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

MOTION TO DISMISS

COMES NOW the City of Springfield, Missouri, through the Board of Public Utilities ("Respondent"), by and through counsel, and pursuant to 4 CSR 240-2.080 and the *Notice of Complaint* issued by the Commission in the above-captioned cause on June 18, 2003, for its Motion To Dismiss respectfully states as follows:

1. For purposes of this Motion, Respondent incorporates by reference herein all affirmative defenses and related allegations raised by Respondent in Respondent's *Answer To Complaint* filed in this case.

Commission Jurisdiction

2. In order for the Commission to lawfully entertain the Petition in the first instance, it obviously must have jurisdiction over Respondent and its natural gas, electric and water operations because like a court, any order rendered or other action taken by the Commission in excess of its jurisdiction is void. *See, e.g. Parner v. Bean*, 636 S.W. 2d 691, 695 (Mo. App. E.D. 1982). The Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and the powers reasonably incidental thereto. *Inter-City Beverage Co., Inc. v. Kansas City Power & Light Co.*, 778 S.W.2d 875 (Mo. App. W.D. 1994); *State ex rel. and to Use of Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, (Mo. 1943). It is for the legislature, not the Commission, to set the extent of the

Commission's jurisdiction. *State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 54 (Mo. 1979). Being a creature of statute, the Commission can only exercise such powers as are expressly conferred on it by statute and neither convenience, expediency, nor necessity are proper matters for consideration in determining whether the Commission is authorized by statute to act. *State ex. rel. Missouri Cable Telecommunications Ass'n v. Missouri Public Service Commission*, 929 S.W. 2d 768 (Mo. App. W.D. 1996). Accordingly, if the Commission has not been statutorily granted jurisdiction over Respondent and the subject matter of the Petition, the Commission must dismiss the Petition as a matter of law.

Jurisdiction--Electric and Natural Gas Rates

3. Petitioners cite two statutory sections in support of their contention that the Commission has jurisdiction over the Respondent and the rates charged by Respondent for its provision of electric and natural gas services, namely, Section 386.250(1) and (7) RSMo.[1] Petitioners mis-interpret the applicable law. First, on their face the statutory provisions cited by Petitioners are very broad and do not specifically give the Commission specific regulatory rate jurisdiction over the Respondent or its municipally owned natural gas and electric operations. Second, being a municipal corporation, a constitutional charter city, and a political subdivision of the State, Respondent by definition is not a an "electrical corporation" nor a "gas corporation", and therefore is not a "public utility" subject to the Commission's regulatory jurisdiction, as those terms are defined under Sections 386.020 (15), (18) and (42)

[1] All statutory citations are to RSMo 2000 unless otherwise noted.

RSMo. As such, Peitioner's interpretation of the two statutes cited directly conflict with, and are contrary to, these other clearly applicable provisions of the Public Service Commission Act. Third, applicable case law is overwhelmingly contrary to Petitioners' jurisdictional claim. In terms of legislative history, the original 1913 Public Service Commission Act initially purported to grant to the Commission specific power to regulate rates and services of municipally operated public utilities. However, the Missouri Supreme Court subsequently ruled that this original statutory grant of power to the Commission to regulate the rates of municipally owned public utilities was unconstitutional, and that ruling subsequently was codified by amendments to the Public Service Commission Act in 1949. *City of Columbia v. Public Service Commission,* 43 S.W.2d 813 (Mo. 1931); *Forest City v. City of Oregon*, 569 S.W.2d 330, 332-333 (Mo. App. W.D. 1978). *See also, State ex rel. City of Springfield et al. v. Public Service Commission*, 812 S.W.2d 827, 830 (Mo. App. W.D. 1991) (municipal utilities are free to determine and set rates without being subject to the ratemaking process of the Commission) (reversed on other grounds) (citing, *Shepard v. City of Wentzville*, 645 S.W.2d 130, 133 Mo. App. 1982).

4. As a general proposition, the utility industry as a whole is comprised of three sectors: rural electric cooperatives, municipally-owned utilities, and investor-owned utilities; as a matter of long standing law and practice in Missouri, the Commission's plenary regulatory authority extends only to matters relating to investor owned utilities. Several court decisions recognize this fundamental approach. *Love 1979 Partners v. Public Service Commission*, 715 S.W.2d 482, 489 (Mo. 1986) (the legislature, in its wisdom, has given the Commission jurisdiction only over investor-owned utilities). Municipal corporations and political

subdivisions of the State are not subject to the Commission's jurisdiction. *Lightfoot v. City of Springfield,* 236 S.W.2d 348 (Mo. 1951); *State ex rel. Fee Fee Trunk Sewer, Inc. v. The Honorable Arthur Litz*, 596 S.W.2d 466, 467 (Mo. App. 1980). The courts have applied this fundamental principal directly to the Respondent, both in terms of ratemaking generally and in terms of the provision of electric and natural gas services to residents and to nonresidents. *Lightfoot*, at 669; *Associated Electric Cooperative, Inc. v. City of Springfield*, 793 S.W.2d 517 (Mo. App. S.D. 1990). The Commission itself has recognized its lack of jurisdiction over Respondent and has so stated in its *Brief of Amicus Curiae* filed with the Southern District Court of Appeals in the *Associated Electric Cooperative* case wherein the Commission stated:

