IN THE MISSOURI SUPREME COURT

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, Respondents, v. **OFFICE OF PUBLIC COUNSEL**, Appellant.	)	**Appeal No. SC99978**

Appeal from the Public Service Commission of the State of Missouri
Case No. WE-2021-0390

OFFICE OF THE PUBLIC COUNSEL'S SUBSTITUTE REPLY BRIEF

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I. Introduction

"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…." §393.140(11) RSMo.[1] Here, this Court must decide whether the Missouri Public Service Commission (the "Commission") has the legal authority to allow a regulated water utility to do precisely what this statute prohibits—charge a single customer a different rate to extend its water mains than that set forth in its tariff.

Although this Court has found that the language of a tariff binds the Commission, DCM Land, LLC ("DCM") and the Commission (collectively "Respondents") argue that the Court should find that it does not. Taken to the extreme, should this Court overrule its precedent, nothing will preclude the Commission from allowing a utility to charge a single customer a different rate for service than that customer is obligated to pay under the utility's tariff without a corresponding alteration of the tariff itself. In most instances, Missouri law[2] prohibits this. §§393.130.3; .140(11) RSMo. Such a result would render a utility's tariff essentially meaningless. At a minimum, it would likely greatly increase the number of cases before the Commission.

Should this Court overrule its precedent, it must determine whether good cause supports granting the variances. Finally, should the Court reach the OPC's third point, it must determine whether the Commission's Revised Order Granting Variances and Granting Waiver (the "Revised Order"), which cited to no difference in service or proper difference in situation, allowed Missouri-American Water Company ("MAWC") to unlawfully discriminate in favor of DCM.

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[1] All references to the Revised Statutes of Missouri are to the 2016 Revised Statutes of Missouri as updated by the 2021 Cumulative Supplement, unless otherwise noted.

[2] Section 393.355 RSMo. allows for a special rate in certain circumstances.

II. Argument

A. Because a Live Controversy Remains, This Case is Not Moot

The Commission argues that the Court should dismiss this appeal as moot because MAWC's tariff Rule 23 ("Rule 23") changed as a result of MAWC's most recent general rate case. (Comm'n Br. 12-13). MAWC filed that case and it concluded during the pendency of this appeal. However, because a live controversy exists, this case is not moot and the Court need not dismiss it. Further, even if the Court were to determine that the change in the tariff mooted the current live controversy, the public interest exception to mootness applies.

This Court has explained that "'[a] cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy.'" *State v. Reardon*, 41 S.W.3d 470, 473 (Mo. banc 2001) (citation omitted). "'When an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed.'" *Id.* (citations omitted).

"Tariffs that are superseded by subsequently filed tariffs are generally moot and are not considered on appeal because superseded tariffs cannot be corrected retroactively." *Mo. Pub. Serv. Comm'n v. Off. of the Pub. Couns.*, 516 S.W.3d 823, 828 (Mo. banc 2017) (citation omitted) (hereinafter "*MAWC ISRS*"). The *MAWC ISRS* case concerned a question of whether MAWC appropriately collected its Infrastructure System Replacement Surcharge where the statute required the locality to have more than one million residents. *See generally id.* The OPC argued that St. Louis no longer met that requirement. *Id.* at 827. This Court decided that the case was moot because while on appeal the applicable surcharge rate had been reset to zero in MAWC's general rate case. *See id.* at 828. This Court further decided that the public interest exception did not apply. *Id.* at 829-30.

This case, however, is different. In the *MAWC ISRS* case, this Court determined that the case was moot because "[t]he surcharge has been reset to zero, and superseded

tariffs cannot be corrected retroactively." *Id.* at 828. Here, however, regardless of which version of Rule 23 this Court considers, DCM received a variance from the tariff rule.

The prior version of Rule 23 included two cost sharing mechanisms, one that applied to the St. Louis Metro District (95%/5%) and another that applied to all of the other districts (86%/14%). (Stipulation of Facts ¶¶ 10, 11, LF 105-06, V.I 109-10;[3] MO PSC No. 13, 1st Revised Sheet No. R48, Rule 23A.3, App. A38 (hereinafter "Rule 23A.3"); MO PSC No. 13, Original Sheet No. R51, Rule 23C.6, App. A41 (hereinafter "Rule 23C.6")). It also included a provision allowing entities to receive a refund of certain costs based on the number of customers that guaranteed to take service at their premises within 120 days. (Stipulation of Facts ¶ 10, LF 105, V.I 109; MO PSC No. 13, 1st Revised Sheet No. R48, Rule 23A.2, App. A38 (hereinafter "Rule 23A.2")).

The current version of Rule 23 includes one cost sharing mechanism (75%/25%). (MO PSC No. 13, 2nd Revised Sheet No. R48, Rule 23A.2, Reply App. A1). The current version of Rule 23 does not allow for any refunds because it removes the 120-day timeframe and removes the 4 times annual revenue requirement in all instances. (*Id.*; *see* Comm'n Case No. WR-2022-0303, Report & Order App. A 5, Comm'n App. A34).

