**IN THE SUPREME COURT OF MISSOURI**

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| STATE OF MISSOURI, ex rel. PUBLIC SERVICE COMMISSION, | ) | |
| Relator, | ) | |
| v. | ) | Case No. SC 83484 |
| HONORABLE DAVID C. DALLY, Judge, Division 2, Circuit Court of Jasper County, Missouri, | ) | |
| Respondent. | ) | |

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Petition for Writ of Prohibition Concerning
the Circuit Court of Jasper County
Twenty-Ninth Judicial Circuit
Cases Nos. 00CV680808 and 00CV680824
The Honorable David C. Dally

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# BRIEF OF INTERVENOR MISSOURI-AMERICAN WATER COMPANY

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## JURISDICTIONAL STATEMENT

This is an original remedial writ initiated by a Petition for Writ of Prohibition filed by Relator Missouri Public Service Commission against Respondent Honorable David C. Dally, Circuit Court Judge, Circuit Court of Jasper County (Twenty-Ninth Judicial Circuit). Relator seeks to have the Court issue its Writ of Prohibition commanding Respondent to dismiss the actions filed by Gilster Mary-Lee Corporation and the City of Joplin (hereinafter sometimes collectively referred to as "Gilster and Joplin") in Jasper County and to refrain from proceeding further therein. The Court issued its Preliminary Order in Prohibition on April 10, 2001.

A Petition for Writ of Prohibition concerning this matter was previously filed in the Missouri Court of Appeals, Southern District. The Southern District overruled this petition on January 29, 2001.

Therefore, this case falls within the original jurisdiction of the Missouri Supreme Court. *See* **Mo. Const. art. V, § 4.**

## STATEMENT OF FACTS

Missouri-American Water Company ("MAWC" or "Missouri-American") provides water service to customers in seven districts in the State of Missouri. These districts are found in St. Joseph, Joplin, St. Charles, Warrensburg, Mexico, Parkville, and Brunswick. MAWC is a "water corporation" and "public utility" as those terms are defined in section 386.020 (58) and (42), RSMo 2000. It is subject to the rate making jurisdiction of Relator Missouri Public Service Commission ("Relator" or "Commission").

MAWC instituted a general rate case proceeding before the Missouri Public Service Commission by the filing of proposed rate schedules on October 15, 1999. This is a procedure authorized by section 393.150, RSMo 2000. The Commission suspended the proposed implementation of such rate schedules for ten months pursuant to section 393.150 RSMo 2000, and docketed the case as Case no. WR-2000-281.

The case was heard by the Commission on June 5 through 9, June 15 and 16, and on June 26 through 29, 2000 in Jefferson City, Cole County, Missouri. The Commission issued a Report and Order in Case No. WR-2000-281, on August 31, 2000 (the "Report and Order"). The Commission's Report and Order primarily addressed two general subjects -- MAWC's revenue requirement (how much of an increase in MAWC's existing revenues should be authorized) and rate design (how should MAWC's existing rates be adjusted to recover those additional revenues).

On September 19, 2000, MAWC filed a Petition for Writ of Review seeking review of the Report and Order in the Circuit Court of Cole County (Nineteenth Judicial Circuit) (Case No. 00CV325014). Petitions for Review were also filed in Cole County by:

- the St. Joseph Area Water Districts[1] on October 11, 2001 (Case No. 00CV325196);
- the City of St. Joseph on October 13, 2001 (Case No. 00CV325206);
- the Missouri Office of the Public Counsel on October 18, 2001 (Case No. 00CV325218);
- **the City of Joplin on October 17, 2001 (Case No. 00CV325217);**
- **Gilster Mary-Lee Corporation on October 18, 2001 (Case No. 00CV325220); and,**
- AG Processing Inc., Friskies Petcare Division of Nestle' Inc., Wire Rope Corporation of America Inc. and the City of Riverside, Missouri (hereinafter referred to as "St. Joseph Industrial Intervenors") on October 18, 2001 (Case No. 00CV325222).

St. Joseph Industrial Intervenors also filed a Petition for Writ of Review, identical to their Cole County petition, in the Buchanan County Circuit Court on October 16, 2001 (Case No. 00CV73667) (the "Buchanan County Case").

Gilster Mary-Lee Corporation ("Gilster") and the City of Joplin ("Joplin") filed Petitions for Writs of Review, identical to their Cole County petitions, in the Jasper County Circuit Court on October 17, 2001 (Cases Nos. 00CV680824 and 00CV680808, respectively).

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[1]Public Water Supply District ("PWSD") No. 1 of Andrew County, PWSD No. 2 of Andrew County, PSWD No. 1 of Buchanan County and PWSD No. 1 of DeKalb County.

All the referenced petitions for writs of review filed in Cole, Buchanan and Jasper Counties seek review of the referenced Report and Order.

On November 14, 2000, Relator filed its Motion to Dismiss Writ of Review, Or in the Alternative, for Transfer to Cole County, and Suggestions in Support, in Jasper County Circuit Court Cases No. 00CV680824 and 00CV680808. On December 1, 2000, Jasper County Circuit Court Judge Jon Dermott entered an Order Overruling Motion to Dismiss or, in the Alternative, Motion to Transfer in Case No. 00CV680824. On February 1, 2001, Jasper County Circuit Court Judge David C. Dally issued an Order Overruling Motion to Dismiss or, in the Alternative, Motion to Transfer in Case No. 00CV680808. Also, on February 1, 2001, an Order Consolidating Cases No. 00CV680808 and 00CV680824 for purposes of briefing and argument was issued by Judge Dally.

