IN THE SUPREME COURT 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, vs. Office of the Public Counsel, Appellant.	Case No. SC95713

SUBSTITUTE BRIEF OF RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

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JURISDICTIONAL STATEMENT

The case is before this Court on post-opinion transfer from the Court of Appeals for the Western District under Rule 83.04. The Court granted applications for transfer from both the Respondent Public Service Commission of the State of Missouri (Commission) and the Respondent Missouri American Water Company (MAWC).

SUMMARY OF ARGUMENT

The question presented in this case is whether the Public Service Commission erred when it approved a petition and application to change its Infrastructure System Replacement Surcharge (ISRS) made by Missouri American Water Company. The Appellant Public Counsel has asserted that the Commission should not have approved the application and petition because the population of St. Louis County as reflected in the 2010 decennial census is fewer than one million inhabitants, rendering the relief sought by the petition and application unavailable under Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013).

In its first point, the Commission argues that this appeal is moot because intervening circumstances have changed such that effective relief is no longer available to Public Counsel. Since the inception of this appeal, the Commission has approved new rates for MAWC in a general rate case. As part of that rate case, MAWC's ISRS was reset to zero. The tariff at issue in this case is no longer effective, and long-standing law provides that superseded tariffs cannot be corrected retroactively.

In its second point, the Commission argues that the report and order should be affirmed because the statutory criteria for the adjustment of an ISRS have been satisfied.

The Commission asserts four grounds in support of this argument. First, St. Louis County meets the statutory criteria to establish or change an ISRS under the plain meaning of the language of Section 1.100. Second, Section 393.1003 does not impermissibly create a closed category because it is based on open-ended criteria. Third, the prior orders establishing or modifying the ISRS that Public Counsel is also challenging in this case are final and not subject to collateral attack. Fourth, the statutory interpretation that Public Counsel is proposing would create unintended confusion and instability for many other statutes that apply to St. Louis County.

In its third point, the Commission argues that the report and order should be affirmed because the methodology adopted by the Commission is both lawful and reasonable. Contrary to the assertion by Public Counsel, the Commission did not create a guarantee of recovery of any specific amount of ISRS revenue. It merely provided the utility the opportunity to collect the amount of ISRS revenue that is permitted by statute. In setting the ISRS amount, the Commission used the billing determinants set in MAWC's most recent rate case as required by the ISRS statute and Public Counsel has not offered any evidence to the contrary.

STATEMENT OF FACTS

The Commission is the state agency responsible for regulating public utilities in Missouri. (LF 234). MAWC is a public utility and water corporation subject to regulation by the Commission. (LF 233). The Office of Public Counsel (Public Counsel) represents

the public in cases before the Commission and on appeal from Commission orders and decisions.[1]

In 2003, the General Assembly enacted a statute that allows water corporations providing service in counties with more than one million inhabitants to apply to the Commission for authorization to impose an Infrastructure System Replacement Surcharge (ISRS) on customer bills. (LF 202). At the time the statute was passed, the 2000 decennial census was the most recent census in effect. Only St. Louis County had more than one million inhabitants according to that census. MAWC applied for and was granted authority to collect an ISRS charge from its customers in St. Louis County in 2003.[2] (LF 265).

The ISRS being challenged in this case became effective on September 25, 2012. (LF 234). The ISRS has been changed upon application by MAWC and approval by the Commission several times throughout its existence, as allowed by the ISRS statutes. (LF 234). The case underlying this appeal was a request by MAWC to increase its approved ISRS charge by 0.7%. (LF 230).

The rate case that preceded the ISRS at issue in this case was in 2011. (LF 233-34). MAWC's base level revenue as set in the 2011 rate case is $258,926,618. (LF 233). Ten percent of this base level revenue is $25,892,662. (LF 233). That ten percent amount is the maximum amount of ISRS revenue that can be recovered under the applicable

[1] Section 386.710, RSMo (2000).

[2] Commission docket WO-2014-0116.

statute.[3] (LF 233). MAWC's original 2012 ISRS tariffs were designed to recover a maximum of $25,892,662 in revenue from its customers in St. Louis County. (LF 235).

The 2012 ISRS calculations assumed more customer usage than actually occurred. (LF 234). As a result, the ISRS generated less revenue than expected. (LF 234). The fact that an under-recovery had occurred was determined by performing a reconciliation. (L.F. 234). As of the reconciliation period ending in September 2014, the amount of under-recovery totaled $1,665,202 and the Commission authorized an ISRS to produce $25,637,873 in revenue. (LF 234). The difference between actual recovered revenue and the authorized recovery amount is $1,919,991. (LF 234). Between October 1 and March 31, 2015, MAWC incurred enough in eligible costs for an ISRS that produces more than the maximum $25,982,662 that is authorized by statute. (LF 234). In other words, MAWC has made infrastructure investments totaling more than $25,982,662 in projects that otherwise would be eligible for recovery under an ISRS, but for the existence of the ten percent cap. MAWC has not collected any ISRS revenue for the costs incurred for those projects totaling amounts in excess of the cap.

