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 BRIEF

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I. Jurisdictional Statement

This appeal primarily concerns the scope of the Public Service Commission of the State of Missouri's (the "Commission") legal authority to grant variances from a rule in a regulated utility's Commission-approved tariff. Specifically, whether the Commission has the legal authority to grant Missouri-American Water Company ("MAWC") and DCM Land, LLC's ("DCM") joint request for variances from three provisions of a rule in MAWC's Commission-approved tariff that governs the extension of MAWC's water mains.

Should this Court determine that the Commission has the legal authority to grant these variances, this case also concerns whether sufficient facts exist to justify granting the requested variances in this case and whether granting these variances allows MAWC to engage in undue discrimination in favor of DCM.

Because the Office of the Public Counsel (the "OPC") has complied with the requirements of § 386.500 RSMo. (App. A20) and § 386.510 RSMo. (App. A21) and this Court granted the OPC's request for transfer following the Missouri Court of Appeals, Western District's (the "Western District") opinion, this Court has jurisdiction to hear this appeal "as on original appeal" under article V, section 10 of the Constitution of the State of Missouri, Missouri Supreme Court Rule 83.09 (App. A61), and § 386.510 RSMo. (App. A21).

II. Introduction

A properly filed and published tariff "acquires the force and effect of law." *State ex rel. St. Louis Cnty. Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86 (Mo. 1926) (hereinafter "*St. Louis County Gas*"). "[I]t 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." *Id.* (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.*

This Court's description of the role of a regulated utility's tariff has helped to define the regulatory environment surrounding these utilities since at least 1926. In this case though, the Commission has allowed a regulated utility, MAWC, to stray from applying three provisions of its main extension tariff rule for the benefit of a single developer, DCM. The result of these three variances is that DCM will pay less and MAWC will pay more for MAWC to extend its water mains to DCM's planned development, Cottleville Trails. Because MAWC is a regulated utility, it is likely that MAWC's ratepayers will ultimately shoulder these increased costs.

This Court's prior cases make clear that the Commission does not have the legal authority to grant these variances. Nothing cited by the Commission in its March 16, 2022 Revised Order Granting Variances and Granting Waiver (the "Revised Order") changes that result. Further, should this Court overturn its precedent and determine that the Commission has the legal authority to grant the requested variances, the facts relied on by the Commission in this case do not support granting them. Finally, in granting MAWC and DCM's requested variances, the Commission has allowed MAWC to unduly discriminate in favor of DCM.

For at least these reasons, this Court should reverse the Commission's Revised Order and order the Commission on remand to enter an Order consistent with this Court's opinion.

III. Statement of Facts

The OPC begins with a discussion of the factual background of this matter before turning to a brief discussion of the procedural background most applicable to this appeal.

A. Factual Background

This case arises from MAWC and DCM's request for variances from three provisions of MAWC's tariff Rule 23, which governs the extension of MAWC's water mains. (Stipulation of Facts ¶¶ 10-11, 13-14, LF 105-06, V.I pdf 109-10).[1] Specifically, MAWC and DCM request variances from Rules 23A.2, 23A.3, and 23C.6. (*Id.* ¶¶ 10–11, LF 105-06, V.I pdf 109-10). These three variances effectively decrease the amount DCM must pay for MAWC to extend its water mains to DCM's new residential development, Cottleville Trails. (*See id.* ¶¶ 1, 10-11, 13-14, LF 103, 105-06, V.I pdf 107, 109-10).

Cottleville Trails is located in Cottleville, Saint Charles County, Missouri. (*Id.* ¶ 3, LF 103, V.I pdf 107). For the initial development, DCM plans for 355 single family residences and 175 apartment units. (*Id.* ¶ 4, LF 104, V.I pdf 108). An additional 217 attached, single family residences are planned for future development. (*Id.*).

A Commission-approved Territorial Agreement[2] between MAWC and Public Water District No. 2 of St. Charles County, Missouri ("PWD#2") places Cottleville Trails in MAWC's exclusive service area. (*Id.* ¶ 5, LF 104, V.I pdf 108). MAWC's service area in St. Charles County—where Cottleville Trails is located—is part of the St. Louis Metro District for MAWC's tariff Rule 23. (*Id.* ¶¶ 3, 5, LF 103-04, V.I pdf 107-08).

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[1] "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* pdf" 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* pdf" references the page number of the specified pdf.

[2] On May 15, 2001, the Commission approved this Territorial Agreement in Case Number WO-2001-441 and, on November 15, 2011, approved its amendment in Case Number WO-2012-0088. (Stipulation of Facts ¶ 5, LF 104, V.I pdf 108).

Two of the three variances MAWC and DCM request would change a cost sharing mechanism identified in MAWC's extension Rules 23A.3[3] and 23C.6.[4] (*See id.* ¶¶ 10-11, 13-14, LF 105-06, V.I pdf 109-10). This cost sharing mechanism determines the portion MAWC and the applicant each must pay of a specified portion of the cost to extend MAWC's water mains to the applicant.[5] (*See id.*). For costs exceeding a specified amount,

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[3] 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.*

(Stipulation of Facts ¶ 10, LF 105, V.I pdf 109; MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23A.3, App. A38 (emphasis added)).

[4] 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, LF 106, V.I pdf 110; MO PSC No. 13, Original Sheet No. R 51, Rule 23C.6, App. A41 (emphasis added)).

applicants in the St. Louis Metro District pay 95% of the costs and MAWC pays 5% of the costs. (*Id.*). For those costs in other districts, applicants pay 86% of the costs and MAWC pays the remaining 14% of the costs. (*Id.*). Because MAWC's service area in St. Charles County—where Cottleville Trails is located—is part of the St. Louis Metro District, the 95%/5% cost sharing mechanism applies. (*Id.* ¶¶ 3, 5, 10, 11 LF 103-06 V.I pdf 107-10). With their requests for variances from Rules 23A.3 and 23C.6, MAWC and DCM request that DCM instead be subject to the 86%/14% cost-sharing ratio. (*Id.* ¶ 14, LF 106, V.I pdf 110).

For their third requested variance, MAWC and DCM seek a variance from MAWC's tariff Rule 23A.2,[6] which requires MAWC to fund the extension of its water mains to an applicant "where the cost of the extension does not exceed four (4) times the estimated average annual revenue from the new Applicant(s) . . . ." (*Id.* ¶¶ 10, 13, LF 105-06, V.I pdf 109-10). Rule 23A.2's definition of a "New Applicant" requires the applicant

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[5] At the time the instant case arose, Rules 23A.3 and 23C.6 created a distinction between (1) the St. Louis Metro District and (2) all other districts. (*See id.* ¶¶ 10-11, LF 105-06, V.I pdf 109-10). As a result of a Stipulation and Agreement in MAWC's most-recent rate case, Commission Case Number WR-2022-0303, MAWC's tariff Rule 23 no longer differentiates between the districts. Because the prior version of MAWC's tariff Rule 23 was in effect at the time of this case, the OPC refers to it only.

[6] Rule 23A.2 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, LF 105, V.I pdf 109; MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23A.2, App. A38 (emphasis added)).

to "guarantee to [MAWC] . . . that they will take water service at their premises within one hundred twenty (120) days . . . ."[7] (*Id.* ¶ 10, LF 105, V.I pdf 109). With this requested variance, MAWC and DCM ask that the Commission extend the time for DCM to connect a customer to the system from 120 days to five (5) years. (*Id.* ¶ 13, LF 106, V.I pdf 110).

MAWC and DCM's requests seek to change the application of these three tariff provisions as to DCM only. (*See generally* Joint Application, LF 3-9, V.I pdf 7-13). They did not seek corresponding changes to MAWC's tariff to reflect these variances. (*See generally id.*).

B. Procedural Background

This case began with MAWC and DCM's Joint Application, in which they requested the three variances. (LF 6-8; V.I pdf 10-12).

The Staff of the Commission ("Staff") then filed a Recommendation in which it suggested 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." (LF 55-56, V.I pdf 59-60). DCM and MAWC both filed a response to Staff's Recommendation. (LF 83-92, V.I pdf 87-96).

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"). (LF 103-09, V.I pdf 107-13). On that same day, DCM, Staff, and MAWC each filed a brief addressing the issues in this matter. (LF 110-36, V.I pdf 114-40).

The Commission initially granted each of the variances requested by MAWC and DCM. (LF 137-44; V.I pdf 141-48).

[7] As a result of the Stipulation and Agreement in Commission Case Number WR-2022-0303, MAWC's tariff Rule 23A.2 no longer includes the 120-day time limit. However, because the rule applicable at the time the instant case arose included the limitation, the OPC refers to that version of the rule only.

