BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Joint Application of Missouri-American Water Company and DCM Land, LLC, for a Variance from the Company's Tariff Provisions Regarding the Extension of Company Mains	)))))	Case No. WE-2021-0390

SECOND APPLICATION FOR REHEARING

COMES NOW the Office of the Public Counsel (the "OPC") and pursuant to RSMo. § 386.500, submits its Second Application for Rehearing concerning the Revised Order Granting Variances and Granting Waiver issued by the Public Service Commission of the State of Missouri (the "Commission") in the above-captioned matter on March 16, 2022 (the "March 16, 2022 Order"). (Doc. 39).[1] The OPC respectfully states as follows:

The March 16, 2022 Order is unlawful, unjust, and unreasonable. As explained below, the statutes, regulation, tariff provision, and cases cited by the Commission in the March 16, 2022 Order do not establish legal authority to grant the variances Missouri-American Water Company ("MAWC") and DCM Land, LLC ("DCM") requested in their Joint Application for Variance and Motion for Waiver (the "Joint Application"). (Doc. 1). Rather, the Commission does not have the legal authority to grant these variances. The facts the Commission cited to in the March 16, 2022 Order also do not support granting the requested variances and, further, granting the requested variances allows MAWC to unduly discriminate in favor of DCM. For these reasons, the OPC requests that the Commission grant this Second Application for Rehearing, reconsider its decision as set forth in its March 16, 2022 Order to grant the requested variances, and deny MAWC and DCM's requested variances.

[1] References to document numbers represent the document numbers assigned in the Electronic Filing Information System ("EFIS").

I. Background

A. Procedural Background

On May 6, 2021, MAWC and DCM filed the Joint Application requesting, in part, that the Commission grant three variances from the rules set forth in MAWC's current tariff. (Doc. 1). The Commission then filed an Order Directing Notice, Setting Time for Intervention and Responses, and Directing a Staff Recommendation. (Doc. 2).

The Staff of the Commission ("Staff") then filed its Recommendation, in which it recommended that the Commission reject the requests made in the Joint Application because the Commission "is without the authority to waive the provisions of MAWC's tariffs requested by the Joint Applicants." (Recommendation 10–11, Doc. 6). DCM and MAWC filed their replies. (Docs. 7, 8).

Following a procedural conference at which the OPC, Staff, DCM, and MAWC (collectively, the "Parties") were present, the Parties filed a joint Stipulation of Facts and List of Issues (the "Stipulation of Facts"). (Docs. 12, 13). On that same day, DCM, Staff, and MAWC each filed a brief addressing the issues in this matter. (Docs. 14, 15, 16). On October 14, 2021, the Commission issued its Order Granting Variances, Granting Waiver, and Granting Expedited Treatment, in which it granted each of the variances requested by MAWC and DCM in the Joint Application. (Doc. 17).

The OPC then filed an Application for Rehearing, which the Commission granted. (Docs. 18, 22). The Parties then participated in another procedural conference. (*See* Doc. 25). Following that procedural conference, the Parties filed a Joint Motion for Clarification requesting Commission guidance "as to what aspects of this case [the Commission] wants to rehear." (Jt. Mot. Clarification 2, Doc. 26).

On January 18, 2022, the Commission entered an Order Directing Filing (the "January 18, 2022 Order") in which it made two inquiries and asked a series of numbered and lettered questions and sub-questions. (*See generally* Jan. 18, 2022 Order, Doc. 27). Specifically, the Commission requested "the parties' positions on what legal authority the Commission has to grant the requested variance from the tariff" and "evidence concerning why [MAWC's] extension policy for St. Louis County is different from all its other service territory." (*Id.* 1). The Commission's questions and sub-questions requested additional factual information. (*See id.* 1–2). The Commission ordered the Parties to provide "a pleading addressing how they plan to address these questions." (*Id.* 3).

The Parties filed a Joint Response to the Commission's January 18, 2022 Order Directing Filing (the "Joint Response"), describing their plan to address the Commission's inquiries and questions. (Doc. 28). The Commission adopted the Parties' proposed filing schedule. (Doc. 29). Each of the Parties then filed pleadings in accordance with the filing schedule on February 4, 2022 and February 14, 2022. (*See* Docs. 30–37).

In its March 16, 2022 Order, the Commission concluded that legal authority existed for it to grant the variances MAWC and DCM requested in the Joint Application. (Mar. 16, 2022 Order 5–9). Upon finding a sufficient factual basis to do so, the Commission granted each of the requested variances. (*See generally id.*).

B. Factual Background

In their Joint Application, MAWC and DCM requested three variances from the rule governing extensions of company mains set forth in MAWC's tariff—Rule 23. (Stipulation of Facts ¶¶ 10, 11, 13, 14, Doc. 13). Specifically, MAWC and DCM request a variance from Rule 23A.2, 23A.3, and 23C.6. (*Id.* ¶¶ 10–11). If granted, the three variances would decrease the cost

to DCM for MAWC to extend its water mains to a new residential development DCM plans to construct, known as "Cottleville Trails." (*See id.* ¶¶ 10, 11, 13, 14).

Cottleville Trails is located in Cottleville, Saint Charles County, Missouri. (*Id.* ¶ 3). For the initial development, DCM plans for 355 single family residences and 175 apartment units. (*Id.* ¶ 4). An additional 217 attached, single family residences are planned for future development. (*Id.*).

A Territorial Agreement between MAWC and Public Water District No. 2 of St. Charles County, Missouri ("PWD#2"), which the Commission approved in Case Number WO-2001-441, and whose amendment the Commission approved in Case Number WO-2012-0088, places Cottleville Trails in MAWC's exclusive service area. (*Id.* ¶ 5). MAWC's service area in St. Charles County is part of the St. Louis Metro District for the purpose of MAWC's tariff Rule 23, which pertains to the extension of company mains. (*Id.*).

Two of the three variances MAWC and DCM request would alter a cost sharing mechanism described in MAWC's extension rules. (*See id.* ¶¶ 10, 11, 13, 14). These variances apply to Rules 23A.3 and 23C.6. (*See id.* ¶¶ 10, 11, 14). Rule 23A.3 states:

> If the estimated cost of the proposed extension required in order to furnish general water service exceeds four (4) times the Company's estimate of average annual revenue from the new Applicant, the Applicant and Company shall fund the remaining cost (i.e., total cost less four (4) times the estimated average annual revenue from any new Applicant(s)) of the proposed water main extension at a ratio of *95:5 (i.e., 95% Applicant funded and 5% Company funded) for St. Louis Metro District, and 86:14 (i.e., 86% Applicant funded and 14% Company funded) for all other districts.*

(*Id.* ¶ 10; PSC MO. No. 13, 1st Revised Sheet No. R 48, Rule 23A.3 (emphasis added)). Similarly, Rule 23C.6 states:

> Upon completion of the Main Extension, and prior to acceptance of the extension by the Company, the Applicant will provide to the Company a final statement of Applicant's costs to construct such extension. The final statement of costs will be

> added to the actual costs for Company to provide services as per the Developer Lay Proposal. Upon acceptance of the main extension, the Company will then issue payment to the Applicant of *five percent (5%) (for St. Louis Metro District contracts) and fourteen percent (14%) (for all other district contracts) of the total, final costs that exceed four (4) times the estimated average annual revenue pursuant to Provision A.2. and 3., above*. The Company will adjust its payment based on the shortfall or excess of the difference between the actual Developer Lay costs and the Developer Lay Proposal payment made by the Applicant pursuant to Provision C.5., above.

