Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

IN THE SUPREME COURT OF MISSOURI

MISSOURI-AMERICAN WATER COMPANY FOR APPROVAL TO CHANGE ITS INFRASTRUCTURE SYSTEM REPLACEMENT SURCHARGE (ISRS)	)	
and	)	Case No. SC95713
MISSOURI PUBLIC SERVICE COMMISSION,	)	
Respondents,	)	
v.	)	
OFFICE OF THE PUBLIC COUNSEL,	)	
Appellant.	)	

Appeal from the Missouri Public Service Commission
Case No. WO-2015-0211
On Transfer from the Missouri Court of Appeals, Western District

SUBSTITUTE BRIEF OF RESPONDENT
MISSOURI-AMERICAN WATER COMPANY

Dean L. Cooper – Mo. Bar #36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Telephone: 573-635-7166
Facsimile: 573-635-3847
E-mail: dcooper@brydonlaw.com

Erwin O. Switzer – Mo. Bar #29653
John C. Drake – Mo. Bar #64822
GREENSFELDER, HEMKER & GALE, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102
Telephone: 314-241-9090
Facsimile: 314-241-8624
E-mail: eos@greensfelder.com
E-mail: jdrake@greensfelder.com

ATTORNEYS FOR RESPONDENT
MISSOURI-AMERICAN WATER COMPANY

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

SUMMARY OF ARGUMENT 1

STATEMENT OF FACTS 4

1. What is an ISRS? 4

2. MAWC's ISRS Application 6

3. Petition for Rehearing and the Population Issue 7

ARGUMENT 9

STANDARD OF REVIEW APPLICABLE TO BOTH POINTS 9

I. The Public Service Commission Order is lawful because (1) Section 1.100.2 allows the continued use of the population of St. Louis County at the time the Infrastructure System Replacement Surcharge (ISRS) law was passed in 2003, and (2) the "population" argument was waived. [RESPONSE TO POINT I] 11

A. Pursuant to Section 1.100.2, St. Louis County *is Deemed to* Have a Population of More than 1,000,000. 12

1. The plain language and history of Section 1.100.2 ties the population figure in statutes to the population at the time of passage. 13

a. "Shall be deemed to include counties . . . in that category at the time the law passed" Means that

Counties Within the Category at the Time the Law Passed Are Included. 14

b. The General Population Statute Evolved to Put All of the Clauses Addressing Changes in Population in a New Subsection. 15

c. The Public Counsel's Proposed Alternative Meanings Of "At The Time The Law Passed" Are Wrong. 18

2. The 1971 Amendment for the City of St. Louis Does Not Show that the Legislature Intended to Allow Covered Political Subdivisions to Fall Out of Population Categories 21

a. The 1971 Amendment Has A Different Scope Than The Phrase "At The Time The Law Passed." 22

b. *Expressio Unius* and the Presumption Against Meaningless Words are Mere Presumptions. 23

c. Why The 1971 Amendment Was Passed 25

3. There are Scores of Statutes with Population Categories With Long-Term Application, Showing that Legislators Have Long Believed that Political Subdivisions Remain Covered by Population-Based Statutes if They Start Out Covered. 28

a. The Legislature Has Amended Statutes that Have Already Sunset, in The Public Counsel's View. 30

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

b. St. Louis County Would Have Numerous Statutes Nullified by the Public Counsel's Interpretation. 34

c. Statutes Advancing Public Safety and Other Matters in Every Corner of the State Could Be Nullified by Adoption of the Public Counsel's View. 36

d. The Public Counsel's Interpretation Would Mean That Legislative Sessions Following a Census Could Do Little More than Address the Many Statutes Potentially Affected by New Population Numbers, Which Has Not Occurred in the Past. 40

B. The Population Issue Was Waived Because It Was Not Raised in a Timely Manner, and It Is Not Jurisdictional 41

1. The Population Issue Was Waived by Not Being Raised Until the Application for Rehearing. 41

2. The PSC Had the Jurisdiction to Decide the Population Issue, So the Failure to Raise it in a Timely Manner is Waivable. 44

II. The Public Service Commission Properly Approved a Change to MAWC's Infrastructure System Replacement Surcharge (ISRS) Because the Order Designed the ISRS to Ensure that It Does Not Produce Revenues in Excess of Ten Percent of MAWC's Base Revenue Level Approved by the Commission in MAWC's Most Recent General Rate Proceeding. [RESPONSE TO POINT II]..... 48

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

CONCLUSION 52

RULE 84.04(h) STATEMENT 53

CERTIFICATE OF COMPLIANCE 53

CERTIFICATE OF SERVICE 53

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

TABLE OF AUTHORITIES

Cases

Angoff v. M & M Mgmt. Corp.,

897 S.W.2d 649 (Mo. App. W.D. 1995) 23

City of Harrisonville v. Public Water Supply Dist. No. 9,

129 S.W.3d 37 (Mo. App. W.D. 2004) 19, 36

Dep't of Soc. Servs., Fam. Supp. Div. v. Hatcher,

341 S.W.3d 762 (Mo. App. W.D. 2011) 22

Eminence R-1 Sch. Dist. v. Hodge,

635 S.W.2d 10 (Mo. 1982) 51

Farrow v. Saint Francis Med. Ctr.,

407 S.W.3d 579 (Mo. banc 2013) 9

Franklin v. Massachusetts,

505 U.S. 788 (1992) 43

Hayes v. Price,

313 S.W.3d 645 (Mo. banc 2010) 26

Hightower v. Myers,

304 S.W.3d 727 (Mo. banc 2010) 45, 46

In re Laclede Gas Company, et al.,

417 S.W.3d 815 (Mo.App.W.D. 2014) 50, 51

In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water

Company,

2001 Mo. PSC LEXIS 515, 10 Mo. P.S.C. 3d 56 (February 13, 2001) 5, 35

Ivie v. Smith,

439 S.W.3d 189 (Mo. banc 2014) 24, 25

J.C.W. ex rel. Webb v. Wyciskall,

275 S.W.3d 249 (Mo. banc 2009) 44, 45, 46

Jackson County v. State,

207 S.W.3d 608 (Mo. 2006) 12, 39

M.A.H. v. Mo. Dep't of Soc. Servs,

447 S.W.3d 694 (Mo. App. E.D. 2014) 45

Parktown Imports, Inc. v. Audi of Am., Inc.,

278 S.W.3d 671 (Mo. banc 2009) 24

Six Flags Theme Parks, Inc. v. Dir. of Revenue,

179 S.W.3d 266 (Mo. banc 2005) 24

State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n,

120 S.W.3d 732 (Mo. banc 2003) 9

State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n,

103 S.W.3d 753 (Mo. banc 2003) 9

State ex rel. City of Blue Springs v. Rice,

853 S.W.2d 918 (Mo. banc 1993) 11, 39

State ex rel. Heart of Am. Council v. McKenzie,

484 S.W.3d 320 (Mo. banc 2016) 14

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

State ex rel. Jackson County v. Spradling,

522 S.W.2d 788 (Mo. banc 1975) 29, 33, 39

State ex rel. Major v. Ryan,

133 S.W. 8 (Mo. 1910) 20, 21

State ex rel. McNeal v. Roach,

520 S.W.2d 69 (Mo. banc 1975) 26

State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n,

921 S.W.2d 5 (Mo. App. W.D. 1996) 9

State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n,

344 S.W.3d 178 (Mo. banc 2011) 10, 45

State ex rel. Smith v. Atterbury,

270 S.W.2d 399 (Mo. banc 1954) 15

State ex rel. Sprint Mo. Inc., v. Pub. Serv. Comm'n,

165 S.W.3d 160 (Mo. banc 2005) 9

State ex rel. Wallace v. Summers,

9 S.W.2d 867 (Mo. App. K.C. 1928) 20

State v. McLaughlin,

265 S.W.3d 257 (Mo. 2008) 51

State v. Rowe,

63 S.W.3d 647 (Mo. banc 2002) 14

Tetzner v. Dept. of Soc. Servs.,

446 S.W.3d 689 (Mo. App. W.D. 2014) 46

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Union Elec. Co. v. Cuivre River Elec. Co-op., Inc.,

571 S.W.2d 790 (Mo. App. E.D. 1978)..... 15, 25

Wollard v. City of Kansas City,

831 S.W.2d 200 (Mo. banc 1992) 14, 22

Statutes

Mo. Rev. Stat. § 1.100.1 ..... passim

Mo. Rev. Stat. § 1.100.2 ..... passim

Mo. Rev. Stat. § 23.020 36

Mo. Rev. Stat. § 64.215 37

Mo. Rev. Stat. § 67.1401 - 67-1571 34

Mo. Rev. Stat. § 67.1804 *et seq.* 34

Mo. Rev. Stat. § 67.392 37

Mo. Rev. Stat. § 94.579 ..... 30, 31

Mo. Rev. Stat. § 94.900 36

Mo. Rev. Stat. § 99.820.3 32

Mo. Rev. Stat. § 99.921 34

Mo. Rev. Stat. § 99.939 34

Mo. Rev. Stat. § 163.011 34

Mo. Rev. Stat. § 190.325 37

Mo. Rev. Stat. § 227.107 34

Mo. Rev. Stat. § 227.300 38

Mo. Rev. Stat. § 227.306 38

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Mo. Rev. Stat. § 227.308 38

Mo. Rev. Stat. § 227.319 38

Mo. Rev. Stat. § 227.326 38

Mo. Rev. Stat. § 227.329 38

Mo. Rev. Stat. § 227.331 38

Mo. Rev. Stat. § 249.951 37

Mo. Rev. Stat. § 386.020(59) 4

Mo. Rev. Stat. § 386.250 46

Mo. Rev. Stat. § 386.520.2 46

Mo. Rev. Stat. § 393.1003 ..... passim

Mo. Rev. Stat. § 488.2275 37

Other Authorities

Black's Law Dictionary, B. Garner, Editor (10th ed. 2014) 17

H.B. 1434, 98th Legis., 2nd Reg. Sess. (Mo. June 29, 2016) 32

Constitutional Provisions

Mo. Const. Art. 3, § 35 36

Mo. Const. Art. III, § 40(30) 12, 39

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

SUMMARY OF ARGUMENT

The key issue in this case is whether a political subdivision within the scope of a statutory population category when a statute is passed is deemed to be within the statute's scope if there is a later increase or decrease in population. A Missouri statute in effect since 1959 answers that question affirmatively by stating:

> Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population . . . shall be deemed to include all counties, cities or other political subdivisions which thereafter acquire such population . . . **as well as those in that category at the time the law passed**.

