BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Missouri-American Water Company for Approval to Establish an Infrastructure System Replacement Surcharge	))))	**Case No. WO-2017-0297**

PUBLIC COUNSEL'S REPLY TO MAWC'S RESPONSE TO MOTION TO DISMISS AND MOTION TO LATE-FILE

COMES NOW the Office of the Public Counsel ("OPC" or "Public Counsel"), and in further support of its Motion to Dismiss Missouri-American Water Company's ("MAWC") petition to establish an Infrastructure System Replacement Surcharge ("ISRS") offers this *Reply to MAWC's Response to Motion to Dismiss*:

Introduction

1. MAWC does not provide water service in a county with more than one million people as required by law. *See* Sections 393.1003, 393.1006.2(4) RSMo (2016) (providing only a "water corporation providing water service in a county with a charter form of government and with more than one million inhabitants" may file a "petition to establish or change ISRS rate schedules" with the Commission). Because MAWC's petition fails to meet the requirements of the law, the Commission may not consider or approve the petitioner's request and must dismiss this action. *Livingston Manor, Inc. v. Dep't of Soc. Servs.*, 809 S.W.3d 153, 156 (Mo. App. W.D. 1991) (stating "[i]f an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction"); *St. Charles Ambulance Dist., Inc. v. Dep't of Health & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008) (reiterating "[w]ithout subject matter jurisdiction, the agency can take no other action than to dismiss the proceeding").

2. In its *Response*, MAWC notes "the issue raised by OPC has been litigated through the appellate courts" with no substantive decision from the Supreme Court and that the Legislature

passed House Committee Substitute for House Bill No. 451 (Journal of the Senate, 99th Gen. Ass., Sixty-Eighth Day, p. 1419 (Mo. May 9, 2017))[1] before offering its theory that these events support its ability to seek an ISRS despite the results of the 2010 decennial census of the United States.

3. In short, MAWC claims the water ISRS statute, through the operation of Section 1.100.2, was always intended to apply only to MAWC's operations in St. Louis County. In supporting its theory, MAWC represents the Supreme Court merely invited the legislature to "clarify" the meaning of Section 1.100.2 and concludes that by passing H.C.S. H.B. 451 the Legislature "merely clarifies what has been law since 1959." *See* MAWC's *Response*, pp. 2-3. Then, based on its conclusion, MAWC dismisses the fact that the changes to Section 1.100.2 are not effective until August 28, 2017.

4. Presumably, MAWC did not wait to file its petition and clings to this argument because – as shown in its petition – it seeks to recover $2,484,500 to reconcile its prior ISRS. This gambit by the Company is especially bold given that the Supreme Court dismissed Public Counsel's prior appeal as moot only after reasoning "[b]ecause the costs that formed the basis of the disputed surcharge have been incorporated into MAWC's base rate, the base rate supersedes the surcharge." *Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel*, 2017 Mo. LEXIS 92, *10 (Mo. 2017). Now MAWC seeks to do an "end-run" around Supreme Court's decision in order to charge customers in St. Louis County an additional $2,484,500 after rates have already been rebased.

5. In this *Reply*, Public Counsel will explain that H.C.S. H.B. 451 is a change to the existing law and that, to rely on H.C.S. H.B. 451 in support of its petition for an ISRS, MAWC must wait

[1] Hereinafter referred to as H.C.S. H.B. 451. MAWC refers to the legislation as "HB 451" throughout its pleading.

until August 28, 2017 to petition. First, however, it is necessary to address MAWC's comments about the prior litigation of this issue.

Public Counsel's prior appeal

6. On June 17, 2015, the Commission issued its Report and Order in Case No. WO-2015-0211 regarding MAWC's petition for a change in its Infrastructure System Replacement Surcharge. Public Counsel filed its appeal with the Court of Appeals - Western District.

