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

BRIEF OF *AMICUS CURIAE,* THE MISSOURI MUNICIPAL LEAGUE, IN SUPPORT OF RESPONDENTS

Respectfully Submitted,
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STATEMENT OF INTEREST OF AMICUS CURIAE

The issue in this case which impinges on the interest of the Missouri Municipal League and its members is whether a political subdivision which comes within the scope of a statutory population category under a statute remains within the statute's scope if there is a subsequent change in population which would cause the political subdivision to no longer be within the purview of the statute.

The Missouri Municipal League ("League") is a Missouri benevolent corporation representing the interests of over 600 municipalities throughout the State of Missouri. The League fosters cooperation of Missouri cities, towns and villages, and promotes common interests, welfare, and cooperative relations among them, in order to improve municipal government and its administration throughout Missouri. The issue of municipal interest presented in this case pertains to the proper interpretation and application of Mo. Rev. Stat § 1.100.2 and is of critical importance to municipalities. The position advanced by the Office of Public Counsel, as ruled upon by the Court of Appeals, would severely impact the operation of municipalities and place at risk the accepted application of the statute as it has been accepted for over half a century. Any decision which accepts a transient view of population requirements in statutes would interfere with the State-delegated authority properly held and exercised by municipalities and other political subdivisions throughout the State. The defeasance of authority granted by specific population based statutes based on subsequent changes in population would place municipalities at risk of loss of the ability to perform necessary functions, lead to increased litigation, and place numerous financing mechanisms at risk.

An interpretation of a statute which leads to the elimination of a city's lawfully-delegated powers due only to an erosion or increase of population opens the flood gates for uncertainty and chaos as cities exercise all manner of powers heretofore vested in those cities by the Legislature through passage of statutes with population ranges as a criterion for application to various political subdivisions.

As the representative of over 600 municipalities in the State, the League has a vital interest in preserving the long-standing and clearly-expressed State policy that once granted authority within the scope of a statute with a population criterion, the municipality retains the authority granted, even if its population changes at a later date. The continuity of a city's authority assures that all properly delegated authority by the State held by its cities is not interfered with or eliminated by the sole fact of a change in population as determined by a later census.

The League has the right to express their views in an amicus curiae brief because the issues raised in this lawsuit involve questions of general statewide importance to all cities within the State, and the League's interest and experience will provide aid to and assist the Court in resolving the legal principles at issue in this matter. See e.g., *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 487 (Mo. banc 2009); *Barks v. Turnbeau*, 573 S.W.2d 677, 680 (Mo. App. E.D. 1978); 4 Am. Jur. 2d AMICUS CURIAE § 3 (2015).

STATEMENT OF FACTS

The Missouri Municipal League incorporates the statement of facts as set forth in the Substitute Brief of respondent Missouri-American Water Company.

POINTS RELIED UPON

The Public Service Commission Order is lawful because Section 1.100.2 allows the continued use of statutory provisions and authority once a jurisdiction comes within the purview of a statute with population criterion.

ARGUMENT

STANDARD OF REVIEW

The appellate standard of review of a PSC order commences with an analysis and determination of the lawfulness of the order. *State ex rel. Mo. Gas Pipeline, LLC v. Mo. PSC*, 366 S.W.3d 493, 495 (Mo. 2012). The burden of showing the unlawfulness is on the appellant. *State ex rel. AG Processing, Inc. v. Public Service Commission,* 120 S.W.3d 732, 734 (Mo. banc 2003), The existence of statutory authority determines lawfulness and legal issues involved are reviewed *de novo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n,* 409 S.W.3d 371 (Mo. 2013).

The Public Service Commission Order is lawful because Section 1.100.2 allows the continued use of statutory provisions and authority once a jurisdiction comes within the purview of a statute with population criterion.