(Stipulation of Facts ¶ 11; PSC MO. No. 13, Original Sheet No. R 51, Rule 23C.6 (emphasis added)). With these two variances, MAWC and DCM request that DCM be subject to the 86%/14% ratio as opposed to the 95%/5% ratio to calculate the cost for MAWC to extend water service to Cottleville Trails. (Stipulation of Facts ¶ 14).

In addition to variances from the tariff rules pertaining to the cost-sharing mechanism, DCM and MAWC also request a variance from a tariff rule requiring that a new customer guarantee to take service within 120 days. (*Id.* ¶¶ 10, 13). This variance pertains to Rule 23A.2, which states, in pertinent part:

> The Company will be responsible for all main extensions where the cost of the extension does not exceed four (4) times the estimated average annual revenue from the new Applicant(s) whose service pipe(s) will immediately be connected directly to the extension and from whom the Company has received application(s) for service upon forms provided by the Company for this purpose. New Applicants shall be those who commit to purchase water service for at least one year, and *guarantee to the Company that they will take water service at their premises within one hundred twenty (120) days* after the date the Company accepts the main and determines it ready for Customer service.

(Stipulation of Facts ¶ 10; PSC MO. No. 13, 1st Revised Sheet No. R 48, Rule 23A.2 (emphasis added)). Specifically, with this variance MAWC and DCM request that the 120-day time period be extended to five (5) years. (Stipulation of Facts ¶ 13).

As part of the water main extension needed for the development, DCM will install a 12" main in place of an existing 4" main in Old Town Cottleville. (*Id.* ¶ 22). "That replacement would

improve fire protection in the area and provide water main access to several additional properties nearby." (*Id.* ¶ 22).

II. Standard of Review

"After an order or decision has been made by the commission, the public counsel . . . shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear." RSMo. § 386.500(1).[2] An application for rehearing "shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust, or unreasonable." *Id.* § 386.500(2).

"Lawfulness is determined by whether or not the Commission had the statutory authority to act as it did." *Pub. Serv. Comm'n v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012) (citations omitted). "Reasonableness depends on whether or not (i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the Commission abused its discretion." *Id.* (internal quotation marks and citations omitted).

III. Argument

The Commission's March 16, 2022 Order is unlawful, unjust, and unreasonable. The statutes, regulation, tariff provision, and cases cited in the Commission's March 16, 2022 Order do not establish legal authority for the Commission to grant the requested variances. Rather, no legal authority exists for the Commission to grant these variances. The facts cited by the Commission also do not support granting MAWC and DCM's requested relief. Specifically, the

[2] All references are to the 2016 version of the Revised Statutes of Missouri as supplemented by the 2021 cumulative supplement, unless specifically stated.

Commission has not cited to sufficient good cause to grant these variances. Further, in granting the variances, the Commission has allowed MAWC to unduly discriminate in favor of DCM.

A. The Cited Statutes, Regulation, Tariff Provision, and Cases Do Not Establish Legal Authority to Grant the Requested Variances

In the Conclusions of Law section of its March 16, 2022 Order, the Commission cites to two statutes, one regulation, one provision of MAWC's tariff, and two cases to support its contention that legal authority exists for it to grant the requested variances. However, the statutes cited by the Commission do not provide legal authority to grant the requested variances, rather both prohibit it. The procedural regulation cited by the Commission also does not establish legal authority to grant the variances. Further, because MAWC and DCM request neither a change nor an alteration to MAWC's tariff, the plain language of the cited tariff provision does not apply. Finally, key elements of the cases cited by the Commission are distinguishable from the instant matter, so neither case provides legal authority for the Commission to grant MAWC and DCM's requested relief.

1. Neither RSMo. § 393.140(11) nor § 393.130(3) Provide Legal Authority for the Commission to Grant the Variances

In its March 16, 2022 Order, the Commission states that the authority to waive the application of a rule set forth in a utility's Commission-approved tariff "is implied by the Commission's statutory authority, and is not derived just from authority granted by a tariff." (Mar. 16, 2022 Order 7). The Commission cites to no statute in support of this proposition. However, throughout the Conclusions of Law section, the Commission cites to two statutes—RSMo. § 393.140(11) and § 393.130(3). Neither of these statutes provide legal authority for the Commission to grant the requested variances, both prohibit it.

a. RSMo. § 393.140(11)

The Commission begins its Conclusions of Law section with reference to specific language found in RSMo. § 393.140(11). However, it specifically excludes other portions of that statute, including language that appears to expressly prohibit the variances sought by MAWC and DCM. Looking to the whole of the statute, it becomes clear that it does not provide legal authority for the Commission to grant MAWC and DCM's requested relief because (1) neither do MAWC and DCM seek to change MAWC's tariff nor does the Commission order MAWC to do so and (2) granting the variances would allow MAWC to violate the express language of the statute.

Section 393.140(11) of the Revised Statutes of Missouri provides, in total:

> The commission shall: . . . Have power to require every gas corporation, electrical corporation, water corporation, and sewer corporation to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation, water corporation, or sewer corporation; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission

> shall also have power to establish such rules and regulations, to carry into effect the provisions of this subdivision, as it may deem necessary, and to modify and amend such rules or regulations from time to time.

RSMo. § 393.140(11).

i. <u>The Cited Language of RSMo. § 393.140(11) Does Not Apply</u>

The Commission cites to portions of RSMo. § 393.140(11) in its March 16, 2022 Order. Specifically, the Commission stated that

> Section 393.140(11) RSMo authorizes the Commission to order changes to tariffs, or in any form of contract or agreement, and its rates or charges or services:
>
> Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect.

(Mar. 16, 2022 Order 5). Courts have referred to this portion of the statute along with the provision that the Commission "for good cause shown may allow changes without requiring the thirty days' notice" as part of the "file and suspend" procedure which an investor-owned utility may utilize to seek an increase in rates before the Commission. *See State ex rel. Jackson Cty. v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 25 (Mo. banc 1975); *Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 781 n.6 (Mo. Ct. App. 2016) (citation omitted) (hereinafter "*KCP&L Request*"); *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 566–67 (Mo. Ct. App. 1976). In requesting the variances, MAWC does not seek to change its tariff or its rates. Therefore, this provision does not apply.

