplied the term.

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[1] See, http://benton.lphamo.org/ordinance.htm; and, the Department of Health and Senior Service statues and regulations that the local ordinance must follow: http://health.mo.gov/living/environment/onsite/lawsregs.php.

[2] Part of the proposed intervenor's argument erroneously states that the local District ordinance that requires connection is invalid because of *Moats v. Pulaski County Sewer District No. 1*, 23 S.W.3d 868 (Mo. Ct. App. 2000)(holding that a local connection ordinance was invalid because it was preempted by Missouri Clean Water Law §§ 644.006 to 644.150 RSMo). However, in 2001 after the ruling in *Moats,* the Missouri Legislature passed § 644.027 RSMo, which took effect on April 17, 2001. Section 644.027 RSMo states that mandatory hook-up ordinances for publicly owned, or non-profit, or municipal sewer districts are not prohibited by law. At any rate, the issue is irrelevant to the question before the Commission.

[3] *State ex rel. Public Water Supply District v. Public Service Commission*, 600 S.W.2d 147, 154 (Mo. App. 1980). The dominant purpose in creation of the Commission is public welfare. *State ex rel. Mo. Pac. Freight Transport Co. v. Public Service Commission*, 288 S.W.2d 679, 682 (Mo. App. 1956).

Finally, Mr. Hall's remaining arguments are irrelevant because they do not address whether MAWC meets the Commission's standard for the issuance of a certificate of convenience and necessity.[4] For the foregoing reasons, the Motion for Reconsideration should be denied.

III. Response to Order for Response

a. No Public Service Commission statutes or regulations require an individual to connect to a private sewer.

The primary consideration for the Commission is whether there are any statutes or regulations authorizing the Public Service Commission to require an individual to connect to a public utility regulated by the Commission. Counsel is unaware of any such statutes or regulations.

b. Other statutes and regulations provide state and local government with the authority to require an individual homeowner to connect to a central sewer system, but those laws are not relevant to the issues before the Commission in this case.

The following statutes, regulations, and ordinances are not applicable to this matter, and are therefore irrelevant. However, the Department wants to provide these authorities to the Commission as requested.

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[4] To issue a certificate: (1) there must be a need for the service; (2) the applicant must be qualified to provide the proposed service; (3) the applicant must have the financial ability to provide the service; (4) the applicant's proposal must be economically feasible; and (5) the service must promote the public interest. *In re. Tartan Energy Company*, 3 Mo. P.S.C. 173 (1994); *In re. Intercon Gas, Inc.*, 30 Mo. P.S.C. (N.S.) 554 (1991).

Local ordinances, permitted by § 644.027 RSMo, may require individuals to connect to municipal, or publicly owned, or non-profit sewer systems. See, § 644.027 RSMo. Such systems are not regulated by the Commission, and are therefore not at issue in this matter.

Section 701.031.1 RSMo requires that all property owners of all buildings that allow people to assemble shall provide for the sanitary disposal of domestic sewage, either by a DNR regulated facility or a Department of Health and Senior Services ("DHSS") regulated facility. See, 701.031.1 RSMo. Single-family homes with a minimum of at least three acres of real property are exempt from this requirement. *Id.* Systems receive or are designed to receive three-thousand gallons per day or less are regulated by DHSS. Section 701.027 RSMo. Under these statutes, a source of wastewater that does not meet the exemptions, and which may produce wastewater is required to connect or install an appropriate system by either DNR or DHSS, depending on the volume of wastewater produced.

The Department of Natural Resources, as a part of its obligation to implement the federal Clean Water Act, and through the Clean Water Commission, has regulatory authority at 644.026 RSMo to regulate sources of water pollution. See generally, § 644.026 RSMo. Primarily, DNR regulates water pollution sources through issuing Missouri State Operating Permits ("MSOP"). Under DNR regulation 10 CSR 20-6.010(8)(A)10, DNR can require

as a condition of an MSOP that a DNR-regulated sewage facility connect to a higher preference municipal, public sewer district, or Commission regulated sewer-company, if those connections are available.[5] Similarly, 10 CSR 20-6.010(3)(B) provides that a regulated pollutant source already connected to a DNR regulated system would be required to receive a waiver from the system in order to disconnect. See, 10 CSR 20-6.010(3). Note that, due to §§ 701.027 and 701.031 RSMo, 10 CSR 20-6.010(3)(B) and -6.010(8)(A)10 cannot apply to users of on-site systems that are not regulated by DNR, and thus does not apply to a standalone single family home with a design flow of less than 3000 gallons per day.