Mo. Rev. Stat § 1.100.2 (emphasis added) (MAWC App. at A1-2).

The Office of the Public Counsel ("OPC" or "Public Counsel") argues that the Infrastructure System Replacement Surcharge ("ISRS") authorized by Section 393.1003.1 is no longer available to Missouri-American Water Company ("MAWC") because that statute requires St. Louis County to **continue** to have a population of more than 1,000,000 after each decennial census, and St. Louis County's population dipped to 998,954 according to the 2010 census. In making that argument, the Public Counsel asks this Court to declare that Section 1.100.2 does **not** keep political subdivisions within a population category if they were within the category when the law passed.

The Public Counsel's position, if adopted by this Court, would cause a tectonic shift in Missouri law on construction of the hundreds of statutes tied to population. To adopt the Public Counsel's position would require this Court to conclude that when the legislature repeatedly passed bills with long-term ramifications during the past 57 years,

it inconsistently intended that these bills could, and often would, sunset when there was a population change. Indeed, for nearly 200 statutes that have a narrow population category with a floor and a ceiling, nullification would be inevitable. If this Court were to adopt the Public Counsel's position, scores of statutes would be rendered ineffective.

The legislative intent revealed by the passing of these bills is fully supported by the language and history of Section 1.100.2. Undoubtedly legislators over nearly six decades thought they were safe in relying on the phrase "shall be deemed to include all . . . political subdivisions . . . **in that category at the time the law passed**" to mean that the political subdivisions they described would remain within the scope of the substantive statute even as their populations fluctuated over time.

The primary argument of the Public Counsel is that an amendment to Section 1.100.2 (which was enacted 12 years after the original statute was enacted) to protect the City of St. Louis from population losses shows that no other political subdivision is protected from population losses. The Public Counsel argues that otherwise the amendment would be meaningless and the protection of the City of St. Louis necessarily meant that the legislature was declaring that no other subdivisions were protected, citing the *expressio unius* maxim. That argument fails for at least three reasons. First, the City of St. Louis amendment was not identical to the pre-amendment protection, which applied only if the political subdivisions were covered at the time of passing of the bill. The 1971 amendment protected the City of St. Louis even if it came within a statute's scope **after** passage of the statute. Second, the pre-amendment version of Subsection 2 by plain language and context clearly was designed to protect against population shifts,

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

which was not altered by restating (and expanding) protection for one entity. Third, the "*expressio unius*" doctrine is disfavored and does not justify a contortion of the statute's original plain language and legislative enactments over 57 years.

Moreover, this Court should not consider the population issue at all. The Public Counsel first raised it in a motion for rehearing, and therefore the issue was not "determined" by the Public Service Commission in its June 17, 2015 Report and Order. In addition to constituting waiver, the failure to raise the issue until after the hearing meant that MAWC was not able to put on additional evidence of legislative intent (although the record is more than sufficient to affirm the PSC decision).

The Public Counsel's other Point Relied On claims that the Report and Order allows an excessive ISRS recovery. However, the Commission properly analyzed the statute and interpreted that its purpose is to incentivize preventative water line replacement, rather than rely on post-break fixes. The ISRS statute is intended to promote the water-company equivalent of re-paving streets, rather than filling potholes. The PSC is the agency charged with administration and construction of Section 393.1003, and its interpretation is entitled to great weight.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

STATEMENT OF FACTS

This case arises out of the application that Respondent Missouri-American Water Company filed with the Public Service Commission ("PSC" or "Commission") to change its Infrastructure System Replacement Surcharge ("ISRS") rate schedule to recover ISRS-eligible costs. (2/27/15 Application, L.F. 4).

1. What is an ISRS?

An ISRS provides a regulated utility a method, outside of a general rate case, to recover the cost of certain infrastructure system replacement projects via a petition to establish or change an ISRS. MAWC is a regulated utility, meaning that it is subject to the jurisdiction of the PSC and that its rates are subject to PSC approval. Mo. Rev. Stat. § 386.020(59). (Exhibits to Transcript of Tinsley Testimony at PSC Hearing, 6/3/15, at WD78792 Exhibit pages 3-4 ("Transcript Exhibit page"); L.F. 4 [MAWC Petition at PSC, 2/27/15]; OPC App. at A2-3 [PSC Report and Order, 6/27/15]). In the absence of an ISRS, a utility like MAWC is compensated only through a general rate case. A general rate case compensates the utility for expenses based on an historical test year, occurs only every few years, and takes 11 months to decide. (Transcript Exhibit pages 4-5; L.F. 4; OPC App. at A3).

An ISRS allows the utility to recover certain eligible expenditures between general rate actions, so it "constitutes an incentive" for the utility to pursue infrastructure projects. (Transcript Exhibit pages 5-6; L.F. 4; OPC App. at A3). The ISRS involved in this case is for water service, and the statute states in pertinent part:

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

> [A]s 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 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 . . . .

Mo. Rev. Stat. § 393.1003.

The ISRS statute has provided MAWC with an incentive to be aggressive in the replacement of aging infrastructure in St. Louis County. Not so many years ago, the Commission recognized the problems that had developed in St. Louis County in regard to water infrastructure:

> St. Louis County Water Company is nearly 100 years old. Its first generation mains, in its oldest service areas like University City, are simply wearing out. Consequently, the Company is experiencing an exponential increase in water main breaks and repair costs. The worn-out piping and mains require replacement. However, the cost of replacing these mains is great. The Company states that it will require a large amount of new capital to invest in infrastructure replacement.

In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Company,

2001 Mo. PSC LEXIS 515, 10 Mo. P.S.C. 3d 56 (February 13, 2001). Largely because of the incentive provided by the ISRS, MAWC had invested approximately $445,515,360 in St. Louis County infrastructure replacement since 2003 as of the time of the hearing. (Transcript Exhibit page 14).

2. MAWC's ISRS Application

The application at issue is for ISRS recovery for some infrastructure expenses incurred since MAWC's last general rate case and since MAWC's last ISRS application. MAWC filed a revised tariff sheet to implement its ISRS rate change along with its application on February 27, 2015, and carried a proposed effective date of June 27, 2015. (L.F. 15 [Appendix to MAWC Petition at PSC, 2/27/15]; OPC App. at A2 [PSC Report and Order, 6/27/15]). The proposed increase in ISRS rates was designed to allow MAWC to recover annual revenue for qualifying plant placed in service between October 1, 2014 and March 31, 2015. The Commission found that during that time MAWC incurred enough in eligible costs for an ISRS that produces more than $25,892,662. (OPC App. at A6 [PSC Report and Order, 6/27/15]). The preceding general rate case for MAWC established an ISRS effective September 25, 2012. Commission Case No. WO-2012-0401. The ISRS had previously been changed by the PSC effective June 21, 2013, December 14, 2013, May 30, 2014, and December 31, 2014. (Transcript Exhibit page 8).

The ISRS statute authorizes "a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants" to file a petition and proposed rate schedules to provide for recovery of infrastructure replacement costs. Mo. Rev. Stat. § 393.1003.1. At no time during the proceedings

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

below through the evidentiary hearing and the issuance of the PSC Report and Order approving the ISRS did the Public Counsel or anyone else question that MAWC was authorized to seek an ISRS under Section 393.1003. Nor had the Public Counsel or anyone else questioned the availability of Section 393.1003 to MAWC in the 2012 general rate case or the four intervening ISRS petitions.

The evidentiary hearing was held on June 3, 2015. (Tr. 1). The Public Counsel participated in the hearing, but did not raise the population issue. (Tr. 1-85). Post-hearing briefs were filed by the Staff and MAWC on June 12, 2015. (L.F. 197, 214). In lieu of a brief, the Public Counsel filed its "Statement in Support of Staff." The OPC Statement said nothing about the population of St. Louis County. (L.F. 226).

The Commission unanimously approved MAWC's ISRS petition through its *Report and Order*, issued June 17, 2015, effective June 27, 2015. (L.F. 229, OPC App. at A1). MAWC's revised ISRS tariff sheet was allowed to become effective June 27, 2015. (L.F. 242, OPC App. at A14).

3. Petition for Rehearing and the Population Issue

The Public Counsel filed an application for rehearing on June 26, 2015, suggesting two reasons for rehearing: (1) the Public Counsel argued that the Commission's Order "guarantees" recovery instead of merely providing a "reasonable opportunity for recovery;" and, (2) for the first time, the Public Counsel argued that MAWC is not eligible for an ISRS because St. Louis County lacked the population required by statute as of the 2010 decennial census. (L.F. 246). Specifically, the Public Counsel argued that Section 393.1003 was not available to MAWC because the population of St. Louis

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

County was 998,954, citing a portion of the 2010 U.S. Census records for Missouri. (L.F. 246-47; OPC App. at A23).

