

**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 )

**PUBLIC COUNSEL’S RESPONSE TO STAFF’S RECOMMENDATION**

COMES NOW the Office of the Public Counsel (“OPC” or “Public Counsel”), and in response to Staff’s Recommendation regarding Missouri-American Water Company’s (“MAWC”) petition to establish an Infrastructure System Replacement Surcharge (“ISRS”) states:

Introduction

1. Staff’s recommendation to the Commission is deficient in at least three ways. First, the Staff’s recommendation does not address the question of whether or not MAWC’s petition fails to meet the requirements of the law because the company does not provide water service in a county with more than one million people. To the extent Staff implicitly endorses the legality of the company’s petition or the Commission’s authority to act, it is in error. Second, Staff’s recommendation unlawfully includes \$2,484,500 in the ISRS revenue requirement to account for “under-collected ISRS revenue”. Assuming, *arguendo*, statutory authority exists for the present ISRS petition, this “reconciliation” amount was resolved by stipulation and agreement in the company’s prior rate case, Case No. WR-2014-0301. Including this amount in the present application is both a violation of the stipulation and agreement and collateral attack on the Commission’s order approving the stipulation and agreement. Third, Staff’s recommendation fails to address or explain certain inconsistencies regarding the inclusion of both Net Operating Losses (“NOLs”) and income tax expenses in the ISRS.

## No Statutory Authority to Grant MAWC's ISRS Petition

2. In fulfilling its obligation to follow the Commission's directive to conduct a review of the ISRS petition, Staff's Recommendation neglects to acknowledge the pending motion to dismiss filed by Public Counsel or any of the competing filings between Public Counsel and MAWC thereafter. In so doing, the Staff's Recommendation is deficient.

3. As Public Counsel pointed out in its Motion to Dismiss, MAWC does not provide water service in a county with more than one million people as required by law. *See* Sections 393.1003, 393.1006.2(4) RSMo (2016) (providing only 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 to establish or change ISRS rate schedules" with the Commission). 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. *Livingston Manor, Inc. v. Dep't of Soc. Servs.*, 809 S.W.3d 153, 156 (Mo. App. W.D. 1991) (stating "[i]f an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction"); *St. Charles Ambulance Dist., Inc. v. Dep't of Health & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008) (reiterating "[w]ithout subject matter jurisdiction, the agency can take no other action than to dismiss the proceeding").

4. Staff fails to address the arguments offered by Public Counsel or the counter-arguments offered by MAWC. To be clear, the latest arguments offered by MAWC in its *Sur-reply* offered by MAWC provide no basis for the Commission to consider or approve the present petition. The plain language of Section 1.100 RSMo (2016) as it applies to the ISRS statutes requires the population considered to be that of the last previous decennial census (showing St. Louis County to have a population under one million people).

5. Nor does Staff address the disputed impact of House Committee Substitute for House Bill No. 451 (Journal of the Senate, 99th Gen. Ass., Sixty-Eighth Day, p. 1419 (Mo. May 9, 2017) (hereinafter “H.C.S. H.B. 451”). MAWC, while portraying H.C.S. H.B. 451 as a mere clarification of the law offers a variety of theories in its latest filing. First, MAWC accuses OPC of “misquoting the Supreme Court opinion.” (Doc. No. 12, p. 1). This is false.<sup>1</sup> Indeed, immediately after its false charge, the company itself misrepresents the opinion. The Company states:

The Supreme Court actually said the opposite: that if the legislature clarified the statute “before *this issue recurs*, [it] would make it *unnecessary* for this Court to address the issue.” The only reasonable inference supported by what the Supreme Court actually said is that legislative action should make the result clear to everyone.

(MAWC’s Sur-reply Concerning OPC’s Motion to Dismiss, Doc. No. 12, pp.1-2). The actual language of the Court’s Order states:

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

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<sup>1</sup> Perhaps MAWC meant to say it *disagrees* with Public Counsel’s interpretation and argument of the order, but that is not the same as alleging Public Counsel misquoted the opinion. All quotes contained in Public Counsel’s prior pleading are accurate and presented in the appropriate context. MAWC simply does not like OPC’s argument made after presenting the Commission with a block quote containing the full text (*See* Public Counsel’s Reply to MAWC’s Response to Motion to Dismiss Public Counsel, Doc. No. 10, pp. 4-5). Public Counsel offers no opinion whether MAWC’s accusation was born of ignorance or an intent to mislead the Commission.

