

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

In the Matter of the Application/Petition of)	
Missouri-American Water Company for)	
Approval to Reconcile its Infrastructure)	File No. WO-2016-0098
System Replacement Surcharge (ISRS))	

Motion to Dismiss

COMES NOW the Office of the Public Counsel, by and through undersigned counsel, and for its *Motion to Dismiss* states as follows:

1. On October 28, 2015, Missouri American Water Company (“MAWC”) filed its *Application/Petition to Reconcile its Infrastructure System Replacement Surcharge* pursuant to Sections 393.1000, et seq., RSMo, and Missouri Public Service Commission (“Commission”) Rule 4 CSR 240-3.650(16) and 4 CSR 240-3.650(19). See *EFIS* entry number 1. Commission Rule 4 CSR 240-3.650(16) requires water corporations with an Infrastructure System Replacement Surcharge (“ISRS”) to file an annual reconciliation at the end of each 12-month period that an ISRS is in effect. Rule 4 CSR 240-3.650(16) states as follows:

At the end of each **twelve (12)-month period** that an ISRS is in effect, the eligible water utility shall reconcile the differences between the revenues resulting from the ISRS and the appropriate pretax revenues as found by the commission for that period, and shall submit the reconciliation **and proposed ISRS rate schedule revisions to the commission for approval to recover or refund the difference, as appropriate.**

[Emphasis added]. See also Mo. Rev. Stat. §393.1006(5)(2). MAWC’s application provides an attached reconciliation of billing revenues claiming it has an under-collection of \$5,870,309 in ISRS revenues for a three year period September 25, 2012, through September 30, 2015.

2. The Commission should reject MAWC's application/petition because it fails to comply with the plain language of §393.1006(5)(2) which requires a reconciliation filing at the end of each twelve (12)-month period that an ISRS is in effect. The current application/petition on its face attempts to provide for reconciliation for a period of 3 years which is not in compliance with the mandates of the statute. It also does not set forth the over or under collection for the prior 12 month calendar period as required by statute, and should be dismissed.

3. Additionally, the Commission should reject MAWC's application/petition because it fails to comply with the Commission rules found in 4 CSR 240-3.650(16) and fails to state a claim upon which this Commission can grant relief. As set forth in the plain language of 4 CSR 240-3.650(16), in filing an application/petition to reconcile the ISRS an eligible water corporation shall "submit the reconciliation **and proposed ISRS rate schedule revisions** to the commission for approval to recover or refund the difference, as appropriate." MAWC failed to provide any proposed ISRS rate schedule revisions therefore there is nothing for the Commission to approve. MAWC's filing amounts to nothing more than an informational filing and does not comply with the Commission rule. It should be dismissed for failure to comply with the Commission's rules.

4. In the alternative, MAWC's application/petition should be dismissed by the Commission as the Commission lacks jurisdiction to approve any recovery under the ISRS statute. With respect to the levy of an ISRS, the Commission's authority to act is limited by the terms of §§ 393.1000 -393.1006. Mo. Rev. Stat. §§ 393.1000 – 393.1006 (Cum. Supp. 2013). 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**" (emphasis added) may file a "petition to establish or **change** ISRS rate schedules" (emphasis

added) with the Commission. Where the petition fails to meet the requirements of the law, the Commission may not consider or approve the petitioner's request; the Commission has no authority to act. Mo. Rev. Stat. §§ 393.1003.2, 393.1006.2(4). The last previous decennial census shows the population of St. Louis County to be 998,954, which is below the statutory requirement of "more than one million inhabitants" as required by Section 393.1003.1.

5. The decennial census is controlling in determining the population prerequisite of the ISRS statute. As set forth in § 1.100.1:

The population of any political subdivision of the state for the purpose of representation or other matters...is determined on the basis of the last previous decennial census of the United States. ...[T]he effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961....

Mo. Rev. Stat. § 1.100.1 (2000). The results of the last previous decennial census are judicially noticed by the courts of Missouri. *State v. Van Black*, 715 S.W.2d 568, 571 (Mo. App. S.D. 1986). Missouri's Supreme Court has recognized this approach since at least 1882, including in at least one case concerning the Commission. *See Varble v. Whitecotton*, 190 S.W.2d 244, 246 (Mo. banc 1945) (stating "this court has always taken judicial notice of the results of the census"); *State ex rel. Alton R. Co. v. Pub. Serv. Comm'n*, 70 S.W.2d 52, 54 (Mo. 1934); *Carter Cnty. v. Huett*, 259 S.W. 1057, 1058 (Mo. 1924); *State ex inf. Crow v. Evans*, 66 S.W. 355, 357 (Mo. 1902); *State ex rel. Martin v. Wofford*, 25 S.W. 851, 853 (Mo. 1894); *State ex rel. Bd. of Managers v. Justices of Cnty. Court*, 1 S.W. 307 (Mo. 1886); *State ex rel. Harris v. Herrmann*, 75 Mo. 340, 352 (1882). This application/petition requires no different treatment, and indeed, judicial notice is particularly appropriate where, as here, the population question is of a jurisdictional dimension.

6. The ISRS statute makes clear that the Commission has no authority or right either 1) to proceed to determine a petitioner's entitlement to establish or change a water ISRS rate schedule or 2) to grant such a request, unless the petition is brought by "a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants." Mo. Rev. Stat. § 393.1003.1. MAWC is not a water corporation providing water service in a county with a charter form of government with more than one million inhabitants.¹ Therefore, the Commission must dismiss and reject MAWC's application/petition.

WHEREFORE, the Office of the Public Counsel submits this *Motion to Dismiss* and requests that the Commission dismiss this application/petition and for such other relief as maybe warranted.

Respectfully submitted,

/s/ Cydney D. Mayfield
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing has been served, by hand delivery, electronic mail, or First Class United States Mail, postage prepaid, to all parties of record on the Service List maintained for this case by the Data Center of the Missouri Public Service Commission, **on this 28th Day of December, 2015.**

/s/ Cydney D. Mayfield

¹This jurisdictional argument is currently before the Court of Appeals-Western District in case number WD78792.