MAWC filed a petition to change its ISRS on February 27, 2015. (LF 230). At the same time, MAWC filed a proposed ISRS tariff. (LF 230). In its petition, MAWC pleads:

> 20. In determining the appropriate pre-tax revenues, the proposed rate schedule utilizes customer class billing determinants as utilized designing the rates for the St. Louis metro district during MAWC's most recently completed rate proceeding.

[3] Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013).

(LF 10). The report and order acknowledges that the ISRS statutes require MAWC to use the billing determinants established in its last rate case. (LF 232). Billing determinants refer to the volume of usage imputed to the various customer classes when designing rates.

Staff, MAWC, and Public Counsel participated in the case. All three parties filed position statements. (LF 187; LF 189; LF 184). Staff[4] filed a recommendation for the Commission to deny the petition and reject the proposed tariff. (LF 230). The Commission held an evidentiary hearing. (LF 231). Public Counsel did not offer any witnesses or sponsor any testimony at the hearing. (LF 226).

The difference in the proposal made by MAWC and that of Staff as endorsed by Public Counsel is that Staff's proposal includes reconciliation amounts. MAWC's proposal did not include reconciliation amounts because those amounts were not actually recovered through the previous ISRS. (LF 237-38).Staff's position was that the maximum revenue that MAWC could recover should be calculated as the sum of the amount of revenue collected by MAWC through the ISRS as of September 2014, the amounts under-recovered from prior ISRS filings (reconciliation amounts), and the new ISRS eligible costs. (LF 236). MAWC's position was that the calculation of the maximum

[4] Staff comprises the technical experts who are employed by the Commission. Staff is represented by attorneys in Staff Counsel's Office. Staff is a party to every case before the Commission unless it indicates its intent not to participate. Staff does not participate in appeals of Commission orders and decisions.

revenue that can be recovered should not include the reconciliation amounts from the prior ISRS because the revenue represented by the reconciliation amounts was never collected. (LF 236).

Public Counsel did not offer the 2010 census as evidence or ask the Commission to make any factual finding regarding the population of St. Louis County during the course of the hearing. Staff and MAWC filed post-hearing briefs. (LF 231). Public Counsel filed a statement in support of Staff's positions. (LF 226-28). Public Counsel did not raise the issue of whether or not the population of St. Louis County met the statutory requirement for an ISRS in its statement of position or in its post-hearing statement of support for Staff's positions. (LF 184-86; LF 226-28). The population issue was not raised by any other party during the evidentiary phase of the case.

The Commission found that MAWC's position was more persuasive than Staff's position. (LF 238). The Commission granted MAWC's request and approved MAWC's proposed ISRS tariff. (L.F. 230). The Commission also ordered MAWC to file new tariffs designed to discontinue all ISRS charges associated with revenue arising from this order no later than 60 days before MAWC expects to reach the maximum allowable revenue amount of $25,982,662. (LF 243).

Public Counsel filed a timely application for rehearing. (LF 246). For the first time in its application for rehearing, Public Counsel argued that because of a decrease in the population of St. Louis County as reflected in the 2010 decennial census, MAWC was ineligible to collect an ISRS charge. (LF 248). MAWC filed a response to Public

Counsel's argument. (LF 252). The Commission denied the application for rehearing. (LF 265).

Public Counsel appealed the report and order in the Court of Appeals for the Western District. (LF 270). The Court of Appeals reversed the report and order and directed the Commission to dismiss MAWC's petition.

Following the opinion of the Court of Appeals, MAWC and the Commission sought rehearing and/or transfer in the Court of Appeals. The Court of Appeals denied those requests. MAWC and the Commission then sought transfer to this Court. This Court accepted transfer.

Before the underlying report and order was issued, MAWC had filed a separate rate case, which was ongoing at the Commission when the report and order was issued. (PSC Appendix A1).[5] As part of that rate case, MAWC and Staff reached a stipulation and agreement as to revenue requirement issues in the rate case. (PSC Appendix A18). As part of the stipulation and agreement, MAWC's ISRS charge was reset to zero as required by statute.[6] (PSC Appendix A22). The Commission accepted the stipulation and agreement as part of the disposition of the rate case. (PSC Appendix A41). MAWC was ordered to file new tariffs to reflect the stipulation and agreement, as well as the

[5] The Commission docket number is WR-2015-0301. The case was filed on July 31, 2015.

[6] Section 393.1006.6(1), RSMo (2000) (Cum. Supp. 2013).

additional findings made in the Commission's report and order. (PSC Appendix 41).[7] Those tariffs have been filed and approved by the Commission. (PSC Appendix 99). The new tariffs have gone into effect. (PSC Appendix 99). The ISRS tariffs at issue in this case are no longer in effect. (PSC Appendix 99).

