BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Staff of the Missouri Public Service Commission,	)	
Complainant,	)	
	)	
v.	)	**Case No. GC-2006-0491**
	)	
Missouri Pipeline Company, LLC, and Missouri Gas Company, LLC, et al.,	)	
Respondents.	)	

APPLICATION FOR REHEARING OF
UNION ELECTRIC COMPANY d/b/a AMERENUE

COMES NOW Union Electric Company d/b/a AmerenUE ("AmerenUE" or the "Company") and, pursuant to § 386.500.1, RSMo.[1] and 4 CSR 240-2.160, respectfully applies for rehearing of the Commission's Report and Order issued August 28, 2007 ("Report and Order") in the above-captioned proceeding.

Legal Principles That Govern Applications for Rehearing

1. Commission decisions must be lawful (i.e., the Commission must have statutory authority to do what it did) and must be reasonable. *State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm'n*, 103 S.W.3d 753, 759 (Mo. banc 2003); *State ex rel. Alma Tele. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 387 (Mo. App. W.D. 2001). The decision is reasonable only if supported by competent and substantial evidence of record. *Alma*, 40 S.W.3d at 387. Moreover, Commission decisions must not be arbitrary, capricious, or unreasonable. § 536.140.1(6), RSMo. The Commission is a creature of statute and it has only the powers conferred on it by the Legislature. *State ex rel. City of St. Louis v. Pub. Serv. Comm'n*, 73 S.W.2d 393, 399 (Mo. banc 1934). Because it has no power to declare or enforce principles of law or equity (*State ex rel.*

[1] Statutory references are to the Missouri Revised Statutes (2000), unless otherwise noted.

Utility Consumers Council v. Pub. Serv. Comm'n, 585 S.W.2d 41, 47 (Mo. banc 1979)), its statutory interpretations and application of legal principles, which are legal questions, will be reviewed by the courts *de novo*. *Id*.

2. Under Missouri law, the absence of sufficient findings of fact and conclusions of law also render a Commission order unlawful. *See, e.g., Friendship Village v. Pub. Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. W.D. 1995). Section 386.420, RSMo. requires findings of fact that are not completely conclusory. *State of Missouri ex rel. Laclede Gas Co. v. Pub. Serv. Comm'n*, 103 S.W.3d 813, 816 (Mo. App. W.D. 2003). Section 536.090, RSMo. supplements § 386.420, and requires that the Commission's findings provide insight into how controlling issues were resolved. *Id*. The findings must be sufficiently definite and certain so that a reviewing court can review the decision intelligently to ascertain if the facts afford a reasonable basis for the decision without resorting to the evidence. *Id*.

3. A review of the evidentiary record in this case and applicable law demonstrates that the Report and Order fails to comply with the above-referenced principles relating to the Commission's conclusion that the discounted rates given to Missouri Pipeline Company ("MPC") and Missouri Gas Company ("MGC") affiliate Omega Pipeline Company ("Omega") did not set the maximum rates that could be charged to unaffiliated shippers, including AmerenUE, until June 21, 2006. Indeed, an examination of the tariff provisions in light of applicable principles of statutory construction demonstrate that the maximum rate provisions applied starting July 1, 2003, when MPC/MGC began charging Omega a lower transportation rate.

Bases for Rehearing

A. The Commission's Interpretation of Section 3.2 of the Subject Tariffs is Erroneous.

4. The Commission sustained Count III of the Complaint and determined that MPC/MGC violated their tariffs by charging non-affiliated shippers, including AmerenUE, in excess of the maximum transportation rates allowed by those tariffs. However, the Commission determined that the maximum transportation rates at issue were not established until June 21, 2006, the date Staff filed the subject Complaint.

5. The Commission has erred in its interpretation of the subject tariff provisions. The Commission concluded that MPC/MGC could charge non-affiliated shippers more than its affiliated shipper, Omega, until such time as Staff notified MPC/MGC that the provisions Section 3.2(b) of the subject tariffs were "not effective in preventing rate discrimination to non-affiliates." Report and Order p. 37. The Commission reached that conclusion because it believed it was the only way to "give effect" to Section 3.2(b). The Commission has overlooked the interplay between Sections 3.2(b) and 3.2(c), and fails to recognize that Section 3.2(b) serves a purpose that is separate and independent from Section 3.2(c), and indeed applies at a different time than does Section 3.2(c).

