

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

In the matter of the Petition of Missouri-)
American Water Company for Approval) File No. WO-2015-0211
to Change its Infrastructure System)
Replacement Surcharge (ISRS).)

THE OFFICE OF THE PUBLIC COUNSEL’S APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (Public Counsel), pursuant to § 386.500 and 4 CSR 240-2.160, and hereby requests that the Commission rehear this case because the Commission’s findings and conclusions are unlawful and unreasonable. The order is unlawful in that statutory authority for the order does not exist. The order is unreasonable in that it is unsupported by substantial and competent evidence considering the whole record and constitutes an abuse of the Commission’s discretion.¹

St. Louis County’s Population Is Less Than One Million Inhabitants

Section 393.1003.1 states that 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....”² This sentence establishes several jurisdictional pre-requisites that must be met in

¹*Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 2015 Mo. Lexis 98, Slip Op. at 5 (June 16, 2015); *Report and Order*, Case No. WO-2015-0211 (Doc. No. 35).

² Mo. Rev. Stat. § 393.1003.1 (Sup. 2014); *see also* § 393.1003.2 (reiterating that the population requirement is jurisdictional by stating that “the Commission shall not approve an ISRS” where each of the following elements has not been met: 1) a water corporation; 2) in a county with a charter form of government; 3) with more than one million inhabitants, and 4) a general rate proceeding before the Commission in the past three years.

order for the Commission to consider an ISRS application. The applicant must be 1) a water corporation, 2) providing service in a charter county, and 3) which has more than one million inhabitants. Non-water corporations cannot file an ISRS application. Water corporations providing service only in non-charter counties cannot file an ISRS application. Water corporations which provide service in charter counties with populations of one million or less cannot file an ISRS application. And unless these jurisdictional pre-requisites are met by the applicant, the Commission has no authority to consider such an application, as the Commission is a creature of statute and has only that authority which is expressly conferred upon it by the legislature.³

Here, there is no dispute that the applicant is a water corporation providing service in a charter county, and thus meets those two elements of § 393.1003.1's requirements. However, the applicant is not providing service in a charter county with one million or more inhabitants. As of the most recent decennial census, no such county exists in Missouri.⁴ Section 1.100.1 requires the Commission to use the 2010 decennial census to determine population in this instance.⁵ And while § 1.100.2 has a savings provision for St. Louis City if its population were to drop between decennial censuses, no such savings provision exists for any other county which experiences a drop in population.⁶

³ *Sharp v. Kansas City Power & Light*, 457 S.W.3d 823, *13 (Mo. App. W.D. 2015).

⁴ *See* 2010 Decennial Census Summary File 998954 Table P1, Public Law 94-171 (indicating population for St. Louis County – Missouri's most-populous charter county – to be 998,954 inhabitants as of April 1, 2010).

⁵ *See Union Elec. Co. v. Cuivre River Elec. Coop.*, 571 S.W.2d 790, 796 (Mo. App. St. Louis 1978) (holding the term "other matters" as used in the § 1.100 is not restricted to those matters specifically enumerated thereafter in the law).

⁶ *See* Mo. Rev. Stat. § 1.100.2 (Supp. 2014).

The Commission's Report and Order states expressly that it grants Missouri-American's request for relief in this case.⁷ However, Missouri-American Water's request for relief in this case exceeds the scope of the Commission's authority and must be denied. Indeed, it may be that the Commission is required to go further and to reject all of Missouri-American Water's existing ISRS tariffs due to the population change in St. Louis County. In granting Missouri-American's request for relief, despite the fact that St. Louis County no longer satisfies the population-based, and statutorily mandated, condition precedent to an ISRS, the Commission risks making permanent an order which is unlawful. The Commission should reconsider and rehear this matter in order to correct this error.

