BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Missouri-American Water Company's Request for Authority to Implement General Rate Increase for Water and Sewer Service Provided in Missouri Service Areas.	))))	**File No. WR-2017-0285, et al.**

THE OFFICE OF THE PUBLIC COUNSEL'S
APPLICATION FOR REHEARING

The Missouri Office of the Public Counsel applies for a rehearing because the Missouri Public Service Commission's Report and Order is unreasonable and unlawful. The Commission should grant OPC's request and provide relief that is not inconsistent with the arguments contained in this application.

OPC files its application because the Commission's decision is contrary to Missouri law. *Office of the Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 375 (Mo. 2013). The Commission's decision is also unreasonable because it is not supported by substantial and competent evidence on the record as a whole. *Id*. The Report and Order results in unjust and prejudicial harm to customers, and the Commission's Report and Order lacks sufficient findings to promote intelligible review on appeal.

Section 386.500[1] empowers OPC with the right to apply for a rehearing in respect to any matter determined therein, and the Commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear. Section 386.500.2 requires that an application for rehearing set forth specifically "the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust, or unreasonable." OPC's application for rehearing sets forth these grounds below and is timely under § 386.500.2.

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[1] All statutory citations are to RSMo 2016 unless otherwise provided.

1. *The Commission erred because the consequence of the Report and Order is an unlawful expansion of its jurisdiction.*

The Commission's order is unlawful because the Commission exceeds its jurisdiction in that the Commission authorized the Company to charge all residential customers for the replacement of some residential customers' privately owned assets. Not only did the Commission fail to make sufficient findings of fact and conclusions of law, the consequence of the Commission's Report and Order is an unlawful expansion of its jurisdiction. The issue is whether the Commission exceeds its jurisdiction by ordering the recovery of costs associated with the replacement of customer-owned service lines.

It is well-established that the "PSC 'is a body of limited jurisdiction and has only such powers as are conferred upon it by statute, and such incidental powers as may be necessary to enable the commission to exercise the powers granted.'" *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823, 828-29 (Mo App. 2015). Section 386.250 limits the jurisdiction of the Commission to "all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of the same."

Missouri law also interlinks the term "water system" with the term "water corporation." Missouri law defines a "water system" as including a variety of different items that are "owned, operated, controlled or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing or carriage of water for municipal, domestic or other beneficial use." Section 386.030(60). For example, Missouri law prohibits a "water corporation" from beginning construction of a "water system . . .without first having obtained the permission and approval of the commission." Section 393.170.1. Elsewhere in Chapter 393 of the Revised Statutes of Missouri, the Commission is given "general supervision of all . . . water

corporations . . . to lay down, erect or maintain wires, pipes, conduits, ducts, or other fixtures *in, over or under the streets, highways and public places of any municipality,* for the purposes of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, or for the purpose of collecting carrying, treating, or disposing of sewage, and all . . . *water systems* owned, leased or operated by any . . . water corporation." Section 393.140(1) (emphasis added).

Missouri law sets a clear limit on regulated activity of a Missouri water corporation. The Commission has no jurisdiction to grant rate recovery to the replacement of customer-owned assets located on customer premises. For example, the legislature limited a water corporation's condemnation powers to the property line along the right-of-way.[2] The NARUC USoA makes the same limitation by only allowing costs to be recorded in Account 345 *up to* the customer's premises. Ex. 217, OPC Witness John Robinett's Surrebuttal Testimony, Pg. 4, Lns. 16-27 (citing NARUC USoA Water Utilities Class A and B 1973 1976 revisions Balance Sheet Accounts 1. Utility Plant. P. 44).

Directly relevant to this proceeding, the American Water Works Association argued that the EPA could not set a *new line of demarcation* in the rule making process during the original promulgation of the Lead and Copper Rule. See.,e.g., Ex. 200-203, Direct Testimony of OPC Witness Geoff Marke, Schedule GM-3, Pg. 12 (or Pg. 15/44) Lns. 21-23. American Water

[2] The power of eminent domain also sets Constitutional and statutory boundaries as to where the Company can make legal takings and expand their regulated water system. First, the taking must be for a "public use," which the Company cannot claim in the instance of a lead service line replacement. Mo. Const. Art. XI, §4 and Art. I, § 26-28 ("when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public"). In Missouri, a water utility has the power of eminent domain "along the right-of-way of any public highways" and shall have the power of eminent domain "along any right-of-way of any railroad company." Mo. Rev. Stat. § 393.020.

Works Association argued that privately owned lead service lines would not be within the "control" of a public water system.

Consistent with the law, no Commission has never promulgated a rule that allows a water utility to receive rate recovery for the replacement of customer-owned assets. There is not even a Commission rule on the general topic of lead service lines. Furthermore, no statute gives the Commission authority to replace customer-owned service lines.

Courts have agreed with the American Water Works Association stating that "it was *quite reasonable for the regulated industry* not to perceive any doubt on the EPA's part that its control over a service line *ends* at the private property line." *See American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. Ct. of App. 1994) (emphasis added) ("we vacate the rule insofar as it deems privately owned lead service lines to be within the 'control' of a public water system for the purpose of obligating the system to replace them").

The Georgia Supreme Court made a similar finding by determining that the Director of the Environmental Protection Division did not have authority to legally order a water system's owner to clean contaminated pipes located on the property of residential consumers because the authority of the director was limited by the term "control" as it related to the collection, treatment, storage, and distribution systems. *Bass v. Ledbetter*, 363 S.E.2d 760 (Ga. 1988). "Clearly, the private lines running from the service connections of the distribution facilities into the homes of the residents *are not within the control of the operator, and consequently, the EPD is charged with no responsibility for those private lines*." *Id.* at 761. (emphasis added). Similar in reason to these cases, this Commission has recently recognized a limit on its authority in the context of electric vehicle charging stations. ET-2016-0246, Report and Order, Pg. 10-11.

