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 REPLY BRIEF

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I. The Public Service Commission had no authority to approve Missouri-American Water Company's infrastructure system replacement surcharge petition.

"As a creature of statute, the [Public Service] Commission [("Commission" or "PSC")] 'only has the power granted to it by the Legislature and may only act in a manner directed by the Legislature or otherwise authorized by necessary or reasonable interpretation." *Public Serv. Comm'n v. Consol. Pub. Water Supply Dist. C-1*, 474 S.W.3d 643, 649 (Mo. App. W.D. 2015) ("*Water Supply Dist.*") (citing *Evans v. Empire Dist. Elec. Co.*, 346 S.W.3d 313, 318 (Mo. App. W.D. 2011)). "If a power is not granted to the Commission by Missouri statute, then the Commission does not have that power." *Id*.

With respect to the levy of a water infrastructure system replacement surcharge ("ISRS"), the Commission's authority to act is limited by the terms of §§ 393.1000 - 393.1006. Mo. Rev. Stat. §§ 393.1000 – 393.1006 (Cum. Supp. 2013). Section 393.1003.1 makes clear only a "water corporation providing water service in a county with a charter form of government and *with more than one million inhabitants*" (emphasis added) may file a "petition to establish *or change* ISRS rate schedules" (emphasis added) with the Commission. Where the petition fails to meet the requirements of the law, the Commission may not consider or approve the petitioner's request; the Commission has no authority to act. Mo. Rev. Stat. §§ 393.1003.2, 393.1006.2(4). Here, despite strained protests to the contrary, the Commission plainly exceeded the authority

granted to it by the legislature when it approved Missouri-American Water Company's ("MAWC") ISRS petition.

MAWC suggests that the Office of the Public Counsel ("OPC") failed to raise the population question articulated in OPC's first point on appeal in a timely manner before the Commission; therefore, the question cannot be considered by this Court (MAWC Br. at 41).[1] However, OPC's objection to the Commission's Report and Order is jurisdictional and one which OPC gave the Commission an opportunity to consider by moving for rehearing prior to bringing this appeal.

> A basic tenet of administrative law provides that 'an administrative agency has only such jurisdiction or authority as may be granted by the legislature.' If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction. The agency's subject

[1] The Commission does not raise this point, but does suggest that OPC's argument is actually a collateral attack on a prior Commission order, which generally would be prohibited (Comm'n Br. at 24). *See State* ex rel. *Mo. Gas Pipeline, LLC v. Pub. Serv. Comm'n*, 395 S.W.3d 562, 566 (Mo. App. W.D. 2013). OPC attacks no Commission order except the Report and Order from which it appealed. This case is about a $1.9 million ISRS change petition, and only that.

> matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.

Livingston Manor, Inc. v. Dep't of Soc. Servs., 809 S.W.3d 153, 156 (Mo. App. W.D. 1991) (quoting *State* ex rel. *Mo. Health Care Ass'n v. Mo. Health Facilities Review Comm.*, 768 S.W.2d 559, 562 (Mo. App. W.D. 1988)). "Without subject matter jurisdiction, the agency can take no other action than to dismiss the proceeding." *St. Charles Ambulance Dist., Inc. v. Dep't of Health & Senior Servs.*, 248 S.W.3d 52, 54 (Mo. App. W.D. 2008). When a tribunal takes action in excess of its subject matter jurisdiction, "any action it takes is null and void." *Hightower v. Myers*, 304 S.W.3d 727, 733 (Mo. 2010) ("*Hightower*"). Accordingly, "lack of subject matter jurisdiction may be raised at any stage in the proceedings…" and cannot be waived. *State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982).

"Subject matter jurisdiction concerns 'the nature of the cause of action or the relief sought' and exists only when the tribunal 'has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed.'" *Id.* (quoting *Cantrell v. City of Caruthersville*, 221 S.W.2d 471, 476 (Mo. 1949)). In general, courts have broad jurisdiction under the Missouri Constitution to hear and resolve any controversies brought to them. Mo. Const., art. V, § 14(a). By contrast, administrative agencies, as explained above, have only limited jurisdiction as may be granted by the legislature. An administrative agency may lack jurisdiction because it is powerless to grant the requested relief.