The Commission also cites to two other portions of RSMo. § 393.140(11): (1) language that "gives the Commission authority to require a water corporation to file a tariff with the

Commission showing 'all rules and regulations relating to rates, charges or service used or to be used' by that water corporation;" and (2) language that "[t]he Commission is also given authority to 'prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise.'" (Mar. 16, 2022 Order 5 (quoting RSMo. § 393.140(11))). Both of these portions of the statute allude to the Commission's authority to require a water corporation, as defined by the statutes, to file a tariff and to make changes to that tariff. But, here, MAWC and DCM do not seek to change the language of MAWC's tariff. Rather, they seek to change only the application of one of MAWC's tariff rules to the benefit of DCM only. Further, in granting MAWC and DCM's requested relief, the Commission is not requiring MAWC to change the language of its tariff rules. Therefore, these provisions of RSMo. § 393.140(11) do not apply to the instant case.[3]

ii. <u>RSMo. § 393.140(11) Prohibits Granting the Variances</u>

Section 393.140(11) of the Revised Statutes of Missouri also cannot provide the legal authority for the Commission to grant MAWC and DCM's requested variances because to do so would allow MAWC to expressly violate language in the statute itself.

Specifically, RSMo. § 393.140(11) states, in pertinent part:

> nor shall any corporation refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances.

[3] As explained in its February 14, 2022 Response to February 4, 2022 Filings (the "February 14, 2022 Response"), the OPC has maintained that MAWC and DCM could lawfully request the relief they seek. (Feb. 14, 2022 Resp. 12–13, Doc. 35). For instance, MAWC could seek Commission approval to change its tariff language by requesting the addition of a variance provision, similar to the one interpreted by the Supreme Court of Missouri in *State ex rel. Kennedy v. Public Service Commission*, 42 S.W.2d 349 (Mo. 1931) (hereinafter "*Kennedy*"). If the Commission approves the addition of such language, MAWC and DCM could again request the relief they currently seek in the Joint Application. In this scenario, the Commission would have legal authority to grant MAWC and DCM's requested variances. *See Kennedy*, 42 S.W.2d at 353.

In allowing MAWC to waive application of its tariff Rules 23A.2, 23A.3, and 23C.6 as to DCM only, the Commission would allow MAWC to extend to DCM a rule different than that which is "regularly and uniformly extended to all . . . corporations under like circumstances."[4] RSMo. § 393.140(11). Doing so is expressly prohibited by the statute.[5] Therefore, RSMo. § 393.140(11) cannot form the basis of the Commission's legal authority to grant the requested variances.

b. RSMo. § 393.130(3)

The Commission also cited RSMo. § 393.130(3) in its Conclusions of Law section. Rather than providing legal authority for the Commission to grant MAWC and DCM's requested relief, this statute also prohibits granting the variances because to do so would result in undue discrimination. Because whether discrimination is "unlawful and unjust or the circumstances are essentially dissimilar is usually a question of fact," the OPC addresses this statute only briefly here. *State ex rel. Mo. Office of the Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 782 S.W.2d 822, 825 (Mo. Ct. App. 1990) (citation omitted). The OPC addresses discrimination more fully in its discussion of the facts addressed in the Commission's March 16, 2022 Order. Because the statute prohibits undue or unreasonable discrimination and granting the variances results in such, RSMo.

[4] In concluding that "good cause" existed to grant the variances from Rule 23A.3 and 23C.6, the Commission cited, in part "the specific facts surrounding the location of this development within the service territory of St. Louis Metro District of MAWC instead of another tariffed district or the PW[]D#2." (Mar. 16, 2022 Order 11). Therefore, the Commission may reason that DCM is not "under like circumstances" as other corporations operating within MAWC's St. Louis Metro district. *See* RSMo. § 393.140(11). However, the physical location of the land upon which DCM currently plans to construct Cottleville Trails cannot be changed. As explained in further detail below, in the Stipulation of Facts, the Parties stipulated that "Cottleville Trails is located within the *exclusive* service area of MAWC in the Territorial Agreement between MAWC and [PWD#2]." (Stipulation of Facts ¶ 5 (emphasis added)). Further, the Parties stipulated that "[t]he Cottleville Trails development is located in Cottleville, Saint Charles County, Missouri," (*id.* ¶ 3), and that "MAWC's service area in St. Charles County is a part of the St. Louis Metro District for the purpose of MAWC's tariff Rule 23—Extension of Company Mains," (*id.* ¶ 5). Due to these facts and as explained further below, PWD#2's line extension policy and MAWC's line extension policy applicable to other service areas are irrelevant.

[5] In its March 16, 2022 Order, the Commission stated that "the existence of a tariff cannot nullify the Commission's authority and obligation to regulate Missouri's utilities in a way that protects the public." (Mar. 16, 2022 Order 7). It cites RSMo. § 393.140 in support. (*Id.* at 7 n.24). However, the Commission did not identify how granting the requested variances protects the public.

§ 393.130(3) also cannot provide the legal authority for the Commission to grant MAWC and DCM's requested relief.

2. 20 CSR 4240-2.060(4) is a Procedural Regulation and Does Not Grant the Commission the Ability to Grant a Variance from a Tariff Rule

The Commission also recognized in its March 16, 2022 Order that it "has granted variances from utility tariffs in the past. Indeed, the Commission has promulgated a rule—20 CSR 4240-2.060(4)—to establish the information that is to be included in an application for variance from Commission rules and tariff provisions." (Mar. 16, 2022 Order 7). Although no longer relying solely on this procedural rule to conclude that it has legal authority to grant the variances, it appears the Commission cited the existence of this regulation to support its contention that legal authority to grant MAWC and DCM's requested variances exists. However, because 20 CSR 4240-2.060(4) is a procedural regulation and does not grant the Commission any new substantive rights, this regulation cannot form the basis for the Commission's legal authority to grant a variance from a rule in a lawfully enacted tariff that does not include a variance provision.

"[P]rocedural regulations establish the method of enforcing rights and carrying on the suit." *Declue v. Dir. of Revenue*, 945 S.W.2d 684, 686 (Mo. Ct. App. 1977) (citation omitted); *see Wilkes v. Mo. Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988) (defining procedural law with a similar definition and stating that "procedural law is the machinery used for carrying on the suit."). "Substantive laws define the rights and duties giving rise to the cause of action by impairing vested rights acquired under existing law, creating new obligations, or imposing new duties." *Declue*, 945 S.W.2d at 686 (citation omitted); *see Wilkes*, 762 S.W.2d at 28 (defining substantive law with a similar definition); *see also In re Mo.-Am. Water Co. for Approval to Establish an Infrastructure Sys. Replacement Surcharge*, 2017 Mo. PSC LEXIS 436, *3 (2017) (granting the OPC's motion to dismiss because a new law was substantive).