The Commission denied this application for rehearing on a 5-0 vote, July 7, 2015. (L.F. 265). The Commission specifically noted that pursuant to Section 1.100.2, St. Louis County is still to be included in the ISRS statute "as a county with the specified population at the time the law passed." (L.F. 267). Also on July 7, 2015, the Public Counsel filed with the Commission its Notice of Appeal to the Missouri Court of Appeals, Western District. (L.F. 270). In an opinion rendered on March 8, 2016, the Court of Appeals ruled in The Public Counsel's favor on the issue of whether St. Louis County was required to currently have 1,000,000 inhabitants. However, the Court of Appeals ordered that the PSC dismiss MAWC's petition, which was a remedy not sought by any party or the subject of any briefing. The Public Counsel had sought (and seeks from this Court) a remand to the PSC to address the issue of refunds to customers, rather than dismissal.

This Court granted transfer on June 28, 2016.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

ARGUMENT

STANDARD OF REVIEW APPLICABLE TO BOTH POINTS

"[T]he appellate standard of review of a PSC order is two-pronged: 'first, the reviewing court must determine whether the [PSC's] order is lawful; and second, the court must determine whether the order is reasonable.'" *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. banc 2003), *quoting State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003).

"The lawfulness of a PSC order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed *de novo*." *AG Processing, Inc.*, 120 S.W.3d at 734. *See also, State ex rel. Mobile Home Estates, Inc. v. Pub. Serv. Comm'n*, 921 S.W.2d 5, 9 (Mo. App. W.D. 1996).

However, and of particular relevance to Point II, "the interpretation and construction of a statute by an agency charged with its administration is entitled to great weight." *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 592 (Mo. banc 2013). Furthermore, "Missouri courts have long recognized that when the decision involves the exercise of regulatory discretion, the PSC is delegated a large amount of discretion, and many of its decisions necessarily rest largely in the exercise of a sound judgment." *State ex rel. Sprint Mo. Inc., v. Pub. Serv. Comm'n*, 165 S.W.3d 160, 164 (Mo. banc 2005) (internal quotations omitted). "Under these circumstances, the reviewing court will not substitute its judgment for that of the PSC on issues within the realm of the agency's expertise." *Id.*

With respect to the reasonableness prong: "The decision of the [PSC] is **reasonable** where the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious or where the [PSC] has not abused its discretion." *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. banc 2011) (emphasis added).

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

I. The Public Service Commission Order is lawful because (1) Section 1.100.2 allows the continued use of the population of St. Louis County at the time the Infrastructure System Replacement Surcharge (ISRS) law was passed in 2003, and (2) the "population" argument was waived. [RESPONSE TO POINT I]

The PSC correctly determined that St. Louis County's population is deemed to be more than 1,000,000 for purposes of the ISRS statute because Section 1.100.2 requires the PSC and the courts to use the population of St. Louis County as of 2003 when the ISRS statute was passed. (Section I.A., below). Furthermore, the failure of the Public Counsel to raise the issue prior to the evidentiary hearing means that the issue was waived. (Section I.B., below).[1]

---

[1] The Public Counsel's brief states in a footnote that Section 393.1003 could be special legislation if that Section is read to preclude the possibility that other counties could be covered, even if they achieve a population of 1,000,000. (OPC Br. 11, n.2). MAWC is not addressing whether Section 393.1003 is a special law because (1) the Public Counsel has never asserted that Section 393.1003 **is** a special law, and (2) the Public Counsel did not argue to the PSC that Section 393.1003 is a special law. If the Public Counsel had asserted before the Commission and prior to the hearing that Section 393.1003 is a special law, MAWC could have provided overwhelming evidence that there is a rational reason and substantial justification for the classification. *State ex rel. City of Blue*

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

A. Pursuant to Section 1.100.2, St. Louis County *is Deemed to* Have a Population of More than 1,000,000.

The ISRS statute applies to water companies operating in counties with a population of more than 1,000,000. Mo. Rev. Stat. § 393.1003.1. St. Louis County's population, according to the 2010 county-by-county U.S. Census figures, is 998,954, while it was 1,016,315 when the law was passed in 2003. (OPC App. at A22-23). Missouri's general population statute provides that statutes with population categories are "deemed to include" those in that category "at the time the law passed." Mo. Rev. Stat. § 1.100.2. The plain language of that phrase alone can dispose of this case.

The main argument the Public Counsel makes to support its claim that counties can nevertheless fall out of statutory population categories is that an amendment to Section 1.100.2 protects only the City of St. Louis from population drops, implying that no other political subdivision is protected from those changes.

As detailed in the rest of Section I.A, below, the Public Counsel's interpretation is wrong because (1) the amendment would not supersede the plain language, (2) the phrase "deemed to include" is properly used only when the thing described might not otherwise actually be included in a category, (3) all would agree that the rest of Subsection 2 (other than the phrase "at the time the law passed") applies to population changes, so it should

---

Springs v. Rice, 853 S.W.2d 918, 921 (Mo. banc 1993), *citing* Mo. Const. Art. III, § 40(30). *See Jackson County v. State*, 207 S.W.3d 608 (Mo. 2006) (rational reason for classification existed).

be assumed that phrase also deals with population changes, and (4) the 1971 amendment adds meaning by providing to the City of St. Louis additional protection from population shifts even if the City entered the population category **after** the law passed. Finally, and perhaps most compelling, there is the history of the legislature passing laws year after year with narrow population categories on matters of great public importance that were obviously not intended to "sunset" after the next census. Those laws would only make sense if they were passed with the knowledge and belief of the legislators that Section 1.100.2 meant that political subdivisions within a population category at the time of passage will remain in the category.

1. The Plain Language and History of Section 1.100.2 Ties the Population Figure in Statutes to the Population at the Time of Passage.

Both the plain language and the legislative history of the general population statute compel the conclusion that a political subdivision that is within a category's scope at the time of passage shall remain within its scope. The meaning of a statute with a 1971 amendment cannot be discerned without understanding the meaning prior to the amendment. When analyzed in that way, the amendment does not create the meaning for the un-amended portion that the Public Counsel asks this Court to adopt.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

a. "Shall be deemed to include counties . . . in that category at the time the law passed" Means that Counties Within the Category at the Time the Law Passed Are Included.

The second subsection of the general population statute addresses the question of whether statutes tied to population are subject to being made ineffective after every census. That subsection states, and has stated for 57 years:

> Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population . . . shall be deemed to include all counties, cities or other political subdivisions which thereafter acquire such population . . . **as well as those in that category at the time the law passed**."

Section 1.100.2 (emphasis added).

The plain and ordinary language of that phrase should be the end of the analysis. *State ex rel. Heart of Am. Council v. McKenzie*, 484 S.W.3d 320, 327 (Mo. banc 2016) ("When the words of a statute are clear, there is nothing to construe beyond applying the plain meaning of the law.") (*quoting State v. Rowe*, 63 S.W.3d 647, 649 (Mo. banc 2002)); *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992)). The language creates an arrangement where a political subdivision that was "in" the category when the law passed stays "in."

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

b. The General Population Statute Evolved to Put All of the Clauses Addressing Changes in Population in a New Subsection.

The conclusion that Subsection 2 protects political subdivisions from population shifts after the substantive law passed is buttressed by the way the Section 1.100 developed. "One of the accepted canons of statutory construction permits and often requires an examination of the historical development of the legislation, including changes therein and related statutes." *State ex rel. Smith v. Atterbury*, 270 S.W.2d 399, 405 (Mo. banc 1954). In 1949, the provision requiring use of the federal census was adopted, with no provision dealing with changes in population and no Subsection 2:

> The population of any political subdivision of the state for the purpose of representation or other matters including the ascertainment of the salary of any county officer for any year or for the amount of fees he may retain or the amount he is allowed to pay for deputies and assistants is determined on the basis of the last previous decennial census of the United States . . . .

Mo. Rev. Stat. § 1.100.1; *See* Historical Notes of Section 1.100, *Vernon's Annotated Missouri Statutes* (MAWC App. at A1-2) and *Union Elec. Co. v. Cuivre River Elec. Co-op., Inc.*, 571 S.W.2d 790, 794-95 (Mo. App. E.D. 1978) (reciting legislative history and concluding that federal census data must be used for any matter, and not just those items enumerated). This was a significant change because at one point the population of a county for certain purposes was deemed to be five times the number of votes cast in the

last previous general election. *See* Historical Notes, *Vernon's Annotated Missouri Statutes, citing* R.S. 1929, § 11808 (MAWC App. at A1-2).

Ten years later, in 1959, Subsection 2 was added. The entire text of Subsection 2 is set out here, with the 1959 portion italicized.

> 2. *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.

Mo. Rev. Stat. §1.100.2. *See* Historical Notes, *Vernon's Annotated Missouri Statutes, citing* HB 304) (MAWC App. at A1-2).

Everything in Subsection 2, then and now, deals with changes in population (whether it be moving entities in or **not** moving them out), **unless** the Public Counsel's interpretation of "at the time the law passed" is adopted. The Public Counsel's position would require this Court to decree that everything in Section 2 deals with population changes, except for the phrase "at the time the law passed." Under that view, the clause is redundant of Subsection 1.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Subsection 2 also shows that it deals with changes or deviations from the simple rule in Subsection 1 by use of the phrase "shall be **deemed** to include." The word "deemed" is used to signify a distinction from what is actually the case. As stated in Black's Law Dictionary, "deem means 'to treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have.'" DEEM, Black's Law Dictionary, B. Garner, Editor (10th ed. 2014) (MAWC App. at A3). Black's also cites for the same point G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996):

> "'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is . . . .'Deeming' creates an artificiality . . . .".