## POINTS RELIED ON

I. RELATOR PUBLIC SERVICE COMMISSION IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN DISMISSING SUCH CASE OR TRANSFERRING SUCH CASE TO THE CIRCUIT COURT OF COLE COUNTY, BECAUSE THE UNDERLYING CASE IS DUPLICATIVE OF IDENTICAL PROCEEDINGS PENDING IN THE CIRCUIT COURT OF COLE COUNTY, AND IS CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY AND CONVENIENCE TO PARTIES, IN THAT INTERVENOR MISSOURI-AMERICAN WATER COMPANY, GILSTER MARY-LEE CORPORATION AND THE CITY OF JOPLIN HAVE EACH FILED JUDICIAL REVIEW PROCEEDINGS PURSUANT TO SECTION 386.510, RSMO. IN COLE COUNTY

*Authorities Relied On*:

RSMo. §386.500 (2000)

RSMo. §386.510 (2000)

*Concord Pub. House, Inc. v. Director of Revenue,* 916 S.W.2d 186 (Mo. banc 1996)

*State ex rel. Farmers Insurance Co., Inc. v. Murphy*, 518 S.W.2d 655 (Mo. banc 1975)

*State ex rel. County of Jackson v. Public Service Com'n. et. al.*, 14 S.W.3d 99 (Mo. App. W.D. 2000)

*Estate of Williams v. Williams*, 12 S.W.3d 302 (Mo. banc 2000)

II. RELATOR PUBLIC SERVICE COMMISSION IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN DISMISSING SUCH CASE OR TRANSFERRING SUCH CASE TO THE CIRCUIT COURT OF COLE COUNTY, BECAUSE THE PRINCIPLE OF ABATEMENT PRECLUDES RESPONDENT FROM ADJUDICATING THE PETITIONS FOR JUDICIAL REVIEW FILED BY GILSTER MARY-LEE CORPORATION AND THE CITY OF JOPLIN IN JASPER COUNTY, IN THAT INTERVENOR MISSOURI-AMERICAN WATER COMPANY FILED THE FIRST PETITION FOR JUDICIAL REVIEW CHALLENGING RELATOR'S REPORT AND ORDER IN CASE NO. WR-2000-281 IN THE CIRCUIT COURT OF COLE COUNTY, AND IN THAT THE CIRCUIT COURTS OF JASPER AND COLE COUNTIES COULD RENDER CONFLICTING AND INCONSISTENT JUDGMENTS ON REVIEW OF THE SAME ISSUES RELATED TO THE SAME REPORT AND ORDER OF THE PUBLIC SERVICE COMMISSION.

*Authorities Relied On*:

RSMo. §386.500 (2000)

RSMo. §386.510 (2000)

*State ex rel. County of Jackson v. Public Service Com'n. et. al.*, 14 S.W.3d 99 (Mo. App. W.D. 2000)

*State ex rel. Kincannon v. Schoenlaub*, 521 S.W.2d 391 (Mo. banc 1975)

*State ex rel. Riederer v. Collins,* 799 S.W.2d 644 (Mo. App. W.D. 1990)

*State of Missouri ex rel. City of Springfield Through the Board of Public Utilities v. Conley,* 760 S.W.2d 948 (Mo. App. W.D. 1988)

## ARGUMENT

**I. RELATOR PUBLIC SERVICE COMMISSION IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN DISMISSING SUCH CASE OR TRANSFERRING SUCH CASE TO THE CIRCUIT COURT OF COLE COUNTY, BECAUSE THE UNDERLYING CASE IS DUPLICATIVE OF IDENTICAL PROCEEDINGS PENDING IN THE CIRCUIT COURT OF COLE COUNTY, AND IS CONTRARY TO THE INTERESTS OF JUDICIAL ECONOMY AND CONVENIENCE TO PARTIES, IN THAT INTERVENOR MISSOURI-AMERICAN WATER COMPANY, GILSTER MARY-LEE CORPORATION AND THE CITY OF JOPLIN HAVE EACH FILED JUDICIAL REVIEW PROCEEDINGS PURSUANT TO SECTION 386.510, RSMO. IN COLE COUNTY.**

*A. Present Review Proceedings*

On August 31, 2000, Relator Public Service Commission (hereinafter "Relator" or "Commission") issued its Report and Order in Case No. WR-2000-281. The Commission's Report and Order, which had an effective date of September 14, 2000, (hereinafter "Report and Order"), authorized an increase in Missouri-American Water Company's water service rates or revenue requirement[2] and specified the rate design[3] to be applied. Tariff sheets reflecting the increased rates

[2]The total annual revenues to be received by MAWC.

[3]The method by which the responsibility for the payment of the authorized annual revenue

authorized by the Report and Order were submitted to the Commission by Intervenor MAWC and were approved by the Commission on September 19, 2000. Also on September 19, 2000, MAWC filed its Petition for Writ of Review in the Circuit Court of Cole County, seeking judicial review of certain aspects of the Report and Order. MAWC's judicial review proceeding was filed following the Commission's denial of its timely application for rehearing.

Unquestionably, the Circuit Court of Cole County has jurisdiction of MAWC's petition seeking judicial review of the Report and Order, and is a proper venue in which to hear this matter, pursuant to the provisions of §386.510, RSMo.[4] Section 386.510, RSMo. provides in relevant part as follows:

> Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of *the county where the hearing was held* or *in which the commission has its principal office* for a writ of certiorari or review (herein referred to as a writ of review) for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined.

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requirement should be assigned to various customer classes and districts.

[4]All statutory references shall be to RSMo. 2000 unless otherwise indicated.

(Emphasis added). There is no dispute that MAWC has complied with the procedural requirements of §386.510, in that it timely filed its Application for Rehearing with the Commission (which was denied) and then timely filed its Petition for Writ of Review with the Cole County Circuit Court, the county in which the Commission had conducted the evidentiary portion of its hearings in the underlying rate case and the county in which the Commission has its principal office. There is likewise no dispute, in fact, that MAWC filed the first such petition for judicial review, in any county, of any of the parties seeking review of the Report and Order.

