IN THE SUPREME COURT OF THE STATE OF MISSOURI

In the Matter of the Petition of Missouri-American Water Company for Approval to Change Its Infrastructure System Replacement Surcharge (ISRS), and Missouri Public Service Commission,	)	
Respondents.	)	**Case No. SC95713**
vs.	)	
Office of the Public Counsel,	)	
Appellant.	)	

Appeal from the Missouri Public Service Commission

SUBSTITUTE APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The Office of the Public Counsel ("OPC" or "Public Counsel") takes this appeal from a Report and Order of the Public Service Commission ("Commission") regarding Missouri-American Water Company's ("MAWC") petition for a change in its Infrastructure System Replacement Surcharge. An appeal from a judgment of the Commission is brought directly to the "appellate court with the territorial jurisdiction over the county where the hearing was held or in which the commission has its principal office," which was the Court of Appeals - Western District in this instance. Mo. Rev. Stat. §§ 386.510 (Cum. Supp. 2013); 477.070 (2000).

After the Western District of the Court of Appeals issued its opinion reversing and remanding the Commission's Report and Order, MAWC and the Commission each moved the Court to rehear the matter or transfer it to this Court. The Western District Court of Appeals denied both parties' motions.

On May 18, 2016, MAWC and the Commission each sought transfer pursuant to Missouri Supreme Court Rule 83.04. On June 28, 2016, this Court granted transfer.

STATEMENT OF FACTS

In 2003, the General Assembly modified ratemaking for water corporations by authorizing the Commission, upon petition by an eligible water corporation, to permit customer rates to change between general rate cases by means of a mechanism called the Infrastructure System Replacement Surcharge ("ISRS"). Mo. Rev. Stat. §§ 393.1000 - 393.1006 (Cum. Supp. 2013). Relevant here, the ISRS statute states:

> Notwithstanding any provisions of chapter 386 and this chapter to the contrary, as of August 28, 2003, a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants may file a petition and proposed rate schedules with the commission to establish or change ISRS 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; provided that an 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.

Mo. Rev. Stat. § 393.1003.1 (Cum. Supp. 2013). Missouri-American Water Company ("MAWC") filed with the Commission a Petition to Change Its Infrastructure System Replacement Surcharge on February 27, 2015 (L.F. at 3). The Petition sought rate recovery for costs incurred replacing infrastructure in St. Louis County for the period October 1, 2014, through January, 2015 (L.F. at 16). MAWC asserted in its Petition that it was entitled to a Commission order authorizing an additional $1,919,991 in revenue to be produced by the ISRS (L.F. at 8). The Staff of the Public Service Commission ("Staff") filed a "Recommendation to Reject Tariff and Proposed Increase to the Infrastructure Replacement Surcharge" (L.F. at 150). In its Recommendation, the Staff contended that the Petition impermissibly asked the Commission to provide for the recovery of ISRS costs in excess of the 10% cap established by section 393.1003.1 (L.F. at 151). The OPC concurred in the position of the Staff (L.F. 226-28).

The undisputed base level of revenue approved by the Commission in MAWC's most recent general rate proceeding was $258,926,618 (L.F. at 233), which sets the 10% revenue cap for MAWC's ISRS at $25,892,662 (L.F. at 233). The Commission provided for the annual recovery, in four prior cases, of up to $25,637,873 through the ISRS (L.F. at 234). However, because the billing determinants set in MAWC's previous rate case forecast more customer usage than actually occurred, the ISRS produced less revenue than anticipated by MAWC (L.F. at 234). As of September, 2014, despite providing for up to $25.6 million in revenue, MAWC's ISRS actually produced $23,972,670 (L.F. at 234). The amount of revenue produced as of that time was $1,665,203 less than the maximum recovery provided for by the Commission.

MAWC's Petition in the instant case sought to carry forward the $1.6 million not produced from the prior Commission authorizations and, combining that amount with $254,789 in new ISRS expenditures, to set rates which would provide for an additional $1,919,991 in ISRS recovery (L.F. at 8). In sum, MAWC sought the Commission to set ISRS rates at a level which would provide for recovery of $27,557,864 so as to guarantee (or to come as close as practicable) that MAWC realizes actual recovery of the full amounts authorized by the Commission (L.F. at 235). Staff and OPC contended that to set ISRS rates based on an amount in excess of the 10% cap is unlawful and that, because MAWC's Petition exceeded the cap by $1,665,203, the Commission should have rejected the Petition by that amount and ordered MAWC to set ISRS rates in a manner that provided for only $254,789 in additional recovery – the limit of the 10% cap (L.F. at 209, 238). Instead, the Commission provided the relief requested by MAWC (L.F. at 242), but recognizing that its order authorizes rates at a level which would provide for the recovery of ISRS revenue in excess of the 10% cap, the Commission further required "no later than 60 days before MAWC expects to reach the maximum revenue amount of $25,892,662, MAWC must file a new tariff designed to discontinue all ISRS charges associated with the revenues resulting from this order" (L.F. at 243).

On motion for rehearing, OPC brought two issues before the Commission. In the first issue, OPC contended that, as of the effective date of the results of the 2010 census, no county in Missouri met the population requirement established in the water ISRS statute (L.F. at 246-47). As such, OPC asserted MAWC is not a "water corporation providing water service in a county with a charter form of government and with more

than one million inhabitants," and so the Commission did not have the authority to grant the relief MAWC requested (*Id*). MAWC opposed this interpretation (L.F. at 252). The Commission found in favor of MAWC on this point and denied rehearing (L.F. at 267). The second issue OPC brought before the Commission recapitulated the legal arguments regarding the water ISRS statutes discussed *supra* (L.F. at 248-50). MAWC continued its opposition to this interpretation of the statutes (L.F. at 254). The Commission again found in favor of MAWC on this point and denied rehearing (L.F. at 266). This appeal followed (L.F. at 270).

POINTS RELIED ON

I. The Public Service Commission erred in considering and granting MAWC's water ISRS petition because the Commission's order is unlawful, Mo. Rev. Stat. § 386.510 (Cum. Supp. 2013), in that the Commission's jurisdiction to consider water ISRS petitions is limited to those instances in which the petitioner provides water service in a charter county with more than one million inhabitants and MAWC does not provide water service in a charter county with more than one million inhabitants.

Cases

Sharp v. Kansas City Power & Light, 457 S.W.3d 823 (Mo. App. W.D. 2015)

Statutes

Mo. Rev. Stat. § 1.100.2 (2000).

Mo. Rev. Stat. § 393.1003.1 (Cum. Supp. 2013).

Other

U.S. Census Bureau, *2010 Census Redistricting Data* (Public Law 94-171) Summary File Geographic Update – Missouri, Iss'd Aug., 2011.