The OPC then filed an Application for Rehearing (the "First Application for Rehearing") raising arguments similar to those raised here. (LF 145-57, V.I pdf 149-61). The Commission granted the First Application for Rehearing and ordered the Parties to appear at a procedural conference. (LF 173-76, V.I pdf 177-80).

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." (LF 180-84, V.II pdf 4-8).

Later, the Commission entered an Order Directing Filing in which it made two inquiries and asked a series of questions and sub-questions. (LF 185-89, V.II pdf 9-13). As it pertains to this appeal, 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." (LF 185, V.II pdf 9). The Commission's questions and sub-questions also requested additional factual information. (LF 185-86, V.II pdf 9-10). Each of the Parties then filed pleadings to address the Commission's legal and factual questions in accordance with the schedule the Commission entered. (LF 197-419, V.II pdf 21-243).

Following this briefing, the Commission issued its Revised Order, granting the variances MAWC and DCM requested in the Joint Application. (LF 425-39, V.III pdf 6-21, App. A1-A15). In the Revised Order, the Commission concluded that it had the legal authority to grant the variances. (*Id.*). The Commission also concluded that a sufficient factual basis existed to grant each of the variances. (*See generally id.*).

The OPC then filed its Second Application for Rehearing (the "Second Application for Rehearing") raising arguments similar to those raised in the First Application for Rehearing and those addressed herein. (LF 440-70, V.III pdf 21-51).

The Commission denied the Second Application for Rehearing stating only that "Public Counsel has not shown sufficient reason to rehear the revised order." (LF 471-74, V.III pdf 52-55).

The OPC then filed a Notice of Appeal and accompanying attachments initiating an appeal before the Western District. (Notice of Appeal, Case File pt. I[8]). Following briefing and oral argument, the Western District affirmed the Commission's decision on each of the OPC's three points on appeal. (Opinion, Case File pt. III). The OPC filed a Motion for Rehearing, or Alternatively a Request for Transfer ("Motion"), which the Western District denied. (Motion, Case File pt. III).

The OPC then filed a Request for Transfer before this Court. (Request for Transfer). This Court granted that request. (Apr. 4, 2023 Mandate). This Court later granted the OPC, MAWC, DCM, and the Commission's Joint Motion for Extension and adopted a briefing schedule. (Mot. for Extension; Apr. 19, 2023 Order).

[8] The Missouri Court of Appeals, Western District transferred the case record to this Court in five parts. The case file contains individually filed documents. The number following "Case File pt." indicates the part of the case file containing the document.

IV. Points Relied On

Point One: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff rule because the Commission does not have legal authority to grant the requested relief, and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because MAWC's tariff does not include a provision allowing for variances from Rule 23, the Commission is without the legal authority to grant the requested variances and its decision is unlawful.

- *State ex rel. St. Louis Cnty. Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84 (Mo. 1926)
- *State ex rel. Kennedy v. Pub. Serv. Comm'n*, 42 S.W.2d 349 (Mo. 1931)
- § 393.140(11) RSMo.
- § 393.130(3) RSMo.

Point Two: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff Rules 23A.3 and 23C.6 because, assuming that legal authority to grant the variances exists, the facts cited by the Commission do not establish good cause to grant the variances, and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because the Commission ignored the Territorial Agreement and each of the other facts relied upon to establish good cause will exist regardless of whether the Commission approves the variances, the Commission's decision is unreasonable and unjust.

- § 247.172 RSMo. (2001)

Point Three: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff rules because the Commission's decision has authorized MAWC to unduly discriminate in favor of DCM in violation of § 393.130(3) RSMo., and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because only DCM has been granted preferential or advantageous variances from MAWC's tariff and MAWC

has made no changes to its tariff that would put others on notice of their ability to request a variance, the Commission's decision is unlawful and unjust.

- § 393.130(3) RSMo.
- *State ex rel. Laundry, Inc. v. Pub. Serv. Comm'n*, 34 S.W.2d 37 (Mo. 1931)
- *State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 782 S.W.2d 822 (Mo. Ct. App. 1990)
- *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 Cnty. & Christian Cnty., Mo.*, 2007 Mo. PSC LEXIS 148 (2007) (App. A57-A60)

V. Standard of Review

This Court "may finally determine" this case "as on original appeal." Mo. Const. art. V, § 10; *see* Mo. Sup. Ct. R. 83.09 (App. A61). This Court has described the standard of review to apply when reviewing decisions of the Commission saying:

> "Pursuant to section 386.510, appellate review of an order by the [Commission] is two-pronged: first, the reviewing court must determine whether the [Commission's] order is lawful; and second, the court must determine whether the order is reasonable." *Grain Belt Express Clean Line, LLC v. Pub. Serv. Comm'n*, 555 S.W.3d 469, 471 (Mo. banc 2018) (quotation marks omitted). All questions of law, including whether statutory authority exists to support an order of the [Commission], are reviewed *de novo*. *See State ex rel. MoGas Pipeline, LLC v. Pub. Serv. Comm'n*, 366 S.W.3d 493, 496 (Mo. banc 2012). An order of the [Commission] is reasonable when "the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious; [and] where the [Commission] has not abused its discretion." *In the Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 524 (Mo. banc 2015). The [Commission's] orders are presumed to be valid, and the burden is on those challenging the orders to prove their invalidity. *State ex rel. Utility Consumers Council, Inc. v. Public Service Com.*, 585 S.W.2d 41, 47 (Mo. banc 1979).

Amendment of the Comm'n's Rule Regarding Applications for Certificates of Convenience & Necessity v. Mo. Pub. Serv. Comm'n, 618 S.W.3d 520, 523 (Mo. banc 2021) (hereinafter "*Amendment"*).

VI. Argument

The Commission's Revised Order is unlawful because the Commission does not have the legal authority to grant MAWC and DCM's requested variances. This Court's prior cases make that clear. The bases the Commission cited in the Revised Order to establish that authority do not change this result. Should this Court determine that the Commission has legal authority to grant the variances, the Revised Order is unreasonable and unjust because the facts the Commission relied on do not establish "good cause" to grant the variances. Finally, the Commission's decision is unlawful and unjust because it allows MAWC to unduly discriminate in favor of DCM.

A. Point One: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff rule because the Commission does not have legal authority to grant the requested relief, and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because MAWC's tariff does not include a provision allowing for variances from Rule 23, the Commission is without the legal authority to grant the requested variances and its decision is unlawful

MAWC's tariff binds the Commission. *St. Louis Cnty. Gas*, 286 S.W. at 86. MAWC's tariff Rule 23 does not include a variance provision. (*See* MO PSC No. 13, 1st Revised Sheet No. R 48-1st Revised Sheet No. R 55, Rule 23, App. A38-45). Therefore, the Commission lacks the legal authority necessary to grant MAWC and DCM's requested variances from MAWC's tariff.[9] *St. Louis Cnty. Gas*, 286 S.W. at 86; *State ex rel. Kennedy v. Public Service Commission*, 42 S.W.2d 349, 352-53 (Mo. 1931) (hereinafter "*Kennedy*"). Because the Commission granted MAWC and DCM's requested variances

[9] Under the first prong of this Court's review of a Commission order, the Court "must determine whether the [Commission's] order is lawful." *Amendment*, 618 S.W.3d at 523 (citation omitted). In doing so, the Court reviews *de novo* whether statutory authority exists to support the Commission's Revised Order. *Id.* (citation omitted).

from MAWC's tariff without the legal authority to do so, the Commission's Revised Order is unlawful.[10] *See id.*

1. The Commission Has No Legal Authority to Grant MAWC and DCM's Requested Relief

a. Applicable Legal Standards

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) (quoting *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 397 S.W.3d 441, 446–47 (Mo. Ct. App. 2012)) (hereinafter "*KCP&L Request*"). "[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.*

Section 393.140(11) mandates that a regulated utility fairly apply its Commission-approved tariff. *See* § 393.140(11) RSMo. (App. A27) In pertinent part, it states:

> 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.

Id.

This Court, 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 Cnty. Gas Co.*, 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." *Id.* (emphasis

[10] The OPC preserved this argument by raising it in the Second Application for Rehearing, filed before the Commission on March 25, 2022. (*See* 2nd Appl. for Rehearing 23-25, LF 462-64, V.III pdf 43-45).