As a result of the Revised Order, DCM will pay 86% of the cost to extend MAWC's water mains to Cottleville Trails, which is located in MAWC's St. Louis Metro District. (Revised Order 12, LF 436, V.III 17, App. A12). It will also receive a refund of some of the costs to extend MAWC's mains. (*See id.*). The amount of that refund is based on the number of new customers who guarantee to take service within five years. (*Id.*).

The terms under which MAWC will extend its water mains to DCM's Cottleville Trails therefore represent a variance from both MAWC's prior Rule 23 and its current Rule

[3] "LF" refers to the legal file submitted in this case. It is continuously paginated amongst each of the three volumes filed. The page number following LF refers to the page number of the legal file. "V.*x*" refers to the pdf version of the specified volume of the legal file as it has been filed in case.net. The page number following "V.*x*" references the page number of the specified pdf.

23. For this reason, even though the underlying tariff sheets have changed, a live controversy exists and the case is not moot.

Should the Court determine that the revision of MAWC's tariff Rule 23 mooted this case, it should not dismiss this case because it falls within the public interest exception to the mootness doctrine. This "very narrow exception" allows "a court [to]…consider an otherwise moot case if it 'presents an issue that (1) is of general public interest and importance, (2) will recur and (3) will evade appellate review in future live controversies.'" *MAWC ISRS*, 516 S.W.3d at 829 (citation omitted).

Each of the elements of the exception applies to this case. First, the question of whether the Commission has the authority to grant variances from a regulated utility's tariff is a question of general public interest and importance. Second, there is at least one case pending before the Commission in which a regulated utility requests a variance from its tariff, similar to the variances requested in this case. (*See generally* Commission Case Number GE-2023-0393, Spire Application, Reply App. A9-A13). Therefore, this issue will likely recur. Finally, because large regulated utilities routinely file general rate cases and the Commission routinely orders changes to the utilities' tariff as a result of them, it is likely that this case will evade appellate review in future live controversies. For example, this is at least the second case involving MAWC that has come before this Court in which changes to the applicable tariff sheets have raised the question of whether the case is moot. *See generally MAWC ISRS*, 516 S.W.3d 823. Because each of the elements of the public interest exception are met in this case, even if this Court concludes that this case has been mooted, it should not dismiss this case, but should consider it under the public interest exception.

B. The Commission Exceeded its Legal Authority by Granting the Variances[4]

The Commission is bound by the language of a utility's tariff. *See State ex rel. St. Louis Cnty. Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86 (Mo. 1926) (hereinafter "*STL Gas*") (concluding that a properly filed "schedule of rates and charges" binds "not only…the utility and the public, but…the Public Service Commission as well"); *State ex rel. Kennedy v. Pub. Serv. Comm'n*, 42 S.W.2d 349, 353 (Mo. 1931) (hereinafter "*Kennedy*") (stating that "[w]ithout some such provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule" (citation omitted)). Here, in approving Rule 23, which details MAWC's line extension policy, the Commission chose not to include a provision allowing for variances. (*See generally* MO PSC No. 13, 1st Revised Sheet No. R48-1st Revised Sheet No. R55, App. A38-A45 (hereinafter "Rule 23")). This tariff has "the force and effect of law" and the Commission must enforce it as written. *STL Gas*, 286 S.W. at 86. "[I]t cannot set the[rates and charges] aside as to certain individuals and maintain them in force as to the public generally." *Id.* This Court's *Kennedy* and *STL Gas* opinions control the outcome of this case. (*See* OPC's Br. 20-25).

1. This Court May Wish to Clarify its Statement in *Kennedy*

Respondents argue that the Commission cannot give itself the power to grant variances by including a provision allowing for variances in the utility's tariff. (*See* Comm'n Br. 30-31; DCM Br. 23). Allowing the Commission to give itself the power to vary a tariff by including a variance provision may be inconsistent with the plain language of §393.140(11) RSMo. and this Court's *STL Gas* decision. §393.140(11) RSMo.; *STL*

[4] The Commission argues that the OPC does not challenge its authority to grant the Rule 23A.2 variance. (Comm'n Br. 16). This fundamentally misunderstands the OPC's position. The OPC has consistently challenged the Commission's authority to grant *any* of the variances. (*See* OPC Br. 19-47). It is only *if* this Court concludes that the Commission has the authority to grant the variances, that the OPC takes no position on whether the stipulated facts justify the Commission's good cause finding regarding the Rule 23A.2 variance. (*See id.* 47 n.39).

Gas, 286 S.W. at 86. However, this Court's statement in *Kennedy* appears to require this conclusion. In *Kennedy*, this Court considered whether the existence of a provision allowing for exceptions from a utility's main extension rule made the rule discriminatory. 42 S.W.2d at 352-53. In deciding that it did not, this Court stated "[w]ithout some such provision in the rule the commission could not authorize the company to make an exception in the application of its approved rule." *Id.* at 353 (citing *STL Gas*, 286 S.W. 84). Though this Court in *Kennedy* was not tasked with deciding whether the Commission may lawfully grant a variance from a tariff, it appears the only way to interpret this statement is that a variance provision must exist in the tariff rule before the Commission may lawfully grant a variance. *Id.*

This case requires this Court to determine whether the Commission may lawfully grant a variance from a utility's tariff. Based on the plain language of §393.140(11) RSMo., the Commission has no such power. The statute states in pertinent part:

> *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.*[5]

§393.140(11) RSMo. (emphasis added). Relying on a predecessor to this statute, which contained nearly identical language, this Court concluded that a utility's tariff binds the Commission and it could not "set the[tariff] aside as to certain individuals and maintain [it]…in force as to the public generally." *STL Gas*, 286 S.W. at 86.