7. After briefs and oral argument, the Western District Court issued its order concluding: "[w]e find that there was no statutory authority under which the Commission could grant ISRS to MWAC because St. Louis County does not have at least one million inhabitants as required by the statute." *Missouri-American Water Co. v. Office of Pub. Counsel,* 2016 Mo. App. LEXIS 204, *33 (Mo. App. W.D. Mar. 8, 2016). Notably, as it relates to the passage of H.C.S. H.B. 451, the Western District Court advised:

> Although we accept that this ruling has wide reaching consequence for the County, it is an undisputed fact that--according to the 2010 U.S. Census--the County no longer has one million inhabitants. If the legislature intends for those statutes to continue to apply to the County, *amendment is needed,* a power limited to the legislative branch of our government.

Id at 32-33 (emphasis added). However, the case did not end there. After the Western District Court issued its opinion reversing and remanding the Commission's Report and Order, MAWC and the Commission each moved the Court to rehear the matter or transfer it to the Supreme Court. The Western District Court denied both parties' motions. On May 18, 2016, MAWC and the Commission each sought transfer pursuant to Missouri Supreme Court Rule 83.04. On June

28, 2016, the Supreme Court granted transfer. Substitute briefs were filed and an oral argument was held on November 1, 2016.

8. Ultimately, rather than reaching a decision affirming the Western District Court, the Supreme Court dismissed Public Counsel's appeal as moot. In its decision to do so, the court explained it was not reaching a decision on the population issue:

> This appeal involves only Public Counsel's challenge to the surcharge. Because the costs that formed the basis of the disputed surcharge have been incorporated into MAWC's base rate, the base rate supersedes the surcharge. The surcharge has been reset to zero, and superseded tariffs cannot be corrected retroactively. *Praxair*, 328 S.W.3d at 334. The question of whether MAWC could charge a surcharge under section 393.1003 in light of the reduction in the population of St. Louis County to fewer than 1 million inhabitants as shown in the 2010 census therefore has become moot.

Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel, 2017 Mo. LEXIS 92, *10-11 (Mo. 2017). Even though the Supreme Court dismissed the appeal as moot, it offered commentary on Section 1.100.2:

> Precisely because of the general interest and widespread effect should this Court hold that a political subdivision can fall out of the scope of a population statute, *it may well be that the legislature will address and clarify the meaning of section 1.100.2 before this issue recurs*. This would make it unnecessary for this Court to address the issue and would avoid the parade of horribles that it is alleged would occur were this Court to hold that St. Louis County or other political subdivisions

were no longer subject to statutes that have governed them for years if not decades.

But, regardless of whether the legislature acts, the very fact that so many statutes contain population criteria and that so many cities, counties and other political subdivisions may be affected means that it is unlikely that the meaning of section 1.100.2 will evade review.

Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel, 2017 Mo. LEXIS 92, *12-13 (Mo. 2017) (emphasis added). Thus, the Supreme Court noted its belief the issue relating to the meaning of Section 1.100.2 would recur ("…it is unlikely that the meaning of section 1.100.2 will evade review") and the legislature had the option to "address and clarify" the law or it could choose not to act ("…regardless of whether the legislature acts…"). As will be explained below, the legislature *did* act.[2]

9. Based on the foregoing review of the prior litigation, the Commission cannot reasonably infer the prior litigation supports MAWC's conclusion that the operation of Section 1.100.2 RSMo always ensured MAWC's operations in St. Louis County would qualify under the ISRS statute. The only court to articulate a position on the population issue *disagreed* with MAWC about the application of Section 1.100.2.

Passage of House Committee Substitute for House Bill No. 451

10. In May, the Missouri Legislature passed H.C.S. H.B. 451. Contrary to the assertion of MAWC, passage of H.C.S. H.B. 451 does not "merely clarif[y]" the law – it is a change.

[2] Of course, the legislature never needed permission from the Court to do so. *See generally* Mo. Const. art. III. This fact, combined with the context offered in the Court's opinion ("…avoid the parade of horribles…"), lends support to a reasonable inference that, had the cause presented a live controversy, it would have determined MAWC could not seek an ISRS.

