

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

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

MOTION TO DISMISS

COMES NOW the Office of the Public Counsel (“OPC” or “Public Counsel”), pursuant to Commission Rule 4 CSR 240-2.116, and moves the Missouri Public Service Commission (“Commission”) to dismiss Missouri-American Water Company’s (“MAWC”) petition to establish an Infrastructure System Replacement Surcharge (“ISRS”) as follows:

Commission’s Power to Act

“As a creature of statute, the [Public Service] Commission [(“Commission” or “PSC”)] ‘only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable interpretation.’ *Public Serv. Comm’n v. Consol. Pub. Water Supply Dist. C-1*, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015) (“*Water Supply Dist.*”) (citing *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011)). “If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power.” *Id.*

A basic tenet of administrative law provides that ‘an administrative agency has only such jurisdiction or authority as may be granted by the legislature.’ If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency’s subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.

Livingston Manor, Inc. v. Dep't of Soc. Servs., 809 S.W.3d 153, 156 (Mo. App. W.D. 1991) (quoting *State ex rel. Mo. Health Care Ass'n v. Mo. Health Facilities Review Comm.*, 768 S.W.2d 559, 562 (Mo. App. W.D. 1988)). “Without subject matter jurisdiction, the agency can take no other action than to dismiss the proceeding.” *St. Charles Ambulance Dist., Inc. v. Dep't of Health & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008).

Water ISRS Statute

Under the ISRS statute, 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. To paraphrase *State Tax Comm’n v. Admin. Hearing Comm’n*, when the legislature enacted the population requirement in the ISRS, it circumscribed the very “nature” of the ISRS action and the availability of such relief to a utility and denied the Commission any broader authority to act. *See* 641 S.W.2d at 72.

With respect to the levy of a water infrastructure system replacement surcharge, the Commission’s authority to act is limited by the terms of §§ 393.1000 - 393.1006. Mo. Rev. Stat. §§ 393.1000 – 393.1006 (2016). Section 393.1003.1 makes clear 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” 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, 393.1006.2(4).

MAWC Does Not Meet the Statutory Requirements

Section 393.1003.1 authorizes the Commission to approve a surcharge only for those water corporations that meet the requirements of section 393.1003, including that the county in which the water utility operates is a charter county having “more than one million inhabitants.” Public Counsel does not dispute that MAWC is a water corporation providing water service. Nor does Public Counsel dispute that St. Louis County has a charter form of government. However, St. Louis County does not have a population of more than one million inhabitants.

MAWC’s petition suggests that it only need meet the population requirement in 2003 (MAWC Petition, Doc. No. 1, p. 5). This is wrong; Missouri law states that, for counties, the last previous U.S. decennial census determines population. Mo. Rev. Stat. § 1.100; *City of Normandy v. Greitens*, No. SC95624, 2017 Mo. LEXIS 203, *12, FN 4 (Mo. May 16, 2017) (“The ascertainment of a political subdivision’s population is determined by the most recent decennial national census”). The 2010 decennial census reveals that St. Louis County lacks the population necessary for MAWC to file an ISRS petition, and so, the Commission must dismiss this petition. *City of Normandy v. Greitens*, No. SC95624, 2017 Mo. LEXIS 203, *12 (Mo. May 16, 2017) (stating St. Louis County has 998,954 inhabitants). Because MAWC’s petition fails to meet the requirements of the law, the Commission may not consider or approve the petitioner’s request and must dismiss this action.

WHEREFORE Public Counsel moves the Commission to dismiss MAWC’s petition to establish an Infrastructure System Replacement Surcharge.

Respectfully,

OFFICE OF THE PUBLIC COUNSEL

/s/ Tim Opitz

Tim Opitz

Deputy Public Counsel

Missouri Bar No. 65082

P. O. Box 2230

Jefferson City MO 65102

(573) 751-5324

(573) 751-5562 FAX

Timothy.opitz@ded.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to all counsel of record this 30th day of June 2017:

/s/ Tim Opitz
