WILLIAM H. MAY
Attorney at Law

1910 E. Burntwood St.
Springfield, MO 65803
Phone (417) 833-4500
Fax (417) 833-4554

July 25, 2003

FILED[4]
JUL 29 2003
Missouri Public
Service Commission

Dale Hardy Robert
Missouri Public Service Commission
200 Madison
Jefferson City, MO 65101

RE: Suggestions in Opposition to Respondent's Motion to Dismiss

Dear Mr. Robert:

Please file the enclosed Suggestions in Opposition to Respondent's Motion to Dismiss with the Missouri Public Service Commission. Thank you for your assistance in this matter.

Sincerely,

William H. May

William H. May
Attorney at Law

Encl.

FILED[4]
JUL 29 2003
Missouri Public Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Springfield City Utilities' Surcharges on Nonresidents of Springfield Missouri	)))	Case No. AC-2003-0526

SUGGESTIONS IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

COMES NOW the Petitioners by and through counsel, pursuant to the Order Directing Filing issued on July 17, 2003 in the above captioned cause and respectfully submits the following:

Respondent cites numerous cases holding that the Missouri Public Service Commission does not have jurisdiction over the rates of utilities provided by a municipal utility company. All of those cases either predate the 1949 amendments to the Act or can be distinguished from the present case. Most involved rate challenges by residents of a municipality challenging the utility rates charged within that municipality or otherwise raised issues unrelated to the fact situation in this case. *Forest City, Missouri v. City of Oregon, Missouri*, 569 S.W.2d 330 is the only case on point where nonresidents were challenging a higher water rate than that charged to residents of Oregon, Missouri. This 1978 case involved "contracted" water services. None of Petitioners has "contracted" with the Respondent for utilities. Such a contractual relationship as referenced in Missouri Statutes does not exist in this case. Respondent does not cite any cases directly addressing the fact situation in this case.

Respondent urges a strict interpretation of the Missouri Public Service Act. This law, based upon the state's police power, provides an elaborate system, intended to cover the entire field, for the regulation of public utilities and should be liberally construed to

further its life, but with caution to decide only necessary questions raised. *State on inf Baker ex rel. Kansas City v. Kansas City Gas Co.* (1914), 168 S.W.2d 854, *State ex rel. Missouri Southern R. Co. v. Public Service Commission of Missouri*, (1914) 168 S.W.2d 1156. The guiding star of this Act and the dominating purpose of utility regulations is the promotion and conservation of the interest and convenience of the public. *State ex rel. Crown Coach Co. v. Public Service Commission,* (1944) 179 S.W.2d 123. The purpose of providing public utility regulation is to secure equality in service and in rates for all who need or desire such services and are similarly situated. *May Dept. Stores Co. v. Union Electric Light and Power Co.*, (1937) 107 S.W.2d 41. This chapter is a declaration of public interest in every utility service furnished and every rate charged and the purpose of public utility rate regulation is to provide uniform rates and unreasonable preference or advantage in any kind of service is prohibited. *May, Ibed.*

While Petitioners concede that the Public Service Commission does not have jurisdiction with respect to the rates a municipality charges its own residents, the statutes specifically make several references to situations when a municipal utility provides service to nonresidents. Section 386.250(3) RSMo contains clear language providing that the PSC doesn't have authority to regulate water rates except where such service is to be furnished or used beyond the corporate limits of the municipality. It seems quite clear the plain language of that section grants the PSC authority over water rates for services provided beyond a city's boundaries. Section 386.250(6) relates "To the adoption of rules as are supported by evidence as to reasonableness and which prescribe the conditions of rendering public utility service, disconnecting or refusing to reconnect public utility service and billing for public utility service." This language does not refer

to "a public utility" as opposed to a municipal utility, but rather refers to the rendering of utilities to the public.