> "The PSC also has the power to prevent the disposition of assets held by an electrical corporation which are necessary and useful in its service to the public, and any such disposition without prior approval of the PSC is void...It is this power which the PSC invoked in 1945 concerning the transaction between SG&E [Springfield Gas and Electric Company] and the City of Springfield. *Such transaction was subject to PSC approval only because SG&E was a regulated utility; the City of Springfield was not then subject to PSC regulation, and has not been since. Because the PSC had, and continues to have, no jurisdiction over the City of Springfield*, its order approving the transfer of SG&E's assets did not amount to approval of the transfer of SG&E's service territory, delineated in its certificate of convenience and necessity issued by the PSC, to the City of Springfield. The PSC so stated explicitly in the order itself as it directed that SG&E's certificate of convenience and necessity shall '...cease and come to an end[.]' upon the transfer of SG&E's assets to the City of Springfield. Re: City of Springfield, 27 Mo. P.S.C. 187, 200 (1945)".

Public Service Commission's *Brief of Amicus Curiae*, filed with the Court November 29, 1989, pp. 5-6 (emphasis supplied).[2]

5. To the extent that the statutes do grant the Commission any jurisdiction whatsoever

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[2] In its Brief of Amicus Curiae, the Commission went on to urge the Court to address the issue of extraterritorial service by municipalities. The Court, however, did not adopt the Commission's argument on this issue despite being given the clear opportunity to do so nor did the Missouri General Assembly do so when it among other things subsequently codified the Court's decision by enacting Section 386.800 RSMo in 1991.

over municipally-owned utilities, such jurisdiction is limited solely to: changes of electric suppliers under Sections 91.025, 393.106, and 394.315 RSMo; voluntary electric territorial agreements among electric suppliers under Section 394.312 RSMo; voluntary petitions by a municipality for assignment of exclusive service territories and determination of compensation to be paid for the acquisition of electric facilities under Section 386.800 RSMo; and for matters relating to natural gas safety under Section 386.310 RSMo. None of these statutory provisons grant the Commission jurisdiction over Respondent for purposes of Petitioners' Petition.[3]

Jurisdiction--Water Rates

6. Petitioners cite Section 386.250(3) RSMo in support of their contention that the Commission has general jurisdiction over Respondent and specifically the rates charged by Respondent for water service outside Respondent's municipal corporate boundaries. Petitioners' interpretation of this statute, however, must be read in light of the case law previously cited and the fact that the Missouri Supreme Court has specifically held that a municipality is not a "water corporation" and a "public utility" as those terms are defined in Section 386.020 RSMo. *Public Service Commission v. City of Kirkwood*, 4 S.W.2d 773 (Mo. 1928). The Commission in the recent past itself has found that it has no jurisdiction over a municipal corporation's provision of water service. *In the Matter of the Missouri Water Company of Independence*, 28 Mo. P.S.C. (N.S.) 160 (1986). The apparent conflict between Section 386.250(3) and the weight of the other applicable law was last deal with by the

[3] Respondent also directs the Commission to its own Annual Reports in which the Commission itself recognizes its jurisdiction over municipally-owned utilities is limited to territorial agreements and to matters of gas safety. *See, also, In the Matter of the Application of the City of Rolla*, Case No. EA-2000-308, 2001 Mo. P.S.C. LEXIS 602 (March 2001) ("The Missouri Public Service Commission regulates municipal utilities only with respect to territorial contests with other utilities. Section 91.025.").

Western District Court of Appeals in 1978, where it specifically stated:

> "Notwithstanding the 1949 revisions just mentioned, Section 386.250(7) [now 386.250(3)] was left on the statute books intact. Two administrative legal opinions have been rendered, both concurring in the opinion that Section 386.250(7) is not effective alone to confer any power upon the Commission to regulate municipal utility rates, even with respect to water sold beyond the corporate limits. Opinion of the Attorney General No. 6 dated April 27, 1967; Opinion of the General Counsel, Missouri Public Service Commission, No. 73-1 dated May 22, 1973. The conclusions reached in those opinions, in light of the legislative and judicial history just mentioned, are logical and convincing."