Standard of Review

Commission orders are presumed to be valid. Section 386.430, RSMo (2000). The burden of proving that an order of the Commission is invalid is on the party challenging the order. *Id.*

A Commission order will be affirmed if it is lawful and reasonable. Section 386.510, RSMo (2000) (Cum. Supp. 2013). An order is lawful if the Commission has the statutory authority to issue it. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 734 (Mo.banc 2003). The reviewing court will review legal issues *de novo*. *Id*. A reasonable order is an order that is supported by competent and substantial evidence on the record as a whole, and is not arbitrary, capricious, or an abuse of the Commission's discretion. *Id*. at 735. The Commission's factual findings are presumed correct and all evidence and reasonable supporting inferences are viewed in the light most favorable to the Commission's decision. *Id.*

[7] Public Counsel filed an application for rehearing of the report and order. The Commission has denied the application for rehearing. The parties who filed applications for rehearing can seek judicial review of the report and order under Section 386.510, RSMo (2000) (Cum. Supp. 2013).

This standard of review is applicable to Point II and Point III of the Points Relied On.

POINTS RELIED ON

I. The appeal should be dismissed as moot because there is no effective relief available in that MAWC's Infrastructure System Replacement Surcharge was reset to zero in the utility's most recent rate case.

Statutes

Section 393.1000, RSMo (2000) (Cum. Supp. 2013)

Section 393.1006, RSMo (2000) (Cum. Supp. 2013)

Cases

State ex rel. Reed v. Reardon, 41 S.W.3d 470 (Mo.banc 2001)

State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 328 S.W.3d 329 (Mo. Ct. App. W.D. 2010)

Friends of the San Luis, Inc. v. Archdiocese of St. Louis, 312 S.W.3d 479 (Mo. Ct. App. E.D. 2010)

Kinsky v. Steiger, 109 S.W.3d 194 (Mo. Ct. App. E.D. 2003)

II. The report and order should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that MAWC meets the statutory criteria for ISRS eligibility.

Statutes

Section 1.100, RSMo (2000)

Sections 67.1800-67.1822, RSMo (2000) (Cum. Supp. 2013)

Section 99.921, RSMo (2000)

Section 99.939, RSMo (2000)

Section 163.011, RSMo (2000) (Cum. Supp. 2013)

Section 227.100, RSMo (2000) (Cum. Supp. 2013)

Section 386.550, RSMo (2000)

Section 393.1000, RSMo (2000) (Cum. Supp. 2013)

Section 393.1003, RSMo (2000) (Cum. Supp. 2013)

Section 393.1006, RSMo (2000) (Cum. Supp. 2013)

Cases

In the Matter of the Verified Application and Petition of Liberty Energy (Midstates) Corp. d/b/a Liberty Util. to Change its Infrastructure Sys. Replacement Surcharge, *Mo. Pub. Serv. Comm'n v. Office of Pub. Counsel*, 464 S.W.3d 520 (Mo.banc 2015)

City of DeSoto v. Nixon, 476 S.W.3d 282 (Mo.banc 2016)

Donaldson v. Crawford, 230 S.W.3d 340 (Mo.banc 2007)

In re Laclede Gas Co., 417 S.W.3d 815 (Mo. Ct. App. W.D. 2014)

Other Authority

MO. CONST., Article III, Section 40

III. The report and order should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the report and order provides an opportunity for recovery of the maximum amount allowable under the revenue cap but does not create a guarantee of recovery.

Statutes

Section 393.1003, RSMo (2000) (Cum. Supp. 2013)

Section 393.1006, RSMo (2000) (Cum. Supp. 2013)

Case

In re Laclede Gas Co., 417 S.W.3d 815 (Mo. Ct. App. W.D. 2014)

ARGUMENT

I. The appeal should be dismissed as moot because there is no effective relief available in that MAWC's Infrastructure System Replacement Surcharge was reset to zero in the utility's most recent rate case. (Not responsive to any of Public Counsel's Points Relied On).

Appellate courts do not decide moot controversies. *Kinsky v. Steiger*, 109 S.W.3d 194, 195 (Mo. Ct. App. E.D. 2003). A case that was not moot at its inception can become moot on appeal if there is an intervening event that makes granting effectual relief impossible. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo.banc 2001). Tariffs that are superseded by subsequently filed tariffs are generally moot and are not considered on appeal because superseded tariffs cannot be corrected retroactively. *State*

ex rel. Praxair, Inc. v. Pub. Serv. Comm'n, 328 S.W.3d 329, 334 (Mo. Ct. App. W.D. 2010) (citations omitted).

An appellate court can exercise its discretion to decide an otherwise moot controversy if the issue is one of general interest to the public, is recurring, and is likely to evade review in the future. *Id.* (citations omitted). The public interest exception is to be narrowly construed. *Friends of the San Luis, Inc. v. Archdiocese of St. Louis*, 312 S.W.3d 479, 484 (Mo. Ct. App. E.D. 2010). In considering whether a case is moot, the reviewing court may consider matters that are outside of the record on appeal. *Reed*, 41 S.W.3d at 473.