In using the word "deemed" the drafters of Subsection 2 were signaling that entities that were not actually within the scope of a statute under the Subsection 1 standards would be treated as belonging in that category.[2]

---

[2] Although it may not affect the analysis, the Public Counsel improperly describes MAWC's position as advocating for a "grandfather clause." (OPC Br. at 20-21; see also W.D. Op. at 15, 23-24). A grandfather clause is a "provision that creates an exemption from the law's effect for something that existed before the law's effective date." Black's Law Dictionary (10th ed. 2014) (MAWC App. at A4). For instance, an historical building may be exempt from the Americans with Disabilities Act requirements. But covering an entity from the outset, and keeping it covered, is not "grandfathering."

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

c. The Public Counsel's Proposed Alternative Meanings of "At The Time The Law Passed" Are Wrong.

The Public Counsel's main argument is that a 1971 amendment to Section 1.100.2 providing protection from population changes for the City of St. Louis shows that no other political subdivisions are protected. That argument is refuted in Section I.A.2 below. But before discussing the effect of the amendment, this Court must determine what the statute meant for its first 12 years. The Public Counsel posits several possibilities, but they make no sense.

The Public Counsel argues that the phrase "as well as those in that category at the time the law passed" is "meant to ensure that the law captures all the counties that might fit within a certain population based category on the date the law passes, and to ensure no conflict might be discerned between the operation of § 1.100.2 and the preceding subsection - § 1.100.1." (OPC Br. 18-19). According to the Public Counsel, if that phrase were **not** in Section 1.100.2, a law with a population category would apply "prospectively only," and would not apply to "the specific political subdivisions the legislature is trying to reach . . . until the result of the next decennial census." (OPC Br. 19-20).

That argument is nonsensical. Of course a substantive law that describes a population category applies to political subdivisions within that category when the law passed; the Public Counsel's view of "at the time the law passed" would be redundant of the substantive statute. Most (and probably all) of the statutes with population categories describe the qualifying population in the present tense, not the future tense. The Public

Counsel's interpretation would also be redundant of Subsection 1 of 1.100: "The population of any political subdivision . . . is determined on the basis of the last previous decennial census." Also, as explained above, the phrase "deemed to include" shows that Subsection 2 was not intended to merely repeat the requirement of Subsection 1. The Public Counsel is calling for an interpretation that creates a double redundancy.

Our research has not identified a single reported opinion, or even one newspaper article, in which anyone asserted that the phrase "at the time the law passed" does not keep "in" political subdivisions that were "in" when the law passed, until the Public Counsel took that position in 2015. In fact, in the only prior reported opinion on Section 1.100.2 in which a losing party would have been motivated to offer the Public Counsel's interpretation, that party did not do so. *City of Harrisonville v. Public Water Supply Dist. No. 9*, 129 S.W.3d 37 (Mo. App. W.D. 2004). In that case, the City of Harrisonville wanted to be **outside** the scope of a statutory exception that was tied to the population of the County in which the City was located. The City argued that it was "out" because when the statute at issue became effective (signed by the Governor in July 2001), the new census figures had already taken effect, on July 1. The opposing and prevailing party argued that the City was "in" under the "old" census figures in effect when the law passed (May 2001). But under the Public Counsel's interpretation, the City would have prevailed regardless because it would have been "out" once the new census figures took effect. The City's attorneys did not make that argument. The parties and the Court appeared to agree that the correct interpretation of the population statute is "once in, always in." The reported opinions suggest that no litigant had interpreted Section 1.100

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

in the way that Public Counsel now urges, until Public Counsel did so in its 2015 petition for rehearing before the PSC.

The Public Counsel also contends that Missouri case law rejects the rule that a covered entity stays covered by including this quotation: "Once in, always in, is a dogma we do not subscribe to." (OPC Br. at 23, n.9, citing *State ex rel. Major v. Ryan*, 133 S.W. 8, 12 (Mo. 1910) and citing *State ex rel. Wallace v. Summers*, 9 S.W.2d 867, 868 (Mo. App. K.C. 1928)). The main problem with this argument is that the cases were decided long before the phrase "at the time the law passed" became part of Missouri's statutes in 1949. Moreover, the Public Counsel's quotation left out a qualifier. The actual quotation is: "Once in, always in, is a dogma we do not subscribe to *as an invariable rule in legal hermeneutics in cases like this*." 133 S.W.at 12 (emphasis added). The cases show that even before the adoption of the "at the time law passed," this Court refused to categorically reject "once in, always in."

Finally, the Public Counsel argues that the phrase "at the time the law passed" was meant to distinguish between the date the legislature passed the law and the date it became effective. (OPC Br. at 19). According to the Public Counsel, that is important because the "new" census information would not be available until July 1 of the year after the decennial census was taken. July 1 would be between the end of the legislative session and the effective date of most statutes.

One problem with that argument is that the premise is wrong. In fact, federal law requires that the census data be reported to the Governor of a State no later than April 1 of the year after the census, which is about six weeks before the legislative session ends.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

13 U.S.C. 141(c). The data has historically been available even earlier than that. *State ex rel. Major v. Ryan*. 133 S.W.8, 10 (Mo. 1910) (addressing results of 1910 census in 1910). A second problem is that the Public Counsel's view means the legislature included the phrase "at the time the law passed" for situations that would occur only once every ten years: during the legislative session following a decennial census. Surely the legislature would have made clear that that phrase was inserted to deal with a once-a-decade occurrence if that was the intent.

In summary, the only reasonable interpretation of the phrase "at the time the law passed" as enacted in 1959 is that it includes political subdivisions in statutory population categories if they were in the category at the time the law passed.

2. The 1971 Amendment for the City of St. Louis Does Not Show that the Legislature Intended to Allow Covered Political Subdivisions to Fall Out of Population Categories.

The main argument of the Public Counsel is that a 1971 amendment to Section 1.100.2 shows that the legislature intended that only the City of St. Louis would be unaffected by population changes. The part of Subsection 2 adopted in 1971 reads:

> "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."

According to the Public Counsel, the interpretation MAWC advocates would make the 1971 amendment redundant and meaningless and therefore contrary to the presumption of statutory construction against meaningless words or clauses. The Public Counsel also

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

asserts that treating other counties as protected would violate the "*expressio unius*" maxim (the express mention of one thing implies the exclusion of another). (OPC Br. at 21, citing *Dep't of Soc. Servs., Fam. Supp. Div. v. Hatcher*, 341 S.W.3d 762, 769 (Mo. App. W.D. 2011); *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. 1992)). But these presumptions are inapplicable and would be overcome by the plain language and history (discussed above) and the long list of statutes that clearly assumed the covered political bodies would remain covered (discussed in Section I.A.3., below).

a. The 1971 Amendment Has A Different Scope Than The Phrase "At The Time The Law Passed."

The Public Counsel is wrong in stating MAWC's interpretation of "at the time the law passed" would make the 1971 amendment meaningless. The 1971 amendment provides additional protection to the City of St. Louis that was not encompassed by the phrase "at the time the law passed." That phrase only protects political subdivisions from dropping "out" if they had the requisite population at the time the law passed. In contrast, the 1971 amendment protects the City of St. Louis "once [it] has come under the operation of that law," regardless of whether that occurred at the time of passage or thereafter. Mo. Rev. Stat. § 1.100.2.[3]

[3] The Public Counsel noted this distinction in his Reply Brief in the Western District Court of Appeals, stating that those political subdivisions that moved into the population category after passage would not stay "in." (See Public Counsel Mo. App. W.D. Reply Brief at 12-13). The situation in which a political subdivision would later enter into and

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Thus, the *expressio unius* maxim and the presumption against meaningless acts are inapplicable because the 1971 amendment adds meaning by creating a new treatment for the City of St. Louis that did not exist under the clause that deems the population of a subdivision to be within a category by being within "at the time the law passed."

b. *Expressio Unius* and the Presumption Against Meaningless Words are Mere Presumptions.

The Public Counsel's argument attempts to bootstrap the presumption that courts will not assume the legislature intended a useless act, with the separate maxim of statutory construction, *expressio unius*, which is an auxiliary rule of statutory construction only to be applied in certain circumstances where the legislature's intent is not clear. *Angoff v. M & M Mgmt. Corp.*, 897 S.W.2d 649, 655 (Mo. App. W.D. 1995) (rejecting use of *expressio unius* maxim). This Court has previously acknowledged that just because a subsection of a statute is written expressly to apply to one entity, this does not necessarily mean that other entities do not receive similar treatment under other, general, subsections of the statute: "The maxim should be invoked only when it would be natural to assume by a strong contrast that that which is omitted must have been intended

---

then fall out of a statutory category would be unusual, but it is plausible, as the Public Counsel acknowledged. Indeed, the Public Counsel's Reply Brief treated this prospect as likely enough to have argued that the possibility that some subdivisions could drop out (those that went "in" after the law passed) and not others (those "in" when the law passed) is "untenable." *Id.*

for the opposite treatment." *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 179 S.W.3d 266, 270 (Mo. banc 2005) (finding that a statutory section excluding rental boats from sales taxation did not compel a conclusion that *only* rental boats were precluded from taxation in light of a more general exclusion appearing elsewhere in the same statute that the court determined also exempted rental inner tubes from taxation). This Court went on to say: "The strong inference needed for the maxim *expressio unius est exclusio* is not present." *Six Flags*, 179 S.W.3d at 270.