20 CSR 4240-2.060(4) appears in Chapter 2 of Title 20, which is entitled "Practice and Procedure." *See* 20 CSR 4240-2.060. The regulation states its purpose as: "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule." *Id.* Subsection 4 of 20 CSR 4240-2.060 provides:

> (4) In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived, shall contain information as follows:
>
> (A) Specific indication of the statute, rule, or tariff from which the variance or waiver is sought;
>
> (B) The reasons for the proposed variance or waiver and a complete justification setting out the good cause for granting the variance or waiver; and
>
> (C) The name of any public utility affected by the variance or waiver.

Id.

This regulation, which appears in a chapter entitled "Practice and Procedure," in a section whose stated purpose is to set forth the requirements for an application submitted to the Commission, does not contain a new substantive right. *See id.* Rather, this regulation is procedural in that it simply defines what a party must include in its application submitted to the Commission. *See Declue*, 945 S.W.2d at 686; *see Wilkes*, 762 S.W.2d at 28. Because 20 CSR 4240-2.060(4) is a procedural regulation, it does not provide the Commission the power to grant a variance from a tariff rule absent some other legal authority to do so. To conclude otherwise would circumvent the Supreme Court of Missouri's directive in *State ex rel. St. Louis County Gas Co. v. Public Service Commission*, 286 S.W. 84 (Mo. 1926) (hereinafter "*St. Louis Cty. Gas*"), explained more fully below, that a Commission-approved tariff "acquires the force and effect of law" and can be "modified or changed *only* by a new or supplementary schedule."[6] *See St. Louis Cty. Gas*, 286

[6] As the OPC explained in its February 14, 2022 Response, in interpreting 20 CSR 4240-2.060(4), the Commission can avoid contravening the Supreme Court's *Kennedy* decision by adopting a two-step requirement. (Feb. 14, 2022 Resp. 3–4). Specifically, first, if a utility's tariff includes a provision that allows for a variance or waiver from the general rules described in the tariff, then, second, 20 CSR 4240-2.060(4) provides the procedure by which a utility

S.W. at 86 (emphasis added). Therefore, 20 CSR 4240-2.060(4) cannot form the basis of the Commission's authority to grant a variance from a rule in a lawfully enacted tariff.

3. The Cited Tariff Provision Does Not Establish Legal Authority for the Variances

The Commission cites to a provision of MAWC's tariff stating that the provision put readers on notice that the Commission may grant a variance from MAWC's tariff rules. This provision of MAWC's tariff states: "[t]he Company may, subject to the approval of the Commission, prescribe *additional* rates, rules or regulations or to *alter* existing rates, rules or regulations as it may from time to time deem necessary or proper." (Mar. 16, 2022 Order 7–8; PSC MO No. 13, 1st Revised Sheet No. R 9, Rule 2C (emphasis added)). The provision is found in Rule 2 of MAWC's tariff, which is entitled "GENERAL." (*Id.*). This provision does not provide the legal authority for the Commission to grant the requested variances because MAWC does not seek to prescribe additional rules or regulations or to alter existing rules or regulations found in its current tariff. For this reason, the cited provision simply does not apply to the instant case and it cannot constitute the legal authority for the Commission to grant MAWC and DCM's requested variances.

The Court of Appeals of Missouri, Western District has recognize that "a tariff is unique as, unlike other [Commission] orders, a tariff has the same force and effect as a statute passed by the legislature." *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 477 (Mo. Ct. App. 2013) (citing *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 156 S.W.3d 513, 521 (Mo. Ct. App. 2005)) (hereinafter "*Union Electric*"). "A tariff also partakes partially of a contract

may request Commission authority to allow such a variance or waiver. This interpretation harmonizes *Kennedy* with 20 CSR 4240-2.060(4).

as it is generally the subject of some negotiation between the [Commission], the utility, and impacted constituent groups." *Id.*

Because a "tariff has the force and effect of a statute, [the Commission should] apply traditional principles of statutory interpretation." *Id.* at 479 (citation omitted). The first step in interpreting a statute is to "begin with the language chosen by the legislature. If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then [the Commission is] . . . bound by that intent and cannot resort to any statutory construction in interpreting the statute." *Id.* at 479–80 (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 (Mo. banc 2011) (internal quotation marks omitted)). The *Union Electric* court cautioned that

> The rules of statutory interpretation are not intended to be applied haphazardly or indiscriminately to achieve a desired result. Instead, the canons of statutory interpretation are considerations made in a genuine effort to determine what the legislature intended. [The] . . . primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue.

Id. at 480 (quoting *Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009)). Applying these principles to a tariff, the *Union Electric* court stated that "the aforesaid principles of statutory interpretation require [the reviewing entity] to ascertain the intent of [the Commission] from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Id.* (quoting *Laclede Gas Co.*, 156 S.W.3d at 521).

A word in a tariff has a "plain and ordinary meaning," if it is "plain and clear to a person of ordinary intelligence." *Id.* (quoting *State v. Daniel*, 103 S.W.3d 822, 826 (Mo. Ct. App. 2003)). However, if the word is "subject to more than one reasonable interpretation," the word is ambiguous. *Id.* (quoting *State v. Barraza*, 238 S.W.3d 187, 192 (Mo. Ct. App. 2007)).

MAWC's tariff language is clear. It states that "[t]he Company may, subject to the approval of the Commission, prescribe *additional* rates, rules or regulations or to *alter* existing rates, rules or regulations as it may from time to time deem necessary or proper." (PSC MO No. 13, 1st Revised Sheet No. R 9, Rule 2C (emphasis added)). A "person of ordinary intelligence" would interpret the words "additional" and "alter" to have a "plain and clear" meaning that requires some change to MAWC's tariff. *See Union Elec.*, 399 S.W.3d at 480 (internal quotation marks and citation omitted). In requesting the variances, MAWC and DCM do not seek any change to MAWC's tariff. Rather, they seek to simply modify the application of MAWC's current tariff Rule 23 for the benefit of DCM only and to leave the language of Rule 23 unchanged. If the Commission grants the requested variances, MAWC will not file a new tariff sheet that adds additional rules or regulations or that changes existing rules or regulations. Therefore, based on the plain and ordinary language of MAWC's tariff, this provision is irrelevant.[7] For this reason, it also cannot constitute the legal authority for the Commission to grant the requested variances.

4. <u>The Cases Cited By the Commission Do Not Establish That the Commission Has Legal Authority to Grant the Variances Because Each is Distinguishable in Key Ways</u>

Finally, in its Conclusions of Law section, the Commission cites to two cases to support its contention that legal authority exists for it to grant the requested variances: (1) *State ex rel.*

[7] To interpret this provision as a blanket provision allowing variances from or waivers of any provision of MAWC's tariff would also create needless surplusage in other parts of MAWC's tariff. For instance, Rule 4, entitled "Service Connections," contains subdivision M, which is entitled "Waiver of Service Connection and matching of offers made by other water suppliers' charges." (*See* PSC MO No. 13, 1st Revised Sheet No. R 13, Rule 4M). This provision sets out the circumstances under which MAWC may "waive all or part of any service connection charges and/or match offers made by other water suppliers in order to effectively compete." (*Id.*). Similarly, Rule 10, entitled "Discontinuance of Water Service," contains subdivision J, which states that "[t]he provisions of paragraphs H. and I., above, may be waived if safety of Company personnel while at the premises is a consideration." (*Id.* at 1st Revised Sheet No. R 25, Rule 10J). To avoid a situation in which these provisions become surplusage, the Commission should interpret the cited provision as applying to only those situations where MAWC seeks some sort of substantive change to its tariff, and not where MAWC seeks to vary or waive application of its current tariff rules only without a corresponding change in the tariff language.