St. Joseph Industrial Intervenors[5] subsequently filed a Petition for Writ of Review in the Circuit Court of Buchanan County on October 16, 2000. St. Joseph Industrial Intervenors' Buchanan County petition for review is also premised upon §386.510, in that certain Commission-ordered public hearings for the purpose of taking public comment in Case No. WR-2000-281 took place in that county. The St. Joseph Industrial Intervenors then followed up their Buchanan County petition for judicial review with a substantially identical petition in the Cole County Circuit Court, which was filed on October 18, 2000. There is no substantive difference between the St. Joseph Industrial Intervenors' petitions in Buchanan or Cole County, other than their assertion that the Cole County petition was filed only on a "provisional" basis, pending the outcome of challenges to jurisdiction or venue being properly in

[5]Numerous references are made herein to arguments advanced by St. Joseph Industrial Intervenors in the companion writ proceeding in this Court styled as Case No. SC 38414. These arguments are addressed herein due to the identity of facts and legal issues under review in both matters currently pending before this Court.

Buchanan County. Gilster and Joplin also filed identical Petitions for Writ of Review in Jasper and Cole Counties (see pp. 5-6 supra). Like MAWC, the St. Joseph Industrial Intervenors, along with Gilster and Joplin, were all actively engaged in representing their interests as parties to all proceedings before the Commission in Case No. WR-2000-281, and with their multiple petitions for judicial review are seeking to challenge the same Report and Order of the Commission as will be inquired into by the Circuit Court of Cole County as a result of MAWC's petition.[6] Pursuant to §386.510, the review proceedings being pursued in Cole County, and the related proceedings sought by the St. Joseph Industrial Intervenors in Buchanan and Cole County, and those sought by Gilster and Joplin in Jasper

[6]Also, as the result of petitions for writs of review filed in Cole County by the City of St. Joseph, the St. Joseph Area Water Districts and the Office of the Public Counsel.

and Cole County, each will force those respective circuit courts to confront the same legal issue, i.e. the reasonableness and lawfulness of the Commission's Report and Order in Case No. WR-2000-281[7].

*B. Different Circuits With Concurrent Jurisdiction*

Section 386.510, quoted *supra*, contains no language addressing the current situation, in which two or more circuit courts have *concurrent* jurisdiction over separately-filed petitions for judicial review challenging the reasonableness or lawfulness of the *same* Commission Report and Order.

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[7]On review of an order of the Commission, the court's analysis is two-pronged; first, the court must determine whether the Commission's order was lawful, and second, the court must determine whether the Commission's order was reasonable in light of the facts and evidence. *Deaconess Manor Ass'n. v. Public Service Com'n.*, 994 S.W.2d 602, 609-11 (Mo. App. W.D. 1999). A determination of lawfulness turns on whether the Commission's orders or decisions are statutorily authorized. *State ex rel. Midwest Gas User's Ass'n. v. Public Service Com'n.*, 996 S.W.2d 608, 612 n. 2 (Mo. App. W.D. 1999).

MAWC does not dispute that prior appellate holdings have instructed that circuit court jurisdiction is proper under §386.510 in the county in which *any portion* of the Commission's "hearing" on the matter is conducted. *See State ex rel. Case v. Seehorn,* 223 S.W.2d 664 (Mo. banc 1920); *State ex rel. Empire Dist. Elec. v. Public Service Com'n.,* 714 S.W.2d 623 (Mo. App. 1986). However, contrary to the St. Joseph Industrial Intervenors' suggestions to this Court, these cases do not address the precise issue confronted today, which is whether, and how, a choice should be made among different circuits with concurrent jurisdiction under §386.510. Certainly, neither *Seehorn* nor its progeny provide any support for the St. Joseph Industrial Intervenors' contention that it is acceptable under §386.510 for there to be multiple circuit courts from around the state engaged in determining the legality and reasonableness of the same Commission order, with all the attendant problems inherent in such an approach. Rather, the *Seehorn* decisions resulted only from challenges to the jurisdiction of the one circuit court before which the §386.510 proceedings at issue had been filed; they simply did not address the questions presented to this Court in the present matter.

It may thus be concluded that §386.510 is ambiguous, with regard to whether and how a choice must be made among circuits having concurrent jurisdiction to hear petitions thereunder. However, as this Court has previously instructed, statutory language is to be given a "common sense and practical interpretation". *Concord Pub. House, Inc. v. Director of Revenue,* 916 S.W.2d 186, 194 (Mo. banc 1996). If there is ambiguity in a statute, the statute must be construed in a manner consistent with the legislative intent behind the statute, giving meaning to the words used in the broad context of the legislature's purpose in enacting the law. *Estate of Williams v. Williams*, 12 S.W.3d 302, 306 (Mo. banc 2000). For the reasons which follow, a "common sense and practical

interpretation" of §386.510, consistent with its apparent legislative intent[8] to provide parties with a convenient, efficient, and meaningful opportunity for judicial review of Commission rate decisions, is that this statute allows judicial review of the same Report and Order to take place in only one county with proper jurisdiction, despite other counties having concurrent jurisdiction.

In addition, the Western District has recently stated clearly, in a case involving these very statutes, that it "will not assume the legislature intended an absurd or unreasonable construction of the statutes." *State ex rel. County of Jackson v. Public Service Com'n. et. al.,* 14 S.W.3d 99 (Mo. App. W.D. 2000)[9]. At issue in *County of Jackson* was whether, in a Commission rate case where there were multiple parties seeking rehearing by the Commission pursuant to §386.500 RSMo., and where rehearing had been granted to only one of those parties, the parties denied rehearing were entitled to seek judicial review pursuant to §386.510 upon the Commission's denial and prior to the Commission having rendered its decision on rehearing concerning the claims of the one party whose claims were reconsidered. In rejecting Respondents' claims that §386.510 contemplated circuit court

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[8]In enacting provisions of Chapter 386 RSMo., the Legislature's intent was to "enact a statutory design which promotes the orderly setting of rates and review of the rates as set" and as such these provisions must be construed reasonably. *See State of Missouri ex re., GTE North, Inc., et al., v. Missouri Public Service Comm'n., et al.,* 835 S.W.2d 356, 367 (Mo. App. W.D. 1992).