11. Effective August 28, 2017, H.C.S. H.B. 451 amends the second sentence of Section 1.100.2 to provide that a change in population shall not remove a city, county, or political subdivision from the operation of a law limited to certain specified populations. In particular H.C.S. H.B. 451 effects these changes through the following changes to Section 1.100.2[3]:

> 2. Any law which is limited in its operation to counties, cities, or other political subdivisions having a specified population or a specified assessed valuation shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed. Once a city **[**~~not located in a~~**] ,** county**, or political subdivision** has come under the operation of such a law a subsequent **[**~~loss of~~**] change in** population shall not remove that city**, county, or political subdivision** from the operation of that law **regardless of whether the city, county, or political subdivision comes under the operation of the law after the law was passed**. No person whole compensation is set by a statutory formula, which is based in part on a population factor, shall have his compensation reduced due solely to an increase in the population factor.

12. When the legislature amends a statute, it is presumed to intend a change to the existing law or to accomplish some legislative purpose. *Hagan v. Dir of Revenue*, 968 S.W.2d 704, 706 (Mo. 1998). Missouri courts have also explained that the purpose can be clarification rather than a change of existing law. *Andresen v. Bd. of Regents of Missouri W. State College*, 58 S.W.3d 581, 589 (Mo. App. W.D. 2001); *State* ex rel. *Laclede Gas Co. v. Public Service Com.*, 535 S.W.2d 561, 567 (Mo. App. W.D. 1976).

13. MAWC's argument why its petition should not be dismissed hinges on whether or not H.C.S. H.B. 451 merely clarifies the law or if it is change to the existing law. The company's theory that H.C.S. H.B. 451 "merely clarifies what has been law since 1959" is wrong; the bill clearly changes the law as it existed in 2016.

Plain language of Section 1.100.2 RSMo (2016).

14. In its *Response*, MAWC repeats its misinterpretation of Section 1.100.2 RSMo (2016) in order to conclude the 2000 decennial census continues to apply today attaching its Substitute

[3] Matter enclosed in bold brackets is omitted from the law. Matter in bold type is new language.

Brief filed before the Missouri Supreme Court in lieu of argument. Contrary to MAWC's arguments (contained in its Substitute Brief attached to MAWC's *Response* as Appendix B), Section 1.100.2 does not include a "once-in, always-in" clause. The plain language of Section 1.100.2 RSMo. (2016) addresses population gains and losses. The first sentence broadly addresses gains, and states:

> Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population or assessed valuation as well as those in that category at the time the law passed.

Section 1.100.2 RSMo (2016). The second sentence of Section 1.100.2, stating "[o]nce a city not located in a county has come under the operation of such a law a subsequent loss of population shall not remove that city from the operation of that law," narrowly addresses population losses. *Id*.

15. In its Appendix B, MAWC again argues that the phrase "as well as those in the category at the time the law was passed" means that St. Louis County will be considered to have a population of at least 1 million residents forever for purposes of the ISRS statute. Once again MAWC ignores the plain language of Section 1.100.2 RSMo (2016) making clear only the City of St. Louis is saved from falling out of the operation of a law containing a population limitation.[4]

[4] As of August 28, 2017, the effective date of H.C.S. H.B. 451, "once in, always in" treatment is extended to all political subdivisions.

16. As OPC explained in its briefs before the Missouri Supreme Court, the phrase "as well as those in the category at the time the law was passed" ensures that the general statute governing population applies to those political subdivisions meeting the population requirement at the time a particular law is passed. The language "at the time the law passed" in Section 1.100.2 means at the time final passage occurs before the legislature. *City of Harrisonville, Mo. v. Pub. Water Supply Dist. No. 9,* 129 S.W.3d 37, 39 (Mo. App. W.D. 2004). Whichever census is effective on the date the law passes provides the figure to be applied to ascertain whether a political subdivision meets the population criteria of the new law. Because each decennial census becomes effective on July 1st, a date likely between a law's passage and effective date, the phrase "as well as those in that category at the time the law passed" ensures those in a population category during the legislative session are in that category when the law first becomes effective. It does not mean "once in, always in" but only that the census effective at the time of passage will be used until the next census becomes effective in ten years and remains subject to update "on the basis of the last previous decennial census of the United States." Section 1.100.1 RSMo (2016).