Section 1.100 contains two sections designed to establish rules for use in determining population for statutory purposes. Subpart (1) establishes the use of the 1960 decennial census of the United States and subsequent decennial censuses for the determination of population when referenced in statutes for "purpose of representation or other matters. . ." Subpart (2) is the heart of the matter in addressing the lawfulness of the Commission's order and the consequences for municipalities if the Court of Appeals decision stands. As §1.100(2) exists today it reads:

> 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. (emphasis added)
>
> The italicized portion was added in 1971 by the passage of HB 154.

While the Court will be well advised of the rules of statutory construction and legislative history through the filing in this case by other parties, the League's focus is on a different aspect of statutory enactment which, while not exclusive to municipalities, is regularly utilized by the Legislature to enact provisions which target narrow segments of the municipal family based on population. These statutes are passed with summaries indicating their applicability to named cities and counties based on characteristics, usually including population figures. Often the Revisor of Statutes includes an indication of the cities or counties covered by given statutory provisions, reflecting the legislative process and the descriptors included in the enactment. The Legislature intends for these enactments to apply only to the designated cities but have been reminded by the courts of the need to avoid special legislation. See for example *City of DeSoto v. Nixon*, 476 S.W.3d 282, 2016 Mo. LEXIS 2 (Mo. 2016). As noted below the Legislature has exercised its judgment repeatedly and in varying forms to authorize all manner of actions by local government, without any indication that the authority being bestowed would self-destruct or expire upon a change in population. This case does not involve the

provision of the Missouri constitution that prohibits a special law or local law, Mo. Const. Art. III, § 40(30) and any analysis of a specific enactment not germane to this case should await separate analysis with appropriate parties involved.

While not endeavoring to read the minds of legislators long gone from the capital, numerous explanations for the passage of the 1971 amendment can be postulated. Misguided fear, "better safe than sorry" attitudes, political expediency, request from a constituent, and many other recurring themes come to mind based on historical and current practices. Attempting to assign a detailed and specific motive is why courts in Missouri have avoided the route of reading the minds and intent of the Legislature. Having noted the wisdom of the courts in avoiding the quagmire, perhaps the explanation of the reasoning set out by this Court in *State ex rel. McNeal v. Roach,* 520 S.W.2d 69, 74-75 (Mo. banc 1975) provides a probable explanation.

Hundreds of statutes with population categories have been enacted by the Legislature in the last sixty years whose purposes would be thwarted under the interpretation of §1.100(2) advanced by OPC and adopted by the appellate court. The Legislature has relatedly and continually passed and amended such laws demonstrating the legislators' belief in the continuing application of the various statutes without reference to changing population numbers. In looking to interpret an enactment of the Legislature prior and post enactments are germane. *State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788 (Mo. banc 1975).

The Missouri Legislature has passed many laws in the forty-five years after the 1971 amendment treating jurisdictions covered by laws with population criterion as still

covered after a jurisdiction's population changes would have removed it from facial coverage. Statutes are passed with limited applicability by deliberate action and the authority granted continues to be exercised by the municipality. If as proposed by OPC, that authority ended when the updated census numbers were effective, bonds, police ordinances, taxes, membership in board and commissions and the actions taken pursuant to the now inapplicable laws would be in jeopardy. A search through LexisNexis returned over five hundred statutes with population criteria and several thousand bills that were introduced during the last several years utilizing population restrictions.

Looking at the recent session of the Missouri 98th General Assembly Second Regular Session for examples of the continued use of the practice numerous examples can be found including HB 2452 and SB 795 which dealt with streamlined sales tax and incorporated exiting descriptions of cities and counties based on prior use of the same descriptors. In addition to streamlined sales tax, numerous other sales tax authorization statutes utilize population descriptors, which in many instances are quite narrow in the range of population specified. A good example can be found in Chapter 94 RSMo pertaining to lodging taxes. The titles of the various sections, as denoted by the Revisor of Statutes are: § 94.831. Tourism tax on transient guests in hotels and motels (Salem); § 94.832. Transient guest tax for tourism and infrastructure improvements (North Kansas City); § 94.834. Tourism tax on transient guests in hotels and motels (Marshall, Sweet Springs, and Concordia); § 94.836. Tourism tax on transient guests in hotels and motels (Marston, Matthews, Steele) — procedure, ballot, use of revenues — repeal of tax; § 94.837. Transient guest tax (Canton, LaGrange, Edina, special charter cities); § 94.838.