Under the ISRS statute, the Commission has no authority or right either 1) to proceed to determine a petitioner's entitlement to establish or change a water ISRS rate schedule or 2) to grant such a request, unless the petition is brought by "a water corporation providing water service in a county with a charter form of government and with more than one million inhabitants." Mo. Rev. Stat. § 393.1003.1. To paraphrase *State Tax Comm'n v. Admin. Hearing Comm'n*, when the legislature enacted the population requirement in the ISRS, it circumscribed the very "nature" of the ISRS action and the availability of such relief to a utility and denied the Commission any broader authority to act. *See* 641 S.W.2d at 72. Here, the 2010 decennial census reveals that St. Louis County lacks the population necessary for MAWC to file an ISRS petition, and so, the Commission's Report and Order authorizing MAWC's petition exceeded the Commission's subject matter jurisdiction and was in error (Appendix at 23).

MAWC, citing *J.C.W.* ex rel. *Webb v. Wyscilla* 275 S.W.3d 249 (Mo. banc 2009) (*"Webb*"), attempts to equate the subject matter jurisdiction of an Article V court with the subject matter jurisdiction afforded to the Commission (MAWC Br. 44). In *Webb*, the court based its decision upon the concept that a court's subject matter jurisdiction is governed by the Missouri Constitution. *Webb*, 275 S.W.3d at 253; Mo. Const. art. V, § 14. Because an Article V court's jurisdiction flows from the constitution, said jurisdiction cannot be limited by statute. *Webb*, 275 S.W.3d at 254 ("[E]levating statutory restrictions to matters of 'jurisdictional competence' erodes the constitutional boundary established by *article V of the Missouri Constitution*, as well as the separation of powers doctrine,

and robs the concept of subject matter jurisdiction of the clarity the constitution provides."). *Id.*

In contrast, the Commission gains its jurisdiction from statute – not the constitution. MAWC's false equivocation would elevate the jurisdiction of the Commission over that of certain Article V courts. In *Webb*, this court explained subject matter jurisdiction of some courts is limited by statute: "there are subject-matter limits that can be placed by statute on associate circuit judges, as *article V, section 17 of the Missouri Constitution* specifies[.]" *Webb*, 275 S.W.3d at 254, n. 7. MAWC's position elevating the Commission over constitutional courts and should be rejected.

MAWC cites a footnote in *State* ex rel. *Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 192 n. 9 (Mo. banc 2011) ("*Praxair*") to support its argument for extending Article V jurisdiction to the Commission but that reliance is misplaced (MAWC Br. 45). In *Praxair*, the reference to *Webb* is embedded in the court's discussion on allegations of commissioner bias relating to parties' due process rights and merely corrects the use of a term in a particular context. *Praxair*, 344 S.W.3d at 191-92 (stating "Although *Thompson* uses the term 'jurisdiction' the more appropriate term would be authority."). Examination of *State* ex rel. *AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App. 2003) ("*Thompson*"), reveals the term "jurisdiction" was used in the context of examining when disqualification of a particular "judge or administrative decision-maker" would be required. *Thompson*, 100 S.W.3d 915, 920. The court's decision in *Praxair* addressed a different situation than presented here and says nothing to support MAWC's argument.

MAWC also cites *M.A.H. v. Mo. Dep't of Soc. Servs*, 447 S.W.3d 694, 697 (Mo. App. E.D. 2014) ("*M.A.H.*"), to support its flawed proposition to extend jurisdiction. In *M.A.H.*, the court wrote "though the parties do not address whether *Webb's* definition of subject-matter jurisdiction applies in an administrative context, the Missouri Supreme Court has employed *Webb* to distinguish an administrative body's 'jurisdiction' from its 'authority.'" *M.A.H.*, 447 S.W.3d at 697 n. 1. Importantly, *M.A.H.* did not extend *jurisdiction* to where none existed as MAWC would have the court do here. An administrative agency only has the jurisdiction extended to it by the legislature. Here, the ISRS statute provides clear jurisdictional lines that were not met.

MAWC suggests various ways it could have shown population by means other than the decennial census if given the opportunity (MAWC Br. 43). Such suggestions must be rejected. Missouri law states that, for counties, only the last previous U.S. decennial census determines population. Further, the use of decennial census data has long been held to be an extra-record matter that is judicially noticeable by the original tribunal and/or by the reviewing appellate court.

Nothing in the ISRS statute itself declares how population is to be counted for purposes of determining whether the Commission has authority to consider a petition. As such, the ISRS provides no independent source of authority for calculating population, leaving the terms of the general population statute - § 1.100.1 - to control. The legislature is aware of alternative means for counting population when it so chooses, as it has with respect to the populations of municipalities. *See* Mo. Rev. Stat. §§ 71.160 - 71.180, 81.020 - 81.030 (2000).