[9]*Citing Dierkes v. Blue Cross and Blue Shield of Missouri,* 991 S.W.2d 662, 669 (Mo. banc 1999).

writs of review pending before the Commission had completed review of certain claims involving the same Report and Order, the Western District reasoned as follows:

> To construe §386.510 in the way urged by the respondents would require us to assume that the General Assembly intended an unreasonable, if not absurd, process of judicial review: that the General Assembly wanted to reserve judicial review of PSC decisions to cases in which the PSC had an opportunity to correct its mistakes except for multiple party cases, in which the PSC granted only one application for rehearing. In the latter cases, the respondents argue, the circuit court would be free to undertake judicial review before the PSC could act. We reject the notion as an absurd interpretation of the statute.

14 S.W.3d at 102. In other words, the Court in *County of Jackson* refused to read §386.510 to defeat an orderly process of adjudicating challenges brought by multiple parties to the same Commission Report and Order. This approach and reasoning is compellingly persuasive in the present matter as well, wherein the St. Joseph Industrial Intervenors' suggested interpretation of §386.510 would render an absurd and unreasonable result, with multiple parties before multiple circuits reaching potentially inconsistent determinations regarding the same Report and Order. This interpretation would defeat the orderly procedures contemplated by §§386.500 and 386.510, contrary to the reasoning in *County of Jackson*.

*C. Considerations of Judicial Economy and Avoiding Multiple Proceedings*

As a practical application of §386.510 to the facts of this matter, considerations of judicial economy and convenience strongly support issuance of the relief being sought by Relator from this

Court. As discussed supra, the actions for judicial review which have been separately filed in three different counties by MAWC, by the St. Joseph Industrial Intervenors, and by Gilster and Joplin each will require the reviewing courts to determine the "reasonableness" and "lawfulness" of exactly the same decision of the Public Service Commission. In absence of this Court's intervention, the Circuit Courts of Buchanan, Jasper and Cole County will each, simultaneously, be engaging in judicial review of the Commission's Report and Order, and will each be confronting and ultimately issuing judgment on many (if not all) of the same factual and legal arguments set forth by the petitioners in challenge of the reasonableness and lawfulness of the Commission's decision.

Although MAWC is not requesting an order consolidating the underlying circuit court review proceedings, much of the policy and purposes supporting judicial authority to consolidate civil actions (in the appropriate circumstances) is germane to the present matter and strongly mitigates in favor of all of the underlying §386.510 proceedings being heard, considered, and decided by one circuit court with jurisdiction to do so[10]. Further, and as the St. Joseph Industrial Intervenors also note, judicial review proceedings pursuant to §386.510 are not an "appeal" for purposes of procedural analysis, but rather

[10]Neither Relator Public Service Commission, nor MAWC, have sought or moved for consolidation of Gilster or Joplin's Jasper County petitions for review with the related petitions which are pending in Cole County. Consolidation has not been requested because, in the absence of Respondent's transfer of the Jasper County review proceeding to Cole County, the Cole County Circuit Court has no jurisdiction over the Jasper County proceeding and thus has no authority to "consolidate" it with the other Cole County proceedings.

are to be treated as separate civil suits[11], thus making the purposes behind the civil court procedures of consolidation and joinder (also discussed below) entirely analogous to the present matter.

Missouri Supreme Court Rule 66.01 states in part as follows:

* * *

> (b) **Consolidation – Common Question of Law or Fact.** When civil actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the civil actions; it may order all the civil actions consolidated; and it may make such orders concerning proceedings therein *as may tend to avoid unnecessary costs or delay*.

(Italics added.) In applying this rule, it is appropriate to consolidate actions "so as to avoid piecemeal litigation when it is reasonably possible." *Belden v. Chicago Title Ins. Co.,* 958 S.W.2d 54, 57 (Mo. App. E.D. 1997). A court's decision to consolidate is proper where the cases involve common questions of law or fact. *Birt v. Consolidated School Dist. No. 4,* 829 S.W.2d 538, 543 (Mo. App. W.D. 1992). In determining whether to consolidate cases, courts must determine whether there

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[11]*See State ex rel. Anderson Motor Service Co. v. Public Service Com'n.*,154 S.W.2d 777,780 (Mo. 1941); *State ex rel. Southwestern Bell Telephone v. Brown,* 795 S.W.2d 385, 388 (Mo. banc 1990).

would be sufficient saving of the court's and the parties' time and effort to warrant joint proceedings when balanced against the inconvenience, delay, or expense that might result to the parties. *Stein, Hall & Co. v. Scindia Steam Navigation Co.,* 264 F. Supp. 499, 501 (S.D. N.Y. 1967); *see also Whitmer v. Atchison, T. & S.F. Railway,* 82 F. Supp. 914, 915 (W.D. Mo. 1948). Consolidation is a matter of convenience and economy, and it does not change the rights of the parties or make those who are parties in one to be parties in the other. *Johnson v. Manhattan Railway,* 289 U.S. 479, 496-97 (1933).

Clearly, the principles of economy, convenience, and avoiding wasteful piecemeal litigation underlying judicial authority to consolidate are equally applicable to the present matter, and would be advanced by this Court's Order granting Relator's requested relief. The judicial review actions pending in Buchanan, Jasper and Cole Counties have numerous factual and legal issues in common, and it would be substantially less convenient for the courts and, particularly, the parties to be forced to try and defend separate, but substantially identical, review cases in three different circuits on simultaneous time dockets. This argument is especially applicable to Relator, which in absence of this Court's intervention will be forced to simultaneously defend, requiring at least triple the resources, time, and expense, the same review proceedings in three different circuits. It cannot be reasonably concluded that the legislature intended such a result through operation of the procedure created in §386.510.