II. The Public Service Commission erred in its Report and Order because the order is unlawful, Mo. Rev. Stat. § 386.510, in that the Commission ignores the plain language of the water ISRS statute in authorizing MAWC to set its rates at a level which provides for the recovery of an amount of annual revenue exceeding the ten percent cap established by law and which results in a guarantee of infrastructure cost recovery.

Cases

State ex rel. *Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d (Mo. 1979)

Statutes

Mo. Rev. Stat. § 393.1003.1 (Cum. Supp. 2013)

Mo. Rev. Stat. § 393.1006.5 (Cum. Supp. 2013)

ARGUMENT

I. The Public Service Commission erred in considering and granting MAWC's water ISRS petition because the Commission's order is unlawful, Mo. Rev. Stat. § 386.510 (Cum. Supp. 2013), in that the Commission's jurisdiction to consider water ISRS petitions is limited to those instances in which the petitioner provides water service in a charter county with more than one million inhabitants and MAWC does not provide water service in a charter county with more than one million inhabitants.

The 2000 U.S. Census found the population of St. Louis County to exceed one million inhabitants. *See* U.S. Census Bureau, *2000 Census Redistricting Data* (Public Law 94-171) Summary File Table PL1 - Missouri, Table 6: Population for the 15 Largest Counties and Incorporated Places in Missouri: 1990-2000, Iss'd Mar. 9, 2001 (Appendix at 22). St. Louis County was then, and is now, a charter county. *Missouri Bankers' Assoc. v. St. Louis Co.*, 448 S.W.3d 267 (Mo. 2014) (recognizing in passing St. Louis County's status under the Missouri Constitution as a charter county). In 2003, the General Assembly enacted the current water ISRS scheme. Mo. Rev. Stat. §§ 393.1000- 393.1006 (Cum. Supp. 2013). In so doing, the General Assembly limited the availability of the water ISRS ratemaking mechanism to those petitioners to the Commission providing water service and making infrastructure investments in a charter county with more than one million inhabitants; St. Louis County was the only county to qualify. Mo. Rev. Stat. § 393.1003.1. The 2010 U.S. census found that the population of St. Louis County dropped below one million inhabitants. U.S. Census Bureau. *2010 Census Redistricting Data*

(Public Law 94-171) Summary File Geographic Update – Missouri, Iss'd Aug., 2011 (Appendix at 23). The parties' dispute regarding what effect, if any, St. Louis County's population loss has on the availability of a water ISRS to MAWC is the *crux* of this point on appeal.

Standard of Review

Appellate review of a Commission order begins by determining the lawfulness of the order. *State* ex rel. *Mo Gas Pipeline, LLC v. Mo. PSC*, 366 S.W.3d 493, 495 (Mo. 2012); Mo. Rev. Stat. § 386.510. As the appellant, OPC bears the burden of demonstrating to this Court the unlawfulness of the Commission's order. *State* ex rel. *Ag Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo. 2003); Mo. Rev. Stat. § 386.430 (2000). Lawfulness is determined by examining whether "statutory authority for its issuance exists…." *Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 375 (Mo. 2013). "[A]ll legal issues are reviewed *de novo*." *Id.*

Text and Legislative History of § 393.1003.1

As pertinent here, Mo. Rev. Stat. § 393.1003.1 states as follows:

> Notwithstanding any provisions of chapter 386 and this chapter to the contrary, as of August 28, 2003, a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants may file a petition and proposed rate schedules with the commission to establish or change ISRS rate schedules….

Mo. Rev. Stat. § 393.1003.1. The plain language of the aforementioned text establishes three prerequisites which must be met before a water corporation may file a petition to establish or change ISRS rate schedules with the Commission. First, the water corporation must be providing water service. *Id*. Next, the water corporation's water service must be provided in a county with a charter form of government. *Id*. Finally, and in addition, the charter county in which the water corporation provides water service must have more than one million inhabitants. *Id*. Again, all three prerequisites must be met before a water corporation "may file" a water ISRS petition with the Commission. Should the Commission receive a petition which fails to conform with these three prerequisites, Mo. Rev. Stat. § 393.1003.2 makes clear that "the Commission shall not approve" such a petition.[1]

To complete a thorough examination of the statute's text requires the evaluation of what effect, if any, the phrase "as of August 28, 2003" has on the operation of these three prerequisites. As argued before the Commission, MAWC suggested that the phrase "as of August 28, 2003" created a "snapshot test" to be applied to the population requirement (L.F. at 253). Under MAWC's interpretation of the phrase, any county meeting the

[1]In addition to the three pre-requisites laid out in Mo. Rev. Stat. § 393.1003.1, the statute also requires the Commission to disapprove a water ISRS petition where the petitioner has failed to file a general rate proceeding before the Commission in the past three years. Mo. Rev. Stat. § 393.1003.2 (Cum. Supp. 2013). This additional requirement was not at issue below and is not an issue on appeal.

population limitation on August 28, 2003, would always be deemed to meet the population limitation (*Id.*).[2] In the instant appeal, OPC respectfully suggests that the phrase "as of August 28, 2003" is of no moment here and that the argument MAWC offered in this regard, and that the Commission relied on in denying rehearing, is wrong.[3]

The General Assembly established the water ISRS mechanism in Senate Substitute for Senate Committee Substitute for House Bill 208.[4] *See* S.S. for S.C.S. for H.B. 208, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003) (enacted). As truly agreed to and finally passed, H.B. 208 was a bill "relating to the public service commission, with an emergency clause for certain sections." *Id*. The emergency clause to which the General Assembly referred

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[2]The converse also is presumably true under MAWC's interpretation, and no county could ever meet the terms of the statute if it did not do so on exactly August 28, 2003. This observation demonstrates the fallacy of MAWC's argument to the Commission because to follow MAWC's logic converts the water ISRS into special legislation, and this cannot be the result MAWC truly seeks. *See Treadway v. State*, 988 S.W.2d 508, 511 (Mo. 1999).

[3]The Commission adopted a similar reasoning in its examination of section 1.100.2 (L.F. at 266-67). An analysis of the text and history of section 1.100.2 is undertaken later in Appellant's Brief.

[4]Hereafter abbreviated as S.S. for S.C.S. for H.B. 208 where necessary, or H.B. 208 where possible. The same abbreviation convention is applied to other bills of the General Assembly.

in the bill's title related to modifications of only Mo. Rev. Stat. §§ 91.026 and 91.030, and not the new water ISRS provisions included in the bill. As a result, through the combination of 1) the date of the legislature's presentment of the bill to then-Governor Holden, 2) his approval, and 3) operation of Mo. Const. art. III, §§ 20(a) & 29, the water ISRS provisions in H.B. 208 took effect on August 28, 2003. *See also* Mo. Const. art. III, § 31; Mo. Rev. Stat. § 1.130 (2000).