Because § 1.100.1 controls, it merits further discussion:

> 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. …[T]he effective date of each succeeding decennial census of the United States is July first of each tenth year after 1961….

Mo. Rev. Stat. § 1.100.1 (2000). Courts consistently have rejected attempts by litigants to prove population through methods other than those provided under Missouri law. *See Poertner v. Hess*, 646 S.W.2d 753, 757 (Mo. 1983) (rejecting argument that "data assembled pursuant to [§ 37.130]" may be used); *Varble v. Whitecotton*, 190 S.W.2d 244, 246 (Mo. banc 1945) (rejecting use of "other means"); *Union Elec. Co. v. Cuivre River Elec. Coop.*, 571 S.W.2d 790, 796-97 (Mo. App. St. Louis 1978) (rejecting argument that "the population of the City might be established in any authentic manner" and deciding the U.S. decennial census is the "exclusive method"). MAWC's argument regarding additional evidence merely attempts to show population other than in the only manner provided by law – the last previous decennial census. This attempt ignores the binding effect of § 1.100.1 and precedent and invites this Court to partake in the same error. This Court must reject MAWC's invitation.

The results of the last previous decennial census are judicially noticed by the courts of Missouri. *State v. Van Black*, 715 S.W.2d 568, 571 (Mo. App. S.D. 1986). This Court has recognized this approach since at least 1882, including in at least one case

concerning the Commission. *See Varble*, 190 S.W.2d at 246 (stating "this court has always taken judicial notice of the results of the census"); *State* ex rel. *Alton R. Co. v. Pub. Serv. Comm'n*, 70 S.W.2d 52, 54 (Mo. 1934); *Carter Cnty. v. Huett*, 259 S.W. 1057, 1058 (Mo. 1924); *State* ex inf. *Crow v. Evans*, 66 S.W. 355, 357 (Mo. 1902); *State* ex rel. *Martin v. Wofford*, 25 S.W. 851, 853 (Mo. 1894); *State* ex rel. *Bd. of Managers v. Justices of Cnty. Court*, 1 S.W. 307 (Mo. 1886); *State* ex rel. *Harris v. Herrmann*, 75 Mo. 340, 352 (1882). This case requires no different treatment and, indeed, judicial notice is particularly appropriate where, as here, the population question is of a jurisdictional dimension.

To the extent MAWC believes, despite § 1.100.1 and the binding effect of precedent, a fact question might still exist with respect to the population of St. Louis County that could implicate the Commission's jurisdiction, it is important to note that OPC afforded the Commission an opportunity to rehear the jurisdictional issue before this appeal was brought and that opportunity included a discussion of the result of the 2010 census (L.F. at 245-51). In deciding a legal analysis of the relevant statutes resolved the question on rehearing, the Commission apparently determined a factual investigation was not required (L.F. at 265-68). While OPC disagrees with the Commission's legal analysis, OPC concurs that a factual evaluation of the question is not required, most importantly because there is nothing to investigate. Under Missouri law, the judicially noticeable result of the 2010 decennial census is dispositive of whether St. Louis County's population now exceeds one million inhabitants – it does not. The only question remaining, then, is a purely legal one; which census result applies to the ISRS today and

going forward – the stale result from the 2000 census or the result from whichever is "the last previous decennial census"?

On appeal, both MAWC and the Commission misinterpret § 1.100.2 in order to conclude that the result of the 2000 decennial census continues to apply today (MAWC Br. at 11-17; Comm'n Br. at 14-19).[2] Instead, OPC offers a more reasonable and logical interpretation of the ISRS statute and § 1.100.2. The plain language of the law establishes the prerequisites a water corporation must meet "in order to petition the Commission to establish or change" an ISRS. Mo. Rev. Stat. § 393.1003.1. "[T]he Commission shall not approve" a petition that fails to satisfy these prerequisites. Mo. Rev. Stat. §§ 393.1003.2; 393.1006.2(4). Contrary to respondents' arguments, § 1.100.2 does not include a "once-in, always-in" clause applicable to St. Louis County, as suggested by the Commission and MAWC (Comm'n Br. at 19; MAWC Br. at 12-21).

Section 1.100.2 addresses population gains and losses. The first sentence broadly addresses gains, and states:

> 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

[2] Both MAWC and the Commission abandon earlier arguments that the phrase "as of August 28, 2003" in § 393.1003 created a "snapshot" in time to determine ISRS eligibility (L.F. at 253, 267; MAWC Br. at 11, n. 1; Comm'n Br. at 19-23).

> 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.