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 . . . 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.*

Approximately five years later, this Court decided that a provision allowing variances from a rule in a utility's tariff did not render the tariff unduly discriminatory. *Kennedy*, 42 S.W.2d at 352-53. Citing to *St. Louis County Gas* for support, the *Kennedy* court recognized that without a provision allowing the Commission to grant a variance from a rule in a utility's tariff, "the [C]omission could not authorize the company to make an exception in the application of its approved rule." *Id.* at 353 (citation omitted).

This Court's decisions in *St. Louis County Gas* and *Kennedy* should guide this Court's analysis in this case. This Court's *St. Louis County Gas* decision makes the binding nature of a utility's tariff clear. *See* 286 S.W. 84. In that case, this Court decided that the Commission could not compel a gas utility to extend service to a group of new customers in contravention of the rules in the utility's tariff. *Id.* at. 85-86. Noting that a properly filed and approved tariff binds both the utility and the public it serves, this Court concluded that "[i]f such a schedule is to be accorded the force and effect of law," it must bind the Commission as well as the utility and its customers. *Id.* 86. However, this Court noted that if the Commission found the rates and charges are "unjust and unreasonable," then "the Commission, after a hearing . . . may order the scheduled modified in respect to them." *Id.* Then, quoting the statutory provision requiring that a utility apply its tariff uniformly, currently found in § 393.140(11) RSMo.,[11] this Court concluded that both the utility and the Commission had to uniformly apply the utility's tariff to all customers and potential customers. *See id.* (stating "[t]he [utility] cannot 'extend to any person or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, *except*

[11] At the time of *St. Louis County Gas*, this statutory language was found in § 10478(12) RSMo. *See* § 393.140(11) RSMo. note; *St. Louis Cnty. Gas*, 286 S.W. at 85 (citing § 10478(12)).

such as are regularly and uniformly extended to all persons and corporations under like circumstances.' Neither can the Public Service Commission." (emphasis in original)).

In *Kennedy* this Court issued an opinion that further bears on the outcome of this case. *See* 42 S.W.2d 349. In *Kennedy*, a group of residents sought to change a water utility's tariff rules to require the water utility to cover the cost of extending its water mains to the residents. *Id.* at 350. The water utility's tariff included a rule governing when the utility or the requesting customer was to pay for the extension. *Id.* at 349–50. The rule itself included a clause specifically allowing the Commission to approve a variance to the application of the rule. *Id.* at 350. That clause stated in full:

> 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 customers' requests for a rule requiring the utility to pay for the extension or allowing for a hearing before the Commission, this Court concluded that the clause allowing for an exception did not make the rule discriminatory. *Id.* at 352–53.[12] This Court then made clear that "[w]ithout some such provision [that allows for variances] in the rule the commission could not authorize the company to make an exception in the application of its approved rule."[13] *Id.* at 353 (citing *St. Louis Cnty. Gas*, 286 S.W. 84).

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[12] This Court found that the variance provision at issue in *Kennedy* did not make the main extension rule unduly discriminatory. 42 S.W.2d at 352-53. It did not make a broad finding that *all* variance provisions would meet this standard. *See generally id.*

[13] The *Kennedy* court asserted that a variance provision was necessary for the Commission to authorize a variance, but concluded only that the language of the variance provision at issue, which was limited to "exceptional cases" and required Commission approval prior to the utility allowing a variance from the rule, did not make the rule unduly discriminatory. 42 S.W.2d at 349, 352-53. Though allowing the Commission to grant a variance if the tariff allows for variances may seem at odds with this Court's decision that the language of a regulated utility's tariff binds the Commission, *Kennedy* can be harmonized with *St. Louis County Gas*. Specifically, as long as the tariff allows for variances in the way that this Court approved in *Kennedy*, the Commission is doing no more than applying the language of the tariff itself. *See id.* at 353 (stating "If rightly observed . . . we think that

b. This Court's Decisions in *St. Louis County Gas* and *Kennedy* Make Clear the Commission Has No Legal Authority to Grant the Variances

This Court's *St. Louis County Gas* and *Kennedy* decisions make clear that the Commission is bound by MAWC's tariff and cannot grant a variance absent an explicit provision permitting that variance. *St. Louis Cnty. Gas*, 286 S.W. at 86; *Kennedy*, 42 S.W.2d at 352-53. MAWC's tariff Rule 23 does not contain a variance provision. (*See* MO PSC No. 13, 1st Revised Sheet No. R 48-1st Revised Sheet No. R 55, Rule 23, App. A38-45). Therefore, in granting MAWC and DCM's requested variances from three provisions of MAWC's tariff rule, the Commission has exceeded its legal authority. *See St. Louis Cnty. Gas*, 286 S.W. at 86*; Kennedy*, 42 S.W.2d at 352-53.

In the Stipulation of Facts, the Parties agreed that "Cottleville Trails is located within the *exclusive* service area of MAWC." (Stipulation of Facts ¶ 5, LF 104, V.I pdf 108 (emphasis added)). Therefore, MAWC's tariff rules apply to DCM as the developer of Cottleville Trails.

The Commission has approved MAWC's tariff and the applicable tariff sheets have been in effect for at least seven (7) years prior to MAWC and DCM seeking the variances. (*See* MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23, App. A38; MO PSC No. 13, Original Sheet No. R 51, Rule 23, App. A41; *see also* LF 10, V.I pdf 14). No party has argued that MAWC's tariff is invalid. Therefore, that tariff has the force of law and binds "not only . . . the utility and the public, but . . . the Public Service Commission as well." *St. Louis Cnty. Gas*, 286 S.W. at 86.

The Parties also stipulated that "[t]he Cottleville Trails development is located in Cottleville, Saint Charles County, Missouri." (*Id.* ¶ 3, LF 103, V.I pdf 107). The Parties agreed 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."

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provision of the rule will not result in unjust discrimination. The evidence indicates that there has been no attempt or disposition so far on the part of the company to do other than comply with the rule according to its spirit and purpose.").

(Stipulation of Facts ¶ 5, LF 104, V.I pdf 108). Therefore, the general provisions of MAWC's tariff Rule 23 and those specific provisions pertaining to the St. Louis Metro District apply to Cottleville Trails. This includes application of the 95%/5% cost sharing mechanism and the rule that applicants take service within 120 days to qualify as a new applicant for purposes of Rule 23. (MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23, App. A38; MO PSC No. 13, Original Sheet No. R 51, Rule 23, App. A41).

MAWC's tariff Rule 23 does not contain a variance provision similar to that addressed by the *Kennedy* court. (*See generally* MO PSC No. 13, 1st Revised Sheet No. R 48-1st Revised Sheet No. R 55, Rule 23, App. A38-45).

Similar to *St. Louis County Gas* and *Kennedy*, this case also concerns the application of a regulated utility's tariff rule pertaining to the extension of the utility's mains, including who is to pay for that extension. *See St. Louis Cnty. Gas*, 286 S.W. 85; *Kennedy*, 42 S.W.2d at 349-50; (Stipulation of Facts ¶¶ 10-11, 13-14, LF 105-06, V.I pdf 109-10). The Commission's Revised Order, however, contradicts this Court's decisions in those two cases. In granting the requested variances and allowing MAWC to change how it applies its tariff rule for a single customer, the Commission has implied that it is not bound by MAWC's tariff. *Contra St. Louis Cnty. Gas*, 286 S.W. at 86 (making clear that a utility's properly filed and approved tariff binds "not only . . . the utility and the public, but . . . the Public Service Commission as well."). The Commission did so, even though Rule 23 does not contain a variance provision similar to that addressed in *Kennedy*. (Revised Order 12-13, LF 436-37, V.III pdf 17-18, App. A12-A13); *contra Kennedy*, 42 S.W.2d at 353. The *Kennedy* court referring to a variance provision, explicitly stated 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."[14] *Id.* (emphasis added) (citing *St. Louis Cnty. Gas*,

[14] The importance of a variance provision in a regulated utility's tariff cannot be overstated. If the Commission is to have the power to grant variances from the tariff, a utility's captive ratepayers must be on notice that the Commission may grant variances from the rules and rates by which they receive service, as established in the tariff. This Court's statement in *Kennedy* 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" helps

286 S.W. 84). Given the clear dictates of this Court, the Commission cannot set aside the provisions of MAWC's tariff Rule 23 "as to certain individuals and maintain them in force as to the public generally."[15] *St. Louis Cnty. Gas*, 286 S.W. at 86.

The practical effect of these variances is that DCM will pay less and MAWC—more likely MAWC's ratepayers—will pay more for MAWC to extend its water mains to Cottleville Trails. Future applicants will also presumably pay the rate specified in the tariff for MAWC to extend its water mains to them. The Commission's decision to grant the variances is directly at odds with this Court's decisions in *St. Louis County Gas* and *Kennedy*. The Commission's Revised Order exceeded the Commission's statutory authority and is unlawful.