If the Commission determines that a utility's tariff is problematic, it is not without the power to correct it. *See STL Gas*, 286 S.W. at 86. Although it cannot grant a variance from the application of the tariff, §393.140(11) RSMo. provides a process by which the

[5] The OPC will refer to this provision as the "Uniform Application Provision."

utility may request a change to its tariff and the Commission may expedite the time in which that change takes effect. *See* §393.140(11) RSMo. In fact, those changes likely could go into effect nearly immediately. *See State ex rel. Jackson Cnty. v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 35 (Mo. banc 1975) (Seiler, C.J., dissenting) (describing the file method available under §393.140(11) and stating "if the commission so decided for 'good cause', the increased rates could go into effect almost immediately, as the statute allows the commission under those circumstances to forego the thirty days notice."). Because §393.140(11) RSMo. provides a process by which a utility could request a change to its tariff if application of its tariff results in an unjust, unreasonable, unjustly discriminatory, or unduly preferential treatment of a customer, no need exists to allow variances in the application of a tariff rule. *See* §§393.140(5), (11) RSMo.

Concluding that the Commission has no power to allow a utility to vary the application of its tariff, regardless of whether the tariff includes a variance provision clearly complies with the Uniform Application Provision of §393.140(11) RSMo. Therefore, this Court may wish to clarify its statement in *Kennedy* here.[6]

2. Respondents' Arguments Do Not Diminish the Importance of *STL Gas*

The Commission attempts to distinguish this Court's *STL Gas* decision and diminish its importance by relying on *City of O'Fallon v. Union Electric Co.*, 462 S.W.3d 438 (Mo. Ct. App. 2015), for the idea that the Commission has no authority to direct a utility's management decisions over its property. (Comm'n Br. 27-28). To further de-emphasize the importance of *STL Gas*, the Commission focuses on the procedural posture by which it came before the Commission. (*See id.* 27-29). However, these distinctions do little to diminish the crucial role this case plays in deciding the instant case.

[6] DCM contends that this Court made the statement in *Kennedy* regarding the existence of a variance provision in a tariff even though a predecessor statute to §393.140(11) RSMo. existed at that time. (DCM Br. 23). However, it does not appear that this Court considered the impact of §393.140(11) RSMo. on the lawfulness of the tariff provision. *See generally Kennedy*, 42 S.W.2d 349. It is unclear how this statute would have affected the analysis.

This Court's *STL Gas* decision is distinguishable from the Court of Appeals, Western District (the "Western District") *City of O'Fallon* case. In *City of O'Fallon*, the Western District considered whether the Commission had the authority to force a regulated utility to unwillingly sell its property.[7] 462 S.W.3d at 442-43. The complainants brought their argument pursuant to §393.190 RSMo. and later relied on §393.140(5) RSMo. *Id.* at 443. The Western District concluded that the Commission has no such authority under either statute. *Id.* at 444-45.

The complainants in *STL Gas*, however, did not request the Commission require the utility to unwillingly sell its property. *See* 286 S.W. at 85. Rather, they requested only that the Commission find that the utility's main extension rule as applied to them was unreasonable. *Id.* Further, the *STL Gas* court did not address any question regarding a utility's property. *See generally id.* Rather, this Court defined the question presented as

> whether the Commission may in specific instances compel a gas corporation to make extensions and furnish service in violation of the rules relating to rates and charges which are on file with it and have its approval, express or implied, and which are applicable to the public as a whole.

Id. at 85. The *STL Gas* Court found that the "applicatory law" was §10478(12) RSMo., which later became §393.140(11) RSMo. *Id.* at 85-86; Notes to §393.140(11) RSMo. Based on that statute, the Court concluded that the utility's tariff bound "not only…the utility and the public, but…the Public Service Commission as well."[8] *STL Gas*, 286 S.W.

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[7] Although the complainants in *City of O'Fallon* requested a Commission Order and a tariff change, the Court stated "the relief sought through both the order and the tariff amendment was effectively the same: that the Commission order Ameren to sell its street lights to the Cities." 462 S.W.3d at 442-43.

[8] DCM argues that this Court in *STL Gas* "contemplated the Commission's authority to change or modify the tariff rules separate and apart from filing a new or supplementary tariff." (DCM Br. 20-21). DCM relies on this Court's statement that the tariff may be "modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission." (*Id.* at 20 (citation omitted)).

The Commission may after a hearing determine that a utility's rates or charges are "unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law," and then "shall determine and prescribe the just and

at 86. Therefore, not only did *STL Gas* consider a factually distinct situation, it relied on a different statute as well.