This Court has further explained, in rejecting an application of the *expressio unius* maxim where it resulted in an interpretation that was inconsistent with the plain meaning of a statute: "The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result." *Ivie v. Smith*, 439 S.W.3d 189, 203 (Mo. banc 2014) (quoting *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 671, 672 (Mo. banc 2009)). "Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended." *Id.* "Statutory interpretation should not be hyper-technical, but reasonable and logical and should give meaning to the statute." *Ivie*, 439 S.W.3d at 203.

Use of the presumption against meaningless acts is particularly inappropriate in analyzing the population statute, because Section 1.100 itself has numerous redundancies. For instance, Subsection 2 refers to "counties, cities or other political subdivisions," whereas Subsection 1 refers only to "political subdivisions."

Similarly, Subsection 1 redundantly refers to the census figures controlling "for the purpose of representation or other matters including the ascertainment of the salary of

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

any county officer." The proper construction is to conclude that the phrase would mean the same thing if shortened to "for any matter," and an appellate court has so held. *Union Elec. Co. v. Cuivre River Elec. Co-op., Inc.*, 571 S.W.2d 790, 794-95 (Mo. App. E.D. 1978) (reciting legislative history and amendments and concluding that federal census data must be used for any matter). The presumptions the Public Counsel would have this Court use would lead to contortions to try to come up with a construction that avoids redundancies and would not reflect a "genuine effort to determine what the legislature intended." *Ivie*, 439 S.W.3d at 203.

c. Why the 1971 Amendment Was Passed.

Why was the 1971 amendment passed if the City of St. Louis was already protected, and why did the amendment cover only the City of St. Louis? These are fair questions, but the Public Counsel's view is not the right answer. The subjective intent of legislators or St. Louis City officials is not known with certainty, at least with the lack of an opportunity to create a record on the issue. This Court should **not** do what the Public Counsel suggests: assume with no evidence that the legislature intended to protect the City of St. Louis from population drops knowing with certainty that Subsection 2 did not protect any political subdivisions, and intending to express the idea that no other entity was protected. The Public Counsel employs the use of statutory construction maxims in the way that *Ivie* warns against. 439 S.W.3d at 203.

Instead, this Court should look at the language and history of the population statute, and the way it has been applied for decades, all in the context of the understanding of what motivates legislative action and how the legislative process works.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

It is appropriate, in statutory construction, to consider "the problem that the statute was enacted to remedy." *Hayes v. Price*, 313 S.W.3d 645, 654 (Mo. banc 2010). The context surrounding the passage of the 1971 amendment and the unique circumstances that would motivate its passage was explained by this Court in *State ex rel. McNeal v. Roach*, 520 S.W.2d 69, 74-75 (Mo. banc 1975). That case involved funding by the City of St. Louis for the then-state-controlled police department (a $40,000,000 budget item). The statutes dealing with the interrelationship between the City and the Police Board of Commissioners were tied to cities having a population of more than 700,000. According to the 1970 census, the St. Louis population dropped below 700,000, and the effective date of the new census was July 1, 1971, pursuant to Section 1.100.1. As noted in *McNeal*, the amendment for the City of St. Louis was added in the 1971 legislative session with an emergency clause to take effect in June, before the new census figures took effect. The Missouri Supreme Court explained the purpose of the amendment: "Clearly, the legislative amendment . . . was passed for the purpose of continuing the same scheme reference police expenditures." 520 S.W.2d at 75.

What this Court did not address in *McNeal*, and had no reason to address, is whether the phrase "at the time the law passed" already provided sufficient protection. The Public Counsel's assumption is that City officials knew they were **not** protected by the existing statute. But why should this Court make that assumption? If lawyers for the City advised City officials or legislators that they were 95% sure that "at the time the law passed" protected the City, what would City officials likely do? Given what would be at stake for the State's largest city (for the Police Department or other statutes affecting the

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

City of St. Louis), the prudent course of action would have been to seek a legislative amendment to have both a belt and suspenders. The notion that City officials would seek a change in the law only if they "knew" they were not covered does not reflect motivations of government officials or legislators, and does not reflect how competent lawyers advise their clients.

Why didn't the 1971 amendment cover all political subdivisions in Missouri? The Public Counsel wants this Court to assume that legislators representing constituencies in the rest of the state **knew** that everyone else was **not** protected from population changes, and wanted to keep it that way (or wanted to change the law to implicitly remove those protections). That is an unrealistic, unfounded assumption this Court should not make. The far more likely and realistic assumption is that members of the General Assembly representing 114 counties in the State did not feel the need to make the City of St. Louis clause applicable to the whole state **because** they felt protected by existing language, or those legislators had no political subdivisions in their respective districts that were covered by population-category statutes. And they could logically have concluded that they did not want to change a law for their constituencies that they did not feel was necessary, particularly if they were not facing budget emergencies or crises, like the City of St. Louis. Many legislators at the time may have had no political subdivisions in their districts that were the subject of population-category statutes. In fact, a review of the date of enactment or amendment of many of these statutes, it appears that there were far fewer population-category statutes affecting political subdivisions other than the City of St. Louis in 1971 than there are today.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Moreover, legislators who carefully looked at the 1971 proposed amendment might have noticed that it protected only against a "subsequent **loss** of population." Many legislators in 1971 may have believed that the "at the time the law passed" clause kept a political subdivision in a category, whether the change in population was up or down. They might have been concerned that including the political subdivisions in their districts might not have protected growing cities and counties who were covered by statutes that had both a population floor and a ceiling, as is the case with nearly 200 statutes. (See Section I.A.3., below).

There is admittedly some speculation in all this, but not the baseless speculation that forms the foundation of the Public Counsel's position. This Court should not attach heavy weight to the Public Counsel's speculation as to what motivated the 1971 amendment.

3. There are Scores of Statutes with Population Categories With Long-Term Application, Showing that Legislators Have Long Believed that Political Subdivisions Remain Covered by Population-Based Statutes if They Start Out Covered.

Missouri has hundreds of statutes with population categories, and many would be rendered ineffective by a subsequent decennial census under the Public Counsel's interpretation of Section 1.100.2. The fact that the legislature has continually passed such laws over the last 50-plus years shows that the legislators have interpreted Section 1.100.2 the same way as MAWC does: that a political subdivision that is "in" at passage remains "in." This Court has decreed that such a history is relevant: "[I]n determining

the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation." *State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788, 791 (Mo. banc 1975). This Court further stated that "it is proper to consider . . . acts passed at prior legislative sessions and, likewise acts passed at subsequent legislative sessions." *Id.* A court is to ascertain the uniform and consistent purpose of the legislature. *Id.*

Missouri has many laws passed after the 1971 amendment that demonstrate the consistent purpose, policy, and belief of the legislature that political subdivisions covered when the substantive statute was passed would stay "in." A Westlaw search attempting to capture some (but most likely not all) statutes with population categories produced 375 results.[4] There are at least 186 Missouri statutes that define the population category with a small range.[5] As explained below, some of the statutes have been amended even though they would be, under the Public Counsel's view, no longer effective. Most clearly have long-term functions. Those with narrow population ranges made falling out of the population category a near certainty. Under the Public Counsel's view, the

[4] This Westlaw search in the Missouri database produced a result of 375 statutes: TEXT("more than" or "at least" /5 inhabitants) or TEXT(population /5 "more than" or "at least" /5 thousand).

[5] This Westlaw search in the Missouri database produced a result of 186 statutes: TEXT("more than" /s "less than" /s inhabitants or population).

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

legislative session after a decennial census would be consumed by the legislature determining which statutes should be amended with new population categories.

Importantly, this case does not require the Court to determine whether one or more statutes comply with the state or federal constitution. In those cases, courts sometimes nullify numerous statutes to comply with the constitution. But the analysis is different when, as here, the issue is purely one of statutory interpretation. When MAWC makes the point that an opinion of this Court adopting the Public Counsel's view would disrupt the workings of many statutes, it is not to say that courts should never do so. Rather, it is to point out the implausibility of finding that the legislative intent behind a statute is one that would undo the efforts of the legislature.

a. The Legislature Has Engaged in the Meaningless Act of Amending Statutes that Have Already Sunset, if The Public Counsel's View is Adopted.

One of the most compelling indicators of legislative intent is that the legislature has **amended** some of the statutes that would be ineffective if the legislature viewed Section 1.100.2 as the Public Counsel advocates, despite the fact that, at the time of amendment, the political subdivision had fallen outside the statutory population range as a result of a subsequent decennial census. For instance, the legislature passed a law in 2007 applicable to cities with a population range between 151,500 and 151,600 (Springfield) that authorizes a sales tax to fund public safety and pension obligations. Mo. Rev. Stat. § 94.579 (MAWC App. at A5 [Springfield 2000 census population]). In 2014, Springfield renewed the tax authorized under this statute, even

though Springfield fell outside that narrow population range after the 2010 census (as was likely inevitable) (MAWC App. at A6 [Springfield 2010 census population]). This shows that the City of Springfield believed that Section 94.579 still applied to it. Then in 2015 the Legislature passed an amendment to the statute which affected only the ballot language the city must use in renewing its tax every five years, but leaving the population designation unchanged. 2015 HB 517 & 754 (excerpts attached at MAWC App. at A7-12). Under the Public Counsel's interpretation, Springfield's continued collection of the tax and 2014 renewal all would be illegal, and the 2015 amendment would have been a nullity because Section 94.579 would apply to **no** political subdivisions. Thus, the 2015 amendment shows that the Legislature intended and believed that Section 94.579 still applied to Springfield. To rule otherwise, this Court would have to conclude that the Legislature intended to pass a bill that applied to no one.