By placing the phrase "as of August 28, 2003," where it did in the statute then, the General Assembly made explicit its intent that the water ISRS mechanism should be available to eligible petitioners on the effective date of that portion of H.B. 208. That is to say, the General Assembly desired to make clear the availability of this mechanism should not be delayed by any potential rulemaking process. This conclusion – which suggests "as of August 28, 2003," should have no effect on the conclusion reached in the instant appeal – is confirmed in two ways.

First, the phrase "as of August 28, 2003," and its placement within Mo. Rev. Stat. § 393.1003.1, must be read in reference to the other ISRS provisions passed in H.B. 208 regarding the promulgation of administrative rules. The completion of a rule-making process can delay the implementation of a statute by an executive branch agency. Mo. Rev. Stat. §§ 536.021- 536.028 (2000) (Missouri Administrative Procedures Act) (outlining steps and timeline to promulgate a rule). Mo. Rev. Stat. §393.1006.10 rejects that outcome for the water ISRS, however, when it states:

> The commission shall have the authority to promulgate rules for the implementation of sections 393.1000 to 393.1006, but

> only to the extent such rules are consistent with, *and do not delay the implementation of*, the provisions of sections 393.1000 to 393.1006.

Mo. Rev. Stat. § 393.1006.10 (emphasis added). Consistent with Mo. Rev. Stat. § 393.1006.10, Mo. Rev. Stat. §393.1003.1 offers that "as of August 28, 2003" an eligible water corporation may file a petition. Read together, the two subsections make clear that the General Assembly did not intend for water corporations to wait a single day after the effective date of the law before they could file a petition for a water ISRS. The phrase "as of August 28, 2003" means no more than that, and bears no relation to the separate population requirement included in the statute.

Second, OPC's interpretation of this phrase is consistent with the legislative history of the water ISRS statutes. In the 2003 session of the General Assembly, H.B. 208 was the only bill with a water ISRS scheme to become truly agreed to and finally passed. It did so on the penultimate day of session that year. *See* Journal of the House, 92nd Gen. Ass., 1st Reg. Sess., Seventy-Second Day, p. 66 (Mo. May 15, 2003). The language adding the water ISRS to the bill occurred just two days prior to the end of session on the floor of the Senate. *See* Journal of the Senate, 92nd Gen. Ass., 1st Reg. Sess., Seventy-Third Day, p. 88 (Mo. May 14, 2003). Earlier in the session, the legislature considered at least three other bills which included water ISRS language.

In the House, H.B. 426 was the water ISRS bill as introduced that year. *See* H.B. 426, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003) (introduced Feb. 6, 2003). Instead of using the phrase "as of August 28, 2003," H.B. 426 used the phrase "immediately upon

effectuation of sections 393.1000 to 393.1006." *Id*. House Bill 426 contained no language limiting the eligibility of a water ISRS to charter counties with populations in excess of one million inhabitants. *Id*. House Bill 426 was voted do pass out of committee but died thereafter when its provisions were incorporated (with some change) into the House's version of an omnibus utility bill that session. *Compare* H.B. 426 (voted do pass Mar. 11, 2003) *with* H.C.S. for H.B. 404, 92nd Gen. Ass., 1st Reg. Sess. (Mo. 2003) (voted do pass Mar. 13, 2003).

To be sure, the fact that H.B. 426 (no population limitation along with "immediately upon effectuation") used different language compared to the enacted language in H.B. 208 (population limitation along with "as of August 28, 2003"), does not lead to a conclusion that the General Assembly intended to link the population limitation with the phrase "as of August 28, 2003." A review of the other vehicles for the water ISRS that year validates this interpretation. When water ISRS language was added to H.B. 404 in committee, the aforementioned House omnibus utility bill, the text of the bill switched from the "immediately upon effectuation language" to the "as of August 28, 2003" language. *See* H.C.S. for H.B. 404. However, the House Committee Substitute did not at all include any population-based limitation on water ISRS eligibility. *Id.* The change to the "date language" in the bill, then, was independent of the population limitation.

Confirming this conclusion, the original Senate water ISRS bill, S.B. 125, included the "as of August 28, 2003" phrase beginning from the date of its introduction. *See* S.B. 125, 92nd Gen. Ass., 1st Reg. Sess. (2003) (introduced Dec. 1, 2002). Later that

session, after it had passed out of committee, the S.C.S. for S.B. 125 & 290 also included the phrase "as of August 28, 2003." *Id* (voted do pass Mar. 3, 2003). Neither the introduced version of S.B. 125 nor the later Senate Committee Substitute included any population-based limitation on water ISRS eligibility. Yet both versions of the Senate Bill and all versions of the two relevant House Bills contained language making manifest the legislature's intent to permit the Commission to receive water ISRS applications as of the effective date of the new water ISRS laws.[5] This Court should discern no link between the use of the phrase "as of August 28, 2003" in section 393.1003.1 and the separate and independent population limitation found in the same provision, and certainly this Court should not conclude that Mo. Rev. Stat. § 393.1003.1 somehow creates a

[5]House Bill 404 died after being referred back to the budget committee for fiscal review. *See* Journal of the House, 92nd Gen. Ass., 1st Reg. Sess., Fifty-Third Day, p. 1084 (Mo. Apr. 16, 2003). Senate Committee Substitute for S.B. 125 & 290 was brought up twice on the Senate floor and apparently filibustered both times. *See* Journal of the Senate, 92nd Gen. Ass., 1st Reg. Sess., Forty-First Day, p. 566 (Mo. Mar. 19, 2003) & Forty-Eighth Day, p. 685 (Mo. Apr. 7, 2003). This history, along with the substantial change to S.S. for S.C.S. for H.B. 208's title, purpose and content from its introduction to its passage, suggests that the population-based prerequisite added to S.S. for S.C.S. for H.B. 208 on the penultimate day of the 2003 regular session was indispensible to the bill's successful final passage. *Compare* H.B. 208 (introduced Jan, 16, 2003) *with* S.S. for S.C.S. for H.B. 208 (truly agreed to and finally passed May 15, 2003).

"snapshot test" which "grandfathers" into the water ISRS scheme those water corporations that later lose their eligibility, as was argued by MAWC before the Commission.

Text and Legislative History of §§ 1.100.1 & .2

Having addressed the language of Mo. Rev. Stat. § 393.1003.1, it is important to turn to whether any other state law impacts the proper interpretation of the population limitation found in the water ISRS statute. Such a review leads to Mo. Rev. Stat. § 1.100 (2000) that provides in pertinent part:

> The population of any political subdivision of the state for the purpose of representation or other matters…is determined on the basis of the last previous decennial census of the United States. For the purposes of this section the effective date of…each succeeding decennial census of the United States is July first of each tenth year after 1961.