Further support for the importance of protecting the interests of judicial economy and party convenience is present in the policies behind the procedure of *joinder*. In interpreting the then-new provisions of Supreme Court Rule 55.06, this Court in *State ex rel. Farmers Insurance Co., Inc. v. Murphy,* 518 S.W.2d 655 (Mo. banc 1975) allowed joinder pursuant to Rule 55.06(a) of a

plaintiff's tort claims against an insurer with claims against other tortfeasors, and in so doing found that its interpretation–

> . . .is in harmony with the philosophy of permissive joinder **which is to promote judicial economy, expedite final disposition of litigation and prevent inconsistent results due to multiple separate lawsuits.**

518 S.W.2d at 662 (emphasis added.) *See also Lester E. Cox Medical Cntr., et. al. v. Labor and Industrial Relations Com'n. of Missouri, et. al.,* 606 S.W.2d 427, 431 (Mo. App. S.D. 1980).

In the present matter, it is clearly contrary to promoting judicial economy if three different circuits are allowed to hear and consider the same legal challenges (ie. reasonableness and lawfulness) to the same Commission Report and Order. Further, this situation has the obvious and likely potential to substantially delay the final disposition of a judicial determination as to the lawfulness of the Report and Order, and could easily lead to three different and opposing judicial determinations relating to the same Report and Order (discussed in more detail under Point II *infra*).

For all of these reasons, §386.510 must not be read to allow multiple circuit court judicial review proceedings, pending simultaneously in different circuits, involving the same Commission Report and Order. For the reasons discussed below in Point II, it must further be concluded that Cole County is the proper venue in which all pending judicial review proceedings regarding Commission Case No. WR-2000-281 should be heard and decided.

## II. RELATOR PUBLIC SERVICE COMMISSION IS ENTITLED TO AN

**ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING CASE OTHER THAN DISMISSING SUCH CASE OR TRANSFERRING SUCH CASE TO THE CIRCUIT COURT OF COLE COUNTY, BECAUSE THE PRINCIPLE OF ABATEMENT PRECLUDES RESPONDENT FROM ADJUDICATING THE PETITIONS FOR JUDICIAL REVIEW FILED BY GILSTER MARY-LEE CORPORATION AND THE CITY OF JOPLIN IN JASPER COUNTY, IN THAT INTERVENOR MISSOURI-AMERICAN WATER COMPANY FILED THE FIRST PETITION FOR JUDICIAL REVIEW CHALLENGING RELATOR'S REPORT AND ORDER IN CASE NO. WR-2000-281 IN THE CIRCUIT COURT OF COLE COUNTY, AND IN THAT THE CIRCUIT COURTS OF JASPER AND COLE COUNTIES COULD RENDER CONFLICTING AND INCONSISTENT JUDGMENTS ON REVIEW OF THE SAME ISSUES RELATED TO THE SAME REPORT AND ORDER OF THE PUBLIC SERVICE COMMISSION**

*A. Potential for Inconsistent Adjudication*

**1. Generally.**

As discussed under Point I *supra*, the pendency of the Cole County, Buchanan County and Jasper County judicial review proceedings is contrary to the well-established principal of promoting judicial economy, and creates unnecessary hardship for both Relator and MAWC in simultaneously being forced to litigate substantially identical review proceedings in three distantly-removed venues. It is further clear from the foregoing discussion that there is but one (two-part) unifying legal determination to be made by the court in a §386.510 proceeding: the lawfulness and reasonableness of the Commission's orders and decisions at issue. Therefore, regardless of the St. Joseph Industrial Intervenors' attempts to characterize their claims, and those of Gilster and Joplin, raised in the Buchanan County proceedings as fully separate and distinct from the claims being asserted by MAWC in its Cole County petition for review, the Courts in all three circuits will each be required to make precisely the same ultimate determination, that being the legal sufficiency and reasonableness of the Commission's Report and Order in Case No. WR-281-2000. Each court will be constrained by the authority granted it in §386.510.

Section 386.510 further authorizes the reviewing court, in its discretion, to "remand any cause which is reversed by it to the commission for further action." If a circuit court's reversal is "by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected. . .". *See* Section 386.510. Given this authority, the potential for confusion and inconsistency in the present matter becomes obvious. Due to the subtlety and technical nature of the issues being reviewed in a proceeding

such as this one, it is a distinct possibility that one of these reviewing courts would affirm the Commission's order in its entirety, while one or the other or both circuits would reverse on one or more grounds and remand the case to the Commission for "further action."

The Western District Court of Appeals has generally taken the position that the Public Service Commission has no jurisdiction over a matter while it remains on appeal. *See State ex rel. County of Jackson v. Public Service Commission*, 14 S.W. 3d 99, 102 (Mo. App. 2000) (". . . the respondents urge us to construe 386.510 in a way that would permit the Circuit Court to take a matter away from the PSC before the PSC could take any steps to correct its earlier action.")

In the above scenario, which Circuit Court judgment would the Commission be in the untenable position of violating? If one judgment, affirming the Commission order, were to precede the other two circuits' judgments, must the question of the lawfulness of the Commission's Report and Order and MAWC's resulting rate tariffs remain open until the other circuits have issued their judgment, regardless of the time required for issuance of the second and third judgments and regardless of the Commission's order having already been affirmed by a court of competent jurisdiction? Would the appellate court's task be made more complex, and thus more time-consuming, by virtue of two or three conflicting judgments simultaneously on appeal, based on the same Commission order? What if conflicting rulings are made by the Western District and Southern District Courts of Appeals, as, if appealed, the cases would currently be directed to these separate Courts of Appeals? These are but some examples of the difficulties inherent in following Industrial Intervenors' reading of §386.510.