The Commission also argues that because *STL Gas* was a complaint case, it is distinguishable from the instant case. (Comm'n Br. 28). Although the Commission may have initially considered the *STL Gas* case under a complaint standard of review, as shown in the Court-defined question presented and the Court's rationale, this standard did not affect this Court's decision. *See generally* 286 S.W. 84-86. The legal question addressed by this Court in *STL Gas* and its decision directly affect the instant case.

Respondents also attempt to draw a distinction between *STL Gas* and the instant case on the grounds that here MAWC and DCM jointly requested the variance, whereas in *STL Gas*, the utility did not wish to act in contravention of its tariff. (Comm'n Br. 28-29; DCM Br. 20). The Commission also argues that the two cases differ because in requesting the cost-sharing mechanism variances, MAWC and DCM sought to apply a cost-sharing mechanism that appeared in MAWC's tariff,[9] whereas the complainants in *STL Gas* sought

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reasonable rates and charges thereafter to be in force for the service to be furnished…." §393.140(5) RSMo.; *see STL Gas*, 286 S.W. at 86. However, as this Court made clear in *STL Gas*, the Commission "cannot set [the tariff rates and charges]…aside as to certain individuals and maintain them in force as to the public generally." 286 S.W. at 86. Granting a variance in the application of a utility's tariff rule without requiring a corresponding alteration of the tariff itself does exactly that.

[9] The Commission attempts to downplay the relief DCM received in the cost-sharing mechanism variances. (*See, e.g.*, Comm'n Br. 28-29). For instance, it states "[i]nstead the Joint Applicants were requesting that a cost allocation ratio already contained in [MAWC's] former tariff for other developers outside of the St. Louis Metro District be applied to DCM…because it better fit DCM['s]…situation." (*Id.* at 28 (citation omitted)). The Commission provides no indication of how the 86%/14% cost-sharing mechanism "better fit[s]" DCM's situation. (*See id.*). These types of statements also ignore that the Stipulated Facts clearly indicate that Cottleville Trails is located within MAWC's St. Louis Metro District for purposes of Rule 23. (Stipulation of Facts ¶¶ 3, 5, LF 103-04, V.I 107-08). Regardless of whether MAWC's tariff included the 86%/14% cost-sharing mechanism, the plain language of Rule 23 shows that it does not apply to Cottleville Trails. (*See* Rule 23). The relief DCM received represents a variance from the plain language of MAWC's tariff.

relief that did not appear in the utility's tariff.[10] (Comm'n Br. 28-29). Neither Respondent cites to anything to suggest that these differences are material or should affect this Court's analysis. (*See* Comm'n Br. 28-29; DCM Br. 20).

Section 393.140(11) RSMo. shows that these differences are immaterial. The Uniform Application Provision prohibits, in part, a utility from "charg[ing], demand[ing], collect[ing] or receiv[ing] 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…." §393.140(11) RSMo. This prohibition is absolute. *See id.* It does not provide for a different or more favorable standard of review when the utility requests a variance from its tariff or when the provided relief appears in the utility's tariff, but does not apply to the specific situation. *See id.* Therefore, these differences do not affect the importance of this Court's prior *STL Gas* decision.

3. Section 393.140(11) RSMo. Does Not Support Granting the Variances

Respondents argue that a broad reading of the Commission's enabling statutes support a finding that the Commission had legal authority to grant the variances.[11] (Comm'n Br. 13-16, 18-22; DCM Br. 12-17). However, Respondents conveniently ignore the Uniform Application Provision and that this Court has stated that the Commission "cannot set [a utility's tariff]…aside as to certain individuals and maintain [it]…in force as to the public generally." *STL Gas*, 286 S.W. at 86.

The Commission "is purely a creature of statute." *Kan. City Power & Light Co.'s Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, 764 (Mo. Ct. App. 2016) (citation

[10] The Commission ignores that in extending the 120-day time limit for new customers to guarantee to take service, it provided relief that is not mentioned in the tariff.

[11] The Commission argues that because there are multiple ways for it to accomplish certain goals, it must have the authority to grant variances from a utility's tariff. (Comm'n Br. 16-18). Although the Commission may have the statutory authority to accomplish certain goals in various ways, no authority exists allowing the Commission to grant a variance from a rule in a utility's tariff.

omitted). "[I]ts powers are limited to those conferred by statute either expressly, or by clear implication as necessary to carry out the powers specifically granted." *Id.* (citation omitted). Section 386.610 RSMo. states that the "provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." §386.610 RSMo. However, "this provision does not authorize the Court to vest the [Commission] with authority that the legislature has not granted it either expressly or by clear implication." *State ex rel. Mogas Pipeline LLC v. Mo. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo. banc 2012) (citation omitted). "If a power is not granted to the [Commission] by Missouri statute, then the [Commission] does not have that power." *Id.*

The Commission's decision to grant the variances violates the Uniform Application Provision because it allows MAWC to "charge, demand, collect [and] receive a…less or different compensation" from DCM and to extend to DCM a "form of contract or agreement" different from that extended to any other entity in the St. Louis Metro District for providing the same service. §393.140(11) RSMo. Even if the Commission had the broad authority to grant variances from a tariff, it could not do so here because §393.140(11) RSMo. expressly prohibits MAWC from acting on these variances.