Id.[6] Counties are political subdivisions of the State. Mo. Const. art. VI, § 1. When the General Assembly passed the water ISRS statute establishing a one million inhabitant population requirement as a pre-requisite for eligibility, the only county in Missouri whose population exceeded one million inhabitants was St. Louis County (Appendix at

[6]The phrase "or other matters" as used in section 1.100.1 has not been held to be restricted to those matters specifically enumerated thereafter in the law. *See Union Elec. Co. v. Cuivre River Elec. Coop.*, 571 S.W.2d 790, 796 (Mo. App. St. Louis 1978).

22). However, St. Louis County no longer meets this requirement; the 2010 decennial census indicates the population of St. Louis County is 998,954 (Appendix at 23). To determine the effect, if any, this loss of population has on the availability of the water ISRS to MAWC, examination of Mo. Rev. Stat. § 1.100.2 that states:

> 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. 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 operation of that law.

Mo. Rev. Stat. § 1.100.2. "The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. 2015). ("*Liberty Energy*"). The court must presume that "every word, sentence or clause in a statute has effect, and the legislature did not insert superfluous language." *Id*. The plain and unambiguous language of this statute makes clear that all political subdivisions may fall into, and all except the City of St. Louis may fall out of, the ambit of a law whose operation is predicated on having a certain population.

Mo. Rev. Stat. § 1.100.2 has two sentences, one that broadly addresses gains in population after the passage of a law with a population requirement, and one that narrowly addresses losses in population. The first sentence looks at gains and offers that any county which gains a sufficient amount of population after the date a law passes such that it could come under the operation of that law will be deemed to do so. The second sentence looks at losses and offers that only the City of St. Louis is saved from falling out of a law's operation if a political subdivision loses population subsequent to the passage of the law; no other political subdivision in the state receives such treatment.[7] The analysis need be no more complicated than that. However, there exists some dispute about the interpretation of the last clause in the first sentence.

The phrase "as well as those in that category at the time the law passed" is included at the end of the first sentence of Mo. Rev. Stat. § 1.100.2. The inclusion of this phrase 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

[7]It should be noted that where a municipality is confronted with a question about whether it has sufficient population to fit within a particular category, the General Assembly has provided a procedure by which it can request from the Governor a special census be taken of its population. Mo. Rev. Stat. §§ 71.160 – 71.180, 81.010 – 81.030 (2000). No such procedure exists for counties, leaving counties to rely exclusively on the findings of the U.S. Census Bureau in the last previous decennial census. *Poertner v. Hess*, 646 S.W.2d 753, 757 (Mo. 1983).

might be discerned between the operation of Mo. Rev. Stat. § 1.100.2 and the preceding subsection - 1.100.1.

Each successive decennial census becomes effective on July 1st. Mo. Rev. Stat. §1.100.1. Importantly, the relationship between the effective date of the census and the different dates when a law is passed and when it becomes effective illustrates the meaning of the phrase "as well as those in that category at the time the law passed." The General Assembly must adjourn on or before May 30th of each year and so necessarily all laws will be passed *before* a new decennial census becomes effective. Mo. Const. art. III, § 20(a). Laws passed by the General Assembly take effect ninety days after the adjournment of the session unless otherwise provided according to an emergency and so will not become effective until *after* a new decennial census becomes effective. Mo. Const. art. III, § 29; Mo. Rev. Stat. § 1.130. Because each decennial census becomes effective on July 1st, a date likely between a law's passage and effective date, the phrase "as well as those in that category at the time the law passed" means that those in a population category at the time the law is passed are in such category when the law first becomes effective. This is a reasonable outcome and allows the legislature to pass laws with the information available during session. But this does not mean those in such category will always remain in that category if population changes in the future.

Furthermore, without the inclusion of this phrase, the first sentence of Mo. Rev. Stat. § 1.100.2 arguably could be read to operate prospectively only, and could leave out

those political subdivisions which fit within the category at the time the law was passed.[8] Without this language, the specific political subdivisions the legislature likely is trying to reach when it creates a population-based category could be required to wait until the result of the next decennial census before the law would apply to them. Moreover, without this language, certainly confusion would exist regarding what census applies when, as a number of cases have shown. Finally, without inclusion of this phrase, the otherwise prospective nature of Mo. Rev. Stat. § 1.100.2 could be read to conflict with Mo. Rev. Stat. § 1.100.1's mandate to apply the "last previous decennial census" when determining whether a political subdivision meets a population requirement; inclusion of this phrase cures that potential conflict.

Some have misinterpreted this phrase to create something akin to a "grandfather clause," that a county which loses population retains its status in a category because it had that status at the time the law was passed. This has been referred to colloquially as "once in, always in."

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[8]Importantly, as noted in *City of Harrisonville v. Pub. Water Supply Dist. No. 9*, 129 S.W.3d 37 (Mo. App. W.D. 2004), the inclusion of this language very simply serves to provide a cutoff date for the use of a particular census to determine whether a political subdivision's population fits the political subdivision within the ambit of a law. Whichever census is effective, under section 1.100.1, on the date the law passes determines the population figure which is to be applied to ascertain whether a political subdivision meets the population criteria of the new law.

First, there is nothing anywhere in Mo. Rev. Stat. § 1.100.2 that can be read to create such a broad "grandfathering" rule, and certainly not this language. The language at issue here has its own independent meaning, one which serves to ensure Mo. Rev. Stat. § 1.100.2 is broad enough to encompass the full scope of counties the legislature intended to fall within a certain population-based category and to avoid any potential interpretive conflict with Mo. Rev. Stat. § 1.100.1. It does not say that any county which loses population must be permitted to keep a status it once had or to remain in a category in which it no longer is qualified to be a member.

Second, as is often expressed in Missouri when construing statutes, "The express mention of one thing implies the exclusion of another." *Department of Soc. Servs., Fam. Supp. Div. v. Hatcher*, 341 S.W.3d 762, 769 (Mo. App. W.D. 2011) ("*expressio unis*"). Here, application of the *expressio unis* rule to the statute leads to the conclusion that the legislature intended the City of St. Louis - and only the City of St. Louis - to receive "grandfathering" treatment. St. Louis City is the only political subdivision for which the General Assembly has chosen to ensure that a population loss will not deprive it of its status within a population-based category. The express mention of the City of St. Louis for this treatment implies the exclusion of all other political subdivisions.

This argument is strengthened by the presumption that "When the legislature amends a statute, it is presumed to have intended the amendment to have some effect." *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. 1992). The legislature amended Mo. Rev. Stat. § 1.100.2 in 1971 to add the language permitting the City of St. Louis to stay within a population-based category after a population loss. *See* H.B. 1541,

76th Gen. Ass., 1st Reg. Sess. (Mo. 1971) (enacted). Prior to 1971, the law had no such savings provision but did have the language "as well as those in that category at the time the law passed." *See* H.B. 304, 70th Gen. Ass. (Mo. 1959) (enacted). The 1971 amendment to the law must have had some purpose, and so, the rule applied in this case must be that counties and other political subdivisions can move in and out of a population-based category as a county gains or loses population, with the singular exception to that rule being added in 1971 for the City of St. Louis.