Missouri Gas Energy v. Public Service Commission, 210 S.W.3d 330 (Mo. Ct. App. 2006) (hereinafter "*MO Gas Energy*"); and (2) *Deaconess Manor Association v. Public Service Commission*, 994 S.W.2d 602 (Mo. Ct. App. 1999) (hereinafter "*Deaconess Manor*").[8] Because key elements of each of these cases can be distinguished from the instant case, neither provides the legal authority for the Commission to grant MAWC and DCM's requested relief. The OPC will address each case in turn.

a. *MO Gas Energy*

The Commission relies heavily on the *MO Gas Energy* decision and states that it "calls into question the assumption that the Commission's authority to grant a necessary variance is limited to the authority established in a utility's tariff." (Mar. 16, 2022 Order 6). It also contends that the case "recognizes that while various Court decisions have said that 'a tariff has the same force and effect as a statute, and it becomes state law,' and indeed, the [*MO Gas Energy*] decision contains that very language,[] a tariff is not a statute." (*Id.* 7). However, the Commission does not address the fact that the *MO Gas Energy* court addressed a highly unique circumstance. A circumstance that does not exist in the current matter.

As background, the *MO Gas Energy* decision arose when the Commission adopted the Emergency Cold Weather Rule after certain investor-owned utilities incorporated the language of the current Cold Weather Rule into their tariffs. The Cold Weather Rule in effect at the time of the case described, in part, the conditions under which a utility could disconnect a customer from November 1 through March 31. *MO Gas Energy*, 210 S.W.3d at 333. In pertinent part the Cold

[8] The Commission also cites to two other cases in its Conclusions of Law section of the March 16, 2022 Order: (1) *St. Louis Cty. Gas*, 286 S.W. 84, and (2) *Kennedy*, 42 S.W.2d 349. However, the Commission appears to question the continuing validity of these two cases. The OPC addresses both of these cases and their continuing validity when addressing its position that no legal authority exists for the Commission to grant MAWC and DCM's requested variances.

Weather Rule required that "a customer must pay 80% of the outstanding bill to prevent disconnection or to allow reconnection of services." *Id.* The Emergency Cold Weather Rule sought to change those conditions for a three month period—from January 1 through March 31, 2006. *Id.* The Emergency Cold Weather Rule "reduc[ed] the 80% requirement of payment before reconnection or disconnection of services to 50% or five hundred dollars whichever is less" and required several other changes. *Id.* Further, the Emergency Cold Weather Rule "allowed utilities to book any costs of the emergency amendment to a deferral account, rather than recognizing such costs as current expenses" so that "[t]he Utilities can seek to recover those deferred costs by booking them under an Accounting Authority Order . . . and including them in their next rate case." *Id.*

After allowing time for written comments and holding a hearing, the Commission adopted the Emergency Cold Weather Rule. *Id.* Two utilities then filed motions for rehearing, which the Commission denied. *Id.* The Commission then filed the Emergency Cold Weather Rule, which amended the Cold Weather Rule for a period of three months, with the Secretary of State. *Id.*

On that same day, two utilities filed a "petition for writ of review and a motion for stay of the Commission's emergency amendment." *Id.* The Cole County Circuit Court reversed the Commission's Order approving the emergency amendment and the Commission appealed. *Id.* at 333–34.

In reversing the Circuit Court and affirming the Commission, the Court of Appeals recognized that the issue of the case most related to the instant matter was "a matter of first impression for [the] court." *Id.* at 337. The court defined the question presented as "if a utility places the language of a lawful rule in its tariffs, does this prevent the Commission from changing the rule subsequently without a contested case?" *Id.* The *MO Gas Energy* court recognized that

"[a] tariff has the same force and effect as a statute, and it becomes state law." *Id.* (citation omitted). The court determined that "[b]y approving the tariff, the Utility is, as far as the rule is concerned, simply verifying the current standing that the rule has as law at that time." *Id.* The court stated that "[t]his cannot act to limit the statutorily defined power of the Commission to act in promulgating rules." *Id.* Therefore, the *MO Gas Energy* court specifically held that "although a properly passed tariff becomes the law of Missouri, placing the text of rules, which the Commission has already passed, into a tariff does not limit the power of the Commission to promulgate conflicting rules that it has the statutory authority to create." *Id.*

The situation presented in *MO Gas Energy* was unique in that it concerned a conflict between a utility's tariff and the Commission's specific statutory authority to promulgate rules only to the extent that a utility had adopted the current Commission rule into its tariff and the Commission then sought a subsequent change to that rule. *See id.* at 337. This key element is not at issue in the instant matter. Here, MAWC's line extension policy found in tariff Rule 23 does not reflect a current Commission rule. Also, as distinguished from *MO Gas Energy*, in granting the variances the Commission is not seeking to change any current Commission rule under the Commission's statutory authority to promulgate rules.[9] Rather, as explained above, the Commission has cited to no statutory authority that would allow it to grant MAWC and DCM's requested variances. Therefore, because the *MO Gas Energy* case addressed a unique situation that is distinguishable from the instant case, it cannot provide the legal authority for the Commission to grant the requested variances.

[9] Of note, the *MO Gas Energy* court also addressed the question of whether that case constituted a rate case or a rulemaking case. *See* 210 S.W.3d at 334–35. In concluding that the case constituted a rulemaking case, the court recognized that "this is not a rate case because it applies across the industry." *Id.* at 334 (citation omitted). The facts presented in the instant case would not apply across the industry, but affect only MAWC and DCM. Therefore, the instant case cannot constitute a rulemaking case.

b. *Deaconess Manor*

The Commission cites one other case in support of its conclusion that legal authority exists for it to grant the variances: *Deaconess Manor*, 994 S.W.2d 602. The Commission cites *Deaconess Manor* for the proposition that "[t]he Commission has allowed variance from its rules,[10] at the request of a developer, to lower costs."[11] (Mar. 16, 2022 Order 8). The Commission also cited the case stating that "[t]he rule variance granted in *Deaconess Manor* did not affect the rate classification of the units in question, which were billed in accordance with the utility's generally applicable residential tariffs." (*Id.*). However, similar to the *MO Gas Energy* case, the *Deaconess Manor* case addressed a situation that is distinguishable from the instant case in key ways. Therefore, *Deaconess Manor* cannot provide the legal authority for the Commission to grant MAWC and DCM's requested relief.