The Public Counsel's interpretation of the Population Statute would also render void a series of 2016 amendments to Section 99.820 of the Missouri Revised Statutes, which govern the operation of Tax Increment Financing (TIF) Commissions in St. Louis County, St. Charles County and Jefferson County. In 2008, the legislature authorized the establishment of TIF Commissions in three categories of political subdivisions: "any city, town, or village in a county with a charter form of government and with more than **one million** inhabitants" (St. Louis County); "a county with a charter form of government and with more than two hundred fifty thousand but fewer than three hundred fifty thousand inhabitants" (St. Charles County); and "a county of the first classification with more than one hundred eighty-five thousand but fewer than two hundred thousand

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

inhabitants" (Jefferson County). Mo. Rev. Stat. § 99.820.3(1) (emphasis added). The statute was amended by H.B. 1434, signed by the Governor in June 2016, which required municipal TIF proposals to earn the vote of a majority of the county-wide TIF commissions established pursuant to Section 99.820.3. H.B. 1434, 98th Legis., 2nd Reg. Sess. (Mo. June 29, 2016) (amending 99.820.4(3), which applies to "any commission created under subsection 3") (excerpts of HB 1434 attached at MAWC App. at A13-16).[6] But according to the Public Counsel's reading of Section 1.100.1, the county-wide commissions lost their statutory authority when each of the three counties fell outside of the population ranges set out in Section 99.820.3. (According to reports from the 2010 Census, St. Louis County had fewer than 1,000,000 inhabitants; St. Charles County had more than 350,000 inhabitants, and Jefferson County had more than 200,000 inhabitants). (MAWC App. at A17-19) It is not reasonable to assume that the Legislature would craft and pass and that the Governor would sign legislation that applies to no one.

Ironically, while the Public Counsel's appeal is based on his argument that every word in a statute must be given meaning, his interpretation would mean that an entire amendment would have no meaning. The only reasonable conclusion is that the legislature intended that Section 1.100.2 be read the way MAWC suggests: that the

[6] In the absence of approval by the county-wide TIF commission, the municipal authority may still approve a TIF project upon a two-thirds majority vote of the municipal body; however, the municipality is restricted to using TIF proceeds to pay for the cost of demolition of buildings and the clearing and grading of land. H.B. 1434.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

government bodies that started out "in" would stay in. This Court has explained that in interpreting statutes, it seeks to "avoid unjust, absurd, unreasonable, confiscatory or oppressive results." *State ex rel. Jackson County*, 522 S.W.2d at 791

The Legislature routinely amends statutes to add categories of political subdivisions to the operation of statutes, without also amending the population ranges applicable to the political subdivisions covered by the statute at the time of initial enactment. For example, Section 49.272 of the Missouri Revised Statutes, passed in 2003 and amended in 2004 and 2005 authorized the county counselors in five counties (Boone, Cass, Jasper, Jefferson, and Greene) to impose civil fines for violations of misdemeanors. The legislature amended Section 49.272 in 2014 to add Buchanan County to the list of applicable political subdivisions, but left in place the population ranges for the other five counties, despite that each of them fell outside the applicable population ranges that initially brought them into the statute according to 2010 census figures. (MAWC App. at A19-24 [Census reports on the 2010 population of those counties] and MAWC App. at A25-26 [excerpts from SB 896 (2014)). Not surprisingly, the bill summary for SB 896 (2014) only refers to adding Buchanan County, and not being the only covered county: "This act adds Buchanan County to the list of counties authorized to impose a civil fine of up to one thousand dollars for each violation of any county rule, regulation, or ordinance." (MAWC App. at A27).

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

b. St. Louis County Would Have Numerous Statutes Nullified by the Public Counsel's Interpretation.

St. Louis County would be greatly affected in ways beyond the ISRS statute. There are many statutes enacted after the 2000 census referring to counties with a population of more than 1,000,000 that are (and were) clearly intended to have an ongoing effect. These statutes include those that (1) authorize the operation of the St. Louis Regional Taxicab Commission (Mo. Rev. Stat. § 67.1804 *et seq.*), (2) authorize the creation of Community Improvement Districts (§§ 67.1401-67.1571; (3) authorize a county-wide economic stimulus authority to undertake downtown development financing (Mo. Rev. Stat. §§ 99.921(3) and 99.939.1), (4) authorize certain types of highway construction projects in specified counties, including those with more than 1,000,000 inhabitants (Mo. Rev. Stat. § 227.107), (5) create Tax Increment Financing (TIF) Commissions (Section 99.820); and (6) determine the amount of state aid for education (Mo. Rev. Stat. § 163.011).

All of these statutes create structures to address long-term issues and solutions. In the 2000 Census report, the population of St. Louis County was just 1,016,315. (OPC App. at A22). It was completely foreseeable that the population would drop below 1,000,000 by 2010. It is inconceivable that these bills were passed with their nullification in a few years in mind.

Other statutes referring to a county with a population of more than 1,000,000 are listed in the Appendix. (MAWC App. at A28-29).

The ISRS statute involved here is among those statutes that contemplated a long solution. As noted in the Statement of Facts, St. Louis County has critical (and unique) needs for replacement of water mains, while there is "an exponential increase in water main breaks [due to] worn-out piping." *In the Matter of the Consideration of an Accounting Authority Order Designed to Accrue Infrastructure Replacement Costs for St. Louis County Water Company*, 2001 Mo. PSC LEXIS 515, 10 Mo. P.S.C. 3d 56 (February 13, 2001) (quoted at Transcript Exhibit page 14). The ISRS statute recognized that it is critical to make replacements, and not take a "fill the potholes" approach. It would make no sense for the legislature to authorize the PSC to approve incentives for infrastructure replacement potentially for only a few years.

The Western District opinion included the statement that "we find that the legislature was aware of the risk of population decline when it enacted these statutory provisions." Opinion at 23. Presumably the Court of Appeals was indicating that it was finding that the legislature was aware not only of the risk of population decline (which would be expected) but also the risk that the population decline would lead to St. Louis County no longer being covered by the population-based laws. Not only is there no evidence to support such an awareness by the legislature, there is contrary evidence that MAWC could have offered into evidence if the population issue had been raised before the hearing ended. The Chief Bill Drafter of the Committee on Legislative Research emailed a St. Louis County official in 2012 with the opinion that "[o]nce a statute applies to a county/city at the time of passage it always applies, regardless of subsequent population changes." (See MAWC App. at A30-31). The Chief Bill Drafter stated that

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

the opposite position (now taken by the Public Counsel), would be "untenable" in requiring the legislature to "to go back and amend every statute with a description of a county/city which changes population at the next decennial census." MAWC recognizes that the opinion of the Chief Bill Drafter is not binding on the judiciary. But given the fact that the Chief Bill Drafter's job is to advise the general assembly (Mo. Const. Art. 3, § 35; Mo. Rev. Stat. § 23.020), that same advice was presumably being given to legislators. Thus, the opinion directly contradicts the notion that the legislature knew or anticipated that political subdivisions would drop out of the scope of statutes with population categories after a population change.

c. Statutes Advancing Public Safety and Other Matters in Every Corner of the State Could Be Nullified by Adoption of the Public Counsel's View.

Some of the statutes impacted by the Public Counsel's interpretation of Section 1.100.1 involve crucial matters throughout the State. For instance, a statute enacted in 2003 permits five cities to impose a sales tax for public safety. Mo. Rev. Stat. § 94.900. These cities are all defined by population floors and ceilings (a "sliver") ranging from 100 to 2,000 persons, and all (unsurprisingly) are outside that narrow range now (MAWC App. at A32-36 [St. Joseph, Blue Springs, Excelsior Springs, Harrisonville, Peculiar]). In St. Joseph, voters approved a ballot measure in 2013 to impose the tax for the first time and hire some 20 additional police officers. (MAWC App. at 37-38). If the Public Counsel's view is adopted, that vote would be null and void, meaning at minimum that

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

the tax authorized by the voters could not be collected going forward. Claims for refunds presumably would be made.

Jefferson County and Clay County are identified in the title of a statute authorizing the imposition of an emergency telephone tax for central dispatching of emergency services tied to the 1990 census population of those counties. Mo. Rev. Stat. § 190.325. Both counties are now outside the designated population ranges. (MAWC App. at A19, 39). Likewise, Clay County now falls outside the population range of a statute that authorized it to impose a .25% sales tax to fund prosecution of drug offenses and for crime prevention (Mo. Rev. Stat. § 67.392). Cass County is now outside of the population range for a statute authorizing a $10 surcharge in criminal cases in its circuit courts to cover costs of operating county courts (Mo. Rev. Stat. § 488.2275). (MAWC App. at A21).

Another statute authorizes the issuance of notes for the construction of sewage or storm water facilities for cities or counties meeting four different population categories, including one for cities with a population between 105,000 and 120,000. Mo. Rev. Stat. § 249.951. Similarly,

Another example of a statute that would be rendered ineffective and thereby disrupt government services, if the Public Counsel's view is adopted, is the law creating the Cass County Planning Board. Mo. Rev. Stat. § 64.215. This statute, dealing with the eight members of county planning boards in first class counties, was amended in 2005 to make two members of the county planning board non-voting (engineer and county commission member), but only in counties with a population between 82,000 and 82,100.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

The county meeting that description (or the year the amendment was added) is not readily apparent from the statute. But MAWC was able to determine the year of amendment and that the only county in that population range pursuant to the 2005 census was Cass County (82,092). (OPC App. at A22). The population of Cass County is 99,478 as per the 2010 census. (MAWC App. at A21). Under the Public Counsel's interpretation, the non-voting members would have become voting members as of July 1, 2011. But in looking at the Cass County Planning Board website, one can see that it refers only to six members, with no reference to the county commissioner or engineer as members. http://www.casscounty.com/2155/Cass-County-Planning-Board (retrieved 7/29/16). Presumably that is because Cass County officials interpreted Section 1.100.2 the same way that MAWC and every executive or legislative official other than the Public Counsel have interpreted it since 1959. If the Public Counsel's position is adopted, the validity of every action taken by the Cass County Planning Board since July 2, 2011 could be called into question.