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.

But, regardless of whether the legislature acts, the very fact that so many statutes contain population criteria and that so many cities, counties and other political subdivisions may be affected means that it is unlikely that the meaning of section 1.100.2 will evade review.

*Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823, 829-830 (Mo. 2017). As is clear to see, the order supports the arguments made by Public Counsel in its reply to MAWC's response, i.e. that the population issue would recur and that the Legislature could choose to act if it wished to resolve the issue (Doc No. 10, p. 5). In passing H.C.S. H.B. 451, the legislature did act, but that law is not yet effective. Thus, MAWC cannot seek relief under the new language.<sup>2</sup>

6. Next, the Company claims Public Counsel "attempts to rely on the previous Court of Appeals decision in the matter" (Doc. No. 12, p. 2). That is false. Public Counsel offered discussion of the Western District opinion to accurately chronicle the progression of its prior appeal. True, MAWC accurately surmises the Western District's decision is not controlling. However, the Commission is no doubt aware that any appeal of this present petition will again be heard in the Western District, and so, the prior result should be considered carefully.

7. Then, MAWC offers a 2012 email purporting to give meaning to laws passed in 1959 (the general population statute at Section 1.100 RSMo), 1971 (pertaining to Section 1.100.2 RSMo), and 2003 (pertaining the water ISRS statutes at Sections 393.1000, 393.1003, and 393.1006 RSMo). MAWC submits this email and notes it was "presented to the Missouri

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<sup>2</sup> As OPC noted in prior filings, whether MAWC is eligible for the ISRS through the operation of the new Section 1.100.2 RSMo after August 28, 2017 is not yet an issue.

Supreme Court.” (Doc. No. 12, p. 3). Clearly, this irrelevant email is not the “silver bullet” MAWC believes as it did not persuade the Supreme Court to rule in favor of MAWC.

8. Thereafter, the Company switches its focus to the bill summary for H.C.S. H.B. 451 and digresses into a strange discussion on the meaning of the word “this” in an attempt to dispute the proposition that the Legislature *changed* the law (*See* Doc. No. 12, p. 3). After offering its semantic argument, MAWC invites the Commission to disregard the bill summary (and, by implication, the plain language of the new law) because “the detailed description from the Chief Bill Drafter when 393.1003 was passed is far more persuasive as to legislative intent than this anonymous bill summary.” (Doc. No. 12, p. 4). First, MAWC’s statement is ambiguous enough to require comment. To clarify, its MAWC’s apparent belief that a 2012 email is persuasive because it was authored by a person who worked at the legislature in 2003. As the Commission is aware, the water ISRS law contained at Sections 393.1000, 393.1003, and 393.1006 RSMo was passed in 2003, nearly a decade before the email was sent. Second, as mentioned above, MAWC presented this document previously and the Supreme Court was not moved to favor the company’s interpretation.

In any event, the bill summary merely supports what is already clear from the plain language of H.C.S. H.B. 451 – the legislature *changed* the law. Since any claim MAWC may have to an ISRS would be under the new law, it must wait until after August 28 to make its petition.

9. Lastly, MAWC suggests that H.C.S. H.B. 451 is intended to apply retroactively because it is only a procedural change (Doc. No. 12, p. 4). However, laws can be generally procedural but still have a substantive effect that will bar certain retroactive applications. *See Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341(Mo. 1993) (discussing that a law changing a statute of

limitation period did not apply to causes of action already expired). As applied to the water ISRS petition filed by MAWC, even if the new law meant MAWC could retroactively rely on the stale 2000 census to meet the requirements of the ISRS statute for future petitions, the inclusion of the expired “reconciliation” amount is unauthorized.

10. Nothing in Staff’s recommendation addresses the fact that MAWC’s application is facially deficient, as it does not provide water service in a county with more than one million people as required by law. *See* Sections 393.1003, 393.1006.2(4) RSMo (2016). 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.