One of the criteria that an infrastructure system replacement project must meet to be eligible for recovery in an ISRS is that it cannot be included in the utility's rate base[8] at the time of inclusion in the ISRS. Section 393.1000(3)(d), RSMo (2000) (Cum. Supp. 2013). When the utility has its next rate case, those projects are included in the utility's rate base so that the remaining cost of the investment can be recovered in rates and the project is no longer eligible for inclusion in an ISRS charge. Section 393.1006.6(1), RSMo (2000) (Cum. Supp. 2013).

This case is moot because the ISRS tariffs that are at issue in this case have been superseded by the tariffs filed after MAWC's most recent rate case. (PSC Appendix 127). The projects that were included in the former ISRS tariffs have now been included in

[8] Rate base refers to the value of a utility's assets devoted to public use upon which the utility may earn a return in rates.

MAWC's rate base and the costs of those projects, and the authorized rate of return, are now being collected in MAWC's base rates and not through the ISRS charge established by the underlying case. (PSC Appendix 127). No effectual relief is available because the superseded ISRS tariff that is being challenged in this case cannot be corrected retroactively. Public Counsel wants the report and order remanded to the Commission for further action, including refunds, related to this ISRS. This remedy is not available because the ISRS was reset to zero in WR-2015-0301 and the amounts that were previously part of the ISRS have been included in MAWC's new base rates. (PSC Appendix 127).

The Court does not need to exercise its discretion to decide this moot issue. Although the availability of the ISRS to MAWC in St. Louis County may be of general interest to the public, the other two criteria for deciding a moot question are not present. The issue could be revisited in the event that MAWC applies for authority to establish a new ISRS. The issue of whether MAWC is eligible to receive authorization to establish an ISRS would not evade review because an order regarding the establishment of any future ISRS would be subject to judicial review.

The appeal should be dismissed as moot due to the lack of any effective relief that can be granted in this case.

II. The report and order should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that MAWC meets the statutory criteria for ISRS availability. (Responds to Point I of Public Counsel's Points Relied On).

1. The legislative intent of the Chapter 393 ISRS statutes is to permit recovery of costs for infrastructure system replacements over a period of years between rate cases, and Section 1.100 should be read in a way that gives effect to this intent by allowing St. Louis County to remain in the class covered by the ISRS statutes because the county was covered by the ISRS statute "at the time the law passed" as provided in Section 1.100.2, RSMo (2000).

Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013) has specific guidelines for which water utilities are eligible to apply for an ISRS. "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 for approval to collect an ISRS from its customers in that county. Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013).

Once a utility files a petition and application to establish or change an ISRS, the Commission must file an order that will become effective no later than 120 days after the filing of the petition. Section 393.1006.2(3), RSMo (2000) (Cum. Supp. 2013). An ISRS shall be approved if the water utility has had a general rate case within the last three

years. Section 393.1003.2, RSMo (2000) (Cum. Supp. 2013). An established ISRS may be changed by filing a petition and proposed tariffs with the Commission. Section 393.1006.1(1), RSMo (2000) (Cum. Supp. 2013). A reconciliation must be performed by the utility at the end of each 12-month calendar period that an ISRS is in effect. Section 393.1006.5(2), RSMo (2000) (Cum. Supp. 2013). The water utility "shall submit the reconciliation and a proposed ISRS adjustment to the commission for approval to recover or refund the difference as appropriate, through adjustment of an ISRS." *Id.* An existing ISRS will be reset to zero in the water utility's next general rate case. Section 393.1006.5(2), RSMo (2000) (Cum. Supp. 2013). The fact that an ISRS is in place does not bind the Commission to any particular future ratemaking treatment. Section 393.1006.8 (2000) (Cum. Supp. 2013).

If the operation of a law is dependent on the population of a city, county, or political subdivision, the last decennial census in effect at the time the law was passed is used to determine the population size. Section 1.100.1, RSMo (2000). "Any law which is limited in operation to counties, cities or other political subdivisions having a specified population. . .shall be deemed to include all counties, cities, or political subdivisions which thereafter acquire such population. . .as well as those in that category at the time the law passed." Section 1.100.2, RSMo (2000). The second sentence of subsection 2 also provides that a loss in population in "a city not located in a county" does not take that city out of the operation of the statute. *Id.*

"The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *In the*

Matter of the Verified Application and Petition of Liberty Energy (Midstates) Corp. d/b/a Liberty Util. to Change its Infrastructure Sys. Replacement Surcharge, Mo. Pub. Serv. Comm'n v. Office of Pub. Counsel, 464 S.W.3d 520, 524 (Mo.banc 2015). If the words in the statute are plain and unambiguous, the reviewing court will not resort to the rules of statutory construction. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 479-80 (Mo. Ct. App. W.D. 2013). "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and to give meaning to the statutes." *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo.banc 2007). A reviewing court will not read a statute in a way that reaches an "unreasonable, oppressive or absurd result." *Jenkins v. Mo. Farmers Ass'n, Inc*., 851 S.W.2d 542, 545 (Mo. Ct. App. W.D. 1993). A statute is not prohibited "special legislation" if other political subdivisions could later join the class created by the statute. *City of DeSoto v. Nixon,* 476 S.W.3d 282, 287 (Mo.banc 2016).