2. The Bases the Commission Cited to Establish Legal Authority Fail to Bestow the Necessary Authority to Grant the Variances

It is clear from this Court's precedent in *St. Louis County Gas* and *Kennedy* that the Commission lacks authority to grant the variances. *See St. Louis Cnty. Gas*, 286 S.W. at 86; *Kennedy*, 42 S.W.2d at 352-53. However, in the Revised Order, the Commission

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to ensure that all ratepayers, both current and prospective, know the rules that govern their service and when they may seek a variance from those rules. 42 S.W.2d at 352-53. As can be seen in this case, without a variance provision in the tariff, prospective ratepayers likely will not know that they can seek a variance from a tariff rule. (*See* Staff Recommendation Memorandum Attachment E "MAWC Data Request Response" 1-2, LF 80-81, V.I pdf 84-85 (MAWC stating in response to a question that asks for the number of developers that have asked for a variance of this nature that "MAWC is not aware of any formal variance requests. However, developers have from time-to-time expressed that a 120 day period is not enough time to connect customers in a subdivision, especially subdivisions similar in size [to] the subdivision that is the subject of this case.")).

[15] This Court has made clear that if the Commission believes the rules and regulations included in MAWC's tariff—of which the "rules and regulations . . . as to extensions are [an] integral part"—are "unjust and unreasonable," then "the Commission, after a hearing . . . may order the scheduled modified in respect to them." *St. Louis Cnty. Gas*, 286 S.W. at 86. In this case, the Commission did not require MAWC to make any change to its tariff. (Revised Order 12-13, LF 436-37, V.III pdf 17-18, App. A12-A13 (requiring only that "[a]ny Main Extension Contract . . . entered into by MAWC with DCM Land for Cottleville Trails shall reflect the variances granted.")).

attempted to establish legal authority by citing to two statutes, one regulation, one provision of MAWC's tariff, and two cases. (Revised Order 5-8, LF 429-32, V.III pdf 10-13, App. A5-A8). Yet none of these grounds provide the legal authority the Commission seeks. On the contrary, rather than providing legal authority to grant the variances, the statutes cited by the Commission prohibit it. The regulation cited by the Commission also does not grant the required legal authority because it is a procedural regulation. 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, both of the cases the Commission relies on are distinguishable based on key elements of the cases. Therefore, neither case supports the Commission's conclusion that it has the legal authority necessary to grant MAWC and DCM's requested relief. This Court's precedent makes clear that the Commission is bound by MAWC's Commission-approved tariff and the bases cited by the Commission fail to change that.[16]

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

In its Revised Order, the Commission states that the authority to waive the application of a rule included 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." (Revised Order 7, LF 431, V.III pdf 12, App. A7). The Commission does not cite to any statute in support of this proposition. However, throughout the Conclusions of Law section, the Commission cites to two statutes: (1) § 393.140(11) RSMo. (App. A27) and (2) § 393.130(3) RSMo. (App. A23). Neither of these statutes provide a ground for deviating from this Court's precedent in *St. Louis County Gas* and *Kennedy*. The OPC will address each statute in turn.

[16] The OPC preserved this portion of its argument by raising it in the Second Application for Rehearing, filed before the Commission on March 25, 2022. (*See* 2nd Appl. for Rehearing 7-23, LF 446-62, V.III pdf 27-43).

i. § 393.140(11) RSMo.

The Commission begins its Conclusions of Law section with reference to part of § 393.140(11) RSMo. (Revised Order 5, LF 429, V.III pdf 10, App. A5). However, the Commission specifically excludes other portions of that statute, including language that expressly prohibits the variances sought by MAWC and DCM. (*See id.*).

Looking to the whole of the statute, it becomes clear that the statute does not provide legal authority for the Commission to grant MAWC and DCM's requested relief because (1) MAWC and DCM do not seek to change MAWC's tariff and the Commission does not order MAWC to do so, and (2) granting the variances would allow MAWC to violate the express language of the statute itself.

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

> The commission shall: . . . Have power to require every . . . water 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 . . . water 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 . . . 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. 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.

§ 393.140(11) RSMo. (emphasis added) (App. A27).

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

In its Revised Order, the Commission cites to only portions of § 393.140(11) RSMo. (Revised Order 5, 7 n.24, LF 429, 431, V.III pdf 10, 12, App. A5, A7). 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.

(*Id.* 5, LF 429, V.III pdf 10, App. A5). When combined with the provision that the Commission "for good cause shown may allow changes without requiring the thirty days' notice," courts have referred to the portion of the statute the Commission relied on as part of the "file and suspend" procedure that an investor-owned utility may utilize when seeking a rate increase before the Commission. *See State ex rel. Jackson Cnty. v. Pub. Serv. Comm'n*, 532 S.W.2d 20, 24-25 (Mo. banc 1975); *KCP&L Request*, 509 S.W.3d at 781 n.6 (citation omitted); *State ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 535 S.W.2d 561, 566–67 (Mo. Ct. App. 1976). This provision is completely inapplicable to the present case because MAWC does not seek to change its tariff or its rates. (*See generally* Joint

Application, LF 3-9, V.I pdf 7-13). In fact, MAWC seeks a change only in how it *applies* the three (3) provisions of Rule 23 in this particular circumstance. (*See generally id.*). It seeks no corresponding change[17] to the language of its tariff rule itself. (*See generally id.*). Therefore, this provision of § 393.140(11) RSMo. does not apply.

The Commission also cites to two other portions of § 393.140(11) RSMo.: (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.'" (Revised Order 5, LF 429, V.III pdf 10, App. A5 (quoting § 393.140(11) RSMo.)). Both of these portions of § 393.140(11) RSMo. allude to the Commission's authority to require

[17] Some may argue that a variance in the application of a tariff rule constitutes a change to the tariff itself. However, the language of § 393.140(11) RSMo. does not support such an interpretation. First, and most importantly, citing to a prior version of § 393.140(11) RSMo., this Court made clear in *St. Louis County Gas* that the Commission cannot "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*." 286 S.W. at 86 (emphasis in original). As explained in greater detail *infra*, each of the variances the Commission granted would violate this express language of the statute. It simply cannot be that the same statute that prohibits the variances also allows them. *See Roesing v. Dir. of Revenue*, 573 S.W.3d 634, 644 (Mo. 2019) (stating that "this Court found enforcing two facially unambiguous probation statutes together created an absurd result because doing so led to an impossible situation." (citing *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 608 (Mo. 2019))). Second, to adopt such an interpretation would provide the Commission with unbridled power to grant variances, even if the tariff provides no notice that the Commission may consider variances. For instance, as an extreme, there would be nothing to stop the Commission from allowing a regulated utility to charge a single customer a more favorable rate for service, while requiring other customers to pay the tariffed rate. Such an interpretation would essentially render a utility's tariff meaningless, even though this Court has concluded that a properly filed and published tariff "acquires the force and effect of law." *St. Louis Cnty. Gas*, 286 S.W. at 86. For at least these reasons, this Court should avoid interpreting the word "change" to encompass variances of limited applicability that do not include a corresponding change in the language of the tariff itself.

a water corporation to file a tariff and to make changes to that tariff. *See* § 393.140(11) RSMo. (App. A27). Again though, here, MAWC does not seek to change the language of its tariff. (*See* Joint Application, LF 3-9, V.I pdf 7-13). Rather, it seeks to change only the application of three (3) provisions of its tariff rule to benefit DCM only. (*See generally id.*). Further, in granting MAWC and DCM's requested relief, the Commission is not requiring MAWC to change its tariff in any way. (*See* Revised Order 12-13, LF 436-37, V.III pdf 17-18, App. A12-A13 (stating only that "Any Main Extension Contract . . . entered into by MAWC with DCM Land for Cottleville Trails shall reflect the variances granted.")); *cf. St. Louis Cnty. Gas*, 286 S.W. at 86 (recognizing that a tariff "may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the Commission."). There has been no indication that these variances will be noted in MAWC's tariff. Rather, to find evidence of these variances, applicants must know to look for the Commission's Revised Order. Therefore, the provisions of § 393.140(11) RSMo. that allude to the Commission's authority to require MAWC to file a tariff and to make changes to that tariff do not apply to the instant case.

For these reasons, the provisions of § 393.140(11) RSMo. that the Commission cited in its Revised Order do not apply to the instant case.