In this case, the consequence of the Report and Order is an overexpansion of Commission authority. Missouri law does not convey jurisdiction over property that a utility does not operate or control, and the law prohibits giving undue or unreasonable preference or an undue or unreasonable disadvantage to a person. The Commission's order is unlawful and unreasonable because it is inconsistent with statutory law, wrongly assumes jurisdiction, and fails to make needed findings. Of note, the Company "agrees that customer-owned service lines are not within the Company's control and, therefore, as found by these cases, MAWC could not be forced by a Commission order to replace such lines." MAWC's Reply Brief, Pgs. 4-5.

Although the Report and Order cites to Account 186 as a recordkeeping authority, Account 186 is not relevant to the question of jurisdiction to grant cost recovery. The Uniform Systems of Accounts does not confer any authority to the Commission to order rate recovery that would be inconsistent with statutes or the Commission's promulgated rules. Account 186 only describes recordkeeping accounting standards for a water utility to defer "debits not elsewhere provided for." The recordkeeping practices of the Commission are separate and apart from ratemaking considerations. The Commission's Report and Order concedes that an AAO allows a cost to be placed in a separate account for *future consideration*…[and] it does not create an expectation of recovery, nor does it bind the Commission to any particular ratemaking treatment." Report and Order, Pgs. 15-16 (emphasis added). However, after that explanation, the Commission *does not* explain how it has jurisdiction to order rate recovery of costs to replace a service line owned by a customer. In its analysis, the Commission cites to *Mo. Gas Energy v. Mo. Pub. Serv. Comm'n*, 978 S.W.2d 436 (Mo. App. W.D. 1998). OPC agrees that the holding of that case indicates that allowing a deferral under an AAO does not give the Commission the

authority to grant rate relief, but the *Mo. Gas* case is irrelevant to the determination of the Commission's jurisdiction.

In sum, Missouri law sets a clear limit on regulated activity of a Missouri water corporation. The Commission has no jurisdiction to grant rate recovery to the replacement of customer-owned assets located on a customers' premise. In this case, the Commission oversteps its authority by expanding the definition of a water system to include the replacement of assets that are owned and controlled by private individuals. The Commission's enabling statutes do not grant jurisdiction over private property, which a utility does not operate or control For these reasons, the Commission should revise its Report and Order or rehear this matter to make findings and conclusions which are not inconsistent with this application.

2. The Commission's Report and Order is unlawful and unreasonable because it is inconsistent with its own rules on tariffs, avoids statutory requirements to promulgate new rules, and lacks necessary findings.

The Commission's order is unlawful and unreasonable because it avoids statutory processes for the promulgation of new rules and because it makes insufficient findings through a misinterpretation of its own rules. A tariff "means a document published by a public utility, and approved by the commission, that sets forth the services offered by that utility and the rates, terms and conditions for the use of those services." 4 CSR § 240-3.010. "[I]f a tariff is clear and unambiguous, [the Court] cannot give it another meaning." *State ex rel. Associated Natural Gas Co. v. Mo. Pub. Serv. Comm'n*, 37 S.W.3d 287, 293 (Mo. App. W.D. 2000). "In determining whether the language of a tariff is clear and unambiguous, the standard is whether the tariff's terms are plan and clear to one of ordinary intelligence." *Id.* A reviewing court looks at the interpretation of an unambiguous tariff *de novo* in the same manner that it would review a trial

court's interpretation of a statute. *State ex rel. Union Elec. Co. v. Mo. Pub. Serv. Comm'n*, 399 S.W.3d 467, 477 (Mo. Ct. App. W.D. 2013). If a tariff if ambiguous, a reviewing court will apply traditional rules of 'statutory' construction, and review the PSC's resort to evidence of the tariff's intended meaning as a factual determination entitled to deference. *Id*. at 477-78.

For an agency to create a rule, agencies must follow those rulemaking procedures set forth in § 536.021.1. The Commission cannot impose a rule without observing statutory requirements. Section 386.125; *State ex rel. Beaufort Transfer Co. v. Mo. Pub. Serv. Comm'n*, 610 S.W.2d 96, 101 (Mo. Ct. App. W.D. 1980). Failure of an agency to comply with its own rules may invalidate its actions only when prejudice results. *Mo. Nat. Educ. Ass'n v. Mo. State Bd. of Mediation*, 695 S.W.2d 894, 897 (Mo. 1985).

In *State ex rel. Beaufort Transfer Co*., the reviewing court found that the Commission had improperly attempted to impose a rule without observing rule-making procedures because the order had defined trade territories by an unpromulgated formulaic method rather than by the evidence before the Commission. *Id*. at 100. Consequently, the court remanded to the Commission for further findings and explained that the Commission may be able to adopt the formulaic method by properly promulgating a rule. *Id.* at 101.

The Commission cannot make an order that applies a legal standard that would be inconsistent with statutory law and its rules. *Office of the Pub. Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 379 (Mo 2013). In the *Office of the Pub. Counsel* case, the Missouri Supreme Court held that the Commission erred by relying on the presumption of prudence standard rather than relying on statutes and properly promulgated rules. *Id*. The Supreme Court has found that the commission cannot apply another theory of law in contravention either statutes or its effective rules. *Id*.