Citing to §393.140(11) RSMo., the Commission states that "[u]nless otherwise ordered by the Commission, public utilities are not authorized to charge, demand, collect or receive any amount for any service rendered that differs from the rate or charge applicable to such service in the tariff on file with the Commission." (Comm'n Br. 17 (citation omitted)). In this sentence, the Commission appears to argue that it can authorize a utility to accept a different amount than that prescribed in the tariff, without requiring a change in the tariff itself. However, this statement mischaracterizes §393.140(11) RSMo. This statute provides a procedure to request a tariff change. *See* §393.140(11) RSMo. The reference to the Commission's authority to order otherwise refers to the Commission's ability to require a different period of time as a part of that procedure. *See id.* The referenced sentence of §393.140(11) RSMo. states:

> *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…water 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.

Id. (emphasis added). The next sentence states "The commission for good cause shown may allow changes *without requiring the thirty days' notice* under such conditions as it may prescribe." *Id.* (emphasis added). Reading these sentences together shows that the Commission has the power to change the thirty-day requirement identified in the statute. *See Jackson Cnty.*, 532 S.W.2d at 35 (Seiler, C.J., dissenting). In light of the statute's prohibition against accepting an amount different than that specified in the tariff, it cannot be that this sentence supports the Commission's authority to grant the variances. *See State ex rel. MoGas Pipeline LLC v. Pub. Serv. Comm'n*, 395 S.W.3d 562, 568 (Mo. Ct. App. 2013) ("[S]tatutory provisions are 'not read in isolation but [are] construed together, and if reasonably possible, the provisions will be harmonized with each other.'" (citations omitted)) (hereinafter "*MoGas*"). This Court's conclusion that although the Commission may order changes to a utility's tariff, "it cannot set the[tariff] aside as to certain individuals and maintain [it]…in force as to the public generally" supports this position. *STL Gas*, 286 S.W. at 86.

DCM contends that the OPC's interpretation of §393.140(11) RSMo. violates canons of statutory interpretation. (DCM Br. 14-16). DCM argues that the Court should interpret the word "change" to include a variance from a tariff rule with no corresponding modification of the tariff sheet itself. (*Id.* at 15-16). Although DCM acknowledges that "[t]he word 'change' has a broad definition," it limits its argument to definitions that support its position. (*Id.*). DCM ignores that "change" is also defined as "to make over to a radically different form, composition, state, or disposition;" "to substitute another or others in place of;" and "to replace with another or others of the same kind of class."

Change, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). Viewed in isolation, these broad definitions may suggest that the word "change" is ambiguous when determining whether the Commission has the authority to allow a variance from a tariff. *See State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 399 S.W.3d 467, 480 (Mo. Ct. App. 2013) (hereinafter "*Union Electric*"). However, the Court need not find ambiguity here. Looking to the whole of the statute, indeed the very next sentence, the legislature prohibited utilities from "charg[ing], demand[ing], collect[ing] or receiv[ing] 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…." §393.140(11) RSMo. It would be absurd to interpret §393.140(11) RSMo in way that authorizes the Commission to allow utilities to vary the application of their tariffs in one sentence and then prohibits the utility from acting on those variances in another. *See Union Elec.*, 399 S.W.3d at 480-81 (recognizing "the overriding rule that 'construction of a statute should avoid unreasonable or absurd results.'" (citation omitted)); *MoGas*, 395 S.W.3d at 568 ("[S]tatutory provisions are 'not read in isolation but [are] construed together, and if reasonably possible, the provisions will be harmonized with each other.'" (citations omitted)). The Court need only apply the plain language of §393.140(11) RSMo. to find that it does not give the Commission the legal authority to allow MAWC to change the application of its tariff rules as to DCM. *See Union Elec.*, 399 S.W.3d at 479-80 ("If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then we are bound by that intent and cannot resort to any statutory construction in interpreting the statute." (citation omitted)).

Respondents also point to past Commission practice to support their position.[12] (Comm'n Br. 23; DCM Br. 17). "[T]his Court has been willing to defer to the agency's interpretation of its own rules, provided that interpretation was reasonable." *Amend. of the*

[12] For instance, the Commission argues that prior to the adoption of 20 CSR 4240-2.060(4) "the Commission was approving waivers under General Orders issued by the Commission, and the courts were aware of and condoned the practice.[]" (Comm'n Br. 23). The Commission provides no cite to support this contention.

Comm'n's Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n, 618 S.W.3d 520, 525 (Mo. banc 2021) (citation omitted). However, this Court defers to this interpretation "if the meaning of a statute or regulation enforced by the Commission is ambiguous and the canons of construction cannot resolve the issue…." *Mo. Pub. Serv. Comm'n v. Union Elec. Co.*, 552 S.W.3d 532, 539 n.9 (Mo. banc 2018) (citations omitted) (hereinafter "*UE 2018*"). Overall, this Court "exercises 'independent judgment' to 'correct erroneous interpretations.'" *Id.* at 539. As addressed above, §393.140(11) RSMo. is not ambiguous. Therefore, this Court should give the Commission's interpretation of the statute no weight. *UE 2018*, 552 S.W.3d at 539 n.9. In exercising its "independent judgment" this Court must correct the Commission's erroneous interpretation of law and conclude that the Commission has no authority to allow a utility to vary from its tariff. *Id.* at 539.