(b). <u>Granting the Variances Allows MAWC to Violate the Express Language of § 393.140(11) RSMo. In At Least Two Ways</u>

In focusing on limited portions of § 393.140(11) RSMo., the Commission ignores that by granting the variances, it has allowed MAWC to violate the express language of the statute in at least two ways.

Section 393.140(11) of the Revised Statutes of Missouri 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.

§ 393.140(11) RSMo. (App. A27) (emphasis added).

First, in granting the variances the Commission allowed MAWC to "charge, demand, collect or receive a . . . less or different compensation for [a] 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. (App. A27). Second, the variances allow MAWC to extend to DCM a rule different than that which is "regularly and uniformly extended to all . . . corporations under like circumstances."[18] *Id.* The OPC will address how each of the variances violate this language in greater detail in turn.

1. <u>The Rule 23A.2 Variance</u>

Analyzing the Rule 23A.2 variance first, it is clear that this variance violates both of these aspects of § 393.140(11) RSMo. Rule 23A.2 describes the circumstances when MAWC must pay part of the cost to extend its water mains to an applicant. (*Id.* ¶ 10, LF 105, V.I pdf 109; *see also* MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23A.2, App. A38). The Rule 23A.2 variance changes the definition of a new applicant from an applicant who, in part, guarantees to take service within 120 days to one who guarantees to take service within five (5) years. (Stipulation of Facts ¶¶ 10, 13, LF 105-06, V.I pdf 109-10).

[18] Some may argue that DCM is not "under like circumstances" as other developers because, absent the Territorial Agreement between MAWC and PWD#2, Cottleville Trails could have been serviced by PWD#2, which provides a more favorable line extension policy. § 393.140(11) RSMo. (App. A27); (*see* Revised Order 11, LF 435, V.III pdf 16, App. A11 (the Commission citing as part of its good cause finding "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.")).

However, the physical location of the land upon which DCM plans to construct Cottleville Trails cannot be changed. As explained in further detail *infra*, based on the Territorial Agreement, *only* MAWC may provide water service to Cottleville Trails. (Stipulation of Facts 2, LF 104, V.I pdf 108). Because PWD#2 cannot provide service to Cottleville Trails without violating the Territorial Agreement, PWD#2's line extension policy is irrelevant. *See* § 247.172(2) RSMo. (2001) (App. A18). Nothing exists in the record to support the contention that DCM is not "under like circumstances" as other developers. *See* § 393.140(11) RSMo. (App. A27).

This variance affects MAWC's rates and charges because by increasing the amount of time for a new applicant to take service, presumably the amount MAWC—more likely MAWC's ratepayers—must pay to extend its water mains to Cottleville Trails will also increase. (*See id.*); *see St. Louis Cnty. Gas*, 286 S.W. at 86 (stating "[t]he rules and regulations of the [utility] . . . as to extensions are integral parts of its schedule of rates and charges.").

As a simplified example, consider the hypothetical situation whereby a developer is able to connect five (5) homes within the tariff-specified 120 days. To calculate how much MAWC must pay to extend its water mains in this situation, one multiplies the estimated average annual revenue MAWC expects to receive from those five (5) homes by four (4).[19] For purposes of this example, assume the estimated average annual revenue is $2,000 per home. So, MAWC would pay $40,000, which is equivalent to $2,000 × 5 × 4.

To determine how the variance will affect MAWC's rates and charges, keep all variables the same, but instead use the number of homes the developer can connect within the requested five (5) years. Assume that means the subdivision is fully developed with 300 homes. Under these assumptions, MAWC must pay $2,400,000, which is equivalent to $2,000×300×4.

Importantly, because the Rule 23A.2 variance applies to DCM only, Rule 23A.2 will apply to DCM differently than other developers. (*See* Stipulation of Facts ¶¶ 10, 13, LF 105-06, V.I pdf 109-10).

2. <u>The Rule 23A.3 and 23C.6 Variances</u>

Turning to the Rule 23A.3 and 23C.6 variances, which change the applicable cost sharing mechanism, both of these variances also violate each of the specified aspects of § 393.140(11) RSMo. (Stipulation of Facts ¶¶ 10-11, 14, LF 105-06, V.I pdf 109-10). First, by changing the applicable cost sharing mechanism from 95%/5% to 86%/14%, the amount of the costs specified in Rules 23A.3 and 23C.6 for which MAWC—likely MAWC's

[19] Rule 23A.2 requires MAWC to pay four times the estimated annual revenue attributable to each new applicant. (MO PSC No. 13, 1st Revised Sheet No. R 48, Rule 23A.2, App. A38).

ratepayers—must pay increases by 9%. (*See id.*). Because the Stipulated Facts in this case clearly establish that Cottleville Trails is located in MAWC's St. Louis Metro District and the 95%/5% cost sharing mechanism applies to the St. Louis Metro District, § 393.140(11) RSMo. clearly prohibits this. *See* § 393.140(11) RSMo. (App. A27) ("No corporation shall charge, demand, collect or receive a . . . lesser 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."). Similarly, by allowing DCM to utilize the 86%/14% cost sharing mechanism, even though Cottleville Trails is located in St. Charles County, which is within MAWC's St. Louis Metro District, MAWC extends to DCM a rule different than that applied to other applicants. (*See* Stipulation of Facts ¶¶ 3, 5, LF 103-04, V.I pdf 107-08). Section 393.140(11) RSMo. also expressly prohibits this result. *See* § 393.140(11) RSMo. (App. A27) ("No corporation shall . . . 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. Conclusion

Therefore, each of the three variances the Commission granted violate § 393.140(11) RSMo. in at least two ways. This is so both because they allow MAWC to "charge, demand, collect or receive a . . . less or different compensation for [a] 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" and because it allows MAWC to extend to DCM a rule different than that which is "regularly and uniformly extended to all . . . corporations under like circumstances." § 393.140(11) RSMo.[20] (App. A27).

[20] Given the clear prohibition against charging a rate different than that specified in the tariff and the requirement that a tariff be applied uniformly to all corporations under like circumstances, many variances will likely violate this statutory standard. *See* § 393.140(11) RSMo. Notably, in *St. Louis County Gas*, this Court stated that if the Commission concludes that a utility's rates and charges are "unjust and unreasonable the Commission, after a hearing . . . may order the schedule modified in respect to them." 286 S.W. at 86.

Therefore, § 393.140(11) RSMo.[21] does nothing to change this Court's precedent established in *St. Louis County Gas* and *Kennedy*. *See St. Louis Cnty. Gas*, 286 S.W. at 86; *Kennedy*, 42 S.W.2d at 352-53. This statute cannot form the basis of the Commission's legal authority to grant the variances in this case.

ii. § 393.130(3) RSMo.

The Commission also cites § 393.130(3) RSMo. in its Conclusions of Law section. (Revised Order 8, LF 432, V.III pdf 13, App. A8). This statute generally prohibits "undue or unreasonable preference or advantage" or disadvantage. *See* § 393.130(3) RSMo. (App. A23). Rather than providing a ground for overturning this Court's precedent in *St. Louis County Gas* and *Kennedy*, 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). In short, by granting the variances, the Commission has allowed MAWC to grant an "undue or unreasonable preference or advantage to" DCM in that MAWC will pay more of the cost to extend its water mains to Cottleville Trails than it would have under the rules set forth in its tariff. *See* § 393.130(3) RSMo. (App. A23). Specifically, as explained *supra*, MAWC will increase the amount it—or more likely its ratepayers—must pay due to changing both the applicable cost sharing mechanism and extending the time for new customers to take service. The OPC addresses why this discrimination is undue and unreasonable more fully in its third point on appeal. Because the statute prohibits undue or unreasonable discrimination and granting the variances results in such, § 393.130(3) RSMo. also cannot

[21] In its Revised 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." (Revised Order 7, LF 431, V.III pdf 12, App. A7). It cites § 393.140 RSMo. in support. (*Id.* at 7 n.24, LF 431, V.III pdf 12, App. A7). However, the Commission did not identify how granting the variances protects the public.

provide a ground for overturning this Court's decisions in *St. Louis County Gas* and *Kennedy*.

b. 20 CSR 4240-2.060(4) is a Procedural Regulation

The Commission also recognized in its Revised 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)[22]—to establish the information that is to be included in an application for variance from Commission rules and tariff provisions." (Revised Order 7, LF 431, V.III pdf 12, App. A7). However, this procedural Commission rule provides no grounds for deviating from this Court's precedent in *St. Louis County Gas* and *Kennedy*.

"[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).

Using these definitions as guides, it is clear that the referenced regulation, 20 CSR 4240-2.060(4), is a procedural regulation. 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

[22] All references to the Missouri Code of State Regulations are to the current version of the applicable regulation, unless otherwise noted.