The *Deaconess Manor* case arose from a Commission decision dismissing Deaconess Manor d/b/a Orchard House's ("Orchard House") complaint against Union Electric Company ("UE") in which Orchard House claimed that UE erroneously classified certain of Orchard House's buildings "as a residential versus non-residential class customer for electrical service." 994 S.W.2d at 604, 608. The Missouri Code of State Regulations set out requirements for the placement of electrical meters. *Id.* at 605 (citing 4 CSR 240-20.050 (1996)).[12] The *Deaconess Manor* court further explained that "[i]n 1987, representatives of [UE], along with individuals representing

[10] The OPC notes that MAWC and DCM do not request a variance from the Commission's rules.

[11] In making this statement, the Commission did not address that it has also previously denied a variance from a utility's tariff and the Commission's rules in 20 CSR 4240-14.020 because "the "proposal constitutes an undue preference for developers of a single subdivision" and "there seem[ed] to be insufficient justification for giving a special rate to the developer of this single subdivision." *See In re. Appl. of The Empire Dist. Elec. Co. & Ozark Elec. Coop. for Approval of a Written Territorial Agreement Designating the Boundaries of Exclusive Serv. Areas for Each Within Two Tracts of Land in Greene Cty. & Christian Cty., Mo.*, 2007 Mo. PSC LEXIS 148, *8–*9 (2007) (hereinafter "*Empire Appl.*").

[12] The language of 4 CSR 240-20.050 now appears in 20 CSR 4240-20.050. *See* 20 CSR 4240-20.050 Authority note.

Orchard House's developers, held two or three pre-construction meetings to discuss the project's electrical needs." *Id.* The individual representing Orchard House during those meetings "ma[de] it clear that the developers' primary concern was in minimizing upfront construction costs." *Id.* Because it would have been costly to install individual meters pursuant to the Commission's rule in effect at the time, "at Orchard House's request, and as a result of the meetings between the utility and HPI,[13] [UE] applied to the . . . Commission . . . in July, 1988 for a variance to install master meters." *Id.* at 606. The Commission granted the variance. *Id.* at 607.

This variance became an issue in the later *Deaconess Manor* case. *Id.* at 609–11. Orchard House contended that because the units were not separately metered—which was the result of the prior variance—its buildings did not fit within the residential classification of UE's tariff. *See id.* at 609. Therefore, Orchard House contended that "based on the residential rate definition, the Commission's order [in dismissing Orchard House's complaint against UE] violates § 393.140(11)." *Id.* at 610. The *Deaconess Manor* court summarized Orchard House's argument as "that the Commission's order upholding [UE's] charges from 1989 to 1995 violated the statute by allowing the company to collect a residential service fee contrary to its rate schedule . . . and should have obtained a waiver of its residential tariff provision." *Id.*

The court then turned to the prior variance that was now an issue in the current case. The court stated that "in order to bill contrary to its specified tariffs on file with the Commission, [UE] is required by statute to make a written application to the Commission for approval of the change." *Id.* Further, the court recognized that "[UE] did not request, nor did the Commission grant, any . . . waiver" of UE's tariff "and the variance for single metering of part of Building A and all of

[13] The *Deaconess Manor* court explained "[t]he developer of Orchard House . . . hired HPI Engineering ['HPI'] as a consultant on the electrical systems. During construction of the facility, representatives of [UE], the utility supplier, met with HPI representatives . . . ." 994 S.W.2d at 604.

Building B did not operate to change any tariff application." *Id.* Importantly, the court pointed out that the variances' "stated purpose and effect was to allow a variance from the individual metering requirement only." *Id.* The court then examined information from the prior variance case before the Commission, pointing out that "Orchard House's own expert, Brown, testified that: 'A variance obtained from the individual metering rule pursuant to 4 CSR 240-20.050(5) is only a variance from the individual metering requirement of 4 CSR 240-20.050(2).'" *Id.* (presumably quoting Brown testimony in the variance case before the Commission). The court concluded that "[UE] did not seek a variance of the tariff, only of a metering requirement. Therefore, all other restrictions and classifications remained in place, including the applicable tariffs." *Id.*

In affirming the Commission's decision to dismiss Orchard House's complaint, the court stated that "we hold that the Commission, pursuant to its statutory authority, properly found that the variance from the strictures of the statutory metering requirements did not operate as a waiver of the applicability of the [UE] rate tariffs, and did not alter or preclude their applicability to the Orchard House project as compared to their application absent the variance." *Id.* at 610–11 (citation omitted).

Importantly, though not an issue and thus not addressed in the *Deaconess Manor* decision, the version of 4 CSR 240-20.050 in effect at the time of the *Deaconess Manor* decision allowed variances from that regulation. *See* 4 CSR 240-20.050(5) (1996) (stating that "Any person or entity affected by this rule may file an application with the commission seeking a variance from all or parts of this rule (4 CSR 240-20.050) and for good cause shown, variances may be granted as follows: . . ." and providing guidance as to how to request a variance, including establishing a "variance committee"). Although the *Deaconess Manor* court did not detail this portion of 4 CSR 240-20.050 (1996), presumably the Commission utilized the variance procedure addressed in the

regulation in granting the underlying variance. *See Deaconess Manor*, 994 S.W.2d at 606–07 (recognizing that "[i]n making its recommendation to the Commission, the *Variance Committee* stated . . ." (emphasis added)).

Two key distinctions exist between the *Deaconess Manor* case and the case at bar. First, in the *Deaconess Manor* case, the variance sought was from a Commission rule found in the Code of State Regulations. *See Deaconess Manor*, 994 S.W.2d at 611 (concluding that "the variance from the strictures of the statutory metering requirements did not operate as a waiver of the applicability of the [UE] rate tariffs"). Second, that Commission rule in effect at the time, 4 CSR 240-20.050 (1996), allowed for variances and described the procedure to be used in requesting a variance. *See* 4 CSR 240-20.050(5)(1996). Neither of these circumstances exist in the instant case. Here, MAWC and DCM seek variances from one of MAWC's tariff rules. They do so even though, as explained above, MAWC's tariff does not contain a provision allowing for that variance. Therefore, *Deaconess Manor* cannot be used to support the contention that the Commission has legal authority to grant the requested variances.

B. No Legal Authority Exists for the Commission to Grant the Requested Variances

Having explained that the statutes, the regulation, the provision of MAWC's tariff, and the cases cited by Commission do not provide legal authority for the Commission to grant the requested variances, the OPC now returns to its core contention: that no legal authority exists for the Commission to grant the requested variances.

The Commission "is purely a create of statute," therefore "its powers are limited to those conferred by statute either expressly, or by clear implication as necessary to carry out the powers specifically granted." *KCP&L Request*, 509 S.W.3d at 764 (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 397 S.W.3d 441, 446–47 (Mo. Ct. App. 2012)).