To the extent necessary to discern legislative intent, the history of the passage of the 1971 amendment to Mo. Rev. Stat. § 1.100.2 bears out that the above interpretation is correct. The General Assembly amended Mo. Rev. Stat. § 1.100.2 to add for the first time language making clear that the City of St. Louis would be "grandfathered in" to any population-based category if it experienced a population loss. *See* H.B. 1541. Indeed, the General Assembly passed this new version of Mo. Rev. Stat. § 1.100.2 with an emergency clause because the 1959 version – which, again, already had the language "as well as those in that category at the time the law was passed" – did not protect against the threat that after the "1970 census, there will be no statutes to govern certain political subdivisions in the state" due to shifts in population. *Id* at Section A (approved and effective June 8, 1971). If the language "as well as those in that category at the time the law passed" meant that political subdivisions were "grandfathered in" to a particular category once they met certain population criteria, no revision to the 1959 version of the law would have been necessary, much less one with an emergency clause.

Interestingly, in the march toward passage of the revised Mo. Rev. Stat. § 1.100.2 in 1971, the legislature had the opportunity to grandfather in all political subdivisions. House Bill 154 as introduced initially did just that. *See* H.B. 1541 (introduced Jan. 7, 1971) (stating "(o)nce a political subdivision has come under the operation of such a law a subsequent loss of population shall not remove that political subdivision from the operation of that law."). However, the committee to which the House assigned the bill passed a House Committee Substitute which amended the language and narrowed its effect to only "a city not located in a county" – the City of St. Louis. *See* Journal of the House, 76th Gen. Ass., 1st Reg. Sess., Eighteenth Day, p. 343 (Mo. Feb. 10, 1971) (deleting the words "political subdivision" and substituting in lieu thereof "city not located in a county"). While the bill received additional amendment later in the legislative process, the legislature never went back to the language it originally considered. *See* H.B. 154 (enacted). The General Assembly, then, specifically rejected applying a "grandfather" clause for population losses to all political subdivisions in the state. As such, the legislature's intent is manifest that only the City of St. Louis is to qualify for such treatment. *See State* ex rel. *McNeal v. Roach*, 520 S.W.2d 69, 75 (Mo. 1975) (examining the legislature's decision to amend Mo. Rev. Stat. § 1.100.2 on behalf of the City of St. Louis).[9]

[9]There does not appear to be any other authority which might support use of the concept "once in, always in" more broadly than for just the City of St. Louis, nor has there been in Missouri such authority. "Once in, always in, is a dogma we do not

Given this analysis, MAWC's water ISRS application was not authorized by law. St. Louis County's population does not exceed one million inhabitants as determined by the applicable decennial census and there is no savings provision in statute which could serve to keep St. Louis County within the law's ambit. Because an application for a water ISRS may only be brought by a water corporation providing water service in a charter county with more than one million inhabitants, MAWC's water ISRS application should have been rejected as failing to meet one of the pre-requisites to the Commission's authority to act. Mo. Rev. Stat. § 393.1003.1 & .2. The Commission erred when it considered and granted MAWC's water ISRS application despite its lack of statutory authorization to do so. *Sharp v. Kansas City Power & Light*, 457 S.W.3d 823, 828-29 (Mo. App. W.D. 2015); *Laclede Gas v. Office of the Pub. Counsel*, 417 S.W.3d 815, 819-20 (Mo. App. W.D. 2014) ("*Laclede Gas*") (stating the Commission is a creature of statute with only those powers expressly conferred upon it by the legislature). The Commission's decision should be reversed by this Court and the matter remanded back to the Commission with instructions to calculate and then refund to MAWC customers the amounts improperly collected from them based upon the incorrect and unlawful Report and Order.

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subscribe to." *State* ex rel. *Major v. Ryan*, 133 S.W.8, 12 (Mo. 1910). *See also State* ex rel. *Wallace v. Summers*, 9 S.W.2d 867, 868 (Mo. App. K.C. 1928). Except with respect to the City of St. Louis only, Mo. Rev. Stat. § 1.100 codifies the Court's conclusion in every way.

II. The Public Service Commission erred in its Report and Order because the order is unlawful, Mo. Rev. Stat. § 386.510, in that the Commission ignores the plain language of the water ISRS statute in authorizing MAWC to set its rates at a level which provides for the recovery of an amount of annual revenue exceeding the ten percent cap established by law and which results in an guarantee of infrastructure cost recovery.

An examination of the interplay between Missouri's traditional ratemaking regime and the ISRS law is vital to understanding the unlawful nature of the Commission's Report and Order. Traditional regulatory ratemaking in Missouri requires that changes in a customer's rates occur only at a general rate case wherein the Commission can consider all factors relevant to set just and reasonable rates. Mo. Rev. Stat. § 393.270 (2000). To take one expense or one revenue and set rates based upon an increase or decrease in that line item is considered single-issue ratemaking, which generally is prohibited. *State* ex rel. *Utility Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo. 1979) ("*UCCM*"); Mo. Rev. Stat. § 393.270. Moreover, to take an expense or revenue incurred in one period of time and bring it forward to a more recent period in order to include that expense or revenue in ratemaking when otherwise it would be excluded is considered retroactive ratemaking, which also generally is prohibited. *UCCM*, 585 S.W.2d at 58; Mo. Rev. Stat. § 393.270. Within the water utility context, however, exceptions exist to the general prohibitions on single-issue ratemaking and retroactive ratemaking; they are embodied in the water ISRS. Mo. Rev. Stat. §§ 393.1000 – 393.1006. The water ISRS permits an eligible water corporation to recover between

general rate cases the costs incurred replacing water system infrastructure from customers; a deviation from the prohibition on single-issue ratemaking. *Laclede Gas*, 417 S.W.3d 821-22 (recognizing ISRS permits single-issue ratemaking); Mo. Rev. Stat. § 393.1003.1. Further, within the ISRS itself, revenue not recovered within one twelve-month ISRS period can be carried forward into the next ISRS period; a deviation from the prohibition on retroactive ratemaking. Mo. Rev. Stat. § 393.1006.5(2).