Section 386.250(1) specifically provides that "The jurisdiction, supervision powers and duties of the Public Service Commission herein created and established shall extend under this chapter:

1. To the manufacture, sale or distribution of gas, natural and artificial and electricity for light, heat and power within this state." The fact that the legislature further extended that power to "persons or corporations owning, leasing, operating or controlling the same and to gas and electric plants and to persons or corporations owning, leasing, operating or controlling the same" does not negate the grant of authority included in the first part of this section. Petitioners suggest the use of the word and in section 386.250(1) indicates the powers are cumulative and not exclusionary. Nothing in this language suggests the language in the first part of this section is restricted by the additional authority listed in the second part of this section. This interpretation is consistent with the court's rulings regarding safety regulations and their applicability to municipal utilities. *State ex rel. City of Springfield v. Public Service Commission of State of Missouri*, (App 1991) 812 S.W.2d 827.

The statutes make further reference to the Commission's authority with respect to utility rates for utilities provided outside the boundaries of a municipal utility in Section 386.800 RSMo in sections (1) and (7). Section (1) of 386.800 specifically prohibits municipally-owned utilities from providing service outside the municipality except in certain fact situations. One of the situations where this practice is allowed is when a municipal utility purchases an existing utility which already provides service outside the

city. Section 386.800.1(4). In that event, the Commission is specifically directed to consider whether supplying of utility service outside the city's jurisdiction is (1) in the public interest including consideration of rate disparities between the competing electric suppliers and issues of unjust rate discriminations among customers of a single electric supplier if the rates to be charged in the annexed area are lower than those charged to other system customers. Section 386.800(7)(1). (Emphasis added)

In this case, the Commission did grant Respondent the authority to acquire a utility (Springfield Gas and Electric Co.) which supplied service outside the municipal boundaries of the City of Springfield. *In the Matter of City of Springfield* Case No. 10,614 and 10,628 (1945) PSC. If as is provided in Section 386.800 the Commission can consider whether the sale of a utility corporation to a municipality is in the public interest and consider rate disparities in doing so, it stands to reason the Commission's authority to consider such rate disparities would of necessity have to be of a continuing nature. Any other interpretation would obviously allow a municipal utility to acquire private utilities outside their jurisdiction and promptly impose discriminatory rates of any disparity they choose.

In the Matter of Springfield, the Commission did specifically issue a finding that allowing the transfer of Springfield Gas and Electric's assets to the city was in the public interest. At the time of the acquisition, the City of Springfield did not impose any surcharges on the utilities of nonresident customers of Springfield Gas and Electric. The City first began imposing a utility surcharge in 1960.

In addition to the specific statutory provision discussed above, it is clear the intent of Chapter 386 was to regulate utility rates to assure they were fair and reasonable for all

of Missouri's citizens. *May Dept. Stores Co. v. Union Electric Light and Power Company*, 107 S.W.2d 41. Municipal utilities were excluded from the same regulations as public utilities only because a municipally owned utility has its rates regulated by a legislative body elected by its customers. When as here a municipally-owned utility chooses to provide service to tens of thousands of nonresidents, there is no legislative body to represent the interests of nonresident customers. It seems contrary to common sense to interpret Chapter 386 as intending that all utility rates be controlled by an administrative or legislative body but those supplied to nonresidents receiving utilities from a municipality-owned utility. Why would the legislature single out this single class of utility customers and intend that they alone do not need utility rate protection from either an administrative or legislative body? Respondent's interpretation of the statutory language implies that the legislature intended this one class of utility consumer to be subjected to whatever charges the city or its voters wished to impose. Petitioners contend such an interpretation would violate the Due Process clause of both the U.S. and State Constitutions.

In reality, the legislature intended that all Missouri utility customers have administrative or legislative control over their utility rates. The inclusion of Section 386.800 is intended to prohibit just the fact situation in which Petitioners find themselves. That section prohibits city-owned utilities from operating outside their municipal boundaries except in a few limited circumstances. When a municipal utility chooses to operate outside its municipal boundaries Section 386.800(1) was intended to assure that such an arrangement was in the public interest and to address the issue of unjust rate discrimination.