The Western District Court of Appeals in *State ex rel. GTE North, et al. v. Public Service Commission*, 835 S.W.2d 356, 367 (Mo. App. 1992) considered the possible implications

of a different multiple appeal situation. It stated that "if this court were to find that the circuit judgment was subject to execution, since the Commission would be obligated to resume the rate setting process while the appeal proceeds. It is not unreasonable to project that there could be, simultaneous with the original appeal, a second appeal filed and proceeding from the rulings of the Commission upon remand. Such a result *would be unworkable*." (emphasis added). The procedure proposed by Respondent in this case would be equally unworkable.

### 2. Inconsistent Treatment of Commission-Approved Rate Design and Revenue Requirement.

The Commission's Report and Order in its Case No. WR-2000-281 primarily addressed two general subjects – MAWC's revenue requirement (what annual revenues were to be received by MAWC) and its rate design (the method by which the responsibility for the payment of the authorized annual revenue requirement should be assigned to various customer classes and districts). Both of these aspects of the Report and Order are being challenged by various parties on appeal and both subjects provide the opportunity for conflicts without resolution, although at first glance parties seem to be attacking different aspects of the Report and Order.

The most obvious potential for such conflict is found in the area of rate design. In the MAWC rate case, the Commission considered essentially two types of rate design, Single Tariff Pricing ("STP") and District Specific Pricing ("DSP"). "The former is a rate design theory under which all customers of a system with multiple service areas, whether interconnected or not, pay the same rate, regardless of differences in the actual cost of providing the service to the various customers. DSP, on the other hand, sets different rates for each of the service areas, based upon the discrete cost of service in each

district." Report and Order, Case No. WR-2000-281 (August 31, 2000), pp. 57-58.

The Commission chose a form of DSP. However, in moving toward DSP, the Commission decided that no individual district would receive a rate decrease. *Id*. at 58. In addition, it also made decisions which concerned the way the revenue requirement was spread among classes of customers (i.e. residential, commercial, industrial, sale for resale) within districts.

Different parties on different sides of these issues have made claims that their share of the revenue requirement to be received by MAWC should be something less than that which has been ordered by the Commission. For example, on one hand, the St. Joseph Area Water Districts have challenged in Cole County (Case No. 00CV325196) the Commission's move toward DSP. On the other hand, the City of Joplin has challenged in Jasper County (Case No. 00CV680808) the Commission's decision to not move all the way to DSP. These claims are "opposite sides of the same coin." City of Joplin and the St. Joseph Area Water Districts cannot both prevail.

MAWC has a constitutional right to the opportunity to earn a reasonable return. See *Bluefield Water Works and Improvements Company v. Public Service Commission of West Virginia* 262 US 679, 690 (1923) and *Hope Natural Gas Company v. Federal Power Commission* 320 U.S. 591, 603 (1943). The Commission has determined the level of dollars due to MAWC and MAWC has a constitutional right to the opportunity to recover these dollars.

If the St. Joseph Area Water Districts are correct and they are not responsible for paying some part of the increased MAWC revenue requirement, some other group(s) of customers should be paying a greater amount than they are today (i.e. they should have received a greater increase than they are currently paying).

This same type of conflict exists in the appeals related to the customer class rate design issues. The St. Joseph Industrial Intervenors have challenged in Buchanan County (Case No. 00CV73667) the lawfulness and reasonableness of the rates being charged their customer class. The St. Joseph Area Water Districts have made the same allegations in Cole County (Case No. 00CV325196) and the Office of the Public Counsel has taken a different approach in Cole County (Case No. 00CV325218). Additionally, Gilster Mary-Lee Corporation has taken up this fight in Jasper County (Case No. 00CV680824).

There is in this case the danger of three different decisions on this issue by the Cole, Buchanan and Jasper County Circuit Courts. And, like the STP/DSP issue described above, allocation of rate responsibility to customer classes cannot be viewed in a vacuum. If any of these appellants are successful in the customer class portion of their appeal, and their rates should be something less than what they are currently required to pay, it does NOT mean that MAWC should receive less revenue. It merely means that some other party must pay more. Having appeals in multiple jurisdictions greatly increases the likelihood of conflicting judgements that cannot all be satisfied by the Commission.

This potential for conflict also extends into the aspects of review related to MAWC's revenue requirement. One of the primary investments behind the rate increase granted in Commission Case No. WR-2000-281 was MAWC's construction of a new water treatment plant and related facilities in St. Joseph. The Commission found MAWC's decision to construct this treatment plant to be prudent and, thus, MAWC's revenue requirement was based, in part, on its investment in the plant.

The St. Joseph Industrial Intervenors have challenged this Commission decision in Buchanan County, while the Office of the Public Counsel has challenged it in Cole County. Related to both of

these claims is MAWC's challenge to a different aspect of the Commission's Report and Order. As a part of bringing on line the new St. Joseph treatment plant, MAWC took out of service its old St. Joseph treatment plant. The old plant had not been fully depreciated. In its Report and Order, the Commission denied MAWC recovery of these undepreciated funds and required that the company write them off.

This situation again creates the potential for conflict between the Office of the Public Counsel's challenge in Cole County and the St. Joseph Industrial Intervenor's challenge in Buchanan County. It also creates a potential conflict between the MAWC challenge as to the old St. Joseph treatment plant and the Buchanan County prudence decision. The approach to the undepreciated amounts likely change depending upon whether one believes that the underlying decision to construct a new plant was prudent. Certainly, if the new plant was not constructed, there would be no need to take the old plant out of service and, if in fact, the undepreciated amounts would have remained in MAWC's plant accounts.

