

IN THE CIRCUIT COURT OF GASCONADE COUNTY  
STATE OF MISSOURI

CITY OF HERMANN, MISSOURI	)	
	)	
Plaintiff,	)	
	)	Cause No.:
v.	)	
	)	Division:
MISSOURI JOINT MUNICIPAL	)	
ELECTRIC UTILITY COMMISSION,	)	
	)	
and	)	
	)	
MISSOURI PUBLIC ENERGY POOL	)	
	)	
<u>Hold for Service</u>	)	
	)	
Defendants.	)	

PETITION

COMES NOW Plaintiff City of Hermann, Missouri, hereinafter “Hermann,” by and through the undersigned Counsel and for its causes of action against Defendants states and alleges the following:

Parties and Related Entities

1. Plaintiff Hermann is a Fourth Class City located in Gasconade County, Missouri, having a population of approximately 2,400 residents.
2. Defendant Missouri Joint Municipal Electric Utility Commission (hereinafter “MJMEUC”) is a joint action agency and political subdivision existing under the laws of the State of Missouri, and more specifically Section 393.700, RSMo, *et seq.*
3. Defendant Missouri Public Energy Pool (“MoPEP”) is a public energy pool operating under MJMEUC.
4. The City is a member of MJMEUC and MoPEP.

5. MJMEUC is a subsidiary of the Missouri Public Utility Alliance (“MPUA”).

6. The executive staff for both MPUA and MJMEUC are Duncan Kincheloe (President and General Manager), Eve Lissik, P.E. (Senior Vice President and Associate General Manager), John Grotzinger, P.E. (Vice President of Engineering, Operations and Power Supply (Chief Operations Officer of MJMEUC), Mike Loethen (Chief Financial Officer) and Floyd Gilzow (Vice President of Member Relations and Governmental & Environmental Affairs (Chief Operations Officer of the Missouri Association of Municipal Utilities – “MAMU”).

7. Defendant Missouri Public Energy Pool (hereinafter “MoPEP”) is a MJMEUC agency existing by virtue of an agreement between MJMEUC and the cities subject to the agreement, including Hermann, which collectively constitute the MoPEP Pool Members.

8. The current 35 members of MoPEP are the Missouri cities of Albany, Ava, Bethany, Butler, Carrollton, Chillicothe, El Dorado Springs, Farmington, Fayette, Fredericktown, Gallatin, Harrisonville, Hermann, Higginsville, Jackson, La Plata, Lamar, Lebanon, Macon, Marshall, Memphis, Monroe City, Odessa, Palmyra, Rock Port, Rolla, Salisbury, Shelbina, St. James, Stanberry, Thayer, Trenton, Unionville, Vandalia and Waynesville.

#### Facts Common to All Counts

9. Venue is appropriate in this Court, as Hermann is located within Gasconade County.

10. On or about August 26, 1996, Hermann enacted an Ordinance authorizing its Mayor to execute an agreement (hereinafter “Agreement”) with MJMEUC so as to form and join MoPEP. A true and accurate copy of said Ordinance and Agreement is attached hereto as Exhibit “A,” and incorporated herein by reference.

11. Pursuant to the Agreement, the parties agreed to form and join MoPEP.

12. On or about March 14, 2005, Hermann enacted an Ordinance authorizing its Mayor to execute the Amended and Restated MoPEP Agreement (hereinafter the “Amended Joint Agreement”). A true and accurate copy of the Ordinance and Amended Joint Agreement is attached hereto as Exhibit “B,” and incorporated herein by reference.

13. The Amended Joint Agreement was executed by MJMEUC and the MoPEP members, which includes Hermann.

14. MoPEP’s stated objectives call for the “joint planning, central dispatching, joint power purchases, acquisition of ownership interests in facilities, and effective coordination with other power pools and utilities.” (See Exhibit B. Amended Joint Agreement, Art. II.)