The Company's tariff is unambiguous that it does not "set forth the services" of a lead service line replacement program. The tariff did not contain the lead service line replacement service when the Company began replacement services, nor did the revised tariff set forth replacement services at the start of this case, nor did the tariff filed on May 4, 2018 set forth replacement services.[3] The Commission is on the brink of requiring ratepayers to pay for a service that is not set forth in the Company's tariff. There is no dispute that the service is not provided in the tariff because the Company acknowledges the program is not identified in its tariff in their reply brief. MAWC's Reply Brief, Pg. 7. No "terms and conditions for the use of [lead service line replacement] services" are in the tariff because the Company's tariff does not authorize replacement services. In fact, the tariff's exact and specific language indicates the responsibility for the customer-owned service line is with the customer. PSC Mo No. 13 Original Sheet No. R. 12, Rule 4.C, 4.I, 4.J, 4.N; and R. 16.

The Commission's Report and Order creates a new definition of the tariff that constitutes an invalid attempt to promulgate a rule without following statutory authority. Like the facts of *State ex rel. Beaufort Transfer Co.*, the Report and Order constitutes an improper attempt to promulgate a rule because the Commission adopts an understanding of a tariff as a list of prohibitions rather than a document that sets forth services and the associated terms and conditions. Report and Order, Pg. 16-17. The Commission misapplied the law by following the logic of the Company, who unreasonably argued that "the question is not whether the replacement is 'authorized' by MAWC's tariffs, but rather whether the program is prohibited by

[3] P.S.C. Mo. No. 13 (tariff when Company began replacing customer service lines);
WR-2017-0285, EFIS, Item No. 2, "Transmittal Letter and Tariff Revisions (YW-2017-0276 and YW-2017-0277)," (revised tariff filed at the time the rate case was filed);
WR-2017-0285, EFIS, Item No. 454, "Tariff Revisions (YW-2018-0151, YW-2018-0152, and YS-2018-0153)," (revised tariff submitted to comply with the Commission's Report and Order).

any of the Company's tariff provisions." MAWC's Reply Brief, Pg. 7. The Commission agreed, and the Commission gave its opinion, "OPC incorrectly interprets MAWC's tariff as a prohibition on MAWC's efforts to enter a mutual agreement with a customer for the replacement of the customer's LSLs." Report and Order, Pg. 16. The Commission made this conclusion without making a change to its rules and without properly promulgating rules that give new meaning to the term "tariff." The prejudice resulting from the Commission's Report and Order is that the Company will recover in excess of $1.6 Million from customers through rates. Report and Order, Pg. 23. For this reasons, the Commission's order lacks sufficient findings of fact and conclusions of law, is unreasonable, and is unlawful.

Additionally, the Commission's findings are insufficient and incorrect that the Company's lead service line program *does not* violate the tariff. Customers rely on the "terms and conditions," and the terms and conditions contained in the Company's tariff refer to the customer as the responsible party over the customer-owned portion of the service lines. Customers make investment decisions in reliance on the plain terms of the tariff and the Commission's promulgated rules. Any customer who invested in the replacement of their lead service line was mislead by the representations in the tariff and the promulgated Commission rules, and these customers are thrust into an inequitable position of being excluded from receiving a rate-payer funded asset like the rest of his or her similarly situated peers.

The Commission's order fails to distinguish the portions of the tariff cited by OPC in such a way that would allow a reviewing court to intelligently determine how the Commission made its decision. Instead, a reviewing court is left with conclusory statements that prevent intelligible review of these issues. For all of these reasons, the Commission's Report and Order lacks findings, is unreasonable and is unlawful.

3. The Commission's Report and Order lacks sufficient findings of fact and conclusions as to its jurisdiction.

The Commission's order is unreasonable or unlawful because it lacks sufficient findings of fact and conclusions of law as to the jurisdiction of the Commission.[4] The issues are whether the Commission's findings of fact and conclusions of law give sufficient insights into if and how controlling issues were resolved.

"Section 536.090 requires the Commission to make findings of fact and conclusions of law in a contested case." *State ex rel. GS Techs. Operating Co. v. Mo. Pub. Serv. Comm'n*, 116 S.W.3d 680, 691 (Mo Ct. App. W.D. 2003). The sufficiency of a Report and Order's findings and conclusions will not be given deference on appeal. *Id*. (citing *Deaconess Manor Ass'n v. Mo. Pub. Serv. Comm'n*, 994 S.W.2d 602, 612 (Mo. App. 1999)). Section 386.420.2 requires the Commission, whenever it makes an investigation, to "make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises." Courts have interpreted this section by stating that the Commission must include findings of fact in all of its written reports. *State ex rel. Fischer v. Mo. Pub. Serv. Comm'n*, 645 S.W.2d 39, 42 (Mo. Ct. App. W.D. 1982) (Citing *State ex rel. Rice v. Mo. Pub. Serv. Comm'n et al.*, 220 S.W.2d 61 (Mo. Banc 1949)). The Commission must make findings that provide insights into if and how controlling issues were resolved and that the findings are not completely conclusory. *Id* "The most reasonable and practical standard is to require that the findings of fact be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts

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[4] OPC incorporates the legal authority relating to insufficient findings and to insufficient conclusions into other sections of the application that discuss insufficient findings of fact and conclusions of law.

afford a reasonable basis for the order without resorting to the evidence." *State ex rel. Laclede Gas Co. v Mo. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816, and 819 (Mo. Ct. App. W.D. 2003) (The Commission must provide a reasonable basis for its decision and must contain findings of fact that permit intelligent review of its decision).