Mo. Rev. Stat. § 1.100.2. The second sentence of § 1.100.2, stating "[o]nce 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," narrowly addresses population losses. *Id.*

MAWC and the Commission argue that the phrase "as well as those in the category at the time the law was passed" means that St. Louis County will be considered to have a population of at least 1 million residents forever for purposes of the ISRS statute (MAWC Br. at 12-21; Comm'n Br. at 19). However, the plain language of § 1.100.2 makes clear only the City of St. Louis is saved from falling out of the operation of a law containing a population limitation.

To be sure, OPC does not suggest that the phrase "as well as those in the category at the time the law was passed" in § 1.100.2 is devoid of meaning; merely that the phrase does not hold the meaning that MAWC and the Commission would have for it. The phrase simply ensures that the general statute governing population applies to those political subdivisions meeting the population requirement at the time a particular law is passed. Consider the hypothetical example of a county - County A - with a population of 990,000 people at the time the ISRS law was passed. Assuming that the August 28, 2003, language does not create a "snapshot" for eligibility as MAWC and the Commission argued below, § 1.100 then determines the population of County A for purposes of the

ISRS. Section 1.100.1 requires use of the results of the most recent decennial census. Section 1.100.2 includes the phrase "subdivisions which thereafter acquire such population", which means that County A - though not currently qualified due to its population - could qualify in the future if the next decennial census so indicates. Mo. Rev. Stat. § 1.100.2. If the next census shows that County A's population stayed the same or declined, it would continue to be excluded.

MAWC suggests that the language "shall be deemed to include" creates the "once in, always in" provision (MAWC Br. 17). If this is true, then those *not* in the category at the time the law was passed are not privy to "once in, always in" treatment. If County A succeeds in growing into a population requirement and then experiences a population loss during a future census period, it would fall out of the category. County A only gained admission to the category after the law was passed and was not a member of the category "at the time the law was passed." This is the plain result of MAWC and the Commission's reading of the statute - two classes of counties in the state: those which qualify and receive "once in, always in" treatment by virtue of the fact that they had status in a population-based category on the date a law was passed and all those counties that follow which, under MAWC's line of reasoning, move in and out of the category as population dictates.[3] This result lays bare the untenable nature of MAWC and the

[3] The inequity of such disparate treatment is particularly acute as it pertains to statutes with narrow population bands.

Commission's interpretation of § 1.100.2. It is also important to discern that simply because a figure is "deemed" does not mean it is "static" – even "deemed" categories are subject to update after each census as required by § 1.100.1.

As applied to this case, MAWC's reading of § 1.100.2 would single out St. Louis County for special consideration over every other county in the state. It is undisputed that, as of the 2000 census, St. Louis County was the only county in Missouri with a population over 1 million. As a consequence, because all other counties were not original members of the ISRS category, only St. Louis County could ever be prevented from falling out of the category. Any benefits and burdens associated with the water ISRS which might accrue to St. Louis County under MAWC and the Commission's *mis*interpretations are uniquely ensured to persist only for St. Louis County in perpetuity.

Now, consider the case of a county – County B – which has 1,000,001 people at the time the law was passed. One can argue the phrase in § 1.100.2 "political subdivisions which thereafter acquire such population" could exclude County B from qualifying because County B already had the requisite population level and did not acquire it "thereafter." It is only when the phrase "as well as those in the category at the time the law was passed" is included in § 1.100.2 that County B clearly qualifies under the statute. Thus, it is an examination of how the law would be applied without the phrase "as well as those in the category at the time the law was passed" that reveals the meaning and intended effect of the phrase. The phrase plainly and unambiguously exists to resolve any potential question that County B, having already acquired the requisite population, meets the qualification. Without the phrase, the answer to that question is left unclear and this

interpretation makes sense because it is imminently reasonable that when using an important but mutable characteristic like population, the legislature would want to make clear just which political subdivisions are to be considered included in a category and which are not. This language is not, however, "once in, always in" – far from it.

The language "at the time the law passed" in § 1.100.2 means at the time final passage occurs before the legislature. *City of Harrisonville, Mo. v. Pub. Water Supply Dist. No. 9*, 129 S.W.3d 37, 39 (Mo. App. W.D. 2004). Whichever census is effective on the date the law passes provides the figure to be applied to ascertain whether a political subdivision meets the population criteria of the new law. OPC explained the interplay between the date a law is passed, the effective date of a law, and the effective date of each census in its initial brief (App. Br. at 19). 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" ensures those in a population category during the legislative session are in that category when the law first becomes effective. It does not mean "once in, always in" but only that the census effective at the time of passage will be used until the next census becomes effective in ten years.

