

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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|------------------------------|---|-----------------------|
| CITY OF O'FALLON, MISSOURI, |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | Case No. WC-2010-0010 |
| |) | |
| MISSOURI-AMERICAN WATER |) | |
| COMPANY and, |) | |
| |) | |
| PUBLIC WATER SUPPLY DISTRICT |) | |
| NO. 2 OF ST. CHARLES COUNTY, |) | |
| MISSOURI, |) | |
| |) | |
| Respondents. |) | |

MAWC'S ANSWER AND MOTION TO DISMISS

COMES NOW, Missouri-American Water Company (MAWC), by and through its counsel, and, pursuant to 4 CSR 240-2.070, respectfully states the following to the Missouri Public Service Commission (Commission) as its Answer and Motion to Dismiss the Complaint filed by the City of O'Fallon (O'Fallon):

1. MAWC admits that it is a public utility subject to the jurisdiction of the Commission, as provided by law.
2. Correspondence, communications, orders and decisions regarding this matter should be addressed to the undersigned counsel and:

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ANSWER

3. MAWC admits the factual allegations contained in Paragraph 1.
4. MAWC admits the factual allegations contained in Paragraph 2.
5. MAWC admits the factual allegations contained in Paragraph 3.
6. Paragraph 4 does not contain a factual allegation to which a response is required.
7. MAWC admits the factual allegations contained in Paragraph 5.
8. MAWC admits the factual allegations contained in Paragraph 6.
9. MAWC admits that O'Fallon is not a party to the Territorial Agreement between MAWC and the District. MAWC is without sufficient information or belief to admit or deny the remainder of the allegations contained in Paragraph 7, and must, therefore, deny the same.
10. MAWC admits that O'Fallon has informed MAWC that it desires to take service from MAWC pursuant to MAWC's rates for "Sale to Resale" water service now in effect for the St. Louis Metro District, or at such other rates as may hereafter be in force and effect, subject to the rules and regulations on file with, and approved by, the Commission. MAWC is without sufficient information or belief to admit or deny the remainder of the allegations contained in Paragraph 8, and must, therefore, deny the same.
11. MAWC admits that MAWC has, thus far, not agreed to provide service because of uncertainty surrounding the Territorial Agreement. MAWC further admits that MAWC would have to construct facilities in order to provide the desired service. MAWC is without sufficient information or belief to admit or deny the remainder of the allegations contained in Paragraph 9, and must, therefore, deny the same.
12. MAWC is without sufficient information or belief to admit or deny the allegations contained in Paragraph 10, and must, therefore, deny the same.

13. Paragraph 11 of the Complaint contains legal assertions, and, as such, no answer is required of MAWC.

14. Paragraph 12 of the Complaint contains legal assertions and non-factual matters, and, as such, no answer is required of MAWC.

15. MAWC admits the factual allegations contained in Paragraph 13.

16. MAWC admits the factual allegations contained in Paragraph 14.

17. MAWC admits the factual allegations contained in Paragraph 15.

18. MAWC admits that no duplication of facilities or stranded investment will result from providing wholesale water service to O'Fallon in this situation. The remainder of the allegations in Paragraph 16 of the Complaint contain legal assertions and non-factual matters, and, as such, no answer is required of MAWC.

19. Paragraph 17 of the Complaint contains legal assertions and conclusions, and, as such, no answer is required.

20. Paragraph 18 of the Complaint contains legal assertions and non-factual matters, and, as such, no answer is required of MAWC.

21. Paragraph 19 of the Complaint contains legal assertions and non-factual matters, and, as such, no answer is required of MAWC.

AFFIRMATIVE DEFENSES

22. Further answering and as an affirmative defense, MAWC states that it has acted in accordance with its tariffs and applicable statutes and regulations.

MOTION TO DISMISS

23. The Commission should dismiss the Complaint because the terms of the Territorial Agreement dated October 4, 2000, involving the provision of retail water service to

customers within certain tracts and subdivisions in St. Charles County, Missouri, (Territorial Agreement) do not prohibit MAWC from supplying water at wholesale (sale for resale) to O’Fallon for at least the following reasons: a) The subject Territorial Agreement only addresses the ability of the District and MAWC to sell and distribute water at retail within specific geographic territories; and, b) O’Fallon’s water distribution system has customers that are located both within and without the boundaries addressed by the Territorial Agreement.