15. The Amended Joint Agreement further states its purpose as being:

“To attain maximum practical economy to the Pool Members, including seeking economies of scale achievable only through group action and, where appropriate, MJMEUC’s long-term commitment to participation in larger projects on behalf of MoPEP[], consistent with proper standards of reliability and safety, and to provide for equitable sharing of the resulting benefits and costs.” (See Exhibit B. Amended Joint Agreement, Art. II.)

16. Pursuant to the Amended Joint Agreement, “[a] majority vote of all Pool Members present will authorize any action or determination by the Pool Committee, except where otherwise required in this Agreement, including an exhibit.” (See Exhibit B. Amended Joint Agreement, Art. III, Sec. 3.5.)

17. Pursuant to Section 393.715(12), RSMo, MJMEUC is authorized to “[i]ncur debts, liabilities or obligations including the issuance of bonds pursuant to the authority granted in section 27 of Article VI of the Missouri Constitution.”

18. Mo. Const, Art. VI, §27, provides that:

“Any city or incorporated town or village in this state, by vote of a majority of the qualified electors thereof voting thereon, and any joint board or commission, established by a joint contract between municipalities or political subdivisions in this

state, by compliance with then applicable requirements of law, may issue and sell its negotiable interest bearing revenue bonds...”

19. Section 393.725.4, RSMo, requires that Bonds issued by MJMEUC “be authorized by resolution of the board of directors or by resolution of its executive committee if the board has delegated such authority and may be issued under such resolution or under a trust indenture or other security instrument, as authorized by the resolution.”

20. Section 393.730.1, RSMo, sets forth the requisite content of the resolution authorizing bonds stating:

“The resolution authorizing any issuance of bonds hereunder shall make provision for the payment of the bonds fixing such rates, fees and charges for water, sewer, gas, heat, electric power and energy and all other services provided by the project sufficient to pay the interest and principal of the bonds when due, to provide for a sinking fund sufficient to retire the bonds, and to provide and maintain reasonable reserves. Such rates, fees and charges shall also be sufficient to pay the costs of operation, improvement and maintenance of the project.”

29. As such, before MJMEUC may issue bonds in its own name the same must be authorized by resolution.

30. Upon information and belief, MJMEUC has issued a vast quantity of bonds on its own authority without first obtaining the requisite authorizing resolution.

31. For instance in 2007, MJMEUC issued approximately \$550 million in Power Project Revenue Bonds, 2007 Series A & B, for its ownership in the Prairie State Power Project. (See Prairie State Project – Power Project Revenue Bonds, Series 2007, Series 2009 and Series 2010, Continuing Disclosure Report, for Fiscal Year Ending December 31, 2010, a true and accurate copy of which is attached hereto as Exhibit “C.”)

32. In November, 2010, MJMEUC issued approximately \$80 million more in Power Project Revenue Bonds for the Prairie State Power Project.

33. Section 393.725.2, RSMo, requires that:

“Each bond issued pursuant to the provisions of sections 393.700 to 393.770 shall contain a statement that such bond is not an indebtedness of the state or of any political subdivision thereof, other than the joint municipal utility commission, or of the contracting municipalities, the public water supply districts or the contracting sewer districts, but shall be special obligations of the commission only...”

34. Consequently, Hermann is not to be held liable for the bonds issued by MJMEUC.

35. MJMEUC is the only political subdivision that is to be held liable for bonds issued under its own authority.

36. The Amended Joint Agreement provides that upon a member city canceling its participation in MoPEP the city “shall remain responsible for its allocated share, as set forth in Exhibit M at the time of the notice of cancellation, of all Resource Obligation entered into by MJMEUC for MoPEP[] prior to the notice of cancellation.” (See Exhibit B. Amended Joint Agreement, Art. XV, Sec. 15.8.)

37. MJMEUC, through the Amended Joint Agreement, seeks to transfer its own liability under the bonds it issued to any member city seeking to cancel its participation in MoPEP, which violates the statutory provisions mandating MJMEUC be solely liable for its issued bonds.

38. Upon information and belief, MJMEUC, without making full and proper disclosure to the MoPEP members, has issued auction-rate securities bonds. Auction-rate securities bonds are high risk, long term variable interest rate bonds.