Petitioners respectfully contend that this particular fact situation has not been previously addressed by the courts. The *Forest City, Missouri v. City of Oregon, Missouri*, 569 S.W.2d 330 case relied upon by Respondents, is the case with the most points in common with Petitioners' case. There are two important distinctions between that case and the case at hand. *Forest City* was a municipal entity receiving water under a contract with the City of Oregon. The court determined in that case the dispute was a contract matter under Section 91.050 and 91.060 RSMo and therefore not subject to regulation. In addition as a municipality, *Forest City* always had the option of building its own water facility if its residents did not wish to pay Oregon's higher rates. Petitioners have no contract controlling prices nor do they have the option of building their own utility plants. The utility rates paid by Petitioners are whatever the city wishes to charge and are subject to change at any time. It is Petitioners' contention that the facts stated in its application are distinguishable enough from *Forest City* to constitute a matter of first impression.

Where as here you have a municipal utility which (1) provides utilities to at least 40,000 nonresidents, (2) holds a utility monopoly on a substantial area outside its boundaries, (3) uses utility revenues to support its Chamber of Commerce, city bus service and general revenue, (4) imposes substantially higher utility charges on nonresidents than are fair, reasonable or justified on any cost basis, (5) and in which nonresident customers are not allowed to vote regarding rates or the legislative body regulating the utility rates, nonresident utility customers are subjected to what are defacto city taxes. An interpretation of the Public Service Act which allows such taxation

without representation is inconsistent with principles of due process and nullify the protections intended under the Public Service Act to extend to all Missouri citizens.

The City of Springfield's surcharges on nonresidents results in county residents being forced to subsidize the utility cost of city residents who enjoy the benefit of paying a lower cost than they would otherwise pay. This concept was so abhorrent to the courts they have allowed the Public Service rates to override existing contracts. "If all consumers similarly situated are to be treated alike, a contract dealing with one on a different basis from others cannot be recognized. If one consumer by reason of a contract pays less for or gets more service for his money than others, he pays less than it is worth (because the Commission is directed to fix just and reasonable rates) and others would have to pay more than their service is worth in order to make up the difference it would cost the utility to give the one consumer special treatment." *May Department Store Company v. Union Electric Light and Power*, 107 S.W.2d 41 @ 48 Quoting *State ex.rel. Empire District Electric Co. v. Public Service Commission*, 100 S.W.2d 509.

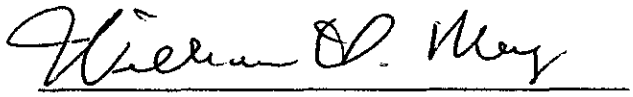
Respondents have cited several cases supporting the principle that the Commission does not have the authority to award monetary damages. While Petitioners recognize that reality, the Commission does have the authority to determine what are fair and reasonable utility rates to be paid by Petitioners and such a finding would be relevant in any court action to impose the new rates or recover past overpayments.

Petitioners acknowledge they have scant case law in support of the arguments raised, however, considering the general intent of the Public Service Act, it seems unreasonable to interpret that language as singling out this one category of utility customer to exclude from the protection and benefit of the Act. It is Petitioners

contention that the Missouri legislature did not do so. The statutory language in 386.800(7) is intended to address this issue by granting the Commission authority to regulate "rate disparities" and "unjust rate discrimination" when it allows the transfer to a municipality of utility assets outside the municipal boundary.

For the foregoing reasons Petitioners respectfully ask the court to overrule Respondent's Motion to Dismiss filed on July 17, 2003.

Respectfully Submitted,



William H. May MO # 28632
1910 E. Burntwood St.
Springfield, MO 65803
Telephone (417) 833-4500
Fax (417) 833-4554
e-mail address: moaahomofc@aol.com
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, postage prepaid, to all counsel of record as shown on the following service list this 25th day of July, 2003.

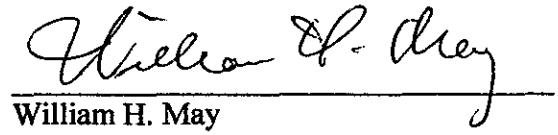
Howard Wright
Springfield City Attorney
840 Boonville
Springfield, MO 65802

Andy Dalton
City Utilities Attorney
P.O. Box 551
Springfield, MO 65801

Charles Brent Stewart
Stewart & Keevil
1001 Cherry St., Ste. 302
Columbia, MO 65201
Attorney for Respondent

John Coffman
Acting Public Counsel
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Dale Hardy Robert
Missouri Public Service Commission
200 Madison Street
Jefferson City, MO 65102



William H. May