6. Section 3.2(b) contains two primary provisions. First, Section 3.2(b)(1) establishes, as long as Section 3.2(b) remains effective, the maximum rate that can be charged to a non-affiliated shipper; i.e., the lowest rate being charged to an affiliated shipper. Second, Section 3.2(b) (2) – (4) provides a mechanism by which MPC/MGC can *request* that the Commission allow MPC/MGC to deviate from the maximum rate provisions reflected in the first sentence of Section 3.2(b)(1).[2] However, if MPC/MGC do not take advantage of their ability to

[2] Section 3.2(b)(5) simply defines the geographic area to which the remainder of Section 3.2(b) will apply.

request relief (or if the Commission declines to give it), the maximum rate provision in the first sentence of Section 3.2(b)(1) continues to cap the rates that MPC/MGC can charge.

7. Contrast Section 3.2(b) with Section 3.2(c). Section 3.2(c) has no application at all as long as Section 3.2(b) remains in effect. But once Staff gives the notice contemplated by Section 3.2(c), Section 3.2(b) goes away (is "automatically replaced") and the maximum rate rule in Section 3.2(c) replaces the maximum rate rule in the first sentence of Section 3.2(b)(1), and any ability on MPC/MGC's part to ask for or receive an exception from that maximum rate rule goes away because the application of Section 3.2(b) in its entirety has also gone away. Stated another way, as long as the information Staff is receiving under Section 3.2(b) or Section 12(c) does not indicate the existence of rate discrimination and before a notice respecting the same is given, Section 3.2(b) applies, MPC/MGC continues to have the option of asking for an exception, and Section 3.2(c) sits dormant. However, once rate discrimination appears to be a concern and Staff provides notice, Section 3.2(b) goes away – goes dormant – and Section 3.2(c) springs into life.

8. This reading gives effect to every word, sentence and clause of Section 3.2. Respectfully, the Commission's reading does not, because the Commission's reading effectively strikes the first sentence of Section 3.2(b)(1) from the tariff entirely and allows MPC/MGC to charge non-affiliated shippers more than they were charging Omega without asking for, and receiving, Commission permission to do so. This violates a fundamental tenet of statutory construction, that is, that every word, phrase, sentence and part thereof be given effect.[3] *See, e.g., State ex rel. Smith v. Atterbury*, 270 S.W.2d 299 (Mo. 1954). Moreover, statutes are to be construed in a manner that will best serve the statute's purpose. *Household Finance Corp. v.*

[3] The Commission correctly points out that in interpreting a tariff, which has the force and effect of law, principles of statutory construction are to be applied. Report and Order p. 39.

Robertson, 364 S.W.2d 595, 602 (Mo. 1963), and are to be construed in such a way as to avoid unreasonable results. State v. Sledd, 949 S.W.2d 643, 645 (Mo. App. W.D. 1997). In effect, these principles are captured by another common principle of statutory construction; that is, the principle that statutes must be construed in light of what the statute seeks to remedy and also in light of the conditions existing at the time the statute was enacted. *State v. Wright*, 575 S.W.2d 421, 427 (Mo. 1974).

9. The Commission's interpretation contradicts these fundamental principles. It is apparent that the purpose of Section 3.2 was to make sure that non-affiliated shippers did not suffer rate discrimination vis-à-vis affiliated shippers and that they paid no more than the rate affiliated shippers were paying, *unless* the Commission approved an exception. The Commission's present interpretation thwarts that purpose because it allows MPC/MGC to charge non-affiliated shippers rates that are higher than the rates charged to their affiliates for one-half of 2003, for all of 2004 and 2005, and until June 21, 2006; i.e., it allows rate discrimination to occur for a period of nearly three years.

10. Indeed, this interpretation, if it were correct, would reward MPC/MGC for completing disregarding the provisions of Section 3.2(b)(2) and Section 12(c), which required reporting to the Commission's Staff. That result is unreasonable and, respectfully, is erroneous as a matter of law. It is also inconsistent with other portions of the Report and Order. Specifically, the Commission found, in sustaining Count IV of the Complaint, that MPC/MGC did not report the discounts it was giving to its affiliated shipper, Omega, to Staff. Section 3.2(c) contemplated that if the information to be provided under Section 3.2(b) (if exceptions to the maximum rate rule were sought) and Section 12(c) (requiring quarterly reports, including reports of affiliate discounts) showed discrimination it was at that point that Staff would file a notice