39. As a result of MJMEUC’s practice of using auction-rate securities, the interest rates payable under the issued bonds are subject to frequent change.

40. Pursuant to the terms of the Amended Joint Agreement, Hermann, or any other MoPEP city seeking to cancel the agreement, will be liable for any increase in the interest rates for any outstanding approved bonded liabilities resulting from MJMEUC’s use of auction-rate securities.

41. Due to the uncertain nature of auction-rate securities bonds, it is impossible to determine the total outstanding liability for MJMEUC under said bonds.

42. Upon information and belief, sometime prior to January 1, 2013, Hermann informed MJMEUC and MoPEP that it wanted to leave MJMEUC and MoPEP, and would be interested in locating and assigning its interest in the Amended Joint Agreement (under Article XII of the Amended Joint Agreement, see Exhibit B) to a city wishing to join MoPEP.

43. In March 2008, MJMEUC and MoPEP adopted the “MoPEP Statement of Considerations in Assignment of a Members Interest,” a copy of which is attached hereto as Exhibit “D.”

44. Exhibit D requires that MJMEUC act in “good faith” when negotiating a proposed assignment of a city’s interest in the Joint Amended Agreement.

45. Despite MJMEUC and MoPEP being aware of Hermann’s desire to seek an assignment City and to leave MJMEUC and MoPEP, MJMEUC allowed the “Sho-Me” cities (consisting of the Missouri cities of Cabool, Cuba, Houston, Mansfield, Newburg, Richland, Salem, Seymour, St. Robert, Steelville, Sullivan, and Willow Springs) to join MJMEUC in 2013.

46. Despite the fact that several of the Sho-Me cities would have made suitable assignment cities for Hermann, MJMEUC and MoPEP did not offer Hermann the opportunity to negotiate an assignment with one of the Sho-Me cities.

#### Count I – Declaratory Judgment

COMES NOW Plaintiff Hermann and for Count I of its Petition against Defendants MJMEUC and MoPEP states as follows:

47. Plaintiff Hermann realleges, restates and incorporates paragraphs 1-46 as if more fully stated herein.

48. Pursuant to Art. XV, Sec.15.8 of the Amended Joint Agreement each MoPEP member is responsible for its allocated share of the bonded liabilities incurred by MJMEUC.

49. Upon information and belief, Hermann is therefore purportedly liable for approximately 2.5% of MJMEUC's authorized resource obligations entered into on behalf of MoPEP. (See Exhibit B. Amended Joint Agreement, Exhibit M thereof.)

50. Based upon information and belief, as of December 31, 2007, MJMEUC had amassed \$1,076,089,256 in total liability on behalf of MJMEUC/MoPEP.

51. Based upon information and belief, as of December 31, 2009, MJMEUC had amassed \$1,455,438,120 in total liability on behalf of MJMEUC/MoPEP.

52. As such, with the addition of the approximately \$80 million in Bonds issued in November, 2010, MJMEUC's total liability exceeds one and one half billion dollars.

53. Hermann's purported exposure on MJMEUC's/MoPEP's total liabilities would be in excess of \$37,500,000.00, if all liabilities were properly authorized.

54. Hermann's annual operating revenue is approximately \$11 million.

55. Mo. Const, Art VI, §26(a) provides that:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

56. MJMEUC through the issuance of bonds has purported to increase Hermann's indebtedness to an amount in excess of the Constitutional limitation set forth by Mo. Const. Art. VI, §26(a) upon Hermann withdrawing from MJMEUC/MoPEP.

57. Further, MJMEUC, on behalf of MoPEP has issued hundreds of millions of dollars in bonded securities, without complying with the statutory requirements mandated by Section 393.725.4, RSMo.

58. MJMEUC has sought to impose liability on Hermann that the state legislature has mandated rests solely with MJMEUC through the MoPEP agreement, and more particularly Art. XV, Sec.15.8 of the Amended Joint Agreement.