Further, Respondents' arguments ignore that the Commission includes variance and waiver provisions in certain tariff provisions. (*See, e.g.*, MO PSC No. 13, 1st Revised Sheet No. R13, Rule 4M, App. A32 (hereinafter "Rule 4M")). The existence of these variance and waiver provisions suggest that the Commission understands the importance of including such provisions and decided not to include one in Rule 23. *See State ex rel. Midwest Gas User's Ass'n v. Pub. Serv. Comm'n*, 996 S.W.2d 608, 616 (Mo. Ct. App. 1999) ("Where Congress includes particular language in on[]e section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion….This is 'powerful evidence' of the intent of the legislature." (citation omitted)). Further, should the Court adopt an interpretation of §393.140(11) RSMo. that allows for the Commission to grant variances in the absence of these variances provisions, it would render the provisions allowing for waivers and variances in other parts of MAWC's tariff needless surplusage. The Court should avoid such an interpretation. *See Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356, 363 (Mo. Ct. App. 2003).

4. The Commission's Ability to Vary its Rules Has no Effect on its Ability to Vary a Tariff

Respondents argue that if the Commission has the authority to grant variances from its own rules, it also has the authority to grant variances from a utility's tariff.[13] (*See* Comm'n Br. 22-26; DCM Br. 24-25). This Court need not decide here whether the Commission may lawfully grant a variance from its rules. Though both a properly promulgated Commission rule and a Commission-approved tariff become state law, a Commission rule is not a tariff. *See State ex rel. Mo. Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 337 (Mo. Ct. App. 2006); *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 611 (Mo. Ct. App. 1999). In fact, a Commission rule is invalid if it conflicts with state law, which includes a tariff. §536.014(2) RSMo. No statute grants the Commission the authority to allow a utility to vary its application of its tariff. Rather, §393.140(11) RSMo. prohibits the utility from applying its tariff differently as to different customers. Similarly, this Court's *STL Gas* decision prohibits the Commission from setting the tariff "aside as to certain individuals and maintain[ing] [it]…in force as to the public generally." 286 S.W. at 86. Therefore, any citation to authority interpreting the Commission's authority to grant a variance from the application of its rules are distinguishable from the instant case.[14]

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[13] Respondents argue that the OPC collaterally attacks 20 CSR 4240-2.060(4). (Comm'n Br. 24; DCM Br. 16-17). This is not true. The OPC does not challenge the Commission's authority to adopt the rule. Rather, its position is that in adopting the rule, the Commission set forth only the procedure for requesting a variance or waiver when such a variance or waiver is allowed. (*See* OPC Br. 35-36).

[14] Respondents continue to rely on *Missouri Gas Energy*, 210 S.W.3d 330 and *Deaconess Manor*, 994 S.W.2d 602. (Comm'n Br. 31-33; DCM Br. 24-25). Both of these cases are factually distinct from the instant case. (*See* OPC Br. 40-46).

The Western District also did not "not[e] that if the Commission may lawfully grant a variance from its own rule—which also becomes the law—it may further do so as to a tariff rule[,]" as DCM asserts. (DCM Br. 25 (citing *Deaconess Manor*, 994 S.W.2d at 609-11)). Rather, the Western District made clear that a difference exists between a variance from a Commission rule and a potential variance from a tariff. *See Deaconess Manor*, 994 S.W.2d at 609-11. Although the Commission in *Deaconess Manor* granted a variance from

5. Rule 2C is Not a Variance Provision and Provides No Notice to Ratepayers

The Commission recognizes that MAWC's tariff Rule 2C "does not give the Commission the authority to grant the variances," but argues that it gives notice to MAWC's customers that they may request a variance from the tariff.[15] (Comm'n Br. 34). DCM, on the other hand, argues that Rule 2C is a variance provision that gives the Commission the authority to grant the variances. (DCM Br. 18-19). However, Rule 2C provides no notice to customers that they may request a variance from MAWC's tariff. Rather, the plain and ordinary meaning of Rule 2C suggests that there will be some modification of MAWC's current tariff language. (OPC Br. 37-40). Rule 2C states in full: "[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." (MO PSC No. 13, 1st Revised Sheet No. R9, Rule 2C, App. A29 (emphasis added)). The variances will affect only the *application* of Rule 23, not Rule 23 itself. Therefore, Rule 2C has no impact on the current case. Further, to interpret this provision as a blanket waiver or variance provision would create needless surplusage within MAWC's tariff, as other provisions of MAWC's tariff contain specific variance provisions. (*See, e.g.*, Rule 4M). The Court should avoid such an interpretation. *See Knob Noster Educ.*, 101 S.W.3d at 363.

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a tariff rule—one that allowed for variances—the Western District concluded that variance had no effect on the utility's tariff. *Id.* at 610-11.