(C) The name of any public utility affected by the variance or waiver.

20 CSR 4240-2.060(4) (App. A47). This regulation appears in Chapter 2 of Title 20 of the Code of State Regulations, which is entitled "Practice and Procedure." *See* 20 CSR 4240-2.060 (App. A46-A48). Its stated purpose is "Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule." *Id.*

This regulation 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 this Court's directive in *St. Louis County Gas* 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." *See* 286 S.W. at 86 (emphasis added). It also violates this Court's conclusion in *Kennedy* that "the [C]omission could not authorize the company to make an exception in the application of its approved rule" without a variance provision included in the rule. *Kennedy*, 42 S.W.2d at 353. Therefore, 20 CSR 4240-2.060(4) cannot provide a ground for deviating from this Court's *St. Louis County Gas* and *Kennedy* decisions.[23]

[23] It is possible to interpret 20 CSR 4240-2.060(4) in a way that harmonizes the rule with this Court's directives in *St. Louis County Gas* and *Kennedy*. Specifically, if the tariff rule includes a provision allowing for variances, as the Court mentioned in *Kennedy*, then 20 CSR 4240-2.060(4) provides the procedure to follow to request such a variance. 42 S.W.2d at 352-53. In this way, the language of the tariff would bind the Commission and the Commission would only apply the language of the tariff itself. *St. Louis County Gas*. 286 S.W. at 86.

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

The Commission also cites to a provision of MAWC's tariff—Rule 2C—stating that the provision put readers on notice that the Commission may grant a variance from MAWC's tariff rules. (Revised Order 7-8, LF 431-32, V.III pdf 12-13, App. A7-A8). However, because MAWC does not seek to prescribe additional rules or regulations or to alter existing rules or regulations found in its current tariff, Rule 2C simply does not apply to the instant case. Therefore, it also cannot constitute the legal authority for deviating from *St. Louis County Gas* and *Kennedy*.

"[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 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 Court 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 Court 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 Rule 2C, which the Commission relies on, 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." (Revised Order 7–8, LF 431-32, V.III pdf 12-13, App. A7-A8; MO PSC No. 13, 1st Revised Sheet No. R 9, Rule 2C, App. A29 (emphasis added)). The provision is found in Rule 2 of MAWC's tariff, which is entitled "GENERAL." (MO PSC No. 13, 1st Revised Sheet No. R 9, Rule 2C, App. A29).

MAWC's tariff language is clear. A "person of ordinary intelligence" would interpret the words "additional" and "alter" to have a "plain and clear" meaning that requires an actual change in the language of MAWC's tariff. *See Union Elec.*, 399 S.W.3d at 480 (internal quotation marks and citation omitted).

As discussed *supra*, in requesting the variances, MAWC and DCM do not seek any change to the language of MAWC's tariff. (*See generally* Joint Application, LF 3-9, V.I pdf 7-13). Rather, they seek to modify the application of MAWC's current tariff Rule 23 for the benefit of DCM only. (*See generally id.*). Nothing in the record indicates that the language of Rule 23 will be amended in any way. For instance, when the Commission granted the requested variances, MAWC did not file a new tariff sheet that added additional rules or regulations or that changed MAWC's existing Rule 23, nor did the Commission

order it to do so. (Revised Order 12-13, LF 436-37, V.III pdf 17-18, App. A12-A13). Rather, the Commission ordered only that "[a]ny Main Extension Contract, as referenced in PSC MO No. 13, 1st Revised Sheet No. R 51, Rule[] 23C.4. entered into by MAWC with DCM Land for Cottleville Trails shall reflect the variances granted." (Revised Order 12, LF 490, V.III pdf 71, App. A12). Based on the plain and ordinary language of MAWC's tariff Rule 2C,[24] this tariff rule is irrelevant to this case.[25] Therefore, Rule 2C

[24] Importantly, at least initially MAWC itself did not believe that Rule 2C constituted a variance provision sufficient to grant the variances. (*See* LF 80-81, V.I pdf 84-85). Staff asked in a data request: "Do MAWC's tariffs explicitly or implicitly allow for a variance from MAWC's Tariff Sheet, 1st Revised Sheet No. R 48, Rule 23 Extension of Company Mains, A.2. and 3.? If yes, please provide a citation to the authorizing provision." (LF 80, V.I pdf 84). In response MAWC stated only: "Variance is not specifically mentioned in MAWC's main extension tariff provision. Variance from tariff provisions is, however, contemplated by Commission Rule 20 CSR 4240-2.060(4), which includes 'variances or waivers from commission rules and tariff provisions. . . .'" (LF 81, V.I pdf 85). MAWC made no mention of Rule 2C in response to this broad data request. (*See id.*).

[25] To interpret Rule 2C as a blanket provision allowing variances from or waivers of any provision of MAWC's tariff would create needless surplusage in 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* MO PSC No. 13, 1st Revised Sheet No. R 13, Rule 4M, App. A32). 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, App. A36). To avoid a situation in which these provisions become surplusage, the Court should interpret Rule 2C as applying to only those situations where MAWC seeks some sort of substantive change to its tariff, and not where MAWC solely seeks to vary the application of its current tariff rules without a corresponding change in the tariff language. *See Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356, 363 (Mo. Ct. App. 2003) ("We should not interpret statutes in a way which will render some of their phrases to be mere surplusage. We must presume that every word of a statute was included for a purpose and has meaning." (citations omitted)); *Union Elec.*, 399 S.W.3d at 479 (stating that because a "tariff has the force and effect of a statute, [the Court should] apply traditional principles of statutory interpretation.").

also cannot serve as the basis for departing from this Court's decisions in *St. Louis County Gas* and *Kennedy*.

d. 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

Finally, in its Conclusions of Law section, the Commission cited to two cases[26] to support its contention that legal authority exists for it to grant the requested variances: (1) *State ex rel. 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*"). Because key elements of each of these cases can be distinguished from the instant case, neither provides a basis for overturning this Court's decisions in *St. Louis County Gas* and *Kennedy*.[27] The OPC will address each case in turn.

i. 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." (Revised Order 6, LF 430, V.III pdf 11, App. A6). It also contends that the case "recognizes that while various

[26] Although the Commission also cites to *St. Louis County Gas*, 286 S.W. 84, and *Kennedy*, 42 S.W.2d 349, the Commission appears to question the continuing validity of each case. (Revised Order 6, LF 484, V.III pdf 65, App. A6). As the OPC discussed *supra*, both of these cases remain valid and define the Commission's powers with regard to granting variances from a regulated utility's tariff.

[27] It is also important to note that the Western District decided both *Mo. Gas Energy* and *Deaconess Manor*. This Court, however, decided *St. Louis County Gas* and *Kennedy*. A lower court cannot overrule this Court's precedent. *See* Mo. Const. art. V, § 2 (mandating that the Missouri Supreme Court's "decisions shall be controlling in all other courts."); *Boland v. St. Luke's Health Sys.*, 588 S.W.3d 879, 884 (Mo. banc 2019) ("It is well settled that, unless the rulings made, and the legal conclusions reached, by this Court, have been criticized, modified, or overruled ***by this Court***, such rulings are controlling in all lower courts." (internal quotation marks and alterations omitted) (emphasis in original)).

Court decisions have said that 'a tariff has the same force and effect as 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, LF 431, V.III pdf 12, App. A7). 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.

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 then-current Cold Weather Rule into their tariffs. *See generally Mo. Gas Energy*, 210 S.W.3d 330. 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 during the time period between November 1 and March 31. *Id.* at 333. The Emergency Cold Weather Rule, on the other hand, sought to change those conditions for a three month period—from January 1 through March 31, 2006. *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 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 Western District recognized that the issue of the case most related to this case was "a matter of first impression for [the] court." *Id.* at 337. The court defined the question presented as: "[I]f 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 held: "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. 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 subsequently sought to change that rule. *See id.* This key element is not at issue in the instant matter.

Here, MAWC's line extension policy does not reflect a current Commission rule. Also, as distinguished from *Mo. Gas Energy*, in granting the variances the Commission does not seek to change any current Commission rule using its statutory authority to promulgate rules.[28] Because the *Mo. Gas Energy* case addressed a unique situation that is distinguishable from the instant case, it cannot provide the legal authority for deviating from this Court's *St. Louis County Gas* and *Kennedy* decisions.[29]

ii. Deaconess Manor

The Commission cites another 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

[28] 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. 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.* (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. *See id.* This further distinguishes *Mo. Gas Energy*.