59. As such, the Amended Joint Agreement is *ultra vires*, by virtue of its attempts to reallocate liabilities that are statutorily mandated to rest solely with MJMEUC. See Section 393.725.1 RSMo.

60. As a result, the Amended Joint Agreement is invalid and *void ab initio*.

61. Further, the bonds issued by MJMEUC on behalf of MoPEP are invalid as the bonds were issued without being authorized by resolution as required by Section 393.725.4, RSMo.

62. Hermann requires a declaratory judgment as to the correct interpretation of its liabilities under the Amended Joint Agreement, as it now seeks to withdraw from MJMEUC/MoPEP, and MJMEUC seeks to increase Hermann's liabilities, rendering this a judicable controversy among the parties to this lawsuit.

63. Absent a clear interpretation of Hermann's liability under the Amended Joint Agreement, Hermann is unable to make an informed decision as to whether it is financially feasible for it to withdraw from MJMEUC/MoPEP.

64. Further, both the Agreement and the Amended Joint Agreement are invalid as they are in violation of the Municipal State of Frauds (Section 432.070 RSMo), which requires the consideration for a contract to be clearly set forth in writing. MJMEUC's consideration received from Hermann under the both the Agreement and the Amended Joint Agreement is Hermann's uncertain and ever increasing debt obligation, which was not set forth clearly in writing as required by Section 432.070 RSMo.



65. Hermann is respectfully requesting that this Court enter its declaratory judgment declaring that:

- (a) The Amended Joint Agreement is *void ab initio*, of no legal effect and unenforceable by the parties thereto;
- (b) Hermann has no liability under bonds issued by MJMEUC, as pursuant to Section 393.725.1 RSMo, said liability rests exclusively with MJMEUC and are not liabilities of the contracting cities;
- (c) Hermann has no liability under MJMEUC's bonds as said bonds were issued in violation of Section 393.725.4, RSMo; and
- (d) Hermann has no liability under MoPEP, by virtue of any MJMEUC agreements that would encumber the City of Hermann in amount that exceeds its constitutional debt limitation.

66. Hermann further submits that it is entitled to an award of costs, including its reasonable attorneys' fees, as authorized by Mo. R. Civ. P, 87.09.

WHEREFORE, Hermann prays that this Court enters its declaratory judgment as requested, and further award Hermann its costs and attorneys' fees, pursuant to Mo. R. Civ. P, 87.09, and award such other relief as the Court deems just and proper under the circumstances.

Count II – Action to Enforce the Assignment  
(Mandatory Injunction)

COMES NOW Plaintiff Hermann and for Count II of its Petition against Defendants MJMEUC and MoPEP states as follows:

67. Plaintiff Hermann realleges, restates and incorporates paragraphs 1-66 as if more fully stated herein.

68. Several of the Sho-Me cities were suitable assignee cities within the definition of the MoPEP Statement of Considerations in Assignment of a Members Interest.

69. Said Statement required that MJMEUC act in good faith in negotiating a potential assignment.

70. MJMEUC failed to act in good faith by refusing to allow Hermann to assign its position in MJMEUC and MoPEP to a Sho-Me city, and subsequently allowing the Sho-Me cities to enter into MJMEUC independently.

71. Hermann has no adequate remedy at law.

72. Absent an order of this Court enforcing the assignment of Hermann's position in MJMEUC, Hermann will be forced to remain a member of MJMEUC for at least the five year notice period.

73. Further, MJMEUC is seeking to hold Hermann liable for monthly payments for its share of the bonded liabilities in excess of \$37,500,000.00 should it attempt to withdraw from MJMEUC.

74. Hermann, therefore, is unable to withdraw from MJMEUC/MoPEP under the terms of the MJMEUC agreement without violating the constitutional debt limitation.

75. MJMEUC would not be prejudiced by an enforcement of the assignment as the 12 Sho-Me cities have already become members of MJMEUC and any costs to MJMEUC would be nominal.