Improper to Include Past Reconciliation Amount

11. Staff’s recommendation improperly includes \$2,484,500 for “under-collected ISRS revenue” (Doc. No. 11, Memorandum, p. 5). Of course, this amount refers to the inclusion of the company’s defunct ISRS. As the Commission is aware, Public Counsel challenged the Company’s ISRS in its previous rate case. However, this issue was not litigated during the evidentiary hearing. As a part of a revenue requirement stipulation and agreement, the ISRS issue was resolved (Non-Unanimous Revenue Requirement Stipulation and Agreement, Case No. WR-2015-0301, Doc. No. 227, p. 2). The parties agreed to “resolve the ...issues as described in the *List of Issues, List and Order of Witnesses, Order of Opening Statements, and Order of Cross-Examination*, filed with the Commission on March 10, 2016” (*Id.*). The issue presented the question: “[h]ow should the Commission address the Western District Court of Appeal’s opinion in WD78792?” (List of Issues, Case No. WR-2015-0301, Doc. No. 196, p. 14). The Commission is aware the Western District found in favor of Public Counsel that MAWC did not meet the statutory requirements for the ISRS. From OPC’s perspective, the stipulation resolved the issue

by eliminating the company's ISRS, including all "reconciliation" amounts, but included the value of the infrastructure in-service in the company's rates consistent with traditional ratemaking standards. This stipulation and agreement was approved by the Commission on April 6, 2016 – effectively ending the company's then existing ISRS (Order Approving Non-unanimous Stipulation and Agreement, Case No. WR-2015-0301, Doc. No. 371). The Supreme Court order dismissing the appeal as moot supports the proposition that all ISRS issues were resolved. *Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823, 828 (Mo. 2017) ("Because the costs that formed the basis of the disputed surcharge have been incorporated into MAWC's base rate, the base rate supersedes the surcharge. The surcharge has been reset to zero, and superseded tariffs cannot be corrected retroactively.").

12. Therefore, assuming *arguendo*, statutory authority exists for the present ISRS petition, this "reconciliation" amount from MAWC's defunct ISRS was resolved by stipulation and agreement in the Company's prior rate case, and should have been excluded by the Staff during its audit. Including this amount in the present application is both a violation of the stipulation and agreement and collateral attack on the Commission's order approving the stipulation and agreement (*See* Section 386.550 RSMo).

#### Net Operating Losses and Income Tax Expense

13. For the first time that Public Counsel can discern, the company's ISRS petition includes net operating losses ("NOLs"). MAWC does not describe the reason for including NOLs or how these NOLs are associated with the projects included in the company's filing. Nor does Staff's recommendation discuss NOLs.

14. In this case MAWC seeks to increase its ISRS rate base due to what appears to be past income tax NOLs. Traditionally, accumulated deferred income taxes have been an offset (or

decrease) in an ISRS rate base. The impact of MAWC's decision to include NOLs is to eliminate deferred income taxes from bonus depreciation on this plant, thus increasing the ISRS rate base. The inclusion of NOLs requires further scrutiny.

15. Furthermore, if the company is including NOLs, this means it has no taxable income and, therefore, no income tax payments. However, despite the foregoing, MAWC also included income tax expense in its ISRS petition. This, too, deserves further scrutiny.

16. Because the petition otherwise fails to meet the requirements of the law, these issues should be addressed within MAWC's pending rate case.

#### Conclusion

17. Standing on its own, Staff's recommendation is deficient because (1) it unlawfully includes \$2,484,500 in the ISRS revenue requirement to account for "under-collected ISRS revenue" from an expired ISRS and (2) fails to address or explain certain inconsistencies regarding the inclusion of both NOLs and income tax expenses in the ISRS. These deficiencies exist whether or not the Commission has authority to grant an ISRS.

18. Importantly, the Commission does not have the authority to consider or approve the MAWC's request. MAWC's petition fails to meet the requirements of the law and so the Commission must dismiss this action.

WHEREFORE Public Counsel submits this *Response to Staff's Recommendation* and asks the Commission to grant its motion 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 7<sup>th</sup> day of August 2017:

**/s/ Tim Opitz**