Furthermore, there are numerous "Memorial Highway" designations tied to population, including population slivers.[7]

---

[7] See, e.g., the following subsections of Chapter 227, RSMo: 300 (Cong. Taylor, Jasper County); 306 (VFW, Linn & Livingston counties); 308 (Dep. Barnes, Dent County); 319 (Trooper Froemsdorg, Perry County); 326 (Sgt. Guilliams, Pemiscot County); 329 (Trooper Poynter, Texas County); 331 (Trooper Linegar, Taney County); and many more.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

There are undoubtedly many other statutes that would be rendered ineffective and call into question the validity of government actions if the Public Counsel's view is adopted that can be ascertained only with a time-consuming and difficult research, if at all. In many cases the ramifications cannot be determined because of the large number of statutes and the lack of readily available information as to how a statute is currently being implemented. In other situations, the ramifications will not be known for some time, and perhaps not until after the next census.

While some of the substantive statutes may directly address issues of whether the political subdivisions stay "in" or not, it appears that the vast majority do not. For these statutes, this Court's decision is critical to avoid the "unjust, absurd, unreasonable, confiscatory [and] oppressive result[]" this Court seeks to avoid in statutory interpretation. *State ex rel. Jackson County*, 522 S.W.2d at 791.[8]

---

[8] Finally, it is important to remember that this case does not involve the provision of the Missouri constitution that prohibits a "special law . . . where a general law can be made applicable." Mo. Const. Art. III, § 40(30). While some may be intrigued by the idea that sliver statutes would violate the special law clause, that decision should not be made in a case in which the affected communities are not parties or perhaps even aware of the case. Even a "special law" is constitutional if there is a "substantial justification" for special treatment. *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993). *See Jackson County v. State*, 207 S.W.3d 608 (Mo. 2006) (rational reason for classification existed). The affected communities should at least have the chance to put

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

d. The Public Counsel's Interpretation Would Mean That Legislative Sessions Following a Census Could Do Little More than Address the Many Statutes Potentially Affected by New Population Numbers, Which Has Not Occurred in the Past.

If the Public Counsel's interpretation were adopted, it would wreak havoc on the legislature during the session immediately following each census. During the window of time between the results of a decennial census being issued, and the date that the new census would be applied (July 1 of the year after the census was conducted, per RSMo § 1.100.1), the legislature would have to devote much of its regular session to trying to locate all of the population-based statutes and amend them to ensure that they remain in effect. Or, more likely, the legislature would pass a law providing that statutory population categories apply to political subdivisions that were in the category at the time the law passed, regardless of subsequent changes.

But it appears that the legislature believes it already passed such a law. MAWC's research did not locate substantive statutes with population categories that were amended after the decennial census reports were issued (1961, 1971, 1981, 1991, 2001, 2011). The lack of an overhaul of the statutes is consistent with the opinion of the Chief Bill Drafter

---

forth a substantial justification, rather than have a law affecting them nullified through the back door by a declaration that political subdivisions covered by a statute do not remain covered.

of the Committee on Legislative Research that such changes are unnecessary. (MAWC App. at 30-31).

B. The Population Issue Was Waived Because It Was Not Raised in a Timely Manner, and It Is Not Jurisdictional.

The population issue was waived because it was not raised until the Application for Rehearing, after the record was closed. Although the Public Counsel has claimed that the population issue is not waivable because it is jurisdictional, that is not correct. Indeed, the Public Counsel implicitly recognizes the PSC has jurisdiction to deal with the population issue because it is asking this Court to remand the case to the PSC for a remedy.

1. The Population Issue Was Waived by Not Being Raised Until the Application for Rehearing.

The Public Counsel asserts that the Commission erred in its *Report and Order* because the population of St. Louis County is now less than 1,000,000. But the Commission could not have erred in failing to address an issue on which the Public Counsel provided no evidence or argument prior to the *Report and Order* being issued on June 17, 2015. The Public Counsel first raised the population issue in its Application for Rehearing. (OPC Br. 4-5, L.F. 246-47).

The Missouri statutes relating both to rehearing and appeal bar consideration of the population issue. First, there is a right to apply for a rehearing only in respect to any matter "determined" in the Commission order at issue:

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

> 1. After an order or decision has been made by the commission, the public counsel or any corporation or person or public utility interested therein shall have the right to apply for a rehearing **in respect to any matter determined therein** . . . .

Section 386.500.1 (emphasis added).

There is **no** right to apply for a rehearing on a matter **not** determined by the Commission. The issue raised in the Public Counsel's Application for Rehearing and this appeal (whether to use the population of St. Louis County in the 2010 census for purposes of Section 393.1003) was not presented to the Commission and therefore was not "determined" in the *Report and Order*. Therefore, there was no right to apply for a rehearing on that issue.

Similarly, Missouri law dictates the limited scope of an appeal from an order of the Public Service Commission:

> Except with respect to a stay or suspension pursuant to subsection 1 of section 386.520, no new or additional evidence may be introduced in the appellate court but the cause shall be heard by the court without the intervention of a jury on the evidence and exhibits **introduced before** the commission **and certified to by it . . . .**

Section 386.510 (emphasis added).

Here, the Public Counsel did not offer any evidence at or before the hearing that St. Louis County's population was not, or should not be deemed to be, less than 1,000,000. Therefore, the Commission did not certify evidence on the subject. Thus, Section 386.510 provides another reason this Court cannot consider the population issue.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

If the Public Counsel had raised the issue in a timely manner, MAWC could have introduced evidence on the subject. That evidence might have included the opinion of the Chief Bill Drafter as to how she advised the legislature of the meaning of Section 1.100.2. It might have included information on the importance and reasonableness of a classification that affected only St. Louis County at the time.

The evidence also might have included information on other data from the 2010 decennial census. For instance, the 2010 census counts as Missourians 22,551 federal overseas personnel (military and civilian) who are not included in the county-by-county figures. (MAWC App. A40). If they are counted and allocated proportionally by population among Missouri's counties, St. Louis County's population is more than 1,000,000. (St. Louis County has 16.68% of the population of the state, and when that figure is applied to the 22,551 federal overseas personnel, 3,762 Missourians would be allocated to St. Louis County's population. Adding the 3,762 to 998,954 would make the St. Louis County population per the 2010 decennial U.S. Census 1,002,716). The Census Bureau did not count overseas federal personnel when Section 1.100.1 was passed, so that statute does not address the issue. *See Franklin v. Massachusetts*, 505 U.S. 788, 792-93 (1992) (noting that overseas federal personnel were usually not included in the census until 1970).

There may be other, easy methods to count the men and women from Missouri serving their country. It is not necessary for this Court to adopt a way of counting overseas personnel at this time. But MAWC should have had the chance to make a

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

record on the issue so long as the Public Counsel is advocating for allowing political subdivisions to drop out of population categories.

2. The PSC Had the Jurisdiction to Decide the Population Issue, So the Failure to Raise it in a Timely Manner is Waivable.

The Public Counsel may assert, as it successfully did in the Court of Appeals, that the population issue was not waivable because it goes to the subject matter jurisdiction of the PSC. But that is incorrect. The PSC had the subject matter jurisdiction to determine the population. The Court of Appeals took that mistaken view of jurisdiction one step further, and ordered that the PSC must dismiss MAWC's Petition. The Public Counsel had not sought dismissal. Instead, it sought the same relief it seeks in this Court: a remand to the PSC to address refunds.

This Court clarified the distinction between a tribunal's authority and a tribunal's subject matter jurisdiction in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). In *Webb*, the Supreme Court considered whether a trial court was without jurisdiction to consider a petition by a parent to modify a judgment because that parent was more than $10,000 in arrears in child support and had failed to post a bond for the amount by which the parent was in arrears as required by statute. This Court clarified that subject matter jurisdiction relates to a tribunal's "authority to render judgment in a particular category of case," and not to whether a litigant has met the prerequisites to judicial relief. 275 S.W.3d at 253.

Applying that principle here, even assuming that the PSC did not have statutory authority to grant the increase, the PSC had subject matter jurisdiction to hear the case.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

The Supreme Court has applied the *Webb* principle to administrative tribunals. *See Praxair, Inc. v. Publ. Serv. Comm'n*, 344 S.W.3d 178, 192 n.9 (Mo. banc 2011) (citing *Webb* in finding that a challenge based on alleged bias among PSC commissioners was not a jurisdictional challenge that could only be raised by way of writ). *See also M.A.H. v. Mo. Dep't of Soc. Servs*, 447 S.W.3d 694, 697 (Mo. App. E.D. 2014) (confirming that *Praxair* extended *Webb's* distinction between a court's authority and its jurisdiction to administrative tribunals). In *M.A.H.*, the Court of Appeals explained that an agency has subject matter jurisdiction if it has "the right to proceed to determine the controversy or question in issue between the parties." 447 S.W.3d 694, 698.