In *State ex rel. GS Techs. Operating Co.,* the reviewing court determined that the commission erred in failing to make findings on the reasonableness of a theory of imprudence. *State ex rel. GS Techs. Operating Co*, 116 S.W.3d at 691-92. The issue in the *GS Techs* case was whether the commission's order failed to address a theory of imprudence that KCPL should have responded to a flooding incident by placing a hold on gas valves while the Burner Management System was under repair. *Id*. In determining this issue, the *GS Techs* court cited to various sources of law requiring the Commission to make findings of fact including *Barry Serv. Agency Co v. Manning*, 891 S.W.2d 882, 892 (Mo. App. 1995) for the principle that a reviewing court may find that an agency acts arbitrarily or capriciously when *it completely fails to consider an important aspect or factor of the issue before it*. *Id*. (emphasis added) The reviewing court rejected the sufficiency of the order because it was merely conclusory in that it stated the "failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision." *Id.* Rejecting this type of finding, the reviewing court found, "the Commission's failure to address the issue of whether KCPL should have placed a hold on the gas valves after the flooding caused the Burner Management System to malfunction and its failure to do so triggered the Hawthorn 5 explosion <u>*precludes this court from being able to adequately assess the Commission's conclusion*</u> that GST failed to show that

KCPL's imprudence caused the Hawthorn 5 explosion. *Id*. at 692-93. (emphasis added). The court ordered remand for additional findings. *Id*.

In *State ex. rel. Laclede Gas Co*, the Court noted that the commission's order contained findings of fact which were remarkably similar to those discussed in *State ex rel. Noranda Aluminum, Inc. v Mo. Pub. Serv. Comm'n,* 24 S.W.3d 243, 246 (Mo. App. W.D. 2000), in that the findings of fact consisted of a general discussion of the parties' positions and a brief explanation of which position the Commission deemed correct.'" *State ex rel. Laclede Gas Co.*, at 817. These "general discussions" were insufficient. The reviewing court found that the order's findings failed to support the contention that Staff's depreciation method of calculating net salvage value is less likely to result in Laclede over-recovering from its customers than Laclede's depreciation method. *Id*. at 818. The reviewing court found that the commission's findings of fact did not permit intelligent review of its decision and there was no basis to determine whether the Commission's decision was supported by substantial and competent evidence.

In *State ex rel. Fischer*, the reviewing court found that the record was insufficient because there were not meaningful insights into if and how controlling issues were resolved. Similarly, in *State ex rel. Monsanto Co. v. Mo. Pub. Serv. Comm'n*, 716 S.W.2d 791 (Mo. Banc 1986), the Missouri Supreme Court relied on the holding of *State ex rel. Fischer* in finding that the commission's order was flawed because the order's conclusions failed to refer to the evidence in the record. Failure to include sufficient and necessary findings is a basis for reversal, and a procedure prescribed by statute must be followed. *Id*. at 796. No deference is accorded the order of the Commission on the issue of lawfulness of the order. *Id*.

In this case, the Commission's Report and Order contains insufficient findings of fact and conclusions of law as to the Commission's jurisdiction. The Commission's conclusions can be

summarized in the following manner. In the Report and Order, the Commission acknowledges the utility is a “water corporation,” “sewer corporation, and “public utility.” The commission generally cites to Chapter 386 and 393, and made a single conclusory sentence that 393.130 and 393.140 “mandate that the Commission ensure that all utilities are providing safe and adequate service and that all rates set by the Commission are just and reasonable.” OPC does not challenge whether the Commission can ensure that utilities are providing safe and adequate service. OPC challenges the Commission’s legal authority as to whether the Commission can grant the Company’s request to charge residential customers for the replacement of *some* residential customers’ private property. More specifically, OPC argued that customer-owned assets are not part of the utility’s “water system.” Initial Brief of the Office of the Public Counsel, Pg. 6. The Commission did not sufficiently address this argument nor did the Report and Order provide sufficient findings of facts or conclusions of law on this topic. The Report and Order does not quote from or identify the subsections of law it relies on for its jurisdiction.

The Report and Order is deficient in much the same way as the previously stated cases because the Commission’s findings are insufficient and conclusory. Like *GT Techs.*, the Commission’s Report and Order provides a finding that is merely conclusory because the Report and Order states, “[f]ailure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the material was not dispositive of this decision.” The Report and Order uses the same generic, conclusory statement that the *GS Techs.* court rejected. *State ex rel. GS Techs. Operating Co*, 116 S.W.3d at 691-92. The Commission must follow statutory duties by articulating its specific finding of facts, and should reconsider its Report and Order in this case given its generic finding of facts, such as the one used in the *GT Tech* case. This Commission’s

Report and Order fails to provide sufficient findings of fact to provide "insights into if and how controlling issues were resolved." The Commission's order ignores OPC's entire argument on the issue of its jurisdiction, and the Commission should rehear this matter or make additional findings such that a reviewing court can engage in an intelligent review of the Commission's reasoning. For these reasons, the Commission should revise its Report and Order or rehear this matter to make findings and conclusions which are not inconsistent with this application.

4. *The Commission fails to make sufficient findings of fact and conclusions of law relating to its prudence determination.*

The Commission's Report and Order fails to cite what legal standard it applied in its prudence determination for rate recovery of costs associated with the replacement of customer-owned lead service lines. A reviewing court cannot intelligently identify the standard of law that the Commission applied to its Report and Order. Similarly, a reviewing court cannot intelligently review whether the Report and Order applied a presumption of prudence. OPC argued it does not apply to these facts. Initial Brief of the Office of the Public Counsel, Pg. 4. Although it can be implied that the Commission found the costs to be prudent, the Report and Order does not explain how or why. The issues in this case are whether the Report and Order lacks sufficient findings of fact and conclusions of law.