[29] Importantly, the Western District did not mention either *St. Louis County Gas* or *Kennedy* in the *Mo. Gas Energy* case. *See generally* 210 S.W.3d 330.

cites *Deaconess Manor* for the proposition that "[t]he Commission has allowed [a] variance from its rules,[30] at the request of a developer, to lower costs."[31] (Revised Order 8, LF 432, V.III pdf 13, App. A8). 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 a basis for departing from the clear decisions reached in *St. Louis County Gas* and *Kennedy*.

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"). 994 S.W.2d at 608. In its complaint, Orchard House claimed that UE erroneously classified certain of Orchard House's buildings "as a residential versus non-residential class customer for electrical service," presumably leading to incorrect bills for service. *Id.* at 604.

As background, 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)).[32] "In 1987, representatives of [UE], along with individuals representing 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

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[30] MAWC and DCM do not request a variance from the Commission's rules. (*See generally* Joint Application, LF 3-9, V.I pdf 7-13).

[31] 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 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 Cnty. & Christian Cnty., Mo.*, 2007 Mo. PSC LEXIS 148, *8–*9 (2007) (App. A59-A60) (hereinafter "*Empire Appl.*").

[32] The language of 4 CSR 240-20.050 now appears in 20 CSR 4240-20.050. *See* 20 CSR 4240-20.050 Authority note (App. A56).

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,[33] [UE] applied to the . . . Commission . . . 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—because 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 and 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."[34] *Id.* The court specifically recognized that "[UE] did not request, nor did the Commission grant, any . . . waiver" of UE's tariff. *Id.* It also stated that "the variance for single metering of part of Building A and all of 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.* (emphasis in original). Then examining information from the prior variance case before the Commission, the court pointed out that "Orchard House's own expert . . . testified that: 'A variance obtained from

[33] Orchard House hired HPI Engineering ("HPI") as a consultant on the electric systems. *Deaconess Manor*, 994 S.W.2d at 604-05.

[34] The *Deaconess Manor* court did not cite anything in support of this statement. 994 S.W.2d at 610.

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 testimony in the variance case before the Commission) (emphasis in original). 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

> 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 allowed for variances. *See* 4 CSR 240-20.050(5) (1996) (App. A54) (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 the rule, presumably the Commission utilized the specified variance procedure 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 therefore 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, not from UE's tariff. *See id.* at 610-11 (referring to the variance and stating "[i]ts stated purpose and effect was to allow a variance from the individual metering requirement only." (emphasis in original)). Second,

the Commission rule in effect at the time, 4 CSR 240-20.050 (1996), allowed for variances. *See* 4 CSR 240-20.050(5)(1996) (App. A54).

Neither of these circumstances exist in the instant case. Here, MAWC and DCM seek variances from MAWC's tariff Rule 23, not a Commission rule.[35] (*See generally* Joint Application, LF 3-9, V.I pdf 7-13). They do so even though, as explained above, MAWC's tariff Rule 23 does not contain a provision allowing for a variance. (*See* MO PSC No. 13, 1st Revised Sheet No. R 48-1st Revised Sheet No. R 55, Rule 23, App. A38-45). Therefore, *Deaconess Manor* cannot be used to support the contention that the Commission has legal authority to grant the requested variances. This Court's decisions in *St. Louis County Gas* and *Kennedy* remain unaffected.[36]

3. Conclusion: None of the Bases the Commission Cited in the Revised Order Support Deviating from this Court's *St. Louis County Gas* and *Kennedy* Decisions

In *St. Louis County Gas* this Court made clear that the Commission is bound by a regulated utility's tariff. 286 S.W. at 86. Five years later, citing to its *St. Louis County Gas* decision in support, this Court stated that the Commission could not grant a variance from a utility's tariff, unless the tariff itself contained a provision allowing for variances. *Kennedy*, 42 S.W.2d at 353. In its Revised Order, the Commission cited to no basis to justify deviating from these decisions. It is clear that no legal authority exists for the Commission to grant MAWC and DCM's requested variances. The plain language of MAWC's tariff binds the Commission and the Commission's decision to allow variances

[35] It is clear that "[a] properly promulgated rule also becomes the law of Missouri." *See Mo. Gas Energy*, 210 S.W.3d at 337 (citation omitted). However, the Commission not only included variance provisions in many of its rules, it has also enacted a general rule recognizing its authority to grant a variance or waiver of a Commission rule. *See, e.g.*, 20 CSR 4240-13.055(13); 20 CSR 4240-13.065(1); 20 CSR 4240-2.205. Therefore, in considering variances from Commission rules, the Commission is simply applying the rules as written.

[36] Importantly, the Western District did not mention either *St. Louis County Gas* or *Kennedy* in the *Deaconess Manor* case. *See generally* 994 S.W.2d 602.

from that language is unlawful. *St. Louis Cnty. Gas*, 286 S.W. at 86. To conclude otherwise would contravene this Court's decisions in *Kennedy* and *St. Louis County Gas.*

B. Point Two: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff Rules 23A.3 and 23C.6 because, assuming that legal authority to grant the variances exists, the facts cited by the Commission do not establish good cause to grant the variances, and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because the Commission ignored the Territorial Agreement and each of the other facts relied upon to establish good cause will exist regardless of whether the Commission approves the variances, the Commission's decision is unreasonable and unjust

In addition to being unlawful, the Commission's Revised Order is unreasonable and unjust[37] because the facts cited by the Commission do not establish good cause[38] to grant variances from MAWC's tariff Rules 23A.3 and 23C.6.[39] Therefore, the Commission's Revised Order is unreasonable and unjust.[40]

In granting the requested variances, the Commission cited five grounds as the good cause to grant the requested variances: (1) "the added fire protection" (2) "access gained

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[37] This Court reviews whether the Commission's Revised Order is unreasonable under the second prong of its review. *Amendment,* 618 S.W.3d at 523 (citation omitted). "An order of the [Commission] is reasonable when "the order is supported by substantial, competent evidence on the whole record; the decision is not arbitrary or capricious; [and] where the [Commission] has not abused its discretion." *Id.* (citation omitted).

[38] In granting the variances, the Commission alludes to a "good cause" standard. (*See* Revised Order 10–11, LF 434-35, V.III pdf 15-16, App. A10-A11). Although the Commission does not explain the origin of this standard, the OPC presumes for the purpose of this Brief only, that "good cause" constitutes the proper standard and proceeds to explain how the cited facts do not meet this standard.

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

[40] The OPC preserved this argument by raising it in the Second Application for Rehearing, filed before the Commission on March 25, 2022. (*See* 2nd Appl. for Rehearing 26-29, LF 465-68, V.III pdf 46-49).

to nearby areas," (3) "the number of new customers taking service" (4) "the revenue expected to be produced, and" (5) "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 . . ." (Revised Order 11, LF 435, V.III pdf 16, App. A11). These facts do not support granting the requested variances. The OPC will first address the fifth ground and will then address the remaining four grounds together.

1. The Location of Cottleville Trails

An issue that has run throughout this matter is that but for a Commission-approved Territorial Agreement between MAWC and PWD#2, Cottleville Trails could have been served by PWD#2, which offers a more favorable line extension policy. (*See, e.g., id.*). However, in order to give effect to the Territorial Agreement, which no party to this matter has ever challenged, this fact must be considered irrelevant.

Section 247.172(1) of the 2001 Revised Statutes of Missouri allows public water supply districts, such as PWD#2, and water corporations subject to Commission jurisdiction, such as MAWC, to enter into written territorial agreements in place of competing to sell and distribute water. *See* § 247.172(1) RSMo. (2001) (App. A18).[41]

[41] Because the Commission approved the Territorial Agreement in 2001, the OPC provides citations to § 247.172 (2001) RSMo. The OPC notes that the revisions to the statute since 2001 do not substantively affect the argument here. *Compare* § 247.172 RSMo. (2001) (App. A18-A19), *with* § 247.172 RSMo. (2021) (App. A16-A17). However, the OPC will draw the Court'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* § 247.172(4) RSMo. (2001) (App. A18) (requiring the commission to hold an evidentiary hearing in all cases), *with* § 247.172(5) RSMo. (2021) (App. A16) (requiring the commission to hold an evidentiary hearing, unless all parties submit a stipulation and agreement and agree to waive the hearing).

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) (App. A18). 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) (App A18). 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) (App. A18).