17. Importantly, the not-yet-effective language of H.C.S. H.B. 451 amends only the second sentence of Section 1.100.2, leaving first sentence in place unchanged. In examining statutory amendments, the Supreme Court has explained a general rule:

> Where a statute is amended only in part, or as respects only certain isolated and integral sections thereof and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected by the amendatory act or acts, it is presumed that the Legislature intended the

> unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act.

Citizens Bank & Trust Co. v. Director of Revenue, 639 S.W.2d 833, 835 (Mo. 1982) (quoting *State* ex rel. *Dean v. Daues*, 14 S.W.2d 990, 1002 (1928)); *see also* Section 1.120 RSMo (2016) ("The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."). Prior to the passage of H.C.S. H.B. 451, the phrase "as well as those in that category at the time the law passed" in the first sentence of Section 1.100.2 did not mean "once in, always in" and because it was left unchanged by the legislature's amendatory act it retains its original plain language meaning as advocated by Public Counsel.

The 1971 Amendment

18. "When the legislature amends a statute, it is presumed to have intended the amendment to have some effect." *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. 1992). The legislature amended Mo. Rev. Stat. § 1.100.2 in 1971 to add the language permitting the City of St. Louis to stay within a population-based category after a population loss. *See* H.B. 154, 76th Gen. Ass., 1st Reg. Sess. (Mo. 1971) (enacted). Prior to 1971, the law had no such savings provision but did have the language "as well as those in that category at the time the law passed." *See* H.B. 304, 70th Gen. Ass. (Mo. 1959) (enacted). The 1971 amendment to the law must have had some purpose, and so, the rule applied in this case must be that counties and other political subdivisions could move in and out of a population-based category as a county gains or loses population, with the singular exception to that rule being added in 1971 for the City of St. Louis.

19. The history of the passage of the 1971 amendment to Section 1.100.2 supports the above interpretation. The General Assembly amended Section 1.100.2 to add new language making

clear that the City of St. Louis would remain a member of any population-based category if it experienced a population loss. *See* H.B. 154. Indeed, the General Assembly passed this new version of Section 1.100.2 with an emergency clause because the 1959 version – which, again, already had the language "as well as those in that category at the time the law was passed" – did not protect against the threat that after the "1970 census, there will be no statutes to govern certain political subdivisions in the state" due to shifts in population. *Id* at Section A (approved and effective June 8, 1971). If the language "as well as those in that category at the time the law passed" meant that political subdivisions were "once in, always in", no revision to the 1959 version of the law would have been necessary, much less one with an emergency clause.

20. Importantly, even though the Legislature changed the law in 1971 to ensure a loss of population would not remove the City of St. Louis from the operation of laws requiring a specified population, all other political subdivisions remained subject to move in and out of population-based categories. *See State* ex rel. *McNeal v. Roach*, 520 S.W.2d 69, 75 (Mo. 1975) (examining the legislature's decision to amend Mo. Rev. Stat. § 1.100.2 on behalf of the City of St. Louis).

The 2017 Amendment

21. The plain language of H.C.S. H.B. 451 demonstrates conclusively that the new language changes the law, rather than clarifying. As explained above, effective August 28, 2017, H.C.S. H.B. 451 amends the second sentence of Section 1.100.2 (now applicable to St. Louis City only) to provide that a change in population shall not remove a city, county, or political subdivision from the operation of a law limited to certain specified populations. This amendment cannot be a mere clarification because in addition to granting "once in, always in" treatment to all cities, counties, and political subdivisions, it extends additional protection to the City of St. Louis.