The distinction between a tribunal's jurisdiction and its authority is critical when waiver is at issue. In *Hightower v. Myers*, for example, a case that was cited in the Public Counsel's reply brief before the court of appeals, a litigant claimed that in order for a family court to have subject matter jurisdiction over a child custody and support modification, the four "jurisdictional" prerequisites of the Uniform Child Custody Jurisdiction Act (UCCJA) had to be met. 304 S.W.3d 727, 733 (Mo. banc 2010). However, the court found that, despite the moniker of "jurisdiction," the prerequisites of UCCJA could not alter a trial court's subject matter jurisdiction in light of *Webb*. The court found that, because the trial court's authority under the UCCJA was not raised in the trial court proceedings, it was waived. 304 S.W.3d at 733.

The cases cited by the Public Counsel in the Court of Appeals were pre-*Webb* cases that refer to an agency's authority to act as a matter of subject matter jurisdiction and are thus no longer good law on that point. As explained in *M.A.H.*, "Reliance on

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

pre-*Webb* cases discussing 'subject-matter jurisdiction' is often misplaced." 447 S.W.3d at 697. The only post-*Webb* case cited by the Public Counsel was *Hightower*, in which, as discussed above, this Court held that a party's argument regarding a trial court's authority to act was *waived* precisely because it was *not* a matter of the trial court's subject matter jurisdiction.

The Court of Appeals' opinion cited *Tetzner v. Dept. of Soc. Servs.*, 446 S.W.3d 689, 692 (Mo. App. W.D. 2014) for the proposition: "If the agency lacks statutory authority to consider a matter, it is without subject matter jurisdiction." But the issue here is whether the PSC could "consider" the matter, not whether it could grant the requested relief. The *Tetzner* court held that the administrative agency did have subject matter jurisdiction.

Here, the PSC had subject matter jurisdiction over MAWC. The jurisdiction of PSC over MAWC is set out in the PSC's enabling statute, which states "The jurisdiction, supervision, powers and duties of the public service commission herein created and established shall extend under this chapter: … (3) To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state . . . .". Mo. Rev. Stat. § 386.250. That the PSC has jurisdiction over proposed ISRS rate schedules is clear from the language of the ISRS statute which instructs a water corporation to file its petition "with the commission." Mo. Rev. Stat. § 393.1003. Even when an order is unlawful, the appellate court is to remand to the PSC for a remedy, because the Commission has jurisdiction. Mo. Rev. Stat. § 386.520.2(2). Jurisdiction to consider the question in the first instance rests with the PSC, **and the PSC**

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

alone, subject to petitions for rehearing and judicial review if such questions are properly preserved.

The relief the Public Counsel seeks—refunds from the PSC—is inconsistent with a claim that the PSC lacks jurisdiction. (OPC Br. at 41).

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

II. The Public Service Commission Properly Approved a Change to MAWC's Infrastructure System Replacement Surcharge (ISRS) Because the Order Designed the ISRS to Ensure that It Does Not Produce Revenues in Excess of Ten Percent of MAWC's Base Revenue Level Approved by the Commission in MAWC's Most Recent General Rate Proceeding. [RESPONSE TO POINT II]

The question presented to the Commission by MAWC and the Staff of the Commission (Staff) was as follows:

> Should the amount of ISRS revenues authorized by the Commission associated with reconciliation of prior under or over collections be included or excluded from the ISRS revenue cap calculation for MAWC in this proceeding?

MAWC's previously effective ISRS was based upon an ISRS revenue requirement of $25,637,873. This ISRS revenue requirement included $1,665,202 of reconciliation related to previous under-recovery or under-collection of authorized ISRS dollars. The Public Counsel challenges the PSC's determination that under-recoveries should be included in the reconciliation leading to the ISRS.

Section 393.1003.1 limits the ISRS as follows:

> [A]n 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.

(emphasis added).

Ten percent of MAWC's base revenue level approved by the commission in MAWC's most recent general rate proceeding equals $25,892,662 (the "ISRS cap"). MAWC's testimony explained that MAWC had not recovered the authorized **ISRS revenue requirement** in prior ISRS periods because volumes sold in those periods had been less than the volumes utilized in the last general rate case (and upon which the ISRS rate was calculated).

The Commission's decision focused on the alleged cause of this past under recovery (declining usage) and the ISRS cap language requiring that the ISRS not "**produce ISRS revenues"** "in excess of ten percent of the water corporation's base revenue level." MAWC explained in its testimony that it has experienced "declining usage" within its customer base over the subject time period. (Transcript Exhibit page 6). That is, the volumes of water the Commission assumed that MAWC's customers would use in the past are greater than the volumes of water now being used by those customers. (*Id*.)

As a result, the Commission approved MAWC's proposed ISRS tariff sheet (based on an **ISRS revenue requirement** of $27,812,653), but found that MAWC's **actual recoveries** (the ISRS revenues "produced") would be limited to the ISRS cap ($25,892,662). The Commission found:

> Therefore, in order to effectuate the intent of the ISRS statutes and allow MAWC a real opportunity to recover the maximum revenue but not allow MAWC to recover more than the maximum revenue, the Commission will

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

> order that MAWC track its ISRS revenues. No later than 60 days before MAWC expects to reach the maximum revenue allowed under the ISRS statutes, which is $25,892,662 in this instance, MAWC must file a new tariff designed to discontinue any ISRS charges associated with the revenues the Commission is authorizing in this case.

The Commission used the higher **ISRS revenue requirement**, while treating the cap as a hard cap on **ISRS revenues produced** in a twelve month period (whether those revenues are due to new investment or reconciliation of prior periods).

The Court of Appeals, in the context of the natural gas ISRS statute, has stated as follows in regard to the legislative intent of the ISRS:

> This interpretation is consistent with the **obvious legislative intent, which is to permit the gas company to timely recover its costs for government-mandated infrastructure system replacement projects via a rate adjustment outside of a general rate case for a limited period of time.**

In the Matter of the Application of Laclede Gas Company, et al., 417 S.W.3d 815, 823 (Mo.App.W.D. 2014) (emphasis added).

"In determining the intent and meaning of statutory language, the words must be considered in context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words. The provisions of a legislative act are not read in isolation but construed together,

and if reasonably possible, the provisions will be harmonized with each other." *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. 2008) (internal quotations and citations omitted).

The Commission's goal in construing a statute should be "to ascertain the intent of the lawmakers from the language used [and] to give effect to that intent if possible . . . ." *Eminence R-1 Sch. Dist. v. Hodge*, 635 S.W.2d 10, 13 (Mo. 1982).

The Public Counsel's interpretation of the statute would thwart the legislative intent – to allow the utility to timely recover its costs for infrastructure system replacement projects, by way of a rate adjustment outside of a general rate case – based on a failure to recover authorized amounts due to the rate design. In other words, because of the inexactness of the rate design and declining usage, the Public Counsel would potentially deny MAWC timely recovery of costs associated with MAWC's infrastructure system replacement projects.

This would occur based solely on the fact that prior ISRS rates were set assuming a customer usage level greater than that which MAWC experienced, resulting in the non-recovery of authorized ISRS costs. The *Report and Order* creates a process by which MAWC could recover its authorized ISRS costs without a danger of the ISRS producing revenues in excess of the cap.

The Public Counsel's interpretation of the ISRS statute is contrary to the "obvious legislative intent," as stated by the Court of Appeals opinion in *In re Laclede Gas Co.*, 417 S.W.3d at 823.

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

CONCLUSION

The ISRS statute is applicable to MAWC's Petition because the population of St. Louis County is deemed to be more than 1,000,000 based on its population "at the time the law passed." The Public Counsel's interpretation of Missouri's population statute is inconsistent with the plain language and legislative history of the statute, and is inconsistent with the legislature's enactment or amendment of scores of statutes with population categories that would be nullified. The Commission's Report and Order is lawful in that it properly applied the law and is a proper exercise of the Commission's powers. This Court should affirm the Commission's Report and Order.

Respectfully submitted,

/s/ Erwin O. Switzer

Erwin O. Switzer – Mo. Bar #29653
John C. Drake – Mo. Bar #64822
GREENSFELDER, HEMKER & GALE, P.C.
10 S. Broadway, Suite 2000
St. Louis, MO 63102
Telephone: 314-241-9090
Facsimile: 314-241-8624
Email: eos@greensfelder.com
Email: jdrake@greensfelder.com

Dean L. Cooper – Mo Bar #36592
BRYDON, SWEARENGEN & ENGLAND P.C.
312 East Capitol Avenue
P.O. Box 456
Jefferson City, MO 65102-0456
Telephone: 573-635-7166
Facsimile: 573-635-3847
E-mail: dcooper@brydonlaw.com

ATTORNEYS FOR RESPONDENT
MISSOURI-AMERICAN WATER
COMPANY

Electronically Filed - SUPREME COURT OF MISSOURI - August 08, 2016 - 01:00 PM

RULE 84.04(h) STATEMENT

MAWC's Brief is accompanied by an appendix.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the type-volume limitations contained in Rule 84.06(b), using 13 point double-spaced type, Times New Roman font, and contains no more than 14,475 words (exclusive of the cover, certificates of compliance and service, signature block, and appendix), as calculated by Microsoft Word, the software used to prepare this brief.

/s/ Erwin O. Switzer

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 103.08, service of this brief is being made on this 8th day of August, 2016, through the electronic filing system, and by email to the counsel listed below. All parties are represented, and all attorneys of record are registered users.

Jennifer Heintz
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102
Jennifer.Heintz@psc.mo.gov

Tim Opitz
Senior Counsel
Office of Public Counsel
P. O. Box 2230
Jefferson City, MO 65102
Timothy.opitz@ded.mo.gov

/s/ Erwin O. Switzer

1609052