BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

REPLY IN SUPPORT OF APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (Public Counsel) and for its Reply in Support of Application for Rehearing states as follows:

MAWC's Interpretation of Section 393.1003 Is Wrong

In its Application for Rehearing, OPC first contends "Missouri-American Water's request for relief in this case exceeds the scope of the Commission's authority" because Missouri-American Water Company (MAWC) is not a water corporation providing service in a charter county with a population in excess of one million inhabitants, as required by § 393.1003.1.[1] Importantly, in its Response MAWC does not dispute the two underlying bases for Public Counsel's Application – that the issue concerns a prerequisite to the Commission's authority to act and that the 2010 Missouri Census shows that Missouri has no charter counties with more than one million inhabitants.[2] MAWC instead rests its weak defense of its ISRS application on an unnatural and incorrect interpretation of the phrase "as of August 28, 2003," in § 393.1003.1.[3] MAWC's defense fails for at least two reasons.

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[1] *Office of the Public Counsel's Application for Rehearing*, p. 3, File No. WO-2015-0211 (Doc. No. 36).

[2] *See MAWC's Response to Public Counsel Application for Rehearing*, File No. WO-2015-0211 (Doc. No. 37) ("MAWC's Response").

[3] Mo. Rev. Stat. § 393.1003.1 (Supp. 2014).

Text, Structure and Legislative History of the Statute

A straightforward analysis of the text, structure and legislative history of the statute forecloses the argument MAWC presents. As pertinent here, § 393.1003.1 states as follows:

> Notwithstanding any provisions of chapter 386 and this chapter to the contrary, as of August 28, 2003, 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 rates schedules….[4]

MAWC suggests that the phrase "'as of August 28, 2003' – creates a 'snapshot' test for water ISRS qualification. That is, 'AS OF AUGUST 28, 2003,' was the applicant: 1) a water corporation; 2) providing service in a charter county; 3) which has more than one million inhabitants?"[5]

First, if the legislature meant the law to say what MAWC really wants it to say, the better and more natural way to draft such language would be to place "as of August 28, 2003," right behind the population requirement in the statute. The statute would then read, "more than one million inhabitants as of August 28, 2003…." In that way the rule of last antecedent would almost certainly operate to confirm that the phrase "as of August 28, 2003" was intended to place a date-based qualification on the population requirement the law imposes on water ISRSs.[6] But this is not what the legislature said, leaving MAWC with its strained analysis.

There is a much more natural interpretation of the text available than the one offered by MAWC and one that operates consistent with canons of statutory construction. By placing "as of

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[4] *Id*.

[5] MAWC's Response, p. 2.

[6] *See Elliott v. James Patrick Hauling, Inc.*, 490 S.W.2d 284, 287 (Mo. 1973) (explaining rule of last antecedent).

August 28, 2003" where it did, the text can be interpreted as advancing either or both of the following legislative goals: 1) making clear the effective date of the water ISRS is not impacted by the emergency clause adopted for other provisions in the Senate Substitute for Senate Committee Substitute for House Bill 208, and/or 2) ensuring that eligible utilities can file for a water ISRS with the Commission immediately upon the law's effective date and without waiting thereafter for the Commission to adopt rules.

As to the first interpretation, Senate Substitute for Senate Committee Substitute for House Bill No. 208 as passed – though not as introduced – enacts several new sections "relating to the public service commission, with an emergency clause for certain sections."[7] As introduced, House Bill 208 was an act "related to the public service commission's jurisdiction of consumer-owned electric corporations" without an emergency clause.[8] Not until the Senate Substitute of the bill did it include an emergency clause.[9] And not until the Senate Substitute received debate on the floor and Senate Amendment No. 1 added onto the bill's text, was the water ISRS included in the act.[10] However, the emergency clause related only to §§ 91.026 and 91.030 and not to the water ISRS sections.

Given these order of events in the Senate, the use of the phrase "as of August 28, 2003," in Senate Amendment 1 may be fairly read to reflect the legislature's intent that passage of the water ISRS did not, in the Senate's opinion (with which the House later concurred) constitute an emergency requiring its language to take effect immediately upon gubernatorial action. While

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[7] *See* S.S. for S.C.S. for H.B. 208, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003) (enacted).