Utility costs are commonly "presumed to be prudently incurred," and the presumption survives unless there is a "a showing of inefficiency or improvidence" that creates "serious doubt as to the prudence of an expenditure." *Office of the Public Counsel v. Mo. Pub. Serv. Comm'n*, 409 S.W.3d 371, 376 (Mo. 2013). "The company's conduct should be judged by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight." *State ex rel*

Associated Natural Gas Co. v. Mo. Pub. Serv. Comm'n, 954 S.W.2d 520 (Mo. Ct. App. W.D. 1997) (the Court remanded the case for further proceedings consistent with the opinion because the Commission acted unlawfully in that the Commission failed to make sufficient findings of fact relating to its prudence determination).

The Commission's Report and Order fails to cite to this standard or any standard. When discussing the replacement of lead service lines, the Commission's Report and Order only refers to prudence three times. The first time is on page 18 where the Commission's order states it will be beneficial to evaluate "the prudency of costs" for future proceedings. OPC agrees that the prudency of future costs should continue to be scrutinized in future proceedings. However, the prudency of approximately $1.6 million in replacement costs must be evaluated and determined in this proceeding. This is lacking from the Report and Order.

The Commission uses the word prudent a second time on the following page when the Commission asks itself, "What Recovery Approach, If Found Prudent by the Commission, Should be Adopted for the AAO Amount From WU-2017-0296?" By answering this question, a reviewing court can infer that the Commission found the costs to be prudent, but there is no explanation as to how the facts meet the legal standard, or what legal standard the Commission applied.

The Commission's Report and Order mentions prudence a third time on page 22 when the Commission quotes the Company's own opinion relating to prudence – and concludes that the company "should be commended and even made whole for its efforts." However, the Commission does not explain why the Company should be "made whole for its efforts" and why the company "should be commended." Instead of providing an analysis of the prudence of unlawful costs, the Commission explains why the Company cannot lawfully earn a profit on

these costs. Like *State ex rel. Associated Natural Gas*, the Commission's order is unlawful because it fails to provide sufficient findings of fact and fails to provide the correct legal standard for its prudency determinations.

The Commission does not have unlimited authority and power. The Commission's Report and Order argues it has the "power and authority to determine what items are properly includable in a utility's operating expenses and to determine and decide what treatment should be accorded such expense items." Report and Order, Pg. 21. But such power and authority is not unlimited. *Sharp v. Kan. City Power & Light Co.*, 457 S.W.3d 823, 828-29 (Mo App. 2015) (citing *Katz Drug Co. v. Kan. City Power & Light Co.*, 303 S.W.2d 672, 679 (Mo. App. 1957). The Commission must apply appropriate legal standards.

In addition to failing explain the appropriate legal standard, the Commission broadly discusses findings of fact that are sweepingly broad that evade intelligent review. For example, the Commission reasons that "public policy supports full LSL replacement," but the order does not develop the concept as to *what public policy* or *whose public policy* supports full LSL replacement. Report and Order, Pg. 16. In fact, the Commission's finding is also inconsistent with the factual finding that the Commission's "long-standing policy of the Commission is to only include in customer rates those investments that are used and useful." Report and Order, Pg. 8. Private customers' assets, that are replaced by a public utility who does not obtain an ownership interest in them, does not represent "investments that are used and useful" because they remain in the control and authority of the private individual. The assets are only "used and useful" to those customers who are given a rate-payer funded service line.

Additionally, the Commission's policy determination that partial lead service line replacement exposes the public to lead poisoning is *inconsistent* with the United States

Environmental Protection Agency and the Missouri Department of Natural Resources which have promulgated rules that specifically permit the practice. Although the Commission has general authority over ensuring utilities meet safe and adequate service, the Missouri legislature has not given the Commission any specific authority (or general authority) to remediate the issue in this case. However, both the EPA and MDNR have express and specific statutory authority concerning water quality issues intended to mitigate against risks of lead contamination in the safety of drinking water. 40 CFR § 141 and Mo. Code Regs. Ann. Tit. 10, § 60-15. But the Commission's Report and Order fails to discuss these polices and leaves much to the imagination.

The statutes delegate to the Safe Drinking Water Commission ("SDWC") the authority to promulgate rules to set standards for compliance with the federal Safe Drinking Water Act. Sections 640.100 and 640.120, RSMo. *See Dismuke v. City of Sikeston*, 614 S.W.2d 765, 766 (Mo.App. 1981) ("[A] cardinal rule [of statutory interpretation] is that where a specific statute and a general statute dealing with the same subject exist, the specific statute prevails over the general statute.) Rules of a state administrative agency duly promulgated pursuant to properly delegated authority have the force and effect of law. *Missouri Nat'l Education Asso. v. Missouri State Bd. of Mediation*, 695 S.W.2d 894, 897, (Mo. banc 1985). Administrative rules are interpreted under the same rules of construction used in interpreting statutes. *Shomaker v. Dir. of Revenue*, 504 S.W.3d 84, 86 (Mo. E.D. 2016).

SDWC propounded its Lead and Copper Rule at 10 CSR 60-15, which identifies action levels for particulates and monitoring for such particulates. The SDWC was granted specific authority to determine what levels of lead particulates in drinking water constituted a hazard, pursuant to the Safe Drinking Water Act. The SDWC's rules *permit* partial lead-line

replacement. 10 CSR 60-15.050. The only attempt the Commission makes at identifying a present harm to the general public is an assertion that partial lead-line replacement is unsafe. However, the *act* of partial lead-line replacement cannot be determined by the Commission as inherently unsafe, because the agency with specific subject matter jurisdiction has established rules permitting partial lead-line replacement. The SDWC's authority to promulgate safety rules regarding drinking water supersedes the Public Service Commission's general safety authority. MAWC is in compliance with the Lead and Copper Rule. Ex. 2, Company Witness Bruce Aiton's Rebuttal Testimony, Schedule BWA-1, Pg. 5, Lns. 5-10.