The deviations authorized by the ISRS exist in order to alleviate what the utilities consider to be the deleterious effect "regulatory lag" has on their financials. Regulatory lag is a phenomenon which naturally occurs in ratemaking because the regulatory ratemaking process lags behind the actual costs and revenues incurred by the utility. *See* James C. Bonbright *et al*., Principles of Public Utility Rates, 96 (2nd ed. 1988). When a utility is under-recovering revenues, regulatory lag can be seen as deleterious to the utility. *Noranda Alum., Inc.*, et al., *v. Union Elec. Co. d/b/a Ameren Mo.*, 2014 Mo. P.S.C. LEXIS 882, *29-30 (2014). When a utility is over-recovering revenues, regulatory lag can be seen as deleterious to the customer. *Id*. Traditional regulatory ratemaking is predicated on the idea that over a sufficient period of time the benefits and detriments of regulatory lag balance for both the utility and the consumer; sometimes a utility will over-recover, sometimes it will under-recover. *See* Alfred E. Kahn, The Economics of Regulation: Principles and Institutions, 48 (2nd prtg. 1989).

In Missouri, the utilities' regulated business model is to charge customers for the costs incurred providing the customer service. *In the Matter of Union Elec. Co. d/b/a Ameren Missouri's Tariff to Increase Its Revenues for Elec. Serv.*, 2015 Mo. P.S.C.

LEXIS 380, *113-14 (2015) (appealed on other grounds) (reiterating Missouri uses cost-of-service regulation). Investments in physical plant, or infrastructure, make up a substantial proportion of that cost. In addition, the utility has an opportunity to earn a return on that expense to compensate shareholders. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"). Such a model has a benefit to customers in that it incentivizes a utility to build infrastructure and to ensure the infrastructure is suitable for customer demand. However, such a model also could incent building unnecessary infrastructure, a detriment to the customers who would pay for it. For instance, if a piece of physical plant is fully depreciated, it no longer has a cost which can be recovered from customers and no longer provides a return to shareholders.

Regulatory lag, then, also serves as an insurance policy for consumers against overbuilding; the delay in cost recovery and the associated increase in unrecovered depreciation expense tempers a utility's urge to over-build. *See generally* Kahn at 48. The other side of that coin is that regulatory lag is then cited by utilities as hindering investment in infrastructure repair and replacement. *In the Matter of a Working Case to Establish a Rate Stabilization Mechanism to Reduce the Need for Frequent Rate Case Filings*, File No. AW-2013-0110, Initial Comments of Ameren Missouri p. 1-2, Nov. 30, 2012 (Doc. No. 10). To "fix" the delay in recovering expenses associated with regulatory lag will facilitate "appropriate" levels of infrastructure investments according to utilities. According to consumers, such a "fix" upsets the regulatory lag balance and raises the

specter of over-building anew, in addition to facilitating prolonged periods of financial over-recovery.[10]

In establishing the water ISRS, the General Assembly made a policy decision to change the regulatory balance between customer and utility. However, the change was a limited one. Engrafted into the water ISRS are a number of provisions attempting to limit the magnitude and duration of financial harm which can accrue to consumers from a water ISRS. These provisions interact with one another in complex ways in order to protect consumers. The Commission's order stands one such protection on its head, and in so doing, unlawfully subverts the express intent of the legislature.

Water ISRS Cost Recovery

Central to the Commission's incorrect order is its interpretation of the following pertinent language from Mo. Rev. Stat. § 393.1003.1:

> a water corporation…may file a petition…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; provided that an ISRS, on an annualized basis,

[10]At all times, utilities have a legal obligation to provide safe and reliable service. Mo. Rev. Stat. § 393.130 (2000).

> 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.

Mo. Rev. Stat. § 393.1003.1. The statute speaks of "provid[ing] for" recovery of eligible costs through the ISRS to assist utilities, but to protect consumers also offers that the ISRS must not "produce" revenues in excess of 10% of the water corporation's base revenue level. It is the conflicting interpretation of how these two verbs interplay with each other and with other provisions of the water ISRS relating to the use of billing determinants and carrying forward unrecovered ISRS amounts respectively, that creates the basis for this point on appeal.

"The seminal rule of statutory construction [requires determination of] the true intent of the legislature, giving reasonable interpretation in light of the legislative objective." *Williams v. Nat'l Gas Co.*, 132 S.W.3d 244, 249 (Mo. 2004). To that end, this Court must "effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo. 2013). *See also Liberty Energy*, 464 S.W.3d at 524-25. In so doing, the Court should presume every word, sentence or clause in a statute to have effect, and that the legislature did not insert superfluous language. *Wehrenberg, Inc. v. Dir. of Rev.*, 352 S.W.3d 366, 367 (Mo. 2011). Indeed, "[a]ll canons of statutory construction are subordinate to the requirement that the court ascertain and apply a statute in a manner consistent with the legislative intent." *Williams*, 132 S.W.3d at 249. In construing a statute to determine

legislative intent, it is appropriate to consider its history, the presumption that the legislature had knowledge of the law, the surrounding circumstances and the purpose and object to be accomplished. *Person v. Scullin Steel Co.*, 523 S.W.2d 801, 803 (Mo. 1975). The entirety, history and purpose of the statute are all relevant. *Rust v. Mo. Dental Bd.*, 155 S.W.2d 80, 83 (Mo. 1941).

The Commission's role is to set the terms and conditions by which regulated utilities in Missouri provide service to their customers. Mo. Rev. Stat. § 393.140 (2000). In so doing, the Commission must be guided by "the dominant thought and purpose of [public utility] policy [which] is protection of the public while the protection given the utility is merely incidental." *State* ex rel. *Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (Mo. App. K.C. 1944) ("*Crown Coach*"). That is to say, the Commission exists to protect the public and to act as a check on what otherwise would be the unrestrained authority of monopoly investor-owned utilities to set prices, terms and other conditions of service. Nothing in the water ISRS statute changes this vital Commission function.

As part of its responsibility, the Commission undertakes a process to determine what level of revenue is required to compensate a given utility 1) for the expenditures related to providing service, and 2) which will afford the investors in the utility a fair opportunity for return on their investment. *Hope*, 320 U.S. at 603. When this level of revenue is determined, whether in a general rate case or in a water ISRS case, the revenue requirement is then divided among the utility's customers by class ratably. *In the Matter of Union Elec. Co. d/b/a Ameren Missouri's Tariff to Increase Its Annual Revenues for*

Elec. Serv., 2011 Mo. P.S.C. LEXIS 954, *194-95 (2011) (explaining the process of converting overall revenue requirement into the largely volumetric rate a customer pays for utility service). In sum, the Commission sets rates applicable to each customer class, and it is this rate that the customer must pay in order to receive service.

In order to set rates as accurately as possible, the number of customers within a particular class is determined along with the usage pattern of customers within that class. Broadly speaking, these inputs are called billing determinants. *See* Lowell E. Alt Jr., Energy Utility Rate Setting, 81 (2006) (defining billing determinants in regulatory ratemaking as "the metered units of utility service consumed by customers"). In Missouri, the law requires use of the billing determinants established in the utility's preceding general rate case when setting water ISRS rates. Mo. Rev. Stat. § 393.1006.5(1). This requirement is an important consumer protection for a number of reasons. First, because determinations made in the general rate case – where "all relevant factors" are considered in setting rates – are required to be used for the water ISRS case, the law's requirement that these billing determinants be used reiterates that the factors considered for setting a water ISRS rate truly are limited in scope, and thus, the water ISRS itself is a limited exception to traditional ratemaking. Second, use of the billing determinants confirms the legislature's intent that the ISRS is not a guarantee of revenue recovery. Billing determinants are incorrect to a greater or lesser extent after every rate case is decided, and only in the rarest of circumstances will produce exactly the revenue requirement established in the rate case.