[8] *See* H.B. 208 (as introduced).

[9] Journal of the Senate, 92nd Gen. Ass., 1st Reg. Sess., Seventy-Third Day p. 80, 81 (Mo. May 14, 2003).

[10] *Id*. at 88.

some may argue that such an interpretation renders the "as of August 28, 2003" language unnecessary because the state constitution already speaks to a statute's effective date,[11] the rule of statutory construction establishing a presumption against rendering language superfluous or unnecessary is merely that, a presumption, and is not absolute.[12] From time to time - albeit rarely - superfluous text does exist in a statute, and that may be the case here.[13]

However, this Commission and any court reviewing its decision can avoid reaching this conclusion if the Commission (or court) concurs with Public Counsel's second interpretation – that the language exists to permit the eligible water corporation to seek an ISRS even if the Commission has not yet adopted formal rules governing the ISRS.

In passing the water ISRS, the legislature afforded the Commission the power to promulgate rules to implement the new law. Section 393.1006.10 states:

> The commission shall have authority to promulgate rules for the implementation of sections 393.1000 to 393.1006, *but only to the extent such rules are consistent with, and do not delay the implementation of*, the provisions of sections 393.1000 to 393.1006.[14]

The phrase "as of August 28, 2003," and its placement within § 393.1003.1, when read with reference to the whole act, is clearly intended to insure that eligible water ISRS applicants do not

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[11]Mo. Const. art. III, §§ 20(a) & 29 operate such that August 28th of any year, being 90 days after adjournment of the general assembly on May 30th, is the effective date of those duly enacted laws not bearing an emergency clause.

[12] *See Hyde Park Hous. Partnership v. Dir. of Rev.*, 850 S.W.2d 82, 84 (Mo. 1993) (citing *State* ex rel. *Union Elec. Co. v. Pub. Svc. Comm'n*, 765 S.W.2d 626, 628 (Mo. App. W.D. 1988).

[13] *See King v. Burwell*, 576 U.S. ___, ___ (2015) (Roberts, CJ.) (slip op., at 14) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004) and applying analogous canon of statutory construction).

[14] Mo. Rev. Stat. § 393.1006.10 (Supp. 2014) (emphasis added).

have consideration of their petitions delayed because administrative rules have not yet been promulgated. Indeed, this interpretation is consistent with the legislative history.

In the 2003 session of the legislature, House Bill 208 was the only bill with a water ISRS to become truly agreed to and finally passed. It did so on the penultimate day of session that year.[15] The language adding the water ISRS to the bill occurred two days prior to the end of session.[16] Earlier in the session, the legislature considered at least three other bills which, at some point in their respective existences, included water ISRS language. In the House, House Bill 426 was the water ISRS bill as introduced that year.[17] Interestingly, HB 426 contained no language limiting the eligibility of an ISRS to charter counties with populations in excess of one million inhabitants. Moreover, instead of using the phrase "as of August 28, 2003," HB 426 used the phrase "immediately upon effectuation of §§ 393.1000 to 393.1006." HB 426 was voted due pass out of committee but died thereafter when its provisions were incorporated (with some change) into the House's version of an omnibus utility bill that session.

Lest MAWC think there is hope HB 426 somehow shows that the change to the phrase "as of August 28, 2003" is correlated to the addition of a population qualification on ISRS eligibility, a review of the other vehicles for the water ISRS that year takes away such hope and demonstrates no such correlation exists. When water ISRS language was added to HB 404, the aforementioned house omnibus utility bill that year, the text switched from the "immediately

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[15]Journal of the House, 92nd Gen. Ass., 1st Reg. Sess., Seventy-Second Day, p. 66 (Mo. May 15, 2003).

[16] Journal of the Senate, 92nd Gen. Ass., 1st Reg. Sess., Seventy-Third Day, p. 88. (Mo. May 14, 2003).