The Order Is Inconsistent with the Language and Intent of the ISRS Statute

Central to the Commission's incorrect order is its interpretation of the following pertinent language from § 393.1003.1:

a water corporation...may file a petition ...with the commission to establish or change ISRS rate schedules that will allow for the adjustment of the water corporation's rates and charges to provide for the recovery of costs for eligible infrastructure system replacements made in such county with a charter form of government and with more than one million inhabitants; provided that an ISRS, on an annualized basis, must produce ISRS revenues of at least one million dollars but not in excess of ten percent of the water corporation's base revenue level approved by the commission in the water corporation's most recent general rate proceeding.⁸

In entering its order, the Commission ignores both the plain language of the statute and the legislature's intent in passing it.

⁷ *Report and Order*, pg. 13, EFIS Item No. 35.

⁸ Mo. Rev. Stat. § 393.1003.1 (Supp. 2014).

“The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.”⁹ The Commission, when it engages in statutory interpretation, must presume that all words in the statute have meaning and that none are superfluous.¹⁰ Here, § 393.1003.1 does not “guarantee” recovery of eligible projects between general rate cases in any way. Rather, § 393.1003.1 permits the water corporation to file tariff schedules which “provide for” the recovery of eligible costs. This is plain and unambiguous language. “To guarantee” and “to provide for” are not synonymous.

The utility in this case prevailed upon the Commission to ignore this language – language which is entirely consistent with long-standing ratemaking principles that a specific level of revenue requirement is not guaranteed – and instead to focus on language later in the statute which the utility purports creates an entitlement that revenue will be “produced” after the revenue has been applied for and authorized. However, that language must be read in reference to the language around it and in the remaining ISRS subsections and viewed consistent with the purpose of the Commission to protect the public in order to understand the intent of the legislature and its import.¹¹ A proper analysis of such language, guided by correct application of the canons of construction, does not lead to the result the Commission reached.

⁹ *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013).

¹⁰ *Wehrenberg, Inc. v. Dir. of Revenue*, 352 S.W.3d 366, 367 (Mo. 2011).

¹¹ *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-5 (1993) (stating statutory interpretation is “guided ‘not by a single sentence or member of a sentence, but looking to the provisions of the whole law . . .’” (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987))); *Eli Lilly & Co v. Medtronic, Inc.*, 496 U.S. 661-668-69 (1990) (stating statutory interpretation is informed by and should not do violence to the structure of the statutory scheme); *State ex rel. Crown Coach v. Pub. Svc. Comm’n*, 179 S.W.2d 123, 126 (Mo. App. K.C. 1944) (offering the dominant policy rationale for the Commission is the protection of the public).

To the extent the language in the statute is ambiguous, the analysis undertaken by the Commission in its Order as justification for the result it reached, when contrasted with an interpretation of the text consistent with the intent of the legislature in creating the ISRS and the requirement that exceptions to traditional ratemaking must be construed narrowly in favor of the public, demonstrates the error in the Commission’s decision.¹² Instead of seeing the carry-forward provision of the ISRS statute for what it plainly is and what the legislature manifestly intended it to be – a means to assist in providing for, but not guaranteeing, revenue requirement – the Commission’s Order transforms the carry-forward language and uses it as justification for the establishment, in effect, of multiple ISRS’s. The result is a distortion of the statute, an authorization to stack ISRS’s, and a guarantee of revenue requirement recovery. None of this is permitted by law. The logic required to reach the Commission’s result is untenable, contorts the statute unlawfully and leads to unreasonable results. The Commission should reconsider and rehear its order in this regard.

Conclusion

Public Counsel’s Application for Rehearing should be granted because the Report and Order of June 17, 2015, is unlawful and unreasonable and leads to unjust and unreasonable rates in violation of § 393.130.¹³

¹²*Florida Realty, Inc. v. Kirkpatrick*, 509 S.W.2d 114, 121 (Mo. 1974) (holding that statutory exceptions are construed narrowly); *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (quoting *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) stating “To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people”).

¹³Mo. Rev. Stat. § 393.130 (2000 & Supp.); *see also* § 393.1003.1 (indicating that the ISRS may be utilized “*notwithstanding* any provisions of...this chapter to the contrary...”).

WHEREFORE, Public Counsel respectfully requests that the Commission grant its application for rehearing and issue an order rejecting MAWC's proposed tariff revisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 26th day of June 2015:

/s/ Dustin J. Allison