[15] The Commission also argues that 20 CSR 4240-2.060(4) "gives notice to all that a variance of a tariff is a possible request for relief for all tariffs." (Comm'n Br. 23). Rule 23 neither references nor incorporates 20 CSR 4240-2.060(4). (*See generally* Rule 23). This rule sets forth only the procedure that a party must follow in requesting a waiver or variance. (OPC Br. 35-36). Nothing in this rule or Rule 23 suggests that 20 CSR 4240-2.060(4) puts parties on notice that they may request a variance from a tariff rule that does not specifically provide for one. *C.f. State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 311 S.W.3d 361, 365 (Mo. Ct. App. 2010) (discussing the filed rate doctrine and stating "the approved tariffs are to 'provide advance notice to customers of prospective charges, allowing the customers to plan accordingly.'" (citation omitted)).

6. Conclusion

In *STL Gas*, this Court made clear that the Commission "cannot set [a utility's tariff]…aside as to certain individuals and maintain [it]…in force as to the public generally." 286 S.W. at 86. In granting the variances here, the Commission has done just that. This Court should follow its precedent and conclude that the Commission's Revised Order is unlawful.

C. The Evidence the Commission Relied On Fails to Show that Good Cause Exists to Support Granting the Variances

In addition to being unlawful, the Commission's decision is unjust and unreasonable because it fails to cite good cause[16] for granting the variances.

In arguing that good cause exists to grant the variances, Respondents rely most heavily on the location of Cottleville Trails. (*See* Comm'n Br. 35-36; DCM Br. 28-30). To the extent that Respondents seek to challenge the Territorial Agreement between MAWC and Public Water District No. 2 of St. Charles County, Missouri ("PWD#2"), the Court should ignore these arguments as collateral attacks on the Commission-approved Territorial Agreement. *See* §386.550 RSMo. ("In all collateral actions or proceedings the orders and decisions of the commission which have become final shall be conclusive."). Absent an amendment or revocation of the Territorial Agreement, PWD#2 cannot serve Cottleville Trails. (*See* OPC's Br. 48-50). Therefore, PWD#2's cost of service is irrelevant and cannot be used to support a finding of good cause.

The Commission argues that the OPC "contends that the existence of the territorial agreement is irrelevant" and that its argument that the Commission ignored the Territorial Agreement raises an "apparent contradiction" that it failed to resolve. (Comm'n Br. 36). Again, the Commission fundamentally misunderstands the OPC's argument. The OPC has consistently relied on the Territorial Agreement's important role in this case. (OPC Br. 48-

[16] In granting the variances, the Commission alludes to a "good cause" standard. (*See* Revised Order 10–11, LF 434-35, V.III 15-16, App. A10-A11). The OPC presumes for the purpose of this Brief only, that "good cause" constitutes the proper standard.

50, 53 n.47). It is precisely because of this Territorial Agreement that the terms under which PWD#2 would extend service to Cottleville Trails are irrelevant. (*See id.*). Because of this Territorial Agreement, PWD#2 *cannot* provide service to Cottleville Trails. §247.172.2 RSMo. (2001); (Stipulation of Facts ¶ 5, LF 104, V.I 108). Though the Commission may have recognized the existence of the Territorial Agreement in its Revised Order, its findings of fact and the impactful role the location of Cottleville Trails plays in its decision to grant the variances shows the Commission failed to give effect to the Territorial Agreement. (*See* Revised Order 3, 10-11, LF 427, 434-35, V.III 8, 15-16, App. A3, A10-11). Absent an amendment to or revocation of the Territorial Agreement, PWD#2 *cannot* serve Cottleville Trails. §247.172.2 RSMo. (2001).

DCM argues that "it is neither just nor reasonable to require a developer to pay significantly higher costs than would be available from another utility that is ready, willing, and able to provide the necessary service." (DCM Br. 29). It also refers to "a lower cost alternative" that "is available." (*Id.* 30). DCM provides no support for either contention. These statements ignore that PWD#2 *cannot* provide service to Cottleville Trails without violating the terms of the Territorial Agreement. *See* §247.172.2 RSMo. (2001). If DCM wanted to receive service from PWD#2 it could have sought an amendment to or revocation of the Territorial Agreement. §§247.172.3, .6 RSMo. (2001). Nothing in the record indicates that DCM or any other party has sought a change to the Territorial Agreement. Because *only* MAWC may serve Cottleville Trails it is entirely just and reasonable—in fact it is the only lawful outcome—to require DCM to pay the charges as stated in MAWC's tariff. *See* §393.140(11) RSMo; (Stipulation of Facts ¶ 5, LF 104, V.I 108).

Given the impactful role that Cottleville Trails' location has had on this matter and, as explained in the OPC's Initial Brief, because the remaining facts[17] cited by the

[17] DCM argues that it is "critical" that Cottleville Trails "has benefit to others aside from DCM." (DCM Br. 29). Though some benefits may be provided to others as a result of MAWC's extension of service to Cottleville Trails, this is true in nearly every water extension case. To give some meaning to the good cause standard, it cannot be that factors that exist in nearly every water extension case support a finding of good cause.

Commission will exist as long as DCM develops Cottleville Trails and nothing in the record indicates that DCM will not,[18] the Commission's Revised Order lacks good cause and is unreasonable and unjust.

