

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

Staff of the Public Service Commission	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. WC-2008-0331
	)	
Universal Utilities, Inc. and Nancy Carol	)	
Croasdell,	)	
	)	
Respondents.	)	

**RESPONDENTS' APPLICATION FOR REHEARING**  
**AND MOTION TO DISMISS**

COME NOW Respondents, pursuant to § 386.500, RSMo. and 4 CSR 240.160(1), and submit this Application for Rehearing on the grounds that the Commission acted unlawfully, unjustly, and unreasonably when it issued its August 7, 2008 , Notice of Correction Nunc Pro Tunc (the "Notice"), for the reasons that follow.

The proper uses of a nunc pro tunc order are limited to correcting errors or omissions in a tribunal's records. "It is universally held that the only true function of a nunc pro tunc order is to correct some error or inadvertence in the recording of that which was actually done, but which, because of that error or omission was not properly recorded; and, that it may not be used to order that which was not actually done, or to change or modify the action which was taken." *City of Ferguson v. Nelson*, 438 S.W.2d 249, 253 (Mo.1969) (emphasis in original). In other words, it is intended to correct a scrivener's error or some other error in properly recording what was actually done—it is not permitted to be used to change a judgment that actually was entered but was entered erroneously. *State ex rel. Poucher v. Vincent*, --- S.W.3d ----, 2008 WL 2894485 (Mo. 2008).

“[F]or a nunc pro tunc correction to be valid it must be supported by some writing in the record which establishes that the judgment entered is not in fact the judgment rendered” and was, instead, a clerical error. *Wiseman v. Lehmann*, 464 S.W.2d 539, 542 (Mo.App.1971). Where there is nothing in the record to support the conclusion that the tribunal was correcting a clerical mistake, rather than a judicial error that is not subject to correction by a nunc pro tunc order, the nunc pro tunc is a nullity and has no effect. *In re Estate of Shaw*, 256 S.W.3d 72, (Mo. 2008).

In the present case, the Commission wrote in the original Order that, "This case shall be closed on August 8, 2008." If the Commission had made an inadvertent clerical error as to the date, or if the Commission had made an inadvertent typographical error, such as writing, "This case shall *not* be closed," then it would be proper to use a nunc pro tunc to correct the error in the recording of what was actually done. Quite the contrary, the Commission affirmatively closed this case, and now, at the suggestion of Staff, has determined that it would prefer not to have done so.

There is nothing in the record to support the conclusion that the Commission was correcting a clerical mistake, and the original order, the motion of Staff requesting "clarification," and the Notice indicate otherwise. As Staff wrote in its motion: " Denying rehearing on the Commission's Order for Production. . . does not bring all issues in the underlying Complaint case to resolution. . . . Counsel for Staff requests the Commission clarify its August 7, 2008 Order Denying Respondents' Application for Rehearing and Motion to Dismiss to allow the underlying Complaint case to remain open so that it may reach resolution." In fact, Staff was requesting that the Commission modify its order, not clarify it, as there was nothing unclear about the fact that the order closed the case.

The Commission itself writes in the Notice that it " inadvertently closed the case," in effect admitting that the closure of the case was actually done and that the Commission desired to change that action and keep the case open instead. This is precisely what the Commission may not do in an order nunc pro tunc. There is no evidence here that the words, "This case shall be closed on August 8, 2008," were a scrivener's error or some other error in properly recording what was actually done. Under these circumstances, nunc pro tunc does not lie. The Commission must abide by the terms of its own order, and it has lost jurisdiction to modify the order.

Respondents also incorporate by reference into this pleading their arguments for dismissal (for lack of jurisdiction) as set forth in their July 25, 2008 Application for Rehearing and Motion to Dismiss, previously filed in this case.

For the foregoing reasons, respondents request the Commission to vacate its Notice of Correction Nunc Pro Tunc, or, in the alternative, dismiss this matter for lack of jurisdiction, or, in the alternative, stay this matter pending the outcome of the Writ of Review case.

Respectfully submitted,

LATHROP & GAGE, L.C.

/s/David G. Brown

David G. Brown	Mo. #42559
Aimee D.G. Davenport	Mo. #50989
314 East High Street	
Jefferson City, MO 65101	
Telephone: (573) 893-4336	
Facsimile: (573) 893-5398	
E-mail: adavenport@lathropgage.com	

***Attorneys for Universal Utilities, Inc. and  
Nancy Carol Croasdell***

## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 18th day of August, 2008, to:

General Counsel Office  
Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
GenCounsel@psc.mo.gov

Office Of Public Counsel  
200 Madison Street, Suite 650  
P.O. Box 2230  
Jefferson City, MO 65102  
opcservice@ded.mo.gov

Missouri Public Service Commission  
200 Madison Street, Suite 800  
P.O. Box 360  
Jefferson City, MO 65102  
jennifer.hernandez@psc.mo.gov

**/s/David Brown**