The Department may, as part of an administrative or civil enforcement action, require an individual discharging water contaminants to connect to an adequate sewer system. The connection would be sought as a remedy to prevent the imminent discharge of water contaminants or cease the present discharge of contaminants. Such action would necessarily consider whether the resolution would require the installation of a DHSS-regulated or DNR-regulated system, or the connection to an existing DNR-regulated facility.

[5] DNR Regulation 10 CSR 20-6.010(3)(B) lists "in preferential order" types of continuing authorities for DNR regulated wastewater treatment facilities. The terms "larger" and "smaller" apply generally to the size of the system and usually the type of continuing authority.

IV. Response to Investigation Request

On-site systems are not a viable option for a majority of residents within the District. See, Doc. 1, Appendix F, at 11. On August 25, 2014, the United States District Court for the Western District of Missouri found that a central sewer system is necessary for the proper disposal and treatment of wastewater within the District:

> [T]he sale of the District's sewer system to Missouri American serves the best interests of the public. Without the continuation of a common sewer system, many residents will not be able to dispose of sewage in conformity with Missouri law. The operation of the sewer system thus provides a lawful means of sewage disposal for many residents of the District. Further, the continuation of a common sewer system will maintain a sanitary method of sewage disposal for residents that prevents pollution and preserves public health. Preserving public health is what led to the creation of the District's sewer system in the first place, and it remains in the best interest of the public to maintain such sanitary means of sewage disposal. (*See* Doc. 13-2 (USDA Environmental Assessment discussing sewage disposal problems and determining that there was "no viable alternative to construction of a public sewer system" in the District, and Benton County Circuit Court judgment holding that the construction and maintenance of a common sewer system was necessary "to secure proper sanitary conditions for the preservation of public health[.]").)

EFIS, Doc. 1, Appendix F, at 11. The court reached this conclusion after briefing, a hearing, and testimony, including testimony that "a very low number of properties in Benton County would be able to support an on-site sewery system that complied with state and local ordinances." *Id.* at 6. DNR has previously reached the same conclusion as the district court, and fully agrees with its findings.

Second, it is mistaken to conflate the vote to dissolve the District with voting to install on-site systems. The ballot question read: "Shall Benton County Sewer District #1, of Benton County Missouri be dissolved?" See, Exhibit 1, attached. The ballot makes no reference to on-site systems. The vote is only relevant to this proceeding as the factual background that led to the District's need to liquidate its assets.

WHEREFORE, for the aforementioned reasons, the Department respectfully requests that the Commission deny the *Motion for Reconsideration*, and issue a timely ruling on the Application for the Certificate of Convenience and Necessity.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Jacob Westen
Jacob T. Westen, Bar No. 65265
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
Phone: 573-751-8730
Fax: 573-751-8796
Attorney for Missouri Department of Natural Resources

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served electronically, or via electronic mail to all the parties of record this 5th day of January, 2015.

Missouri Public Service Commission
Cydney Mayfield
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
cydney.mayfield@psc.mo.gov

Missouri Public Service Commission
Office General Counsel
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
Phone: 573-751-2690
Fax: 573-751-9285
staffcounselservice@psc.mo.gov

Office of the Public Counsel
Dustin Allison
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
Phone: 573-751-5318
Fax: 573-751-5562
opcservice@ded.mo.gov

Missouri-American Water Company
Dean L. Cooper
312 East Capitol
P.O. Box 456
Jefferson City, MO 65102
Phone: 573-635-7166
Fax: 573-635-3847
dcooper@brydonlaw.com

Missouri-American Water Company
Timothy W. Luft
727 Craig Road
St. Louis, MO 63141
Phone: 314-996-2279
Fax: 314-997-2451
Timothy.Luft@amwater.com

George M. Hall
31971 Chesapeake Dr.
Warsaw, MO 65355
Phone: 660-723-4283
bonzimagnum@yahoo.com

/s/ Jacob Westen
Jacob Westen
Attorney for Department