

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

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

**MAWC’S RESPONSE TO MOTION TO DISMISS**

COMES NOW Missouri-American Water Company (“MAWC”), by and through counsel, and, in response to the Office of the Public Counsel’s (“OPC”) Motion to Dismiss, respectfully states as follows to the Missouri Public Service Commission (“Commission”):

1. The petition to establish an Infrastructure System Replacement Surcharge (ISRS), pursuant to Section 393.1000, et seq. RSMo, was filed by MAWC on May 15, 2017, to initiate the instant proceeding.

2. On June 30, 2017, the OPC filed its Motion to Dismiss, therein alleging that the petition must be dismissed because St. Louis County does not have a population of more than one million inhabitants.

3. The issue raised by OPC has been litigated through the appellate courts by OPC, the Commission, and MAWC. However, no substantive decision resulted as the Missouri Supreme Court found the issue to be moot. *Missouri Public Service Commission v. Office of the Public Counsel*, 516 S.W.3d 823, 2017 Mo. LEXIS 92, No. SC95713 (Mo. 2017).

4. The Missouri Supreme Court did indicate in its decision as follows:

Insofar as this appeal involves the broader issue whether, under section 1.100.2, a political subdivision continues to be subject to a population-based statute even if its population later grows or shrinks outside the specified population threshold, the Court agrees that this issue is of general public interest and importance in that dozens if not hundreds of statutes use population-based criteria. Many of those statutes use the same "one million inhabitants" population criterion at issue here. Many other statutes set out different population criteria affecting various cities

and counties, large and small, that potentially also could be affected if those cities or counties grow or shrink out of the population criteria set out in the statutes.

This does not mean that this issue falls within the public interest exception, however. 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 horrors 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.

*Missouri Public Service Commission v. Office of the Public Counsel*, 2017 Mo. LEXIS 92, \*12-13, 516 S.W.3d 823, 829 (Mo. banc 2017) (emphasis added). Thus, the Supreme Court invited the legislature to “clarify” what Section 1.100.2 means.

5. The legislature did exactly what the Supreme Court invited it to do, in passing House Bill 451. On July 7, 2017, the Governor signed House Bill 451, which addresses and clarifies Section 1.100.2, RSMo (See [Appendix A](#) attached). Therein, the General Assembly has modified Section 1.100.2 to read as follows:

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 whose 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.

6. HB 451 will become effective on August 28, 2017. This is prior to the date on which MAWC’s ISRS tariff sheet is proposed to become effective (September 12, 2017). But the effective date is not material for purposes of the motion to dismiss, because for purposes of

the question of once a political subdivision that started out “in” stays in, HB 451 merely clarifies what has been the law since 1959.

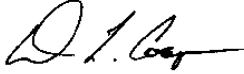
7. MAWC’s detailed position to the population issue as it exists prior to HB 451 can be found in Point I.A. of the Substitute Brief of Respondent Missouri-American Water Company before the Missouri Supreme Court, attached hereto as **Appendix B**. At its essence, it is MAWC’s position that the plain language of Section 1.100.2, RSMo, ties the population figure in statutes to the population at the time of passage. Thus, contrary to OPC’s assertion, it is significant that St. Louis County was deemed by the U.S. Census to have more than 1,000,000 inhabitants in 2003, when the General Assembly enacted Section 393.1000, et seq., RSMo.

8. Lastly, the *City of Normandy v. Greitens* case cited in OPC’s Motion to Dismiss has no applicability to this matter. *City of Normandy* is, at its core, a “Special Law” case. It concerned a law enacted in 2015, making St. Louis County’s population as of 2015 relevant. The statute in question dealt with a population requirement of 950,000 inhabitants. Thus, the issue was not whether St. Louis County qualified under the statute at issue, but rather whether the statute itself was unconstitutional.

**WHEREFORE**, MAWC respectfully requests that the Commission issue an order

denying the OPC's Motion to Dismiss.

Respectfully submitted,



---

Dean L. Cooper MBE#36592  
BRYDON, SWEARENGEN & ENGLAND P.C.  
312 E. Capitol Avenue  
P. O. Box 456  
Jefferson City, MO 65102  
(573) 635-7166  
[dcooper@brydonlaw.com](mailto:dcooper@brydonlaw.com)

Timothy W. Luft, MBE #40506  
Corporate Counsel  
**MISSOURI-AMERICAN WATER  
COMPANY**  
727 Craig Road  
St. Louis, MO 63141  
(314) 996-2279 telephone  
(314) 997-2451 facsimile  
[timothy.luft@amwater.com](mailto:timothy.luft@amwater.com)

ATTORNEYS FOR MISSOURI-AMERICAN  
WATER COMPANY

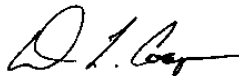
### CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on July 10, 2017, to the following:

Jacob Westen  
Office of the General Counsel  
Governor Office Building  
Jefferson City, MO 65101  
[staffcounsel@psc.mo.gov](mailto:staffcounsel@psc.mo.gov)  
[jacob.westen@psc.mo.gov](mailto:jacob.westen@psc.mo.gov)

Tim Opitz  
Office of the Public Counsel  
Governor Office Building  
Jefferson City, MO 65101  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)  
[timothy.opitz@ded.mo.gov](mailto:timothy.opitz@ded.mo.gov)

Edward F. Downey  
Lewis R. Mills  
Bryan Cave, LLP  
[efdowney@bryancave.com](mailto:efdowney@bryancave.com)  
[lewis.mills@bryancave.com](mailto:lewis.mills@bryancave.com)



---