*B. Principle of Abatement*

It is just this kind of procedural and substantive quagmire that the judicial doctrine of *abatement* was created to avoid. The doctrine of abatement is summarized as follows:

> A second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction, *within the same state or jurisdictional territory,* between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the

rights of the parties may be determined and adjudged.

1 Am.Jur.2d *Abatement, Survival, and Revival* §5 (emphasis added). This doctrine means that a plaintiff "may not simply ignore a prior action and bring a second, independent action on the same set of facts while the original action is pending." *Id.* "Generally, a review proceeding may be pleaded in abatement of a second action." *Id.* at §15.

Under Missouri law, the principle of abatement (also sometimes referred to as the "pending action doctrine") states that where two actions involving the same subject matter, and between the same parties, are brought in separate courts of *concurrent jurisdiction,* the court in which service of process is first obtained[12] acquires *exclusive* jurisdiction and may dispose of the entire matter without

[12]The element of the principle of abatement determining priority based on first *service of process*, as stated in *City of Springfield*, rather than simply first to *file* the action, was questioned in the case of *Baker v. Baker,* 804 S.W.2d 763 (Mo. App. E.D. 1990). In *Baker*, the Court was forced to consider when an action became "pending", for purposes of abatement, and examines the history of cases discussing whether service of process, or mere filing of an action, is required to give an action "pending" status so as to cause a subsequent similar action to abate. The *Baker* opinion concludes that the present rule to be followed, as first articulated in *State ex rel. Kincannon v. Schoenlaub,* 521 S.W.2d 391 (Mo. banc 1975) gives jurisdictional priority to the court in which the first action is *filed*. *See* 804 S.W.2d at 767. In any case, this distinction is irrelevant to the present matter, in that there is no dispute as to service regarding the two petitions for judicial review at issue, nor any dispute that MAWC filed the first petition for review among the parties seeking review of the

interference from the other court. *State of Missouri ex rel. City of Springfield Through the Board of Public Utilities v. Conley*, 760 S.W.2d 948, 950 (Mo. App. W.D. 1988) ("*City of Springfield*"). "Although the doctrine is intended to relieve a party from defending the same cause of action twice, it also operates to forestall the possibility of inconsistent judgments on the same claim." *Id.* (emphasis added). In *City of Springfield*, the appellate court applied the doctrine to preclude the Boone County Circuit Court from exercising jurisdiction over a corporation's counterclaim which raised issues unrelated to the petition, and which would have resulted in parallel adjudication of issues already being tried in the Circuit Court of Greene County, which had concurrent jurisdiction of those matters. 760 S.W.2d at 950-51.

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Commission's Report and Order. In all other aspects, *City of Springfield's* articulation of the abatement doctrine remains unquestioned by subsequent holdings.

Missouri courts recognize the abatement doctrine because "the law abhors a multiplicity of suits." *State ex rel. Riederer v. Collins,* 799 S.W.2d 644, 650 (Mo. App. W.D. 1990), *citing O'Malley v. Lamb,* 113 S.W.2d 810, 811 (Mo. banc 1938).[13] The most recent definition of the doctrine appears to come from the Missouri Court of Appeals for the Eastern District, which stated that where a claim involves the same subject matter and parties as a previously filed action, such that the same facts and issues are presented, resolution should occur through the prior action and the second action should be dismissed. *Meyer v. Meyer,* 21 S.W.3d 886, 889-90 (Mo. App. E.D. 2000). As to the facts and legal issues presented, *Meyer* instructs that the abatement doctrine will apply to foreclose a second action if "the object, purpose and principles of law" are the same for the two actions at issue. *See* 21 S.W.3d at 890; *citing Estate of Holtmeyer v. Piontek,* 913 S.W.2d 352, 357 (Mo. App. E.D. 1996). In *State ex rel. Riederer, supra,* the Western District similarly instructs that an identity of issues between two actions is sufficient for abatement if the "object and purpose. . .and principles of law" are the same. *See* 799 S.W.2d at 652.

*C. Abatement Appropriate In Present Matter*

**1. Common facts and legal issues**

[13]The Court in *Riederer* also embraces the "first to file" analysis, as differentiated from the "first to obtain service of process" test discussed in fn. 11, *supra*. *See* 799 S.W.2d at 650-51.

It is clear, therefore, that abatement of a second action in the same case does not require that the issues raised in each action be precisely identical in all respects; rather, the above holdings make clear that all that is required is that the object, purpose, and principles of law be the same for the cases at issue. This requirement is easily satisfied in the present matter, wherein the review actions in all three circuits are brought to challenge the same Commission Report and Order, involving all of the same facts and evidence from proceedings before the Commission which led to the Report and Order, and wherein the different circuit courts reviewing the actions will each be applying the same "principles of law" via §386.510. The St. Joseph Industrial Intervenors spend considerable argument in support of their assertion that somehow, their claims, and implicitly those of Gilster and Joplin, under §386.510 are separate, and entirely unrelated, to the claims which MAWC and others will be litigating in Cole County. This assertion is simply wrong. In Respondent's Suggestions In Opposition filed herein, the St. Joseph Industrial Intervenors state for example that "[t]he parties are all seeking separate, independent, and original judicial reviews" of the Commission's decision. *See* Respondent's Suggestions In Opposition to Petition For Writ of Prohibition, p. 12. However, the object and purpose of each such review proceeding, regardless of circuit and regardless of who the petitioner may be in each case, is to seek the circuit court's determination that, for differing but obviously related reasons, the Report and Order of the Commission was in some respect unlawful and/or unreasonable. In each such proceeding, the reviewing court will be required to apply the same principles of law, as developed in the substantial body of case law interpreting §386.510, to answer this question. In considering whether abatement will apply to the facts of this matter, the inquiry concerning similarity of the issues should end here. There can be no dispute but that the essential object, purpose and principles of law

are the same for the multiple judicial review proceedings filed in this matter before different circuits.