WHEREFORE, Hermann prays that this Court enters its judgment ordering MJMEUC to immediately allow Hermann to withdraw from MJMEUC/MoPEP as if its interest had been assigned to any one of the ShoMe cities, and further award such other relief as the Court deems just and proper under the circumstances.

Count III – Breach of Fiduciary Duty

COMES NOW Plaintiff Hermann and for Count III of its Petition against Defendants states as follows:

76. Plaintiff Hermann realleges, restates and incorporates paragraphs 1-75 as if more fully stated herein.

77. MJMEUC and MoPEP owe fiduciary duties to Hermann, stemming from their relative positions of power and knowledge as compared to the power and knowledge of their composite members, including Hermann.

78. MJMEUC and MoPEP's fiduciary duties to Hermann included: (1) keeping Hermann informed as to purported bonded liabilities; (2) refraining from causing Hermann to incur liabilities beyond its constitutional debt limit; (3) acting in good faith to allow Hermann to assign its position in MoPEP upon finding a suitable assignee City; and (4) making a full disclosure to Hermann concerning the nature of the bonds that MJMEUC has issued.

79. MJMEUC and MoPEP breached their fiduciary duties to Hermann by:

- a. Failing to keep Hermann informed as to the amount of bonded liability that was purportedly being incurred on Hermann's behalf, including the issuance of over half a billion dollars worth of bonds in 2007;
- b. Causing the issuance of hundreds of millions of dollars worth of bonds without obtaining the requisite authorizing resolution;
- c. Causing Hermann to incur purported indebtedness far in excess of the debt limitation set forth by Mo. Const. Art. VI, §26(a), through the issuance of hundreds of millions of dollars worth of bonds, upon withdrawing from MoPEP;

- d. Failing to act in good faith with respect to Hermann's wishes to assign its position in MoPEP; and
- e. Failing to inform Hermann that it was issuing high risk variable interest rate bonds, rather than fixed rate bonds, at a time when the market for auction-rate securities had suffered greatly over the last few years, causing the interest rates payable on the bonds to have increased.

80. As a result of these breaches of fiduciary duty, Hermann has suffered considerable damages in an amount yet to be determined.

WHEREFORE, the City of Hermann prays that this Court enter its order and judgment awarding Hermann a fair and reasonable sum of damages in an amount to be discovered and proven at trial, its costs and reasonable attorneys' fees, and awarding such further relief as this Court deems necessary under the circumstances.

Count IV --Breach of Contract

COMES NOW Plaintiff Hermann and for Count IV of its Petition against Defendants states as follows:

81. Plaintiff Hermann realleges, restates and incorporates paragraphs 1-80 as if more fully stated herein.

82. Article III, Section 3.5 of the Amended Joint Agreement requires "[a] majority vote of all Pool Members present will authorize any action or determination by the Pool Committee..." (See Exhibit B. Amended Joint Agreement, Art. III, Sec 3.5).

83. MJMEUC has failed to obtain the requisite majority vote before issuing Bonds, which has resulted in MJMEUC amassing in excess of \$1,500,000,000.00 in bonded liabilities.

84. Said actions constitute material breaches of the Amended Joint Agreement, sufficient to excuse Hermann from performing any obligations under the Agreement.

85. Alternatively, MJMEUC's breaches of contract have caused Hermann to be purportedly liable for payments on its more than \$37,500,000.00 share of bonds issued by MJMEUC should it wish to exercise its right to terminate its participation in MoPEP.

86. As such, Hermann has suffered damages in the amount of the liabilities incurred by MJMEUC on its behalf, which it now seeks to impose on Hermann, said damages thought to be in excess of \$37,500,000.00.

WHEREFORE, Plaintiff Hermann prays that this Court enter its order and judgment, finding that Hermann is excused from performing any remaining obligations under the contract, award Hermann a fair and reasonable sum of damages in an amount to be proven at trial, in addition to its costs incurred herein, its attorneys' fees, and any further relief that this Court deems necessary and just under the circumstances.

Respectfully submitted,

CURTIS, HEINZ, GARRETT &  
O'KEEFE

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