with the Commission triggering Section 3.2(c). The purpose of the tariff was not to allow MPC/MGC to conceal the discounts by not reporting them so that MPC/MGC could continue to overcharge non-affiliates for nearly three years until a formal complaint was filed. The tariffs cannot reasonably be interpreted to allow MPC/MGC to withhold the very information Staff would need to give the notice contemplated by Section 3.2(c) of the tariffs, and then to profit from withholding that information by being allowed to retain nearly three years of overcharges on the grounds that the notice was not given. Yet that is the result if the Commission's interpretation stands. The Company is confident that the Commission, after a more careful examination of the tariff provisions in light of their purposes and by giving effect to the maximum rate provisions in both Section 3.2(b)(1) and 3.2(c), will avoid this unreasonable result.

11. Indeed, if that result is allowed to stand, it will thwart the anti-rate discrimination purposes of these tariff provisions. Or, stated another way, if the Commission fails to correct this interpretation it will have failed to "make such construction of the statute as shall suppress the mischief and advance the remedy intended by [the Commission]" and will have failed to "suppress subtle inventions and evasions for the continuance of the mischief." *Vining v. Probst*, 186 S.W.2d 611, 615 (Mo. App. W.D. 1945). The mischief that the maximum tariff provisions seek to suppress is rate discrimination. The remedy the tariff provisions seek to advance (when interpreted properly) is to create a disincentive for MPC/MGC to engage in rate discrimination by requiring that any discount given to an affiliated shipper also be given to non-affiliated shippers. That remedy is made even more effective by removing any ability of MPC/MGC to seek any exceptions from the maximum rate requirements of the tariff if MPC/MGC discriminate. The subtle inventions and evasions that MPC/MGC will get away with if this

erroneous interpretation is not corrected (at least for a period of nearly three years) are many, including failure to report the discounts to the Commission's Staff, as required by the tariff, and trying to hide Omega's shipment of gas (and the discount given to Omega as the shipper) by the so-called "use" of pipeline capacity held by the City of Cuba, without the City's knowledge.

12. At bottom, the maximum rate language appears both in the first sentence of Section 3.2(b)(1) and in the indented portion of Section 3.2(c) because Section 3.2(b) and (c) *do not apply at the same time*. Rather, Section 3.2(b) applies *until* Staff gives the notice contemplated by Section 3.2(c), and if that notice is never given, Section 3.2(c) is inoperative. This means that between July 1, 2003 until June 21, 2006, when the Commission deemed Staff to have given the notice contemplated by Section 3.2(c), the maximum rate provision of the first sentence of Section 3.2(b)(1) applied. This means that from and after June 21, 2006, the maximum rate provision of Section 3.2(c) applied. Regardless of which provision applied when, the maximum rate was set starting July 1, 2003, not June 21, 2006, and MPC/MGC overcharged non-affiliated shippers, including AmerenUE, during that entire time period and continues to overcharge them today.

13. The foregoing demonstrates that the Commission simply made an error when it concluded that it cannot apply the maximum rate provisions of Section 3.2(b)(1) until a notice was given under Section 3.2(c). Applying the maximum rate provisions of Section 3.2(b)(1) starting July 1, 2003 does not render Section 3.2(c) superfluous. The notice contemplated by Section 3.2(c) does not trigger a lower rate. Rather, the notice provision serves to replace the application of Section 3.2(b) with Section 3.2(c), continues the application of the lower rate already established when MPC/MGC started giving Omega a discount on July 1, 2003, and

removed the option that MPC/MGC previously had to seek an exception from the maximum rate provisions.

B. The Commission's Interpretation of Section 3.2 of the Subject Tariffs is in Direct Conflict with the Public Service Commission Law.

14. The Report and Order is also unlawful because it is in direct conflict with the Public Service Commission Law, specifically, Sections 393.130.1 and 393.130.3, and Section 393.140(11). MPC/MPC charged discriminatory rates effective July 1, 2003. By definition, a discriminatory rate is an unjust or unreasonable charge, and thus violates Section 393.130.1. The Commission's incorrect interpretation of Section 3.2 of the tariffs sanctions the retention by MPC/MGC of an unreasonable and unjust charge. If that interpretation were correct, the subject tariff provisions would be unlawful, and void.