The legislature is presumed to know the state of the law in an area about which it chooses to legislate. *Cook Tractor Co. v. Dir. of Rev.*, 187 S.W.3d 870, 873 (Mo. 2006). In requiring the use of billing determinants and in using that term of regulatory art in the law, the legislature is presumed to know that, at times, the number of customers estimated for a particular class fails to materialize going forward, or actual usage falls short of that level which was used in setting the billing determinants. And the legislature must be presumed to know that when either or both conditions happen, the utility may experience an under-recovery. The potential for under-recovery is an imminently predictable and known consequence of using billing determinants from a prior rate case in the water ISRS. Yet, the legislature still required the use of the previously set billing determinants. This legislative decision is consistent with the direction given elsewhere in the ISRS statute that it is intended merely "to provide for" cost recovery between general rate cases, and confirms that the legislature intended the water ISRS to be no guarantee. Mo. Rev. Stat. § 393.1003.1.

Of course, recognizing that billing determinants might not create precisely the revenue requirement established by the water ISRS, the legislature provided that when an eligible water corporation petitions the Commission to change its ISRS rates, it can carry forward unrecovered[11] amounts from one twelve-month period of the ISRS into a

[11]Over-recoveries also may be carried-forward to the next period and credited back to customers. The carry-forward both of under- and over-recovered amounts into a

subsequent period for the life of that ISRS.[12] Mo. Rev. Stat. § 393.1006.5(2). In so doing, if ISRS revenues fail to materialize, the water corporation has a limited additional opportunity which provides for infrastructure replacement cost recovery in advance of its next general rate case. However, in no instance can the carry-forward provision of the water ISRS be used to override the other provisions – particularly the consumer protections – passed contemporaneously with it. Rather, the carry-forward provision must be read harmoniously with the rest of the water ISRS. *State* ex rel. *Robert Evans v. Brown Builders Elec. Co., Inc.*, 254 S.W.3d 31, 35 (Mo. 2008) ("*Robert Evans*"). Further, both the carry-forward as an exception to retroactive ratemaking within the water ISRS, and the water ISRS itself as an exception to single-issue ratemaking, must be read *in pari materia* with the over-arching traditional regulatory regime in which both operate and construed narrowly to protect the public. *Id.*

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subsequent period for inclusion in the rates set in the new period is considered retroactive ratemaking. *UCCM*, 585 S.W.2d at 58.

[12]The maximum life of a water ISRS is three years plus the time it takes to resolve any pending general rate proceeding, which is up to an additional 11 months. Mo. Rev. Stat. §§ 393.1003.2 & .3. This three-year+ life is a consumer protection which helps to ensure that any revenue over-recovery accruing from the ISRS is limited in time. At the end of the water ISRS, which coincides with the effective date of a Commission order setting rates in a general rate case, the ISRS rate is reset to zero. Mo. Rev. Stat. § 393.1006.6(1).

Florida Realty, Inc. v. Kirkpatrick, 509 S.W.2d 114, 121 (Mo. 1974), explains that statutory exceptions should be construed strictly, not liberally. The water ISRS is an exception to the general rule against single-issue ratemaking in Missouri, and the limited carry-forward provision within the water ISRS is itself an exception to the general rule against retroactive ratemaking. The Commission's purpose to protect the public, *Crown Coach*, 179 S.W.2d at 126, suggests that strict construction should be applied in favor of the public. Indeed, the U.S. Supreme Court informs that "to extend an exemption to other than those *plainly and unmistakably* within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) ("*Clark*") (emphasis added) (quoting *Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

In this case, because billing determinants set in the MAWC's last general rate case did not accurately reflect the actual usage which later occurred, MAWC had a balance of approximately $1.6 million in unrecovered revenue from prior ISRS periods (L.F. at 234). Accordingly, using the carry-forward provision of section 393.1006.5(2) as its authority, MAWC sought Commission approval to change its ISRS rates to account for this unrecovered amount in addition to recovery of $254,789 in new expenses (L.F. at 8). However, when using the billing determinants established in the last rate case as is required by Mo. Rev. Stat. § 393.1006.5(1), the utility's ISRS change request would cause MAWC's rates to produce revenue which exceeds the 10% cap expressed in the statute. The billing determinants established in MAWC's last general rate case may or may not have correctly predicted customer usage (L.F. at 234). The remedy for that

problem (if it is one), though, is for MAWC to file another general rate proceeding and have the billing determinants reset. The remedy is not to do what the Commission did and contort the statute in an attempt to convert an *opportunity* for full recovery of the costs for infrastructure investments between rate cases into a *guarantee*.[13] Until such time as a new general rate case order becomes effective, the prior billing determinants must be used, whatever their ultimate impact. Mo. Rev. Stat. § 393.1006.5(1). The law is unambiguous in this regard. MAWC's request, and the Commission's action in granting it, are merely an effort to affect an end run around the impact of the billing determinants

[13]Recall that included in the water ISRS is a return for the utilities' shareholder. Mo. Rev. Stat. § 393.1006.4(2), (3), (4), (7). Should the Commission's Report and Order stand, the water ISRS would be converted not just into a guarantee for recovery of the expenditures associated with infrastructure investment, but also a guarantee of the return authorized for the utility shareholders. A strong incentive is then created to shoehorn every cost into the ISRS so that the utilities' shareholders will then be assured they will experience 100% of the Commission-approved return on as much physical plant as possible with no risk of under-performance of that financial asset. The ISRS, as written, is not intended to provide such a guarantee to shareholders. Further, nowhere else in Missouri's system of regulatory ratemaking is such a guarantee offered to utility shareholders. The Commission's Report and Order represents a substantial departure from the traditional policy expressed in Missouri regulatory ratemaking, and even from the water ISRS's own limited exception to traditional policy.

set in the last rate case, an effort carried out under the guise of the purported authority granted by the carry-forward provision in Mo. Rev. Stat. § 393.1006.5(2).

Turning back to the language creating the 10% cap, it is clear that the statute provides no guarantee of cost recovery up to the limit of the cap; rather, it provides only the opportunity of cost recovery. The cap is a consumer protection ensuring that the magnitude of the impact on the consumer's bill from the water ISRS is limited. A review of the statute confirms this conclusion.