WHOLESALE TRANSACTIONS NOT SUBJECT TO TERRITORIAL AGREEMENT

24. Section 247.172, RSMo, as recited in the Territorial Agreement, permits “competition to *sell and distribute water*” to be displaced by written territorial agreement where certain procedures are followed (emphasis added). This process constitutes state action and makes permissible what otherwise would be a violation of anti-trust laws. Section 416.041.3, RSMo.

25. Both Section 247.172 and the Territorial Agreement focus on the sale and distribution of water within specified geographical boundaries. These terms and this approach are indicative of the retail sale of water. Examples are found in the following paragraphs of the Territorial Agreement (emphasis added):

a) Paragraph 1b – Any customer who has *requested or is receiving water service at more than one structure* shall be a new and different customer at each structure at which water service has been requested;

b) Paragraph 1f – Structure: shall mean an agricultural, residential, commercial, industrial or other building or a mechanical installation, machinery or apparatus;

c) Paragraph 2 – The District shall have the exclusive right to provide service to all existing and future customers *located within its service area . . .*;

d) Paragraph 3 - The Company shall have the exclusive right to provide service to all existing and future customers *located within its service area. . .*;

e) Paragraph 4 – Neither party may furnish, make available, render or extend service to a structure or customer or for use within the territory of the other party either directly, indirectly or through another entity controlled by the party or controlling the party, in whole or in part, excepting sales to each other;

f) Paragraph 5 - The location of a structure or customer for purposes of this Agreement shall be the geographical location at which service is actually used, regardless of the metering point or point of delivery. The first owner of a new structure who requests and receives service at a structure which is located on or crossed by any mutual boundary line described in Paragraphs 2 and 3 dividing the service territories of the parties shall be permitted to choose either party for permanent service. Thereafter that party shall exclusively serve that structure; and,

g) Paragraph 6 – The parties may agree on a case-by-case basis by an Addendum hereto *to allow a structure to receive service* from one party though the structure is located in the service area of the other.

26. The use of the words “owner” and “structure” and the focus on geographical territory make no sense within the context of a wholesale arrangement where water may be used at multiple locations through a distribution system that belongs to neither the District nor

MAWC. There is no attempt in the Territorial Agreement to address how to deal with a wholesale customer, such as O’Fallon, that may have customers located partially within the Territorial Agreement boundaries and partially beyond the Territorial Agreement boundaries.

27. The potential sale of water for resale from MAWC to O’Fallon is not a matter that is subject to the Territorial Agreement. Therefore, O’Fallon’s Complaint should be dismissed.

LOCATION OF O’FALLON DISTRIBUTION FACILITIES

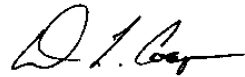
28. The Territorial Agreement provides, in part, that the parties “shall have the exclusive right to provide service to all existing and future customers located within its service area” and that “neither party may furnish, make available, render or extend service to a structure or customer or for use within the territory of the other party either directly, indirectly or through another entity controlled by the party or controlling the party, in whole or in part, excepting sales to each other.” Territorial Agreement, p. 2-3.

29. O’Fallon’s water distribution system is located both within and without the boundaries addressed by the Territorial Agreement. In fact, the majority of the system used by O’Fallon to sell and distribute water is located north of Interstate Highway 70 and, thus, beyond the boundaries addressed by the Territorial Agreement.

30. Because a majority of O’Fallon’s distribution system is located in territory not the subject of the Territorial Agreement, the potential sale of water for resale from MAWC to O’Fallon is a matter not prohibited by the Territorial Agreement. Moreover, O’Fallon does not distribute water beyond the boundaries established in its agreement with the District. Thus, O’Fallon’s ultimate distribution of the water it receives will not result in retail competition with the District or create the potential for duplication of lines or facilities.

WHEREFORE, having fully answered and set forth its affirmative defenses, Missouri-American Water Company prays the Commission dismiss the Complaint and find that the sale of water at wholesale to O'Fallon is not governed by the subject Territorial Agreement for the reasons stated herein and grant such other relief as the Commission deems reasonable and just.

Respectfully submitted,



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ATTORNEYS FOR MISSOURI-AMERICAN
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on August 14, 2009, to the following:

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