

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 16th day of
August, 2017

In the Matter of the Petition of Missouri-American)	
Water Company for Approval to Establish an)	
Infrastructure System Replacement Surcharge)	<u>File No. WO-2017-0297</u>
(ISRS).)	Tariff No. JW-2017-0238

ORDER GRANTING MOTION TO DISMISS

Issue Date: August 16, 2017

Effective Date: August 26, 2017

On May 15, 2017, Missouri-American Water Company (“MAWC”) filed an application and petition (“petition”) with the Commission pursuant to Sections 393.1000, 393.1003, and 393.1006, RSMo 2016, and Commission Rules 4 CSR 240-2.060 and 3.650.¹ In the petition, MAWC requests that the Commission authorize it to change its Infrastructure System Replacement Surcharge (“ISRS”). On June 30, the Office of the Public Counsel (“OPC”) filed a Motion to Dismiss.

Motion

OPC alleges that the Commission must dismiss the petition because MAWC does not meet the statutory standard for an ISRS. In particular, OPC states that the county in which MAWC operates does not have more than one million inhabitants, as required by Section 393.1003.1.

¹ Calendar references are to 2017.

MAWC responded, citing HB 451's recent passage. The new language in that bill provides that once the county in which MAWC operates has come under the operation of a law with a population standard, a subsequent change in population shall not remove the county from the operation of that law.² Relying on this, MAWC contends it is eligible for the ISRS.

Discussion

As even MAWC admits, HB 451 will not become effective until August 28.³ Thus, because MAWC filed its petition before August 28, the Commission cannot apply HB 451 to the petition.

Furthermore, because the date the petition was filed is the operative date for determining ISRS eligibility under the statute, the Commission would reach the same result even if it delayed ruling on OPC's motion until August 28 or later. HB 451 will expand the population "grandfathering" of Section 1.100 from only the City of St. Louis to the City of St. Louis and other counties and political subdivisions. HB 451's application to Section 393.1003.1 arguably changes MAWC's eligibility to apply for an ISRS. Such a law change is substantive in that it ". . . define(s) the rights and duties giving rise to the cause of action by impairing vested rights acquired under existing law, creating new obligations, or imposing new duties."⁴ And, substantive changes operate only prospectively because the Missouri Constitution forbids retroactive law changes that impair vested rights.⁵ Therefore,

² 2017 Mo. Legis. Serv. H.B. 451 (VERNON'S) (West's No. 37).

³ MAWC's Response to Motion to Dismiss, ¶ 6. See also *id.*; Section 1.130 RSMo; MO. CONST., Art. III, § 29.

⁴ *Declue v. DOR*, 945 S.W.2d 684, 686 (Mo.App. 1997).

⁵ *Id.*

whether ruling before the effective date of HB 451 or not, the Commission cannot consider HB 451 in ruling upon MAWC's petition.

The Commission notes that it recently ruled on similar arguments about MAWC's eligibility for an ISRS. In File No. WO-2015-0211, in its *Order Denying Rehearing*, the Commission found MAWC was eligible for an ISRS because the county in which it operates had one million inhabitants at the time the ISRS statute was passed. OPC appealed that decision, and the Court of Appeals found in favor of OPC in an unreported opinion.⁶ While OPC's appeal was eventually dismissed as moot by the Supreme Court of Missouri,⁷ the Commission finds the Court of Appeals' analysis, though not binding, to be instructive and persuasive.⁸

In looking at the history of Section 1.100.2, the statute that HB 451 will have amended on August 28, 2017, the Court noted that in 1971, the General Assembly passed HB 154 to address concerns that the City of St. Louis would fall below the one million population threshold. The Court of Appeals described two versions of Section 1.100.2:

Before 1971:

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

⁶ *In re Missouri American Water Company v. OPC*, 2016 WL 873409, *transferred and dismissed on other grounds*, 516 S.W.3d 823 (Mo. banc. 2017).

⁷ *Missouri Public Service Commission v. Office of the Public Counsel*, 516 S.W.3d 823 (Mo. 2017).

⁸ The Commission has previously noted that, while it is not bound by prior Commission decisions, following prior decisions is good practice since consistency in Commission rulings promotes certainty and predictability. However, if there is good cause to deviate from prior decisions, it is appropriate to do so as long as the Commission clearly and expressly articulates its reasons for the deviation. *See, e.g., In the Matter of Summit Nat. Gas of Missouri Inc.'s Filing of Revised Tariffs to Increase Its Annual Revenues for Nat. Gas Serv.*, Report and Order, File No. GR-2014-0086 (Oct. 29, 2014).

such population or assessed valuation as well as those in that category at the time the law passed.

1971, as amended by HB 154 (additions in bold),

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 has come under the operation of such a law a subsequent loss of population shall not remove that city from the operation of that law. 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.

After scrutinizing this history, the Court of Appeals found that “(t)he only reasonable explanation for the (1971) amendment was that the legislature recognized that political subdivisions could fall out of laws and enacted an emergency statute to address the issue for St. Louis City. The legislature had the opportunity to address the issue for all political subdivisions and chose not to do so.”⁹ The Court of Appeals further stated that “(h)ad the legislature intended the same treatment for all counties it could have easily adopted a broad grandfathering clause. It did not. Instead, after considering a broad grandfathering clause, the Legislature adopted a clause limited and specific to the City of St. Louis.”¹⁰

The statute was amended in 2017 to provide (additions in bold, deletions bracketed):

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

⁹ Supra at fn. 6, p. 8.

¹⁰ *Id.* at 9.

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.

These new changes will effectively address for counties and political subdivisions the same issue the legislature addressed for St. Louis City in 1971. However, as previously explained, these new changes cannot be applied to MAWC's current petition to establish an ISRS.

As the Court of Appeals found, the Commission finds that the county in which MAWC operates does not have more than one million inhabitants based upon the 2010 census, as required by the currently effective Section 393.1003.1.¹¹ Therefore, MAWC does not qualify for an ISRS under the express terms of Section 393.1003, and its petition must be dismissed.

THE COMMISSION ORDERS THAT:

1. The Motion to Dismiss filed by the Office of the Public Counsel is granted.
2. This order shall be effective on August 26, 2017.

¹¹ If MAWC files another ISRS application after HB 451 becomes effective on August 28, the Commission will then have an opportunity to apply that amendment to Section 1.100.2 RSMo to analyze whether the company meets the population standard set forth in the ISRS statutes.

3. This file shall be closed on August 27, 2017.



BY THE COMMISSION

A handwritten signature in cursive script that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Stoll, Kenney,
Rupp, and Coleman, CC., concur.

Pridgin, Deputy Chief Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission,
at Jefferson City, Missouri, this 16th day of August 2017.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

August 16, 2017

File/Case No. WO-2017-0297

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



Morris L. Woodruff
Secretary

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.