MAWC disputes this interpretation as a reasonable outcome because 1) census data is reported to the Governor before the end of the legislative session and 2) OPC's meaning would apply only every ten years (MAWC Br. 20-21). First, whether or not the census data is available prior to the end of a legislative session the phrase "as well as those in that category at the time the law passed" is necessary to ensure a targeted

subdivision remains in the population category prior to the law taking effect. Of course, this starting point remains subject to update "on the basis of the last previous decennial census of the United States." Mo. Rev. Stat. § 1.100.1.

MAWC's second point – that OPC's interpretation is pertinent only in years when a new census becomes effective – acknowledges but minimizes the meaning in OPC's interpretation. OPC's interpretation gives meaning to the phrase and serves a discrete and lawful purpose. With it, the legislature can enact laws containing population categories capable of withstanding constitutional scrutiny in years when a new census is updated.[4] Without it, a targeted political subdivision may fall out of a category before the law becomes effective.

Moreover, MAWC's point illuminates a problem inherent in its interpretation of the law. MAWC's interpretation – that a political subdivision forever remains in a particular category for purposes of a population-based law – causes the statues of Missouri to be increasingly opaque and incomprehensible over the passage of time. MAWC's brief itself proves the problem when stating: "[t]he county meeting that description (or the year the amendment was added) is not readily apparent from the

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[4] The phrase "last previous decennial census" necessarily requires the figures be updated. Attempts to enact population-based laws relying on a particular census not subject to update are unconstitutional special laws. *State* ex rel. *City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993).

statute." (MAWC Br. at 38). MAWC's interpretation also creates a barrier the legislature must overcome whenever it wishes to change any statute with a population-based category. Importantly, there is no need to adopt MAWC's self-serving interpretation.[5] OPC's application of the plain language has meaning and avoids the consequence that the application of certain laws becomes more obscure with the passage of time.

MAWC discusses *State* ex rel. *McNeal v. Roach*, 520 S.W.2d 69 (Mo. 1975) in attempting to explain, weakly, that the legislature was just being cautious when it singled out the City of St. Louis for particular treatment in § 1.100.2 and, that even absent this change, the City still would not fall out of the population category (MAWC Br. at 26-27). To follow MAWC's argument, however, renders the language added to the law for the City of St. Louis in 1971 entirely superfluous, suggests that the act of amending the law

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[5] OPC avers MAWC's interest in this case is about preserving its ability to collect money (approximately $445,515,360 since 2003) from customers in St. Louis County without undergoing the scrutiny of a rate case audit (MAWC Br. at 6). Any suggestion the ISRS is necessary for MAWC to provide safe and adequate service falls flat. As far back as 1914, this court has held the Commission has "plenary power to coerce a public utility corporation into a safe and adequate service." *State* ex rel. *Missouri Southern R. Co. Public Service Commission*, 168 S.W. 1156, 1163 (Mo. banc 1914). This requirement predates the ISRS statute by close to ninety years.

had no meaning, and ignores the fact that the legislature considered and rejected a broad grandfathering rule for all political subdivisions in that process. *See Verified Application & Petition of Liberty Energy (Midstates) Corp. v. Office of Pub. Counsel*, 464 S.W.3d 520, 524-25 (Mo. 2015) (reiterating presumption that "every word, sentence or clause in a statute has effect"); *Department of Soc. Servs., Fam. Supp. Div. v. Hatcher*, 341 S.W.3d 762, 769 (Mo. App. W.D. 2011) (stating "the express mention of one thing implies the exclusion of another"); *Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. 1992) (recapitulating that amendments to legislation are presumed to have an effect); Journal of the House, 76th Gen. Ass., 1st Reg. Sess., Eighteenth Day, p. 343 (Mo. Feb 10. 1971). Standard rules of construction must be ignored completely to reach MAWC's conclusion.