Obviously, the circuit courts of Cole, Jasper and Buchanan Counties will also be performing their judicial reviews based on exactly the same facts which were developed in the underlying proceedings before the Commission, i.e. the facts which comprise the Commission's extensive "Findings of Fact" and "Conclusions of Law" set forth in its August 31, 2000 Report and Order.

Distilled to its essence, the argument being advanced by the St. Joseph Industrial Intervenors is that they and the Jasper county Petitioners should be entitled to go "forum-shopping" for the circuit in which they believe their claims stand the greatest chances of success. Obviously, they believe that their challenges to the rate increases authorized MAWC by the Commission's order will fare better in Buchanan County. The basis for this conclusion is extremely clear, as explained in Respondent's Suggestions in Opposition filed in companion Case No. SC 83414:

> Ag Processing et. al. believes Buchanan County is the proper venue for this matter. The citizens and ratepayers of Missouri-American in St. Joseph, Buchanan County have a greater stake in review of this decision than virtually any other group of Missouri ratepayers.

Respondent's Suggestions in Opposition, p. 21. Certainly, then, the St. Joseph Industrial Intervenors would prefer to have their claims on review heard in Buchanan County. This preference must clearly yield, however, to the interests of all parties combined and of the judiciary in avoiding wasteful duplicative litigation and inconsistent adjudication, as will almost certainly result if the St. Joseph Industrial Intervenors' venue preference remains intact. Also, by contrast, Cole County stands out as the only neutral circuit having statutory jurisdiction to review this matter. Both Buchanan and Jasper County venues are non-neutral in the fact that the Commission-ordered rate increases would be paid by

residents of those Counties. The St. Joseph Industrial Intervenors' attempt to secure a more favorable venue for their particular allegations, at the cost of judicial economy and consistent adjudication, should not be condoned.

**2. Party Identity**

In addition to the identity of issues present in these cases, the challenging parties in each review proceeding (MAWC, the St. Joseph Industrial Intervenors, and Gilster and Joplin) were all parties to the underlying Commission rate case which resulted in issuance of the Report and Order which is being challenged. Thus, application of the abatement principle to forestall the Jasper County review case will not in any way prevent Gilster and Joplin from having the opportunity to fully litigate their specific claims regarding the Report and Order. Section 386.510 undisputedly provides them this right in the Circuit Court of Cole County, and they obviously understand this, as well illustrated by the fact that they have already filed an identical Petition for Writ of Review in Cole County. Each party to the underlying Commission case is accorded the right to judicial review afforded by §386.510, and each may assert that right with respect to the particular effect the Commission's decision has on them. However, application of the abatement doctrine to these facts, thus requiring all of those claims to be heard before one court, is the most appropriate, efficient, and germane approach to avoiding the myriad and serious procedural difficulties outlined previously herein. Application of abatement here will allow each party seeking review to have their claims fully examined by one court of competent jurisdiction, and will help preserve the interests of all parties to the underlying rate case in avoiding wasteful and conflicting

piecemeal litigation.[14]

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[14]Missouri law does not mandate an exact identity of parties in the two (or more) specific actions being reviewed for application of the abatement doctrine. Rather, abatement *ordinarily* occurs when the second action is brought by the same plaintiff against the same defendant, on the same cause of action. *City of Springfield, supra,* 760 S.W.2d at 950. For example, extraneous parties to an action do not preclude its dismissal when determining whether there is sufficient commonality to warrant abatement. *State ex rel. Dunger v. Mummert,* 871 S.W.2d 609, 610 (Mo. App. E.D. 1994). The general rule appears to be that an identity of issues is always required, while an identity of parties is *usually* required. *State ex rel. Riederer, supra,* 799 S.W.2d at 652; *State ex rel.*

### 3. Cole County is proper jurisdiction and venue for all review proceedings

Through application of these principles, each of the pending judicial review proceedings at issue in this matter must be heard and determined by the Circuit Court of Cole County. There is no dispute that:

·The Circuit Court of Cole County is a court of competent jurisdiction pursuant to §386.510 RSMo.;

·MAWC filed the first petition for judicial review in this matter in the Circuit Court of Cole County;

·The St. Joseph Industrial Intervenors have filed a petition for judicial review in Cole County which is substantially identical to their Buchanan County filing;

·Jasper County parties, Gilster Mary-Lee Company and City of Joplin, have each filed petitions for judicial review in Cole County which are substantially identical to those which they have filed in Jasper County; and,

·The St. Joseph Industrial Intervenors, Gilster and Joplin, have each accepted the

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*Dunger, supra,* 871 S.W.2d at 610. These opinions both appear to recognize that abatement will apply absent precise identity of parties, so long as "the object and purpose of the two actions and the principles of law invoked" are the same. *Id.*

appropriateness of venue in Cole County by virtue of initiating proceedings in that county.

Further, and as previously discussed, Cole County is the only venue in this matter with both statutory jurisdiction and a claim to neutrality.

For any or all of these reasons, MAWC urges this Court to extend the principle of abatement to the facts of this matter, and in so doing grant the relief requested by Relator Public Service Commission.

## CONCLUSION

For the reasons set forth herein, the Court should issue its Peremptory Writ of Prohibition as requested by Relator.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the above and foregoing document were sent by U.S. Mail, postage prepaid, on this 9th day of May, 2001, to the following:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Special Rule No. 1, Intervenor hereby certifies that this brief complies with the limitations contained in Special Rule No. 1(b) and that, according to the word count feature in WordPerfect, the entire brief contains 9,287 words. Intervenor further certifies that, pursuant to Special Rule No. 1(f), it is filing with this brief a computer disk which contains a copy of the above and foregoing brief, which was prepared using WordPerfect 8.0, and Intervenor also certifies that the disk has been scanned for viruses and is virus-free.

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