The question in this case is whether MAWC is entitled to an ISRS in St. Louis County under Section 393.1003, RSMo (2000) (Cum. Supp. 2013). That statute permits water corporations operating in counties with more than one million inhabitants and with a charter form of government[9] to obtain authority from the Commission to establish an ISRS to recover some of the costs of eligible infrastructure system replacement projects between general rate cases. Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013).

[9] There is no dispute that St. Louis County has a charter form of government.

Because the ability to request an ISRS under Section 393.1003 is only available to water corporations operating in counties with one million inhabitants, Section 1.100 applies to the statute. Section 1.100.1, RSMo (2000). "Any law which is limited in operation to counties. . .having a specified population. . .shall be deemed to include all counties. . .which thereafter acquire such population. . .as well as those in effect at the time the law passed." Section 1.100.2, RSMo (2000).

At the time that Section 393.1003 went into effect in 2003, St. Louis County was the only county with a population in excess of one million inhabitants according to the 2000 decennial census. MAWC applied for and received an ISRS soon after Section 393.1003 went into effect. The 2010 decennial sentence showed that the population of St. Louis County had dropped to slightly under one million inhabitants. MAWC's first rate case after the 2010 census was in 2011. MAWC established a new ISRS on September 25, 2012. (LF 234). It is this 2012 ISRS, as updated by subsequent adjustments, that is at issue in this case.

It is undisputed that the population of St. Louis County was greater than one million inhabitants when Section 393.1003 was enacted. MAWC, as a water corporation operating in St. Louis County, was permitted to request authorization from the Commission to establish an ISRS at that time, and it did so. Since the enactment of Section 393.1003, MAWC has continued to make investments in infrastructure system replacement projects, and it has been allowed to recover some of the costs of those projects through the use of various ISRS mechanisms as approved by the Commission

without the necessity of a general rate case, which allows the projects to be completed sooner than they otherwise might.

The ISRS projects undertaken by MAWC are beneficial to its ratepayers because they improve MAWC's ability to provide safe and adequate service. The projects included in an ISRS must meet the statutory eligibility requirements found in Section 393.1000(3), RSMo (2000) (Cum. Supp. 2013). Those requirements are that the projects are replacements for existing infrastructure, are in service and useful, are not used to serve new customers, and are not included in the utility's existing rate base. *Id.*

The intent of the legislature was to encourage water utilities in counties with large populations to make necessary investments in infrastructure between general rate cases. This intent would not be served by adopting Public Counsel's restrictive reading of Section 1.100.2. The reading urged by Public Counsel would mean that St. Louis County could move into or out of Section 393.1003 every ten years. If St. Louis County could move into or out of the ISRS statutes in the manner suggested by Public Counsel, it would introduce an unacceptable level of uncertainty into MAWC's infrastructure system replacement planning process and could discourage the utility from making infrastructure investments that are beneficial to its customers. An ISRS may last over a period of years. It is unlikely that the legislature intended for an ISRS that was initially approved during one decennial census period could be terminated by an intervening census before the end of its statutory term. Such an outcome would be unfair to the utility, which would be deprived of the opportunity to recover the amount of revenue allowed under the statutory cap in Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013). This possibility would

serve as a deterrent to the utility and may inhibit investment in infrastructure to the detriment of ratepayers. Section 1.100 should not be read to produce this illogical result. The statute should be read to include St. Louis County because the county was in the statutory category created by Section 393.1003, RSMo (2000) (Cum. Supp. 2013) "at the time the law passed," as permitted by Section 1.100.1, RSMo (2000).[10] This reading would not make Section 393.1003 an impermissible special law, because while St. Louis County would remain in the class, other counties could join the class in the event of a population increase.[11]

2. Section 393.1003 is not an impermissible local or special law.[12]

[10] The Commission joins MAWC's argument that the 1971 amendment to Section 1.100.2 adding a sentence pertaining to "a city not located in a county" does not affect the meaning or operation of the phrase "at the time the law passed" in the previous sentence. The Commission does not offer additional argument on this point.

[11] The Commission's argument in this section does not rely on the phrase "As of August 28, 2003" in Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013).

[12] Public Counsel did not allege that Section 393.1003 is a special law before the Commission and mentioned it only in a footnote in its initial Appellant's brief, although the issue did come up at oral argument in the Court of Appeals. In its substitute brief in this Court, Public Counsel references the argument only in its Footnote 2 and does not rely on it as a basis for reversal of the report and order. Because the issue was not raised by the Appellant, it is not before this Court for decision.