MAWC's argument ignores the fact that it is clear from a plain reading of the law and its progress through the legislature that no other political subdivision besides St. Louis City is targeted. MAWC's argument is particularly odd in that it suggests the 1971 amendment was the "prudent course of action" to protect the City of St. Louis while at the same time MAWC asserts "members of the General Assembly representing 114 counties in the state did not feel the need to make the City of St. Louis clause applicable to the whole state **because** they felt protected by existing language[.]" (MAWC Br. pp. 26-27). MAWC's speculation might have made sense if the legislature had considered language specific to St. Louis City from the outset, but that was not the case. Certainly, the legislature intended to prevent a loss in population from removing the City of St. Louis from the statutes applicable to the city's Board of Police Commissioners. The means by which the legislature provided relief was to add language grandfathering the

City, and only the City. No other political subdivision received such treatment and, again, the legislature considered and rejected the option to provide broad relief for all political subdivisions (App. Br. at 23). *See* House Journal, 76th Gen. Ass., 1st Reg. at p. 343 (deleting the words "political subdivision" from the bill and substituting in lieu thereof "city not located in a county"). In contrast to MAWC's speculation, OPC's position is based on the legislature's affirmative decision to reject a broad "once in, always in" rule for all political subdivisions.

MAWC discusses a variety of other statutes that may be impacted if the Court concurs with OPC (MAWC Br. at 28). The company and *amicus curiae* generally describe selected statutes that could be impacted if the court does not find § 1.100.2 to have a "once-in, always-in" provision (MAWC Br. at 28-30). The application of those statutes is not at issue in this case. MAWC apparently raises these unrelated statutes to persuade the court to ignore the plain language of the statute and to support various speculative arguments about the legislature's intent when passing statutes not at issue in this appeal.

The legislature knows how to insulate a political subdivision from the effects of population loss when it so chooses. For example, § 304.190.4 relating to certain requirements for commercial zones based on population, provides "[i]n no case shall the commercial zone of a city be reduced due to a loss of population." Mo. Rev. Stat. § 304.190.4. Similarly, § 311.090.1, relating to licenses for the sale of intoxicating liquor, provides:

> Once such licenses are issued in a city with a population of at least nineteen thousand five hundred inhabitants, any subsequent loss of population shall not require the qualified voters of such a city to approve the sale of such intoxicating liquor prior to the issuance or renewal of such licenses.

Mo. Rev. Stat. § 311.090.1 (2000). Those are just two examples of the legislature effecting a targeted "once in, always in" rule for a particular enactment. The legislature could have inserted similar language into the ISRS statute but it did not. So, too, could the legislature have inserted similar language into § 1.100.2, thereby enacting a broadly applicable "once in, always in" rule but it did not do so for any political subdivision besides St. Louis City.

Truly open-ended population provisions have long been understood as a permissible means for the legislature to tailor the impact of a statute to particular political subdivisions. *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. 1999). Less considered is that population provisions also provide a built-in opportunity for a statutory scheme to sunset on a particular political subdivision. One must assume when the legislature builds a population limitation into a statutory scheme that it does so for a reason and, further, that it sets the particular population limit where it does for a reason.[6] *Jefferson Cnty. Fire*

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[6] MAWC cites recent legislation amending statutes and concludes the legislature would not have enacted legislation that applied to no particular category (MAWC Br. at 30-33).

Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006). As a result, because population was an important enough consideration for it to include in a statute, the legislature must not intend for that statutory scheme to apply in the absence of meeting the population requirement. Through the language of § 1.100.2, the legislature makes clear that falling out of a population-based category is permissible and, if a political subdivision desires to avoid that unwanted[7] outcome, it will need to come before the legislature. This approach preserves the legislature's role in ensuring the laws it passes apply as it intends. Where the legislature wants to depart from this general rule, it knows how to do so, as it has done in all cases for the City of St. Louis, and on a case-by-case basis with other statutory schemes.

MAWC and St. Louis County/Regional Chamber provide new evidence in the form of an email, not found in the record of the case, purporting to demonstrate the legislature was unaware political subdivisions would fall out of population-based statutes after a population change (MAWC Br. at 35-36; St. Louis County/Regional Chamber Br.

However, this outcome is reasonable. By enacting legislation that does not apply to a particular political subdivision, the legislature is actually creating laws of general applicability. Though no entity may fit into the particular category, any entity may qualify in the future.

[7] It should not be presumed that falling out a population-based category will be considered unwanted in all circumstances, or even a majority of circumstances.

at 13). Legislation proposed this session shows not all legislators shared MAWC's view. Senate Bill 949 and House Bill 2258 would have amended § 1.100.2 to extend the "once in, always in" treatment to political subdivisions other than St. Louis City. *See* S.B. 949, 98th Gen. Ass., 2nd Reg. Sess. (Mo. 2016); H.B. 2258, 98th Gen. Ass., 2nd Reg. Sess. (Mo. 2016). Rather than evaluating competing interpretations of secondary material, this court should rely on the plain language of the statute.