Forest City, at 333. The court went on to hold that the Missouri General Assembly clearly has left the sale of water by a city to nonresidents as a matter of voluntary contract, free from Commission regulation, and that rates charged therefor are not unreasonable or discriminatory simply because the municipality charges more to nonresidents than it does to its own inhabitants. *Id.*, at 334. The court's decision as to extraterritorial service by a municipality being a matter of private contract (and not a "public utility service" comprising an obligation to serve), as well as the legal permissibility of a rate differential between residents and nonresidents, likewise is consistent with the large body of case law in most all jurisdictions. *See, e.g.*, McQuillin, *Municipal Corporations*, Section 35.37; 4 A.L.R. 2d 595 (1949). Section 386.250(3) RSMo, therefore, does not grant jurisdiction over the Respondent and its provision of water service to Petitioners. Moreover, since the provision of water service is a private contract between Respondent and Petitioners, the Commission is without jurisdiction to grant the Petitioners their requested relief. The Commission has no power to declare or enforce any principal of law or equity and cannot determine damages or award pecuniary relief. *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, transferred to 176 S.W.2d 533 (Mo. App. 1992).

7. Notwithstanding the above, Respondent is aware of a 1995 Commission case wherein the Commission, apparently without objection of the municipality involved, purported to assert regulatory rate jurisdiction over a municipality's provision of water service to nonresidents. *In re: Leland Mitten*, 4 Mo. P.S.C. 3d, 253 (1995). Respondent respectfully submits, however, that the Commission's decision in that case is easily distinguishable on the facts, is not controlling, and cannot as a matter of law, confer or otherwise serve as a basis for jurisdiction here. First, as the Commission often has held, the Commission is not necessarily bound by its own precedent. Second, the Commission's specific legal conclusions reached in that particular case have not been tested in the courts, since no party to that case appealed the Commission's assertion of jurisdiction. The fact that the municipality in that case apparently consented to the Commission's jurisdiction did not, as a matter of law, confer subject matter jurisdiction on the Commission. *See*, *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 72 (Mo. banc 1982). Third, to the extent that case might have been appealed to the courts, the courts would not have deferred to nor would have been bound by the Commission's legal conclusions. *Friendship Village of South County v. Public Service Commission*, 907 S.W. 2d 339, 344 (Mo. App. 1995). Fourth, the Commission in that particular case was faced with some very unusual circumstances and facts specific to the case itself which are wholly inapplicable here. Unlike the situation facing the Commission in that case, among other things the nonresidents here are in fact represented by two nonresident City Utilities customers on Respondent's Board of Public Utilities and have been since a vote of the people to so modify the *City Charter of the City of Springfield, Missouri* held on April 4,

1989.[4] Moreover, on their very face the rate differential between residents and nonresidents for water service provided by Respondent pale in comparison to the rate differential proposed to be charged by the municipality in that case[5]. Finally, unlike the municipality in that case, Respondent here is a constitutional charter city, in all respects lawfully operating pursuant to its duly adopted City Charter under Article VI, Sections 19 and 19(a) of the Constitution of the State of Missouri and consistent with the applicable provisions of Chapters 70, 71 and 91 RSMo. The water rates (as well as those for natural gas and electric service) charged by Respondent to Petitioners have been duly adopted, after the required notice and public hearings, by the Board of Public Utilities and ultimately approved by the City Council of Springfield, Missouri. This "alternative" regulatory scheme, while not involving the Commission, is in all respects otherwise authorized by law for constitutional charter cities and fully within the powers granted to Respondent by law. That Petitioners apparently sought new legislation but were unsuccessful is evidence that no state law currently exists which conflicts with Respondent's ratemaking powers currently authorized by its City Charter. *See*, *Cape Motor Lodge v. City of Cape Girardeau*, 706 S.W.2d 208 (Mo. banc 1986). For all the above-stated reasons, the Commission's prior decision and rationale in the *Mitten* case is legally insufficient to justify the assertion of Commission jurisdiction over Respondent for purposes of

[4] This change to Respondent's City Charter was made just a few months prior to the Commission filing its *Brief of Amicus Curiae* in the *Associated Electric Cooperative* case.

[5] Even assuming, *arguendo*, that the Commission has jurisdiction over Respondent's provision of water service to Petitioners, the very real practical problem arises as to exactly how the Commission Staff is to conduct a cost of service or other rate-related investigation of a heretofore unregulated entity and exactly what regulatory standards are to be applied in a non-investor-owned/municipally-owned setting to determine the reasonableness of the rates charged. Presumably, the Commission Staff necessarily would have to analyze the rates charged to Respondent's *residents* in light of Respondent's overall cost of service revenue requirements and this inquiry clearly would be contrary to law with regard to any constitutional charter city or even a non-charter city.

Respondent's provision of water service to Petitioners.

WHEREFORE, for all of the above-stated reasons, Respondent requests that the Commission immediately dismiss the Petitioners' Petition and take no further action in this cause.

Respectfully submitted,

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ATTORNEY FOR THE CITY OF SPRINGFIELD, MISSOURI THROUGH THE BOARD OF PUBLIC UTILITIES

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Answer in Case No. AC-2003-0526 was served this date on counsel for the Petitioners, the General Counsel's Office and the Office of the Public Counsel by placing same in the United States Mail, first class postage pre-paid, or by hand-delivery, this 17th day of July, 2003.

Charles Brent Stewart