By entering into the Territorial Agreement, MAWC and PWD#2 agreed to displace competition to sell and distribute water in the location where DCM intends to develop Cottleville Trails. (*See* Territorial Agreement, LF 67-76, V.I pdf 71-80). That Territorial Agreement designated the boundaries of both MAWC and PWD#2's water service area. *See* §§ 247.172(1)–(2) RSMo. (2001) (App. A18). The Territorial Agreement and its subsequent Addendum became effective upon the Commission's approval. *See id.* § 247.172(3) (2001) (App. A18); (Stipulation of Facts ¶ 5, LF 104, V.I pdf 108). The Parties to this case also 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, LF 104, V.I pdf 108 (emphasis added)). Therefore, **only** MAWC can sell and distribute water to Cottleville Trails.[42] *See* §§ 247.172(1)–(2) RSMo. (2001) (App. 18). Because PWD#2 cannot serve Cottleville Trails without violating the Territorial Agreement, the fact that DCM would be subject to a more favorable line extension policy

[42] Throughout the pendency of this matter, no has party moved to suspend, revoke, or amend the Territorial Agreement.

if it were able to take service from PWD#2 is irrelevant. For this reason, the location of Cottleville Trails cannot form the basis of any good cause for granting the requested variances.

Second and similarly, the fact that DCM may be subject to a more favorable cost-sharing mechanism if Cottleville Trails 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." (*Id.* ¶ 3, LF 103, V.I pdf 107). 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, LF 104, V.I pdf 108). Because the Cottleville Trails development is located in St. Charles County and St. Charles County is a part of the St. Louis Metro District, the tariff rules applicable to the St. Louis Metro District apply. (*See id.* ¶¶ 3, 5, LF 103-04, V.I pdf 107-08). To ensure that MAWC does not extend to DCM a rule different than that which is extended to all other developers, this Court should conclude that the contention that DCM may be subject to a more favorable cost-sharing mechanism if the land were located in another district is irrelevant. *See St. Louis Cnty. Gas*, 286 S.W. at 86. The Commission must apply the plain language of MAWC's tariff, including the rules applicable to the St. Louis Metro District. *See id.* (recognizing that a utility's tariff binds "not only . . . the utility and the public, but . . . the Public Service Commission as well").

2. The Remaining Grounds Cited to Establish Good Cause

As to the remaining facts cited by the Commission—the added fire protection,[43] the access gained to nearby areas,[44] the number of new customers, and the revenue expected to be produced—each of these facts will exist as long as DCM develops Cottleville Trails.

[43] MAWC will add fire protection to the area by adding a fire hydrant with a 300' radius. (LF 362, V.II pdf 186).

[44] Based on MAWC's written response to the Commission's questions, the increased access to nearby areas includes access to five properties, some of which include existing structures and others which do not, that "previously did not have frontage to an existing MAWC water main." (LF 363, V.II pdf 187).

(Revised Order 11, LF 489, V.III pdf 70, App. A11). Nothing in the record conclusively establishes that DCM must receive the variances in order to construct Cottleville Trails. The Parties did not stipulate to this fact and the Commission did not include it in its Revised Order. (*See generally* Stipulation of Facts, LF 103-09, V.I pdf 107-13; Revised Order, LF 479-92, V.III pdf 60-73, App. A1-A15).

As long as DCM develops Cottleville Trails, MAWC—as the only water utility who can lawfully do so—must extend its water mains to provide service to Cottleville Trails. (*See* Stipulation of Facts 2, LF 104, V.I pdf 108). In doing so, MAWC will increase fire protection and gain access to nearby areas by extending its water mains. Similarly, as long as DCM is able to sell its homes in Cottleville Trails, MAWC will also increase its customers, and, in turn, its revenues. Therefore, each of the remaining grounds cited by the Commission will exist as long as DCM develops Cottleville Trails.

These grounds cannot support a finding of good cause to grant the variances. Because each of the cited grounds fail to establish good cause, the Revised Order is unreasonable and unjust.

C. Point Three: The Commission erred in granting MAWC and DCM's requested variances from MAWC's tariff rules because the Commission's decision has authorized MAWC to unduly discriminate in favor of DCM in violation of § 393.130(3) RSMo., and § 386.510 RSMo. allows this Court to review the Commission's decision, in that because only DCM has been granted preferential or advantageous variances from MAWC's tariff and MAWC has made no changes to its tariff that would put others on notice of their ability to request a variance, the Commission's decision is unlawful and unjust

The Commission has no legal authority to grant the variances. It also failed to cite to good cause to grant MAWC and DCM's requested relief. Further still, in granting the variances, the Commission has allowed MAWC to engage in undue discrimination in favor of DCM.[45] Such discrimination is expressly prohibited by § 393.130(3) RSMo.

[45] The OPC preserved this argument by raising it in the Second Application for Rehearing, filed before the Commission on March 25, 2022. (*See* 2nd Appl. for Rehearing 29-30, LF 468-69, V.III pdf 49-50).

§ 393.130(3) RSMo. (App. A23). The Commission's Revised Order is therefore unlawful[46] and unjust.

> 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.

§ 393.130(3) RSMo. (emphasis added) (App. A23).

"[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). 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 unduly and unlawfully discriminate in favor of DCM. With the variances, MAWC will extend to DCM a rule different than that set forth in its tariff and will demand that DCM pay less than that which is mandated by the tariff for MAWC to extend its water mains to Cottleville Trails. *Contra* § 393.140(11) RSMo. (App. A27). Moreover, no other developer who may wish to develop property in MAWC's service territory will be on notice of its ability to request a similar variance. Therefore, it is unlikely that the other developers will receive the same

[46] This Court reviews *de novo* whether statutory authority exists to support the Commission Revised Order. *Amendment*, 618 S.W.3d at 523 (citation omitted).

opportunity. (*See* MAWC Data Request Response 1-2, LF 80-81, V.I pdf 84-86 (MAWC recognizing that although other developers had "expressed that a 120 day period is not enough time to connect customers," it was "not aware of any formal variance requests.")). MAWC's discrimination in favor of DCM is unlawful and unjust because the Commission has cited to nothing to establish that this discrimination is "based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service." *See Mo. Office of Pub. Counsel*, 782 S.W.2d at 825 (citation omitted). Similarly, the Commission has cited to nothing to establish that the difference is based upon a "difference of service." *Laundry*, 34 S.W.2d at 44-45. For instance, nothing in the record indicates that it will be less expensive for MAWC to extend water service to Cottleville Trails. Similarly, nothing shows that DCM is uniquely dissimilar from any other applicant who wishes to have MAWC extend water service to it.[47] Simply put, it appears that DCM seeks the variances from Rule 23 solely to decrease the amount it must pay to have MAWC extend water service to Cottleville Trails. To allow this to happen would result in "undue or unreasonable preference or advantage to" DCM, which is directly prohibited by § 393.130(3) RSMo. *See* § 393.130(3) RSMo. (App. A23).

However, if the Commission dismisses MAWC and DCM's Joint Application and MAWC applies the plain language of Rule 23, all of MAWC's customers will be treated equally. *See Empire Appl.*, 2007 Mo. PSC LEXIS 148, *8–*9 (App. A59) (denying the utility's request for a variance from its tariff and the Commission's rules in 4 CSR 240-14.020[48] 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"); (LF 81, V.I pdf 85 (MAWC in response to a data

[47] Some may argue that DCM is different than other developers based on the fact that, absent the Territorial Agreement, PWD#2 could provide service to Cottleville Trails at a lower price. However, for the same reasons that this cannot serve as the good cause to grant the variances, it cannot serve as the justification for the resulting discrimination.

[48] The language of 4 CSR 240-14.020 now appears in 20 CSR 4240-14.020. *See* 20 CSR 4240-14.020 Authority note (App. A52).

request implying that it has applied its main extension rule as written to other past developments by stating that it "is not aware of any formal variance requests. However, developers have from time-to-time expressed that a 120 day period is not enough time to connect customers in a subdivision, especially subdivisions similar in size [to] the subdivision that is the subject of this case.")).

Because the Commission has allowed MAWC to unduly and unlawfully discriminate in favor of DCM, the Commission's Revised Order is unlawful and unjust.

VII. Conclusion

The Commission's Revised Order is unlawful because, as this Court's decisions in *St. Louis County Gas* and *Kennedy* make clear, no legal authority exists for the Commission to grant MAWC and DCM's requested variances. The bases cited by the Commission in its Revised Order fail to change this. Furthermore, the Commission's decision to grant the requested variances is unreasonable and unjust because the facts the Commission cited to establish good cause fail to do so. Finally, in granting the variances, the Commission has allowed MAWC to unduly discriminate in favor of DCM, further making the Commission's Revised Order unlawful and unjust.

WHEREFORE, for these reasons, 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 18,229 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 26th day of May 2023.

Respectfully submitted,

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