Further, the Commission asks the Court to dismiss this appeal as moot because the ISRS was set to zero in MAWC's recent rate case (Commission Sub. Br. pp. 11-13). The Commission's argument is misinformed and should be rejected. Simply because the infrastructure is accounted for in base rates does not mean there is no remedy available. In fact, § 386.520 provides that, in certain circumstances, the commission "shall be instructed on remand to approve temporary rate adjustments designed to flow through to the public utility's then-existing customers the excess amounts that were collected by the utility." Mo. Rev. Stat. §386.520 (Cum. Supp. 2013). Furthermore, in the event the court accepts the Commission's mootness argument, the issues on appeal – particularly the application of § 1.100.2, are of general interest to the public (as evidenced by the amicus briefs), will recur (each time MAWC seeks an ISRS), and will evade future review (if the court accepts the Commission's rate base argument). *See State* ex rel. *Praxair, Inc. v. PSC*, 328 S.W.3d 329, 333-35 (Mo. Ct. App. W.D. 2010). For those reasons, the court should decide the issues presented in this appeal.

The interpretations of § 1.100.2 offered by the Respondents run afoul of the language of the laws themselves, standard rules of construction, and common sense. Only

OPC's interpretation of the plain language of these statutes provides a pathway forward that avoids the problems of Respondents' analysis and only OPC's interpretation of these statutes has the virtue of being confirmed by the legislative history surrounding their respective passage. The Commission acted in excess of its authority in considering and granting MAWC's petition for an ISRS change. This Court should vacate the Commission's unlawful Report and Order and direct the Commission to ensure the amounts improperly collected from MAWC's customers in this case are refunded.

II. Use of the billing determinants established in MAWC's last rate case results in an under-recovery for this ISRS cycle, even after application of the carry-forward provision in the water ISRS statute, and the Commission's order attempting to avoid that result is unlawful.

The water ISRS statute provides it must not produce revenues in excess of ten percent of MAWC's base revenue level approved by the Commission in MAWC's last rate case. Mo. Rev. Stat. § 393.1003.1. Later, the statute provides that the ISRS rate "shall be calculated based upon the amount of ISRS costs that are eligible for recovery during the period in which the surcharge will be in effect and upon the applicable customer class billing determinants utilized in designing the water corporation's customer rates in its most recent general rate proceeding." Mo. Rev. Stat. § 393.1006.5(1). Harmonizing the varying provisions of the ISRS consistent with the intent of the legislature, and doing so in a manner mindful that the ISRS is a limited derivation from traditional regulatory ratemaking which must be construed narrowly, requires overturning the Commission's erroneous Report and Order.

Very broadly speaking, an ISRS rate is established by taking the ISRS "revenue requirement" and dividing that amount by the "billing determinants" established in the last rate case. Mo. Rev. Stat. § 393.1006.5(1). Once calculated, the ISRS rate is then applied by the utility and multiplied by actual customer usage to determine what gets billed. When the bill is paid by the customer, the amount paid becomes the utility's "revenue recovery." Under Missouri's traditional regulatory scheme, actual revenue recovery is not guaranteed to equal the utility's revenue requirement; the rate set by the

Commission will result in a utility over- or under-recovering to some degree. *Noranda Alum., Inc. v. Union Elec. Co. d/b/a Ameren Mo.*, 2014 Mo. P.S.C. LEXIS 882, *29-30 (2014). The ISRS - while slightly different - does not fundamentally alter this approach. Mo. Rev. Stat. §§ 393.1000 – 393.1006. In addition to being a deviation from traditional ratemaking principles prohibiting single-issue ratemaking, the ISRS also provides additional opportunities for the utility to get closer to full recovery of its ISRS revenue requirement through use of the carry-forward provision that do not exist in the traditional approach (App. Br. at 31-32). Mo. Rev. Stat. § 393.1006.5(2). However, just as in the traditional approach, there is no legal guarantee in the ISRS statute that the mechanism will provide the utility full recovery of its revenue requirement. Indeed, the ISRS statute, in requiring the use of the billing determinants established in the utility's last general rate case, makes clear that it affords the utility merely an opportunity to recover revenue, not a guarantee.

The Commission erred when it misconstrued the ISRS statute to permit it to provide for an additional opportunity at revenue recovery beyond what is authorized by the carry-forward provision. The use of the billing determinants established in MAWC's last rate case is mandatory. Mo. Rev. Stat. § 393.1006.5(1). Because actual customer usage did not match that which was used in creating the billing determinants, MAWC experienced an under-recovery (L.F. at 234). MAWC carried-forward un-recovered costs from one ISRS period to the next, consistent with the law, to permit it an additional opportunity to recover those funds (*Id.*). Mo. Rev. Stat. § 393.1006.5(2). However, at no point does the law permit the Commission to set an ISRS rate that, when combined with

the billing determinants established in the last rate case, will produce revenue in excess of ten percent (10%) of the MAWC's base revenue level established in its last rate case. Mo. Rev. Stat. § 393.1003.1. Here, the Commission did just that.