The Supreme Court of Missouri, dating back to at least 1926, has held that a regulated utility's tariff that has been approved by the Commission "acquires the force and effect of law." *St. Louis Cty. Gas*, 286 S.W. at 86. The Commission recognized this fact in its March 16, 2022 Order. (*See* Mar. 16, 2022 Order 6 (citing *St. Louis Cty. Gas*, 286 S.W. at 86)).

Therefore, a tariff is "binding upon both the corporation filing it and the public which it serves. It may be modified or changed *only* by a new or supplementary schedule, filed voluntarily, or by order of the Commission." *St. Louis Cty. Gas*, 286 S.W. at 86 (emphasis added). "If such a schedule is to be accorded the force and effect of law, it is binding not only upon the utility and the public, but upon the Public Service Commission as well." *Id.* The Commission "cannot set . . . aside" a utility's tariff "as to certain individuals and maintain them in force as to the public generally." *Id.*

In determining that a provision in a company's tariff that allowed for variances from a tariff provision did not invalidate the tariff, the Missouri Supreme Court stated that "[w]ithout some such provision in the rule the [C]omission could not authorize the company to make an exception in the application of its approved rule." *Kennedy*, 42 S.W.2d at 353 (citation omitted).

In the Stipulation of Facts, the Parties agree that "Cottleville Trails is located within the *exclusive* service area of MAWC in the Territorial Agreement between MAWC and [PWD#2]." (Stipulation of Facts ¶ 5). As explained above, the tariff provision the Commission cites in its March 16, 2022 Order does not apply to the instant case because MAWC does not seek to add or alter its existing tariff. MAWC's tariff does not include a variance provision applicable to tariff Rule 23. (*See generally* MAWC Tariff Rules and Regulations). MAWC and DCM simply request three variances that would apply to DCM only.

This case is at odds with the water main extension case considered by the Missouri Supreme Court in *Kennedy*. In *Kennedy*, a group of residents sought to have a water utility's tariff rules changed to require the company to cover the expense of extending its water mains to them. 42 S.W.2d at 350. The water utility's tariff included a general rule governing when the utility or the requesting customer was to pay for the extension. *Id.* at 349–50. The general rule also included a clause specifically allowing the Commission to grant a variance from the general line extension rule. *Id.* at 350. The variance clause stated: "In exceptional cases, where extensions are requested under conditions which may appear to warrant departure from the above rules, the cost of such extensions, if requested and desired by the company, shall be borne as may be approved by the Public Service Commission of Missouri." *Id.* After rejecting the customer's requests for a rule requiring the utility to pay for the extension or allowing for a hearing before the Commission, the Supreme Court of Missouri concluded that the clause allowing for a variance from the general tariff rule did not invalidate the general rule as a whole. *Id.* at 352–53. Rather, the Missouri Supreme Court concluded that without such a provision, the company could not vary the application of its general tariff rule. *Id.* at 353.

The Commission has approved MAWC's tariff. Therefore, that tariff has the force of law and binds "not only . . . the utility and the public, but . . . the Public Service Commission as well." *See St. Louis Cty. Gas*, 286 S.W. at 86. The Commission cannot set aside a rule found in a MAWC's tariff "as to certain individuals and maintain them in force as to the public generally." *Id.* In granting the requested variances, the Commission has done just that. No authority exists in MAWC's tariff or otherwise giving the Commission the power to do so. Therefore, the Commission's March 16, 2022 Order exceeded the Commission's statutory authority and is unlawful.

C. The Facts Cited By the Commission Do Not Support Granting the Requested Variances and To Do So Allows MAWC to Engage in Undue Discrimination in Favor of DCM

The Commission has cited to no legal authority for it to grant MAWC and DCM's requested variances. Rather, no legal authority exist for the Commission to do so. However, in addition being unlawful, the Commission's March 16, 2022 Order is unreasonable and unjust because the facts cited by the Commission do not establish good cause[14] to grant variances from MAWC's tariff Rules 23A.3 and 23C.6.[15] Rather, to grant the requested variances would result in undue discrimination in favor of DCM only.

1. The Cited Facts Do Not Establish Good Cause to Grant the Variances

In granting the requested variances, the Commission cited

> [T]he added fire protection and access gained to nearby areas, the number of new customers taking service and the revenue expected to be produced, and the specific facts surrounding the location of this development within the service territory of St. Louis Metro District of MAWC instead of another tariffed district or the PW[]D#2 . . .

(Mar. 16, 2022 Order 11). These facts, specifically the location of the land upon which DCM proposes to develop Cottleville Trails, do not support granting the requested variances.

An issue that has run throughout this matter is the contention that the land upon which DCM hopes to develop Cottleville Trails could have been served by PWD#2, which offers a more favorable line extension policy, but for a Commission-approved Territorial Agreement between MAWC and PWD#2. (*See id.*). However, this fact is irrelevant.

[14] The OPC notes that in granting the variances from Rules 23A.3 and 23C.6, the Commission alludes to a "good cause" standard. (*See* Mar. 16, 2022 Order 10–11). Although the Commission does not explain the origin of this standard, the OPC presumes for the purpose of this Second Application for Rehearing only, that "good cause" constitutes the proper standard and proceeds to explain how the cited facts do not meet this standard.

[15] The OPC takes no position on whether the stipulated facts support granting a variance from the 120-day requirement in tariff Rule 23A.2.

Section 247.172(1) of the Revised Statutes of Missouri allows public water supply districts, such as PWD#2, and water corporations subject to public service commission jurisdiction, such as MAWC, to enter into written territorial agreements in place of competing to sell and distribute water. *See* RSMo. § 247.172(1) (2001).[16] Specifically, the statute states "Competition to sell and distribute water, as between and among public water supply districts, water corporations subject to public service commission jurisdiction, and municipally owned utilities may be displaced by written territorial agreements, but only to the extent hereinafter provided for in this section." *Id.* The statute goes on to specify that "[s]uch territorial agreements shall specifically designate the boundaries of the water service area of each water supplier subject to the agreement." *Id.* § 247.172(2) (2001). In order for territorial agreements made pursuant to this statute to take effect, they must receive "approval of the public service commission by report and order." *Id.* § 247.172(3) (2001). The statute sets forth the process by which the Commission may approve a territorial agreement and states that the Commission "may approve the application if it shall after a hearing determine that approval of the territorial agreement in total is not detrimental to the public interest." *Id.* § 247.172(4) (2001).