The Missouri Constitution prohibits "any local or special law. . .where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on the subject." MO. CONST. art. III, sec. 40. "The most often-applied test for determining whether a law qualifies as a special law is whether the law is based on open-ended or closed-ended characteristics." *City of DeSoto*, 476 S.W.3d at 287 (citation omitted). Laws based on closed-ended criteria "such as historical or physical facts, geography or constitutional status" are special laws on their face because they do not allow members to join or to leave. *Id*. If a law is on its face a special law, there must be a substantial justification for enacting the special law instead of a general law. *Id*.

> A law based on open-ended characteristics is not facially special and ordinarily is presumed to be constitutional. [citation omitted]. Normally, population classifications are open-ended in that others may fall into the classification and members of the classification may leave it. [citation omitted]. When population classifications are open-ended, laws based on them are not special laws and do not violate article III, section 40, if the classification is made on a reasonable basis. [citation omitted].

Id. A law that is open-ended on its face can be a special law if, as a practical matter, it can apply only to a narrow class. *Id.* There is a three-part test to determine whether a law that is not a special law on its face is so narrowly tailored that the presumption in favor of constitutionality is overcome:

(1) a statute contains a population classification that includes only one political subdivision,

(2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and

(3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all the others.

City of DeSoto, 476 S.W.3d at 287. If the test is satisfied, the presumption that the open-ended statute is constitutional is overcome.

Section 393.1003.1 contains a population classification. The statute is not a special law on its face because the population classification is facially open-ended. The presumption that the statute is unconstitutional is not overcome because the second factor of the test is not met. While St. Louis County is the only political subdivision that meets the population requirement, there is no other political subdivision of a similar size that was excluded from the class. St. Louis County's population exceeds the population of the county with the second-highest population by more than 300,000 residents. There is no other county that is "similar in size" to St. Louis County. Section 393.1003 is constitutional on its face.

Even if the presumption of constitutionality were overcome, which the Commission does not concede, there is a substantial justification for passing ISRS statutes applicable to St. Louis County that would justify the enactment of the statutes

under the test set out in *City of DeSoto*, 476 S.W.3d at 287.[13] Water is essential for public health and welfare. Safe and adequate water infrastructure is necessary to provide this essential service to residents of St. Louis County. Much of the water infrastructure in St. Louis County is old enough to have reached or exceeded the end of its useful life. In the absence of an ISRS, the water corporation serving the county would have to make infrastructure investments and would be unable to recover the costs of the investment until the asset was in service and had been added to the utility's rate base in a general rate case. The utility would have to obtain outside financing for the infrastructure system replacement projects or self-finance them. In a county the size of St. Louis County, the amount of investment needed could be prohibitively high in the absence of an ISRS. The pace of needed infrastructure system replacements could slow considerably in the absence of an ISRS that allows the utility to begin cost recovery for these infrastructure system replacement projects between rate cases. A slower infrastructure system replacement schedule increases the chance of an infrastructure system failure that could endanger public health and safety. Having the ISRS in place is beneficial for ratepayers who rely on the utility for safe and adequate water service.

There are other reasons that the ISRS benefits ratepayers in St. Louis County. The ISRS surcharge can be spread over the relatively large number of ratepayers in the

[13] In its Appendix, MAWC has included Commission orders that outline the need for infrastructure upgrades in St. Louis County and how an ISRS helps to make investment in those infrastructure improvements possible.

county, so that the amount of the surcharge for eligible projects can remain low for each individual ratepayer.[14] The infrastructure system replacement projects are projects that ratepayers will ultimately have to pay for through rates. Having an ISRS can reduce the amount of any rate increase that is ultimately granted in a general rate case and can help prevent rate shock because some costs that would otherwise go into a rate increase will already have been collected through the ISRS. For all of these reasons, there is substantial justification for an ISRS statute that operates only in St. Louis County.

3. The Commission's prior orders establishing the initial ISRS in 2012 and the subsequent adjustments to that ISRS are final and those orders may not be disturbed in this case.

An ISRS, once established, can be adjusted upon application and petition. Section 393.1006.1(1), RSMo (2000) (Cum. Supp. 2013). An initial ISRS must be established within three years of the utility's last general rate case. Section 393.1003.2, RSMo (2000). The three-year limitation applies only to the establishment of an ISRS, not to subsequent adjustments made to it. *In re Laclede Gas Co.*, 417 S.W.3d 815, 822 (Mo. Ct. App. W.D. 2014). "[A]n ISRS begins to exist when the first ISRS rate is approved, that there is only ever one ISRS at a time, and that subsequent changes are simply incorporated into that single ISRS." *Id.* at 824 (internal quotation omitted). To request a change to an existing ISRS, the utility must file an application and petition and the

[14] Ratepayers are further protected by the statutory eligibility criteria and by the statutory floor and cap on the amount of revenue that can be generated by the ISRS.