22. Currently, only a city not located in a county (City of St. Louis) will not fall out of the operation of a law due to a "subsequent loss of population." Section 1.100.2 RSMo (2016). The new language providing insulation from any "subsequent change in population" means that St. Louis City – currently protected only from *falling out* of a population category – will be protected from *growing out* of population categories.

23. Furthermore, to the extent any ambiguity exists the bill summary for H.C.S. H.B. 451 indicates at least some members of the legislature understood the bill to be a change to the existing law. The bill summary provides:

> This bill provides that once any city, county, or other political subdivision has come under the terms of a statute requiring a specified population, a subsequent loss of population will not remove the city, county or political subdivision from operation of that law. *Currently, this only applies to the City of St. Louis*.

(Bill Summary for H.C.S. H.B. 451)(emphasis added)[5]. The summary clearly supports Public Counsel's position as described throughout this pleading.

24. Public Counsel does not address in this *Reply* whether the change to Section 1.100.2, once effective, means that MAWC is eligible to petition for an ISRS under Sections 393.1000, 393.1003, and 393.1006 RSMo. At present, MAWC does not meet the statutory requirements to petition for an ISRS and so the Commission must dismiss the present case.[6]

[5] Available at: http://www.house.mo.gov/billtracking/bills171/sumpdf/HB0451T.pdf

[6] If, after August 28, 2017, MAWC petitions to establish an ISRS the question will become whether the change to Section 1.100.2 means MAWC meets the population requirement based on retrospective application of the stale 2000 decennial census or if MAWC must wait until a future census shows St. Louis County has a population greater than 1 million people before qualifying. Statutes are presumed to operate prospectively unless the legislative intent that they be given retroactive application clearly appears from the express language of the act or by necessary or unavoidable implication. *Dept. of Soc. Servs. v. Villa Capri Homes, Inc.*, 684 S.W.2d 327, 332 (Mo. banc 1985).

The effective date of H.C.S. H.B. 451

25. MAWC acknowledges that H.C.S. H.B.451 will become effective on August 28, 2017. Yet, the company asserts that the effective date of the law does not matter because 1) H.C.S. H.B. 451 "merely clarifies what has been law since 1959" and 2) the Company's tariff sheets bear an effective date after August 28, 2017, and so, the company need not wait to petition for an ISRS. Both theories are wrong.

26. First, Public Counsel has addressed MAWC's misinterpretations regarding the current meaning of Section 1.100.2 and the future changes proscribed in H.C.S. H.B. 451 above. MAWC's interpretation requires the Commission to ignore the plain language of Section 1.100.2 RSMo (2016), the history surrounding the 1971 amendment, and the plain language of H.C.S. H.B. 451. The Commission should decline to do so and should reject the Company's misinterpretation.

27. Second, it does not matter that the Company's tariff sheets bear an effective date after August 28, 2017. The plain language of Section 393.1003.1 makes clear that only "a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants *may file a petition* and proposed rate schedules with the commission to establish or change ISRS rate schedules"(emphasis added). Without meeting the statutory requirements, MAWC does not have the ability to "file a petition" for an ISRS regardless of the effective date of the proposed tariff sheets.

28. The 2010 decennial census reveals that St. Louis County lacks the population necessary for MAWC to file an ISRS petition, and so, the Commission may not consider or approve the petitioner's request and must dismiss this action.

Motion to Late-file

29. Commission Rule 4 CSR 240-2.080(13) provides parties are allowed ten days from the date of filing in which to respond to any pleading. MAWC filed its *Response* to Public Counsel's motion to dismiss on July 10, 2017, making any response due on July 20th. As such, this pleading is one day out of time. Public Counsel apologizes to Commission for missing the filing deadline and requests the Commission accept this late-filing. To ensure no party is unduly prejudiced, Public Counsel asks the Commission to afford other parties additional time to file their responses, if any.

WHEREFORE Public Counsel submits this *Reply to MAWC's Response to Motion to Dismiss* and asks the Commission to dismiss MAWC's petition to establish an Infrastructure System Replacement Surcharge.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 21st day of July 2017:

/s/ Tim Opitz