Similarly, the Public Service Commission Law contains a direct prohibition against discriminatory rates by prohibiting undue or unreasonable preferences or advantages. Section 393.130.3, RSMo. Giving its affiliated shipper a discount while denying that discount to similarly situated shippers constitutes an unreasonable preference or advantage. However, if the Commission's interpretation of Section 3.2 of the subject tariffs were correct, MPC/MGC would be allowed to have engaged in that preferential conduct without consequences for nearly three years. This result flies in the face of the prohibition contained in Section 393.130.3, RSMo.

Finally, because the Commission has erroneously concluded that MPC/MGC can in effect keep nearly three years of overcharges, the Commission's conclusion violates Section 393.140(11), RSMo. which prohibits a public utility from receiving greater compensation than it is allowed to receive under its tariffs.

c. The Commission's Interpretation of the Subject Tariffs if Not Supported by Substantial and Competent Evidence of Record, or by Sufficient Findings of Fact.

15. The Report and Order is also unlawful and unreasonable because it is not supported by substantial and competent evidence nor by sufficient findings of fact. The Commission cites no evidence of record that supports its erroneous interpretation of Section 3.2. Rather, the Commission simply recites the history of the rates charged to non-affiliates and to Omega, establishes that non-affiliates were charged more than the maximum rate, and establishes that MPC/MGC did not report these discounts to Staff, as they were required to do. The Commission then reaches its interpretation of Section 3.2, noting that "it seems" that Sections 3.2(b) and 3.2(c) establish the principle that rate preferences cannot be given. Report and Order p. 39. It does not follow (and there is no evidence that supports this) that the maximum rate provisions in Section 3.2(b)(1) can be disregarded and ignored simply because the separately applicable maximum rate provisions of Section 3.2(c) do not "kick in" until Staff gives the notice. The maximum rate provisions of Section 3.2(b)(1) had already "kicked in" before Staff's notice (the filing of the Complaint) was given, and were simply replaced by the same language in Section 3.2(c), once that notice was given.

D. Conclusion

16. AmerenUE is aware that this case involves a complex record and a long procedural history. However, the subject tariff provisions, and the purpose of them, is apparent, and the Commission's present interpretation allows undue discrimination and unjust and unreasonable rates, in violation of the Commission's enabling legislation. Moreover, the Commission's present interpretation is simply not necessary to give effect to each and every word, phrase and sentence of the subject tariff provisions and thwarts the very purpose of those

tariff provisions, that is, to ensure that affiliated shippers do not receive discounts not made available to non-affiliated shippers.

17. Applying the correct interpretation to the subject tariff provisions will allow non-affiliated shippers who were overcharged since July 1, 2003 to recover those overcharges. In the case of AmerenUE, this will allow AmerenUE ratepayers, who ultimately paid those overcharges through the rates paid for natural gas service, to benefit from a return of those overcharges which would flow through AmerenUE's purchased gas adjustment mechanism.

WHEREFORE, AmerenUE hereby respectfully requests that the Commission grant rehearing and modify its Report and Order to reflect an interpretation of MPC/MGC's tariffs that gives effect to the purpose of the tariff provisions, that is, to remedy rate discrimination by giving any discount afforded to an MPC/MGC affiliate to non-affiliated shippers from and after the time the discount was given on July 1, 2003.

SMITH LEWIS, LLP

By: **/s/ James B. Lowery**
James B. Lowery, #40503
Suite 200, City Centre Building
111 South Ninth Street
P.O. Box 918
Columbia, MO 65205-0918
Phone (573) 443-3141
Facsimile (573) 442-6686
lowery@smithlewis.com

ATTORNEYS FOR UNION ELECTRIC COMPANY d/b/a AMERENUE

UNION ELECTRIC COMPANY,
d/b/a AmerenUE

Steven R. Sullivan, #33102
Sr. Vice President, General Counsel & Secretary
Thomas M. Byrne, #33340
Managing Associate General Counsel
1901 Chouteau Avenue, MC-1310
P.O. Box 66149, MC-131
St. Louis, Missouri 63101-6149
(314) 554-2514 (Telephone)
(314) 554-4014 (Facsimile)
tbyrne@ameren.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing AmerenUE's Application for Rehearing was served to all persons on the official service list in Case No. GC-2006-0491 via electronic filing and electronic mail (e-mail) or via regular mail on this 6th day of September, 2007.

/s/ James B. Lowery
James B. Lowery