Commission must issue an order making a final determination regarding the request. Section 393.1006, RSMo (2000) (Cum. Supp. 2013). Orders and decisions of the Commission which have become final are not subject to collateral attack in subsequent proceedings. Section 386.550, RSMo (2000).

The ISRS that was adjusted in the underlying case was established in 2012. (LF 286). Neither Public Counsel nor any other party objected to the establishment of the ISRS on the basis of the population of St. Louis County at that time. The order establishing the ISRS is final and is not subject to attack in this appeal under Section 386.550, RSMo (2000). The ISRS was adjusted several times prior to the underlying case, again without objection based on the population of St. Louis County from Public Counsel or any other party. The orders approving the ISRS adjustments that occurred before this case are also final orders that are not subject to collateral attack in this appeal. Only the order making this latest ISRS adjustment can be at issue in this appeal.

In the case underlying this appeal, Public Counsel did not offer evidence of the population of St. Louis County at the hearing in this case. (LF 266). Public Counsel did not request that the Commission take notice of the population of St. Louis County or that the Commission make any factual finding on the population issue or any legal conclusion as to its interpretation of Section 1.100. (LF 267). Public Counsel raised the issue for the first time in an application for rehearing after the report and order had been issued. (LF 246). Based on the underlying history of this case and the applicable law regarding the finality of Commission orders, the only possible relief in this case involves only the 0.7% increase to the ISRS that occurred in this case. As discussed in Point I, even this relief is

no longer available because the ISRS at issue in this case was reset to zero as part of MAWC's recently concluded rate case. The infrastructure system replacement projects that were included in the ISRS have now been included in MAWC's rate base and the costs of those projects are being recovered in MAWC's rates. MAWC's former ISRS tariffs cannot be changed retroactively in this appeal. *State ex rel. Praxair, Inc.*, 328 S.W.3d at 334.

4. There are many statutes with language identical to Section 393.1003, RSMo (2000) (Cum. Supp. 2013) that could be adversely affected by a ruling in favor of Public Counsel.

In addition to the impact on the ISRS statutes, this case has implications for other statutes that also apply to "any county with a charter form of government and with more than one million inhabitants." Because of its interest in such statutes, St. Louis County sought and obtained leave to file an amicus brief in the Court of Appeals and has sought leave to file an amicus brief in this Court. St. Louis County has identified several statutes that may be affected by this case: The Regional Taxicab Commission Law, Section 67.1800-67.1822, RSMo (2000) (Cum. Supp. 2013), the Missouri Downtown and Rural Economic Stimulus Act, Sections 99.921 and 99.939, RSMo (2000), Section 227.100, RSMo (2000) (Cum. Supp. 2013) authorizing certain additional design build highway projects in certain counties, and Section 163.011, RSMo (2000) varying the methodology for calculating state aid for certain special districts. This Court should consider the legislative intent behind these statutory schemes and the possible consequences of

adopting Public Counsel's statutory interpretation of Section 1.100, RSMo (2000) in making its decision in this case.

The Commission's order is lawful because the Commission is authorized by statute to allow the establishment of an ISRS upon proper application.[15] The report and order is reasonable because the ISRS allowed by the Commission is supported by competent and substantial evidence on the record as a whole. The report and order should be affirmed on this point.

III. The report and order should be affirmed because it is lawful and reasonable within the meaning of Section 386.510 in that the report and order provides an opportunity for recovery of the maximum amount allowable under the revenue cap but does not create a guarantee of recovery. (Responds to Point II of Public Counsel's Points Relied On).

Under the ISRS statutes, an allowable rate recovery mechanism must be designed to produce at least one million dollars in revenue on an annualized basis but not to produce revenue in excess of ten percent of the water utility's base level of revenue as determined by the Commission in the utility's most recent general rate case. Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013). The "obvious legislative intent" of allowing a utility to use an ISRS mechanism is "to permit the. . .company to timely

[15] In fact, the ISRS statute does not give the Commission the discretion to refuse to establish an ISRS if it is presented with a proper application and petition. Section 393.1006.2(4), RSMo (2000) (Cum. Supp. 2013).

recover its costs for government-mandated infrastructure system replacement projects via a rate adjustment outside of a general rate case. *In re Laclede Gas Co.*, 417 S.W.3d 815, 823 (Mo. Ct. App. W.D. 2014). The statute also sets out how the ISRS is to be calculated:

> An ISRS 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 application of customer class billing determinants utilized in designing the water corporation's customer rates in its most recent general rate proceeding.

Section 393.1006.5(1), RSMo (2000) (Cum. Supp. 2013).