The Report and Order's imagined public policy is likely their own assertion that "[l]ead in drinking water presents a serious health risk." However, the Commission fails to make any findings about: (1) what *amount of lead* in drinking water poses a "serious health risk"; (2) what is a "serious health risk"; (3) what lead concentration is caused by partial lead service line replacement; (4) what level of lead could be avoided through a full lead service line replacement; and (5) whether full lead line replacement sufficiently remediates the "serious health risk." The purpose of the regulatory regime at the federal and state level is to address water quality, and the Company complies with those standards. 40 CFR § 141 and Mo. Code Regs. Ann. Tit. 10, § 60-15. The Commission's Report and Order lacks sufficient findings as to whether the Commission has created its own safety determination standards, created no safety determination standards, or whether their safety determination would conflict with those of the Environmental Protection Agency or the Missouri Department of Natural Resources.

The Commission's conclusion fails to explain the relationship between "a serious health risk," the duration of the risk, and the quantification of the risk between a partial LSL replacement versus a full LSL replacement. The Commission's conclusion similarly fails to

explain what it perceives to be a "serious health risk" or whether such a situation has ever occurred as a result of a partial LSL replacement. The best explanation is when the Commission indicates that lead "can cause a variety of adverse health effects." Report and Order, Pg. 10. Yet, the Commission fails to explain which adverse health effects are being caused by customer-owned lead service lines.

5. The Commission's Report and Order is unlawful and unreasonable because it ignores important aspects or factors on the issue imprudence and makes an arbitrary ruling.

The Report and Oder fails to address a multitude of OPC's theories of imprudence including that the costs and the benefits should have been weighed when investing hundreds of millions of dollars. The Commission must view the Company's conduct by asking whether the conduct was reasonable at the time, under all the circumstances, considering that the company had to solve its problem prospectively rather than in reliance on hindsight." *State ex rel Associated Natural Gas Co. v Mo. Pub. Serv. Comm'n*, 954 S.W.2d 520 (Mo. Ct. App. W.D. 1997) (the Commission failed to make sufficient findings of fact relating to its prudence determination).

When reviewing what the Company knew when it began its replacement program, the Commission unreasonably ignored many of the facts that support OPC's theories of imprudence.

- The Company believes it provides safe and adequate service when it makes a partial lead service line replacement. Evidentiary Hearing – Vol. 17, 3/7/2018, Pg. 632, Lns. 5-8.
- The Company knew it would refuse to replace customer-owned service lines, even if it was legally permitted to do so, if it did not receive a full weighted

average cost of capital on their expenditures. See, e.g., MAWC's Initial Brief, Pg. 22.

- The Company knew that none of its customers had ever reported lead poisoning resulting from a customer-owned service line. Evidentiary Hearing – Vol. 15, 3/5/2018, Pgs. 358-59.
- The Company knew that it had a record of perfect compliance with federal and state drinking water standards relating to lead. Ex. 2, Company Witness Bruce Aiton's Rebuttal Testimony, Schedule BWA-1, Pg. 5, lns. 5-10.
- The Company knew that, unlike Flint, Michigan, it was treating its drinking water to prevent the type of corrosion that occurred in Flint. Ex. 2, Company Witness Bruce Aiton's Rebuttal Testimony, Schedule BWA-1, Pg. 5, lns. 5-10.
- The Company knew or should have known that blood lead levels have dropped dramatically over the last half-century, and the Company knew that the primary sources of lead contamination today is paint. Evidentiary Hearing – Vol. 16, 3/5/2018, Pg. 357, Ln. 1-25.
- The Company should have known that their plan to replace 30,000 service lines in ten years was twelve times faster than the replacements it planned in 2017 and was an unreasonable pace in comparison with the seventeen year timeframe to complete 5,000 customer-owned service line replacements in Madison, Wisconsin. Initial Brief of the Office of the Public Counse, Pg. 28.
- The Company knew that it contacted at least one other government agency, and the government agency told the Company that "they believed the primary source of high blood levels in Missouri was paint, not our pipe, because again, we

haven't had any negative results in our – in our lead testing." Evidentiary Hearing – Vol. 16, 3/5/2018, Pg. 357, Ln. 1-25.

- The Company knew that it planned to prioritize replacement of customer-owned lead service lines in conjunction with main replacement projects rather than prioritizing alleged at-risk populations.
- When the Company encounters a customer-owned service line during a repair of a main, the Company has not kept records of whether the customer-owned line is lead or a different material. Evidentiary Hearing – Vol. 15, 3/5/2018, Pgs. 358-59.
- The Company knew its tariffs did not set forth services or terms and conditions to replace customer-owned lead service lines. The Company unreasonably thinks that "the question is not whether the replacement is 'authorized' by MAWC's tariffs, but rather whether the program is prohibited by any of the Company's tariff provisions." MAWC's Reply Brief, Pg. 7. However, the *Commission's* definition of a tariff "means a document published by a public utility, and approved by the Commission, that *sets forth services offered by that utility* and the rates*, terms and conditions for the use of those services.*" 4 CSR § 240-3.010 (emphasis added). A reasonable utility would have checked the definition of the tariff in the Commission's rules prior to providing an un-tariffed service.
- The Company knew it had not performed a cost-benefit analysis, and the basis of its cost-benefit opinion is that it hopes to "eliminate the risk of even one person developing this condition." MAWC's Initial Brief, Pg. 8 (citing to "Tr. 381-382, Aiton). But as stated earlier, to the best of the Company's knowledge, no

customer has ever "develop[ed] this condition" because a customer-owned service line nor because of the Company's drinking water.