By entering into the Territorial Agreement, MAWC and PWD#2 agreed to displace competition to sell and distribute water in Cottleville Trails' location and designated the boundaries of both MAWC and PWD#2's water service area. *See* RSMo. §§ 247.172(1)–(2)

[16] Because the Commission approved the Territorial Agreement in 2001, the OPC provides citations to RSMo. § 247.172 (2001). The OPC notes that the revisions to the statute since 2001 do not substantively affect the argument here. *Compare* RSMo. § 247.172 (2001), *with* RSMo. § 247.172 (2021). However, the OPC will draw the Commission's attention to three changes. First, sometime after 2001, the legislature created subsection 3 from a part of subsection 2, resulting in the subsection that requires commission approval before a territorial agreement becomes effective moving from subsection 3, in 2001, to subsection 4, in 2021. *Id.* Second, this change also resulted in the subsection requiring the Commission to find that a territorial agreement is "not detrimental to the public interest" moving from subsection 4, in 2001, to subsection 5, in 2021. *Id.* Finally, between 2001 and 2021, the legislature changed the statute to allow the Commission to approve a territorial agreement without a hearing if the parties submit a stipulation and agreement and agree to waive the hearing. *Compare* RSMo. § 247.172(4) (2001) (requiring the commission to hold an evidentiary hearing in all cases), *with* RSMo. § 247.172(5) (2021) (requiring the commission to hold an evidentiary hearing, unless all parties submit a stipulation and agreement and agree to waive the hearing).

(2001). The Territorial Agreement and its subsequent Addendum became effective upon the Commission's approval. *See id.* § 247.172(3) (2001); (Stipulation of Facts ¶ 5). Therefore, only MAWC can sell and distribute water to Cottleville Trails.[17] *See* RSMo. §§ 247.172(1)–(2) (2001). Further, the Parties to this case agree that "Cottleville Trails is located within the *exclusive* service area of MAWC in the Territorial Agreement between MAWC and [PWD#2]." (Stipulation of Facts ¶ 5). The fact that DCM would be subject to a more favorable line extension policy if it were able to take service from PWD#2 is irrelevant. This cannot form the basis of any good cause for granting the requested variances.[18]

Second and similarly, the fact that DCM may be subject to a more favorable cost-sharing mechanism if the land upon which it seeks to develop were located in another of MAWC's tariff districts is irrelevant. The Parties stipulated to the fact that "[t]he Cottleville Trails development is located in Cottleville, Saint Charles County, Missouri." (Stipulation of Facts ¶ 3). They also stipulated that "MAWC's service area in St. Charles County is a part of the St. Louis Metro District for the purpose of MAWC's tariff Rule 23 – Extension of Company Mains." (*Id.* ¶ 5). Because the Cottleville Trails development is located in St. Charles County and St. Charles County is a part of the St. Louis Metro District for purpose of MAWC's tariff Rule 23, it is irrelevant that DCM may be subject to a more favorable cost-sharing mechanism if the land were located outside of that district. The location of the land cannot be changed. The Commission must apply the plain language of MAWC's tariff. *See St. Louis Cty. Gas*, 286 S.W. at 86 (recognizing that a utility's

[17] The OPC notes that no party has moved to suspend, revoke, or amend the Territorial Agreement. This is not the case for the Commission to do so.

[18] In addition to its contention that MAWC and DCM could lawfully seek their requested variances if MAWC first seeks a change to its tariff language, the OPC has maintained that at least one other lawful procedure exists by which the Commission could grant MAWC and DCM's requested relief. Specifically, as explained in the OPC's February 14, 2022 Response, MAWC and PWD#2 could seek an additional amendment to or to suspend or revoke the Territorial Agreement that exists between them, such that PWD#2 could serve the new Cottleville Trails development.

tariff binds "not only . . . the utility and the public, but . . . the Public Service Commission as well").

The remaining facts cited by the Commission further fail to provide good cause to grant the variances. Therefore, the Commission has failed to provide good cause to grant the requested variances and its March 16, 2022 Order is unreasonable and unjust, as well as unlawful.

2. In Granting MAWC and DCM's Requested Variances, the Commission Has Allowed MAWC to Unduly Discriminate in Favor of DCM

In addition to failing to cite to good cause to grant MAWC and DCM's requested relief, in granting the variances, the Commission has allowed MAWC to engage in undue discrimination in favor of DCM. Such discrimination is expressly prohibited in RSMo. § 393.130(3).

Section 393.130(3) of the Revised Statutes of Missouri states:

> No . . . water corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"[T]he principle of equality designed to be enforced by legislation and judicial decision forbids any difference in charge which is not based upon difference of service and even when based upon difference of service [the difference in charge] must have some reasonable relation to the amount of difference, and cannot be so great as to produce unjust discrimination." *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44–45 (Mo. 1931) (citation omitted). The Missouri Court of Appeals has concluded that discrimination "as to rates is not unlawful under the statute where it is based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service." *Mo. Office of Pub. Counsel*, 782 S.W.2d at 825 (citation omitted). "Whether . . . discrimination is unlawful and unjust or the circumstances are essentially dissimilar is usually a question of fact." *Id.* (citation omitted).

In granting the variances, the Commission has allowed MAWC to discriminate in favor of DCM. Beyond the fact that the land upon which DCM plans to develop Cottleville Trails could be served by PWD#2 absent the Territorial Agreement, the Commission has not indicated that the resulting discrimination is "based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service." *See id.* Nothing in the record indicates that it will be less expensive for MAWC to extend water service to Cottleville Trails or that DCM is uniquely dissimilar from any other customer in MAWC's St. Louis Metro District who wishes to have MAWC extend water service to that customer. Simply put, it appears that DCM seeks the variances from Rule 23A.3 and 23C.6 solely to increase the amount of its investment it may ultimately recover from MAWC. To allow this to happen would result in "undue or unreasonable preference or advantage to" DCM, which is directly prohibited by RSMo. § 393.130(3). However, if the Commission denies the requested waivers all of MAWC's customers would presumably be treated equally. *See Empire Appl.*, 2007 Mo. PSC LEXIS 148, *8–*9 (2007) (denying the utility's request for a variance from its tariff and the Commission's rules in 20 CSR 4240-14.020 because the "proposal constitutes an undue preference for developers of a single subdivision" and "there seem[ed] to be insufficient justification for giving a special rate to the developer of this single subdivision"). For this reason as well, in addition to the Commission's March 16, 2022 Order being unlawful, it is unreasonable and unjust.

IV. Conclusion

The statutes, regulation, tariff provision, and cases cited by the Commission in its March 16, 2022 Order do not establish that the Commission has legal authority to grant the requested variances. Rather, no such legal authority exists. The Commission cannot grant a variance from MAWC's tariff Rule 23. Furthermore, the facts the Commission cited do not support granting

MAWC and DCM's requested relief. Therefore, the Commission's March 16, 2022 Order is unlawful, unjust, and unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant the Second Application for Rehearing, reconsider its decision as set forth in the March 16, 2022 Order to grant the requested variances, and deny the requested variances.

Respectfully submitted,

/s/ Lindsay VanGerpen

Lindsay VanGerpen (#71213)
Associate Counsel

Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5565
Facsimile: (573) 751-5562
E-mail: Lindsay.VanGerpen@opc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 25th day of March 2022.

/s/ Lindsay VanGerpen