Mo. Rev. Stat. § 393.1003.1creates the mechanism by which an eligible water corporation may petition the Commission for an ISRS. In creating this mechanism, which is intended to provide a benefit to the utility, the first clause of Mo. Rev. Stat. § 393.1003.1 states that the mechanism "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." Mo. Rev. Stat. § 393.1003.1 (emphasis added). The use of the phrase "to provide for" is no stable platform from which one might argue in favor of the Commission's action in this case. Rather, had the legislature intended the water ISRS to provide a guarantee of ISRS cost recovery between general rate cases, it could have easily just used the word "guarantee." Or, in lieu of "guarantee," any number of other words were available, any of which could provide the utility with more certainty of revenue recovery than the words the legislature actually chose to use.

That the legislature did not provide a guarantee of recovery in the water ISRS is supported by reference to standard guides to statutory construction. Mo. Rev. Stat. § 393.1003.1 must be read in conjunction with the other provisions contemporaneously

passed in the water ISRS. *Robert Evans*, 254 S.W.3d at 35. Contemporaneously passed with the water ISRS is the requirement to use the billing determinants established in the previous general rate case. Mo. Rev. Stat. § 393.1006.5(1). The requirement for use of prior billing determinants to set rates for the water ISRS is inconsistent with an argument that the water ISRS provides a guarantee of cost recovery. As mentioned previously, billing determinants are very rarely accurate predictors of actual usage going forward. The use of billing determinants is a mechanism which merely provides for cost recovery; their use does not guarantee it. To suggest that somehow the 10% cap in Mo. Rev. Stat. § 393.1003.1 creates a guarantee in the face of both the "provide for" language found therein as well as the billing determinant language found in Mo. Rev. Stat. § 393.1006.5(1), requires one to ignore both plain direction to harmonize a statute if at all possible and clear guidance to construe statutory exceptions strictly.[14] *Robert Evans*, 254 S.W.3d at 35; *Florida Realty*, 509 S.W.2d at 121.

The second clause of Mo. Rev. Stat. § 393.1003.1, containing language intended to protect the consumer and wherein the 10% cap may be found, does nothing to alter this conclusion. An eligible water company can request an ISRS, according to the second

[14]As mentioned previously, it also requires one to ignore completely the impact on revenue generation caused by the use of the billing determinants. It would be exceedingly odd for the legislature to have mandated the use of certain billing determinants only to permit the consequence of the use of those billing determinants to be as easily disregarded and circumvented as MAWC attempts in this case.

clause, "provided that an 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…." Mo. Rev. Stat. § 393.1003.1. The floor and cap established in the second clause of Mo. Rev. Stat. § 393.1003.1 operate as consumer protections. In the first instance, the floor limits the practical availability of the ISRS to large water companies, ensuring that small water companies and their customers are not exposed to this surcharge on their bills. Next, the cap on revenues limits the magnitude of the customer's exposure to the ISRS surcharge. That the cap is intended to be a protection for the customer and not a guarantee of revenue generation for the utility is the clear intent of the legislature in enacting this language, and in the placement of this language as it did as a second, independent clause conditioning and circumscribing the scope of the primary enabling statute of the water ISRS. *See Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 668-69 (1990) (stating that the structure of a statute can inform interpretation). The cap does not guarantee that the ISRS will produce revenue up to the 10% limit. Rather, the cap provides that whatever revenue is produced cannot exceed 10% of base revenue. Nothing in the ISRS statute, and certainly not the carry-forward language in section 393.1006.5(2), can be read in any way to weaken this plain language.

In entering its Report and Order, the Commission set rates at a level designed to produce revenue in excess of the 10% cap authorized by law. In setting rates in excess of the cap, the Commission, in effect, ignored the billing determinants established in the last rate case, which the Commission is not empowered to do. Mo. Rev. Stat. § 393.1006.5(1). The law unambiguously requires the billing determinants from the prior

general rate case to be used, and the effect of using those billing determinants cannot be circumvented through distortion of the plain language of the cap. Moreover, nothing in the carry-forward language in the water ISRS statute suggests a different result is permitted. Mo. Rev. Stat. § 393.1006.5(2). In ignoring the mandatory language of the billing determinants provision, the Commission proceeded to convert an opportunity to recover costs through the water ISRS into a guarantee of full recovery up to the limit of the cap. This bold deviation from long-standing regulatory ratemaking should be declared by this Court to be unlawful.

Finally, the Commission's purported remedy against over-recovery is to require the utility to provide notice two months prior to the date it anticipates the 10% cap will be reached so that the ISRS can be stopped (L.F. at 243).[15] First, though likely well intentioned, this remedy is not authorized anywhere in the statute and could conceivably conflict with the prohibition on changing an ISRS rate more than twice in any twelve-month period. Mo. Rev. Stat. § 393.1006.3. More importantly, nothing about this provision remedies the wrong perpetrated by the Commission, which is the disregard and

[15] If the legislature intended the water ISRS to be used in the manner the Commission authorized, it can be assumed the legislature would have created a mechanism to stop ISRS revenue production once the cap had been reached. The fact that the legislature did not create such a mechanism and the Commission had to fashion one for itself casts substantial doubt that the legislature ever intended the water ISRS to be used in the way the Commission has ordered.

circumvention of the plain language and intent of the legislature concerning the impact of the requirement to use billing determinants to establish water ISRS rates, and the distortion of both the carry-forward provision and the 10% cap, thereby converting the ISRS from an *opportunity* for cost recovery between general rate cases into a *guarantee* of full recovery.

The Commission's Report and Order ignores the plain language of the water ISRS statutes with respect to the use of billing determinants, the carry-forward provision and the application of the 10% cap on revenue production. The order fails to harmonize the water ISRS's provisions within itself and within the broader statutory framework in which it operates. The order fails to recognize the ISRS is a limited exception to traditional ratemaking which must be construed strictly in favor of protecting the public and instead construes the water ISRS broadly in favor of the utility. The Report and Order should be overturned and the case remanded to the Commission for further proceedings consistent with this Court's opinion.

CONCLUSION

In view of the foregoing, the Office of the Public Counsel respectfully requests that this Court reverse the Commission's Report and Order granting the relief requested by Missouri-American Water Company and remand this case back to the Commission with instructions to calculate and then refund to MAWC customers the amounts improperly collected from them.

Respectfully submitted,

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Certificate of Service

I hereby certify that this brief and accompanying appendix was filed through the Court's electronic filing system, and notice of this filing, along with an electronic copy of this filing, was provided to the following counsel this 18th day of July 2016.

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CERTIFICATE PURSUANT TO RULE 84.06(b), 84.06(c), AND 84.06(g)

I hereby certify that the foregoing Brief complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare this Brief (excepting the cover, certificate of service, this certificate, and the signature block), contains 11,665 words. I hereby further certify that the file submitted to the Court has been scanned for viruses and that the scan indicated that it is virus free.

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