- The Company knew its affiliate sold line insurance in Missouri, and the Company knew that ratepayer-funded replacements of antiquated service lines could eliminate costs of its affiliate.
- The Company also knew it did not have a policy on how to handle customers who fail to consent to the replacement of their service line, but the Company decided to replace customer lines without consent. The Company knew, or should have known, that their pattern and practice may be subverting important Constitutional and statutory rights relating to eminent domain or tort law.

OPC meticulously documents other deficiencies with the Company's lead line replacement program at pages 22-23 of the Reply Brief of the Office of the Public Counsel. All of these circumstances show that the Company's decision to replace customer-owned service lines has been unreasonable and imprudent. The Commission should have provided sufficient findings to permit intelligent review of its decision. However, the Commission discussed none, or very few, of OPC's numerous theories of imprudence. For these reasons, the Report and Order is unreasonable, unlawful, and is an arbitrary decision.

6. The Commission's Report and Order is unlawful and unreasonable because it misapplies the standard for safe and adequate service and fails to make necessary findings.

The Commission's order is unlawful and unreasonable because it relies on two conflicting interpretations of the legal standard to provide safe and adequate service. Under § 393.130.1, the law requires every "water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all

respects just and reasonable." The language of § 393.130.1 uses the word *shall* rather than the word *may*.

For an agency to create a rule, agencies must follow those rulemaking procedures set forth in § 536.021.1. The Commission cannot impose a rule without observing statutory requirements. Section 386.125; *State ex rel. Beaufort Transfer Co. v. Mo. Pub. Serv. Comm'n*, 610 S.W.2d 96, 101 (Mo. Ct. App. W.D. 1980).

The Report and Order's findings of fact and conclusions of law are internally inconsistent about the legal standard relating to safe and adequate services. On one hand, the Commission states that the Company can *elect* whether or not to provide safe and adequate service. Report and Order, Pg. 17. On the other hand, the Report and Order claims that the law *mandates* the Commission to ensure utilities are providing safe and adequate service. Report and Order, Pg. 9. As a finding of fact, the Commission states that "[t]here is no legal requirement for MAWC to replace customer-owned LSL." Report and Order, Pg. 20, Paragraph 42. The Report and Order has the effect of asserting jurisdiction over what it perceives to be a "serious health risk," but the Commission interprets remediation of that risk as an elective decision. This cannot be the "public policy" the Commission intended to create. The standard of law cannot be elective and mandatory, and the Commission's order is unreasonable and unlawful in assuming jurisdiction over a "serious health risk" and finding that the remediation of that health risk as an elective procedure. Under the Commission's criteria, future Commissions would never be able to order a public utility to remediate serious health risks that are within the Commission's jurisdiction. The

truth is, if safety upgrades were optional, the statute would have been written that way.[5] But it was not.

In addition, the Commission improperly attempts to create a new rule related to a safety determination about concentrations of lead in the drinking water without following statutory requirements related to rulemaking. The Report and Order states, "[l]ead in the drinking water presents a serious health risk." Prior to making this determination, no Commission rule has been promulgated that discusses concentrations of lead that the Commission views as unsafe. By ruling that the mere possession of a customer-owned lead service line *automatically "presents a serious health risk"* to the drinking water, the Commission attempts to apply a broad and formulaic approach to safety decisions without promulgating a rule that sets forth its approach- and that is inconsistent with lead concentration action levels established by federal and state law. The Commission's formulaic approach is similar to the approach that was rejected by the courts in the *State ex rel. Beaufort Transfer Co* case. The Commission should rehear or revise its Report and Order to correct these issues. For these reasons, the Commission's Report and Order is unreasonable and unlawful.

7. *The Commission's Report and Order is unreasonable and arbitrary by assigning costs in an inconsistent fashion.*

The Commission's Report and Order is arbitrary because it assigns costs inconsistently. Section 393.130.3 prohibits water corporations from giving "undue or unreasonable preference

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[5] As a related note, the Company makes a vague threat suggesting that it plans to withhold safe and adequate service in their brief. The Company's threat states: "This means MAWC will not complete the main replacement projects in areas where lead service lines are present, delaying much needed infrastructure replacement and rehabilitation, missing opportunities to coordinate replacement with main replacement projects, and pushing the replacement process out well beyond ten years." As this threat relates to necessary main repair or replacement, OPC reserves its right to file future complaints based on a violation of 393.130.1.

or advantage to any person. . . or to any particular description of service in any respect whatsoever." The issues are whether it was unreasonable to give undue preference to some customers while giving undue disadvantages to others.

The truest expression of the principle of cost causation would be to assign the costs directly to the customers who own the service lines. For many decades now, customers have been solely responsible for costs to maintain or replace their lines. As the costs causers and the sole beneficiaries, customers have historically paid their own costs. The Report and Order's intent to assign costs to all residential customers is frustrated by this reality. Furthermore, the Commission arbitrarily assigns cost incurred by the residential class solely to residential classes, but the Commission consolidates rates and arbitrarily assigns costs to those who do not cause the costs in the rate design section of its Report and Order. Report and Order, Pgs. 24-34. The inconsistent approaches to rate design result in an arbitrary and unreasonable Report and Order, which is unlawfully detrimental to some customers and gives undue preference to other customers. The arbitrary cost-sharing of customer-owned service lines is prohibited by §§ 393.140 and 393.130. For these reasons, the Commission should remedy its Report and Order to deny the recovery of replacement costs and be internally consistent in its methodology.

8. The Commission's Report and Order is unlawful and unreasonable because it suborns trespass and the taking of private property without just compensation.