[17] *See* H.B. 426, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003) (introduced Feb. 6, 2003).

upon effectuation" language to the phrase "as of August 28, 2003."[18] However, the text did not include any population-based limitation on water ISRS eligibility.[19] Further, the original Senate ISRS bill, SB 125, included the "as of August 28, 2003" language from the date of its introduction.[20] The Senate Committee Substitute for SB 125 & 290 also included the phrase "as of August 28, 2003."[21] Neither version of SB 125 included any population-based limitation on water ISRS eligibility, [22] but all contained language permitting the Commission to receive water ISRS applications even before rules had been promulgated to give effect to the new law.

Unconstitutional Result of MAWC's Interpretation

MAWC fails to note in its Response that on August 28, 2003, there was only one charter county in Missouri which had more than one million inhabitants – St. Louis County. Under MAWC's proposal, no other county in Missouri could ever meet the requirements of Section 393.1003 because no other county in Missouri had one million inhabitants as of August 28, 2003. Therefore, the effect of MAWC's purported "snapshot" test is that Section 393.1003, and thus the ISRS statutes for water corporations, was meant from the enactment of that statute and for perpetuity to apply only to St. Louis County. MAWC's view would make the ISRS statutes for water corporations a special law applicable only to St. Louis County.

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[18] *See* H.C.S. for H.B. 404, 92nd Gen. Ass., 1st Reg. Sess. (2003) (voted due pass Mar. 13, 2003).

[19] *Id.*

[20] *See* S.B. 125, 92nd Gen. Ass., 1st Reg. Sess. (2003) (introduced Dec. 1, 2002).

[21] *Id.*

[22] HB 404 died after being referred back to the budget committee and SB 125 was brought up twice on the Senate floor and apparently filibustered, suggesting the prerequisites engrafted onto HB 208 late in the session were indispensible to the bill's final passage.

In *Treadway v. State*, the Missouri Supreme Court reviewed a statutory scheme to determine whether the statues at issue there were special or general statutes. The Supreme Court specifically stated in *Treadway*:

> Article III, section 40(30) prohibits the passage of any local or special law "where a general law can be made applicable." Unconstitutionality of a special law is presumed, *State ex rel. City of Blue Springs v. Rice*, supra, 853 S.W.2d at 921, and there must be "substantial justification" for excluding other political subdivisions. *Id*. Two inquiries are appropriate: "First, is the law a special or local law? Second, if so, is the vice that is sought to be corrected ... so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result?" *School District of Riverview Gardens, et al.*, supra, 816 S.W.2d 221.[23]

Moreover, "a law is facially special if it is based on closed-ended characteristics…a facially special law is presumed to be unconstitutional.[24] And, in fact, "population classifications are open-ended in that others may fall into the classification."[25] However, the effect of MAWC's proposed "snapshot" test is that Section 393.1003 was meant from its enactment to apply only to St. Louis County. In so doing, MAWC's interpretation, if adopted, would convert § 393.1003.1 from a perfectly valid general law, to a special law, and this cannot be the result MAWC seeks.[26]

It is not reasonable to believe the legislature passed a special law intending the words "as of August 28, 2003" to create a "snapshot" test for water corporation ISRS qualification when a general law could easily be (and was) made applicable. Section 393.1003 identifies at least one factor that may change, population. The use of the phrase "as of August 28, 2003," was not

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[23]*Treadway v. State*, 988 S.W. 508, 511 (Mo. 1999).

[24]*Jefferson Co. Fire Protection Dist. Assoc. v. Blunt*, 205 S.W.3d 866, 870 (Mo. 2006).

[25]*Id.*

[26] There is no indication from relevant legislative history that the General Assembly adhered to any of the procedural steps required by the state constitution (Art. III, § 42) before passing the law. This is likely because the General Assembly did not intend the law to be considered a special law.

intended to be such a transformative clause that the applicability, indeed the constitutionality, of this statute hinged solely on precisely what water corporations provided service in a charter county which has more than one million inhabitants on *exactly* August 28, 2003. Therefore, MAWC's argument must fail.

Conclusion

To the extent any argument for rehearing previously made is omitted in this Reply, Public Counsel's hereby adopts and incorporates by reference such argument(s) as is fully set forth above. Further, 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.[27]

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

Respectfully submitted,

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[27] Mo. 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…").

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed, emailed or hand-delivered to the parties of record this 6th day of July 2015:

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