Transient guest tax and tax on retail sales of food (Lamar Heights); and § 94.840. Transient guest tax for tourism and convention facilities (City of Raytown). The population ranges of those statutes are all limited to a difference of one hundred. Given the narrow range it is not surprising when checking the revised census numbers to note that some cities have fallen below the minimum, North Kansas City, while others now exceed the maximum, Salem.

Perhaps one of the "best" examples of the chaos which will ensue if the position of the OPC is adopted can be found in RSMo §67.1360 which authorizes a tourism tax for thirty-six categories based on population. Those descriptions were designed to describe Arnold, Ashland, Bethany, Bloomfield, Bonne Terre, Boonville, Caruthersville, Clarksville, Cuba, Dent County, Desloge, Festus, Grain Valley, Hermann, Hollister, Howard County, Leadington, Lebanon, Louisiana, Montgomery County, New Madrid County and fourth class cities therein, Newton County, Park Hills, Parkville, St. James, Stoddard County, Sugar Creek, Sullivan and Warrenton (§ 67.1360 R.S.Mo.Revisor note) The population range in each category varied from one hundred to one thousand. Many of the intended jurisdictions would no longer fit within the narrow population bands. This particular section has been amended numerous times (L. 1997 2d Ex. Sess. H.B. 3; A.L. 1999 H.B. 518 merged with S.B. 240, et al; A.L. 2000 H.B. 1659 merged with S.B. 724; A.L. 2001 H.B. 242 merged with S.B. 323 & 230; A.L. 2002 H.B. 1041; A.L. 2003 S.B. 228; A.L. 2004 H.B. 795, et al. merged with S.B. 758; A.L. 2007 H.B. 205 merged with H.B. 795 merged with S.B. 22 merged with S.B. 30 merged with S.B. 81; A.L. 2010 H.B. 1442 merged with S.B. 644; A.L. 2012 H.B. 1504, § A, eff. Aug. 28, 2012), but the prior

population descriptions were generally left in place as new jurisdictions were added, in spite of the availability of two new decennial census reports.

While numerous other examples can be found reflecting decades long practice of the Legislature acting on its belief that the application of various statutes continues, the point to be made is that acceptance of the position put forward by the OPC would place at risk the operation of cities throughout the state, jeopardize jobs, including ones protecting public safety, and require budgetary adjustments at the State and local levels of unprecedented proportions.

The numerous statutes adopted by the Legislature as listed throughout this document and as available through a search are in continual use by the jurisdictions covered by their provisions. It is not only foreseeable, but a virtual certainty that the narrow bands of population criteria would not endure for the specific political subdivision described when past by the Legislature. The authorizations in the statutes are of a continuing nature, particularly those which pertain to the power to tax. It is beyond reason that legislators and their constituents intended for the power conferred to be temporary, based on predictable changes in population.

The repercussions of accepting the positon of OPC as to §1.100(2) RSMo, while difficult to precisely detail, will no doubt be disruptive on a scale seldom seen and hard to imagine. Additionally, the impact will be continuing as new census information becomes available, as populations change and as implementation of existing statutes continue. While it is possible the Legislature could enact a "clarification", a ruling along the lines

proposed by OPC would eliminate current authority and place many enactments beyond the power of the Legislature to remedy due to the need for retrospective application.

CONCLUSION

For all the reasons stated above and contained in the respondent's brief, this Court should affirm the Commission's Report and Order.

Respectfully submitted,

By: /s/ *B. Allen Garner* .

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served this 8th day of August, 2016:

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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 limitations contained in Rule 84.06(b), and contains 2548 words (exclusive of the cover, certificates of compliance and service, and signature block and appendix), as calculated by Microsoft Word, the software used to prepare this brief.

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