The Commission's order is unlawful and unreasonable because it supports "continuation of the LSLR program" including a pattern and practice of replacing customer-owned lines without the customer's consent. Report and Order, Pg. 16; Ex. B of the *Stipulation of Fact Related to True-Up and Motion to Suspend True-Up Procedural Schedule.*

Replacing customer-owned property without consent raises many civil and criminal concerns such as trespass to property and trespass to chattel. Initial Brief of the Office of the Public Counsel, Pg. 17. The practice of taking a customer's property without their consent also side-steps the condemnation requirements in the Missouri Constitution and in Chapter 523 of the Missouri Revised Statutes. Mo. Const. Art. I, § 26-28 and Chapter 523 of the Missouri Revised Statutes. *Id*.

The Commission did not address any findings on this subject, but the Commission implies that it approves of this takings practice by agreeing to the "continuation of the LSLR program." The Commission should not permit cost recovery or permit cost deferrals for costs that result from an unlawful taking or an unlawful trespass.

The facts bear repeating. In St. Louis County, it is the customer who owns the entire service line. In other areas of the company's service area, the Company owns a segment of the service line from the main to the T-head. When the Company cannot get consent in St. Louis County, the Company's pattern and practice is to enter the property without consent[6] with the intent to remove personal property, seize personal property and replace the part of the service line owned by *the customer* from the main to the T-Head. The Commission's Report and Order implies that these costs should be deferred in Account 186. It also implies that this pattern and practice is appropriate by agreeing to continue the lead service line replacement program. Although the Commission appears to have disallowed costs associated with non-consensual takings that were the subject of rate recovery in this case, the Report and Order needs additional

[6] As previously identified, no authority exists in the Company's tariff that would permit this trespass as this is not a tariffed activity.

findings to ensure future costs are not deferred in Account 186 and to cease non-consensual takings of property. For these reasons, the Commission's order is unlawful and unreasonable.

9. The Commission's order is unreasonable, unlawful, and provides insufficient findings to support a deferral of costs in Account 186.

The Commission's order is unreasonable in that it fails to provide sufficient facts to support its legal conclusion that grants the Company an AAO. It also unreasonably applies a long-term debt rate for costs that are expected to be a normal part of operation for the next ten years. The issue is whether the Commission's determination to defer future lead service line replacement costs in Accoutn 186 is lawful and reasonable.

USoA General Instruction No. 7 cited in its Report and Order states, "[t]hose items related to the effects of events and transactions which have occurred during the current period and which are not typical or customary business activities of the company shall be considered extraordinary items." *Also see* Report and Order, Pg. 17. Presumably, the "item" would be the Company's costs related to the replacement of service lines. But there is no evidence that an "event" or "transaction" occurred. A tornado is the sort of event that would cause extraordinary expenses to *existing infrastructure.*[7] A Company's decision to engage in unregulated activity is not the sort of "event" described in General Instruction 7. The Commission fails to make findings that show how "those items *related to events and transaction* . . . are not typical or customary." It is unreasonable to permit recovery of unlawfully incurred costs through a deferral account intended to capture excess costs related to events like tornadoes.

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[7] In the Matter of Empire District Electric Company, Report and Order, EU-2011-0387 (Dec. 7, 2011). In the Company's application, it expressly sought "the Commission issue an Accounting Authority Order authorizing Empire to account for and record on its books as a regulatory asset in the incremental May 22, 2011 tornado and severe weather related expenses and the lost fixed cost components of its rates."

Furthermore, the Commission fails to make adequate findings as to how the "continuation of the LSLR program" is not now "typical or a customary business acivit[y]." There is nothing "new" or "eventful" about the existence of lead service lines. In fact, the Commission separately found that lead pipe was installed 50 to 100+ years ago. Report and Order, Pg. 11.

The findings of fact in the Commission's Report and Order are at odds with their conclusions because the replacement program is typical and customary. The Company's plan is like clockwork (or death and taxes, as the saying goes) because it shows 3,000 lead service lines being replaced in each year. For the next ten years, the plan is to make 3,000 replacements. Report and Order, Pg. 14. The Commission fails to show how the replacement of 3,000 customer lines every year for ten years would constitute a non-recurring, a-typical expense. An expense with that type of predictability is about as customary and typical as one could ask for.

The reason that these costs do not squarely conform with General Instruction 7 is that these costs are more akin to charitable contributions. The typical practice for non-mandatory, discretionary costs that go beyond the scope of the public utility's "water system" would be to treat these costs as charitable donations because "highly discretionary costs that do not benefit customers, such as charitable donations, political lobbying expenses, and incentive compensation tied to earnings per share are typically allocated entirely to shareholders." *Kan. City Power & Light co's Request v. Mo. Pub. Serv. Comm'n*, 509 S.W.3d 757, (Mo. Ct. App. W.D. 2016). Charitable costs are not included in rates because they are "discretionary, thus not normal business expenditures" and because the allowance "of the contributions would require the ratepayers to make involuntary contributions to the various charities." *State ex rel. Laclede Gas Co. v. Mo. Pub. Serv. Comm'n*, 600 S.W.2d 222, 229 (Mo. Ct. App. W.D. 1980). The

Commission's attempt to disguise a highly discretionary costs as an "extraordinary" cost is unlawful and unreasonable. For these reasons, the Commission's order to defer future lead service line costs is unreasonable, unlawful, and lacks proper findings.

CONCLUSION

For all of these reasons, the Commission should grant OPC's Application for Rehearing and provide relief that would not be inconsistent with the arguments contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was sent by electronic mail or by U.S. Mail, postage prepaid, on May 25, 2018 to all counsel of record.

/s/ Ryan D. Smith