BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Review of Economic, Legal and Policy Considerations of District-Specific Pricing and Single Tariff Pricing	)))	File No. SW-2011-0103

BRIEF OF THE CITY OF JOPLIN REGARDING
LEGAL PROHIBITION ON SINGLE-TARIFF PRICING

The City of Joplin ("Joplin") submits the following brief pursuant to the Commission's November 16, 2010 Order.

The briefs of the Public Counsel and PSC Staff describe district-specific pricing ("DSP") and single-tariff pricing ("STP"). "DSP is commonly defined as a pricing structure that considers only the cost of providing utility service to a specific geographic region or service territory in establishing rates." [1] STP is a unified rate structure for multiple water or sewer systems that are owned and operated by a single utility, even systems that are not physically interconnected.[2]

In the area of water and sewer, pure or even primarily STP is unlawful absent physical interconnection or contiguity among districts, especially in the case of a district like Missouri-American Water Company's ("MAWC") Joplin Service District. This district serves over 24,000 water customers in Joplin and smaller surrounding communities and is the third largest MAWC system. Further description of the Joplin Service District is found in the October 15, 2010 *Joint Report on Cost of Service* filed in Case No. WR-2010-0131 and made part of this docket per Commission Order. The Joplin Service District is not physically interconnected with other MAWC Service Districts. As such, the law requires that DSP be applied in future rate

[1] MOPSC Staff Brief dated September 1, 2010, filed in Case No. SR-2010-0023 and made part of the record in this proceeding by Commission Order.
[2] The Office of Public Counsel's Brief dated September 1, 2010, made part of the record in this proceeding by Commission Order.

cases as to the Joplin Service District.

A case-by-case evaluation, as suggested by Staff, would be futile in the case of the Joplin Service District because it will almost certainly result in a determination that DSP must continue to apply. Switching to a pure STP would violate the law. Subsection 3 of section 393.130, RSMo, states:

> No gas corporation, electrical corporation, water corporation or sewer corporation shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Joplin recognizes that STP existed previously (but has found no case addressing whether it is indeed lawful under the statute). A switch from STP to DSP, without reducing the rate of the Joplin Service Area and without adequate factual bases set forth for the Commission's decision, brought about *State ex rel. City of Joplin v. Public Serv. Comm'n*, 186 S.W.3d 290 (Mo.App. W.D. 2005). In that case, the Court of Appeals found that the Commission exceeded its authority by ordering a switch from STP to DSP, but leaving the Joplin district rates at a level that was significantly more than the actual costs of service for that district -- Joplin was clearly subsidizing costs of other districts. The Commission's only stated justification was a principle that no rates would be decreased in implementing the change from STP to DSP.

Under common law, unjust discrimination is prohibited. *State ex rel. The Laundry, Inc. v. Public Serv. Comm'n*, 34 S.W.2d 37, 45 (Mo. 1931). The common law principles are reflected in subsection 3 of section 393.130, which has been in statutes since at least 1919. *Id.*

at 44, 45. In the *Laundry* case, the issue was ratepayer classification and availability of a "manufacturer's rate" to a number of businesses. The *Laundry* Court quoted from *Western Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 100 (1901):

> All individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and, even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination.

Of course, even under DSP, there is some subsidization that is allowable between similarly situated customers. The statutes prohibit undue or unreasonable advantages or disadvantages, not variations in degree or amount. In *State ex rel. Marco Sales, Inc. v. Public Serv. Comm'n*, 685 S.W.2d 216, 221 (Mo.App. W.D. 1984), the issue was whether a surcharge tariff upon gas customers who had electric add-on heat pumps was unlawful. In applying section 393.130.3, RSMo, the *Marco* court cited to a 1961 case that held:

> A discrimination as to rates is not unlawful where based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service; * * *. In accordance with the foregoing principles, valid reasons may exist for different rates for current furnished for lighting purposes from that for power purposes. A substantial difference

> constituting a reasonable basis for classification may be found in the time of the use of the service or the manner of service. * * * [T]he reasonableness of the basis of the classification must appear; and whether a discrimination is unlawful and unjust or the circumstances substantially dissimilar is usually a question of fact. 43 AM.JUR., *Public Utilities and Services*, § 178, pp. 689, 690.

Marco, 685 S.W.2d at 221 (quoting *Smith v. Public Serv. Comm'n*, 351 S.W.2d 768, 771 (Mo. 1961).

This question of fact -- the reasonableness of the classification -- must be reflected in findings set forth in a Commission order. Even where there are findings of fact in the order, they are subject to judicial review. In the *Laundry* case, the Commission dismissed the laundry companies' complaints that they were entitled to the manufacturers' rate for water. There was evidence of the reason the water company established the rate and why it did not extend it to the laundries and this evidence was set forth in the Commission's order. Nevertheless, the courts overturned that order, finding that the classification of water users as put forth and approved by the Commission "obviously has no reasonable foundation bottomed upon any dissimilarity or difference in service or operative conditions, but rests solely upon the possibly pecuniary advantage to the Water Company" and that to apply the manufacturers' rate schedule as desired by the Water Company:

> necessarily results in an unjust and unfair discrimination against the complainants herein, who are users of water under the same or substantially similar and contemporaneous service conditions as are applicable to those users of water enjoying the benefit of the manufacturers' rate schedule, in contravention of both the letter and the spirit of the Public Service Commission Law, which is merely

declarative of the rule of the common law bearing upon the subject of unjust discrimination in rates and service.

Laundry, 34 S.W.2d at 45.

In the *Marco* case, a heat pump surcharge tariff case, the Commission made findings to support its approval of the surcharge tariff, but the circuit court and appellate court determined that the Commission's findings were not supported by competent and substantial evidence upon the whole record to support the Commission's findings. *Id.* at 218. The appellate court stated, "This court observes, in the frame of reference at hand, that the evidence relied upon by Laclede and the Commission to fill the role of 'competent and substantial evidence' treads dangerously close to, if not in, the quicksands of speculation, conjecture and surmise." *Id.* at 221.

In the case of the Joplin District, there can be no doubt that Joplin ratepayers cannot be forced to subsidize water service for others who do not receive the same or substantially similar service. In the past ten years, there have been several major improvements to the MAWC Joplin Water District, and the rates for the district were increased to pay for these improvements.[3] If MAWC comes in for a rate case that attempts to shift from DSP to STP and seek a uniform rate across all of its districts, some district will be subsidizing another district. Some district's ratepayers will see a proposed increase in their rates without a corresponding increase in the costs to provide the service to that district – they will be subsidizing some other district's ratepayers' costs. Section 393.130.3 and the case law on this issue will make such a switch from DSP to STP impossible to lawfully accomplish.

Absent a statutory change, the Commission has no authority to authorize single tariff pricing when the tariff sets a single price for customers who are not receiving the same or

[3] October 15, 2010 *Joint Report on Cost of Service* filed in Case No. WR-2010-0131 and made part of this docket per Commission Order.

substantially similar service. This prohibition means that District Specific Pricing -- particularly when the District in question has experienced unique upgrades -- is the lawful course of action. Although STP might pass muster in limited circumstances, the factual record would have to be extremely well developed and it is unlikely the Commission will be faced with such a scenario.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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