D. The Revised Order Allows MAWC to Unreasonably and Unduly Discriminate in Favor of DCM

The Commission's Revised Order is also unlawful and unjust because it allowed MAWC to unduly and unreasonably discriminate in favor of DCM.

Respondents address discrimination only briefly. (*See* Comm'n Br. 37-38;[19] DCM Br. 31-33). They argue that no evidence exists in the record regarding other developers. (Comm'n Br. 38; DCM Br. 32-33). Because of the variances, it cannot be disputed that Rule 23 will apply differently to DCM as compared to MAWC's other customers. This should be evidence enough that discrimination amongst MAWC's customers exists.

Respondents also assert that the variances are not unduly discriminatory because they apply only to the development phase of the project. (Comm'n Br. 38; DCM Br. 32-33). This suggests that DCM, as the developer of Cottleville Trails, and not the future homeowners—MAWC's customers—will primarily benefit from these variances. (*See*

[18] In its Statement of Facts DCM stated "[d]ue to these increased costs and the unattainable time limit [that result from taking service from MAWC instead of PWD#2], the Development may not be feasible without the requested and agreed-upon variances." (DCM Br. 8 (citing LF 81)). In making this statement, DCM cites only to a MAWC response to a Commission Staff data request. (*See* LF 81). The Commission did not make this finding in its Findings of Fact. (*See* Revised Order 2-5, LF 426-29, V.III 7-10). Similarly, the Parties did not stipulate to this fact. The Court should ignore this statement.

[19] The Commission argues that the cost-sharing mechanism variances are not unlawfully discriminatory, in part, because the tariff included the cost-sharing mechanism applied to DCM, it simply applied to a different area. (Comm'n Br. 21-22). The Commission also argues that these variances were not unduly discriminatory because Cottleville Trails is "near the edge of the St. Louis Metro District." (*Id.*). None of the Stipulated Facts support this contention. Further, the Commission cites to nothing to support that either issue makes the variances less discriminatory. As explained above, neither §393.140(11) RSMo. nor this Court's *STL Gas* decision allow for a more favorable standard of review under these circumstances.

id.). Neither Respondent cites anything to support that this makes the variances any less unduly discriminatory.

As the OPC explained in its Appellant's Brief, §393.130.3 RSMo. prohibits "undue or unreasonable preference or advantage." §393.130.3 RSMo.; (OPC Br. 51-54). Examples of what does and does not constitute unlawful discrimination are enlightening. For instance, the Western District has concluded that no unlawful discrimination results when some customers temporarily subsidized extensions to new customers as a result of a Commission choice between alternatives to allocate costs caused by a federal tax law change. *State ex rel. Mo. Off. of Pub. Couns. v. Mo. Pub. Serv. Comm'n*, 782 S.W.2d 822, 823-25 (Mo. Ct. App. 1990). Similarly, this Court found no unlawful discrimination when commercial power customers were subject to a higher percentage increase than other categories of customers because evidence existed that the customers could add a heavy load to the system at any time—a privilege for which they had to pay—and that their infrequent use "is usually unprofitable to the utility." *Smith v. Pub. Serv. Comm'n*, 351 S.W.2d 768, 771-72 (Mo. 1961).

However, when there was "no dissimilarity or difference in the service of furnishing and supplying water" to two sets of customers, this Court found that it was unjust and unfair discrimination to offer the rate to only one set of customers. *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37, 44-46 (Mo. 1931).

In granting the variances, the Commission has allowed MAWC to vary the application of its tariff to the benefit of a single developer: DCM. It has done so, even though the Parties stipulated to facts that clearly establish that DCM should be subject to a 95%/5% cost-sharing mechanism. (*See* Stipulation of Facts ¶ 5, LF 104, V.I 108).

The discrimination caused by the variances here does not result from a Commission choice among alternatives or from a difference in usage patterns and load. *Mo. Off. of Pub. Couns.*, 782 S.W.2d at 825; *Smith*, 351 S.W.2d at 771-72. Rather, nothing in the record supports a finding that this difference is based on a "dissimilarity or difference in service or operative conditions." *See Laundry*, 34 S.W.2d at 45. Nothing in the record establishes that it is less expensive for MAWC to extend its service lines to Cottleville Trails or that

Cottleville Trails will take service in a unique way. Because as explained above, the Court should disregard all arguments that rely on PWD#2's cost of service, nothing in the record establishes that Cottleville Trails is subject to any different situation than any other development in MAWC's St. Louis Metro District. For these reasons, this discrimination is undue and unreasonable.

III. Conclusion

WHEREFORE, the Office of the Public Counsel respectfully requests that the Court reverse the Commission's Revised Order and order the Commission on remand to enter an Order consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 84.06(b) and 84.06(c), I hereby certify (1) that the foregoing brief includes the information required by Rule 55.03, (2) that the foregoing Brief complies with the limitations contained in Rule 84.06(b) in that, according to the word count of the word-processing system used in its preparation, this Brief (excluding the cover, this certificate, the signature block, and the appendix), contains 7,690 words, and (3) that, pursuant to Rule 103.08, copies of this Brief have been served to all counsel of record through the electronic filing system this 10th day of July 2023.

Respectfully submitted,

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