The ISRS statute calls for a reconciliation to be performed at the end of each 12-month period an ISRS is in effect. Section 393.1006.5(2), RSMo (2000) (Cum. Supp. 2013). Adjustments to the ISRS surcharge can be made based on the outcome of the reconciliation. *Id.* The adjustment can be either upward or downward, to either refund or recover the difference between the amount the ISRS was designed to collect and the actual amount collected. *Id*. A water utility may file tariffs to change its ISRS no more than twice in a 12-month period. Section 393.1003.6, RSMo (2000) (Cum. Supp. 2013).

The fact that a utility has an ISRS in place does not bind the Commission to any particular rate-making treatment. Section 393.1003.8, RSMo (2000) (Cum. Supp. 2013). The amount of revenue that a utility may earn from an ISRS is capped at no more than ten percent of the utility's base level of revenue determined in its last general rate case. Section 393.1003.1, RSMo (2000) (Cum. Supp. 2013). The ISRS statutes anticipate that over-or under-recoveries may occur and has built a mechanism into the statute for it to be

addressed in the adjustment period. Section 393.1006.5(2), RSMo (2000) (Cum. Supp. 2013). Public Counsel's concerns about the ten percent rate cap and carry forward provisions are adequately addressed by the existing statutory framework.

Notwithstanding Public Counsel's effort to read non-existent language regarding a "guarantee" into its report and order, the Commission has explicitly refuted Public Counsel's allegation that the report and order has created a guaranteed level of recovery for MAWC. (LF 266). There is no merit to the suggestion that the Commission has converted the "provide for" language in the ISRS statute into a "guarantee." (LF 266). The Commission merely allowed an adjustment to MAWC's ISRS based on the utility's most recent reconciliation as it is authorized to do by Section 393.1006.5(2). (LF 240). The ISRS was adjusted so the MAWC would have an opportunity to earn the full amount of ISRS revenue that was allowed under the statutory cap based on the level of investments in ISRS-eligible projects that MAWC had made and the revenue requirement determined in its 2011 rate case. The actual amount that would be recovered would still be based on the amount of water sold, which cannot be known with certainty or guaranteed by the Commission. The Commission had also ordered MAWC to file notice and a new tariff with the Commission 60 days before it would begin to recover amounts above the statutory cap so that the ISRS could be discontinued. (LF 243).[16]

[16] The 60-day notice provision became unnecessary once the ISRS was discontinued as a result of MAWC's recently-decided rate case.

The ISRS statute contains provisions that permit upward or downward adjustments to an approved ISRS between rate cases. After its 2011 rate case, MAWC was authorized to earn up to $25,982,662 in ISRS revenue based on the revenue requirement in that rate case. (LF 235). MAWC had under-recovered its allowable revenue under its previous ISRS. (LF 232). MAWC has made investments that would permit it to earn in excess of that amount but for the statutory cap. (LF 235). Public Counsel has not alleged that the projects included in in MAWC's ISRS are ineligible projects under the ISRS statutes. The report and order in this case simply allowed MAWC an opportunity to earn the full amount of revenue that is allowed under the applicable statutes by increasing the amount of the surcharge. Nothing in the reconciliation and adjustment process outlined in Section 393.1006, RSMo (2000) (Cum. Supp. 2013) requires MAWC to earn less than the statute allows if a prior ISRS adjustment did not produce the revenue expected.[17]

The report and order acknowledges that the ISRS statutes "require MAWC to bill customers who benefit from the projects per gallon of water ('billing determinants')." (LF 232). MAWC's petition states that it is using the billing determinants used in the rate design of its last rate case. (LF 10). Public Counsel has not pointed to anything in the

[17] It is important to keep in mind that the projects that are eligible for recovery in an ISRS will eventually become part of the utility's rate base, and the utility will be entitled to recover the remainder of the costs of those projects in rates. An ISRS serves to reduce the size of rate increases by allowing recovery of some costs in between rate cases. The costs recovered through the ISRS are costs that do not need to be included in rates.

record that substantiates its claim that the report and order somehow changed the billing determinants that are used in MAWC's ISRS. The report and order does not change the billing determinants. It changes the amount of the ISRS charge that will be collected per unit of water sold, which is still based on the billing determinants from the 2011 rate case. Public Counsel has not carried its burden of proving that the report and order is unlawful or unreasonable on this point.

The Commission's disposition of this case was lawful because the Commission has the statutory authority to approve a change to an existing ISRS. The Commission's decision is reasonable because it is supported by substantial and competent evidence in the record. Because the report and order is lawful and reasonable, it must be affirmed on this point.

CONCLUSION

For the above reasons, the Commission respectfully requests that its report and order be affirmed in all respects. In the alternative, the Commission requests that the appeal be dismissed as moot. The Commission asks that the Court grant any other relief that it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Substitute Brief of Respondent Public Service Commission complies with the limitations contained in Rule 84.06(c) and that:

1. The signature block above contains the information required by Rule 55.03;
2. The brief complies with limitations contained in Rule 84.04(b);
3. The brief contains 7,650 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served by means of electronic filing to the following counsel of record this 8th day of August, 2016 to:

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