Without the requirement to use the billing determinants of the most recent rate case to set the ISRS rate, there is no need for the ISRS statute to have a carry-forward, or reconciliation, provision. The potential for under- or over-recovery is a predictable consequence of using billing determinants from a prior rate case when determining the rate. By mandating the use of billing determinants from the previous rate case, the legislature makes evident its intent that the water ISRS not guarantee a certain level or revenue production. The legislature did not deviate quite so far from traditional ratemaking as MAWC and the Commission might like.

The Commission sets rates. Mo. Rev. Stat. § 393.270.2. The means at the Commission's disposal to ensure revenue production does not exceed the 10% cap and, while also following the billing determinants mandate, is to set the ISRS rate at a level which is not projected to exceed the cap. Using a flawed legal analysis regarding the amounts carried forward from prior periods as its justification, the Commission set rates at a level projected to produce revenue exceeding the 10% cap by roughly $1.6 million (L.F. at 237-40). In so doing, the Commission deliberately established a mechanism whereby the ISRS becomes not an opportunity for infrastructure cost recovery between general rate cases but a guarantee of cost recovery. If the Commission's Report and Order is allowed to stand, the 10% cap - a consumer protection intended to limit the magnitude of harm accruing to consumers due to the ISRS's deviation from traditional

ratemaking - is then converted from its plain and unambiguous purpose. The cap is a ceiling on revenue production; it is not also a floor. The cap is not a guarantee that the utility will recover the full ISRS revenue requirement.

MAWC recognizes that the Commission approved an ISRS revenue requirement designed to recover revenues in excess of the cap (MAWC Br. at 49). However, MAWC defends the Commission's Report and Order on the basis that MAWC's actual recoveries would be limited to the ISRS cap as a result of the Commission's conditions (*Id.*). This argument ignores the plain language of the statute limiting revenue production and requiring the use of the billing determinants of the last rate case in setting rates. Mo. Rev. Stat. § 393.1006.5(1). Further, not only is the Commission's approach unlawful, but it is unfair to those people who are MAWC customers during the period of the excessive rate but no longer customers when the Commission's condition takes effect.

The Commission suggests OPC has not identified anything in the record to substantiate OPC's purported claim that the Commission somehow changed the billing determinants used in MAWC's ISRS (Comm'n Br. at 29-30). OPC does not suggest that the Commission changed the billing determinants. Rather, OPC suggests the Commission unlawfully subverted the effect of using the billing determinants by setting the ISRS rates at a level which, when using those billing determinants, produce revenue in excess of the 10% cap (App. Br. at 38). The Commission then paid lip service to the 10% cap by establishing a new and unauthorized method to ensure MAWC does not recover above

the cap. (L.F. at 241).[8] In so doing, the Commission converted the cap into both a ceiling and a floor; utility recovery of the full amount of the revenue requirement becomes guaranteed. OPC contends the Commission's actions are impermissible.

The Commission's Report and Order ignores the plain language of the ISRS statutes with respect to the application of the 10% cap on revenue production, the use of billing determinants, and application of the carry-forward provision. The order fails to harmonize the 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 that must be construed strictly in favor of protecting the public and instead construes the 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 the Court's opinion.

[8] If the Commission had set the water ISRS rates in the manner prescribed by law, there would be no need for the procedure the Commission set up to attempt to honor the cap. Indeed, the act of establishing this procedure recognizes, at least implicitly, the Commission set rates which will produce revenue in excess of the 10% cap under the billing determinants required to be used.

CONCLUSION

In view of the foregoing, this Court should vacate the Report and Order and instruct the Commission to take those steps necessary and proper to ensure the amounts erroneously charged to customers are refunded. Alternatively, this Court should reverse the decision of the Commission and remand the matter with instructions to recalculate the water ISRS rate going forward and to ensure the amounts charged to customers exceeding that permitted by law are refunded.

Respectfully submitted,

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Certificate of Service

I hereby certify that this brief was filed electronically this 17th day of August 2016 through the Court's electronic filing system and notice of this filing, along with an electronic copy of this filing, was provided to counsel for all parties of record.

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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 7,749 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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