

territory includes areas in the St. Louis metropolitan area and other outlying areas in the State of Missouri.

6. HBA's homebuilder members construct residential projects in MAWC's service area.

7. On December 22, 2017, the Federal Tax Cuts and Jobs Act ("TCJA") was enacted, which eliminated the tax exemption for water and sewer utilities from recognizing Customer Advances for Construction ("CAC") and Contributions in Aid of Construction ("CIAC") as taxable income and provided that such CAC and CIAC are to be treated as ordinary taxable income. Prior to the passage of the TCJA, CIAC and CAC were not considered part of a company's taxable income, but rather a contribution to capital.

8. Following passage of the TCJA, MAWC began demanding HBA's homebuilder members make advance payment to MAWC of the entire federal and state tax purportedly owed by MAWC relating to CIAC and CAC.

9. Faced with this significant impediment to new residential development, HBA brought the issue to the attention of Commission Staff and on May 22, 2018, filed an Application for Rehearing in MAWC's then-pending general rate case No. WR-2017-0285 to ask the Commission to consider the impacts of the TCJA, including elimination of the exemption for CIAC and CAC, in the context of the overall rate-making process.

10. In response to HBA's Application for Rehearing, MAWC represented that it would file a revised tariff "to ensure that applications for extension of service pay only the 'net' increase tax expense associated with CIAC." *See* MAWC Response to Application for Rehearing, ¶ 7.

11. On June 15, 2018, MAWC filed P.S.C. Mo. No. 13, 1st Revised Tariff Sheet No. R.65, which proposed to adopt a present value approach to the payment of tax on the CIAC and

CAC, with the tax paid by the contributor offset by the present value of the tax savings that result from tax depreciation over the life of the contributed asset.

12. On June 25, 2018, Commission Staff filed a motion asking the Commission to open a case and schedule a workshop at which interested stakeholders could comment on the proposed tariff.

13. On June 27, 2018, the Commission granted the Commission Staff's motion to open a case and scheduled a workshop regarding the 1st Revised Tariff Sheet No. 65 for July 19, 2018.

14. HBA and other interested stakeholders participated in the July 19, 2018 workshop and suggested improvements to the proposed tariff to account for the benefits to MAWC and its customers from the contribution of CIAC and CAC, while preventing costly impediments to new residential development in MAWC's service territory.

15. On August 21, 2018, MAWC filed P.S.C. Mo. No. 13, 2nd Revised Tariff Sheet No. R. 65 to replace the 1st Revised Tariff Sheet No. R. 65 (the "2nd Revised R. 65") effective September 20, 2018, which proposed a "no gross-up" method of accounting for income taxes that accrue from CIAC and CAC pursuant to which MAWC will pay such income taxes and segregate such income taxes in a deferred account for inclusion in rate base in a future rate proceeding. Under MAWC's proposal, income tax associated with CIAC or CAC would not be charged to the specific depositor/contributor of the capital.

16. Commission Staff filed a motion to suspend the 2nd Revised R. 65 on August 24, 2018, requesting that the Commission open a formal tariff docket.

17. By Order dated September 5, 2018, the Commission suspended the 2nd Revised R. 65 until November 7, 2018, and established an intervention deadline of September 17.

18. On September 11, 2018, Commission Staff filed a motion requesting that commission provide notice of this proceeding to additional parties and extend the deadlines for intervention, Commission Staff recommendation, and suspension termination.

19. By its Amended Order dated September 17, 2018, the Commission suspended the 2nd Revised R. 65 until December 7, 2018, and established an intervention deadline of October 17, 2018. This Application to Intervene is timely under that Order.

20. The Commission may allow intervention where a person has an interest in the proceeding which is different from that of the general public and which may be adversely affected by a final order arising from the case. 4 CSR 240-2.075(3)(A). Intervention is also permitted where granting intervention would serve the public interest. 4 CSR 240-2.075(3)(B).

21. HBA meets the standards for intervention set forth in 4 CSR 240-2.075. As a trade organization representing individuals and companies in the building industry within MAWC's service territory and in the State of Missouri that works to promote a strong residential construction industry and affordable homeownership, HBA satisfies the standard for intervention because HBA possesses "an interest which is different from that of the general public and which may be adversely affected by a final order arising from the case." 4 CSR 240.2.075(3)(A).

22. HBA has a substantial and direct interest in the outcome of this proceeding. Specifically, HBA has a substantial and direct interest in the treatment of the income tax on CIAC and CAC as a result of the enactment of the TCJA. HBA members contribute millions of dollars' worth of CIAC and CAC to water utilities annually.

23. HBA also has an interest in ensuring that the proposals of other parties that are advanced through testimony, legal arguments, or settlement discussions related to this issue do not adversely impact the interests of HBA.

24. HBA's members may be adversely impacted by the Commission's final order in this proceeding as HBA's members may have to bear the burden of the impact on taxable CIAC and CAC.

25. HBA states, pursuant to 4 CSR 240-2.075(2), that it supports MAWC's proposed 2nd Revised R. 65 tariff. Under MAWC's proposal, the income tax consequences of CIAC and CAC will be included in the overall calculation of income tax expense and, consequently, developers and other homebuilders will not be forced to pay the income tax that the TCJA levied on MAWC.

26. Alternate treatments of the income tax on CIAC and CAC, such as forcing developers and homebuilders to pay the income tax that the TCJA levied on MAWC, constitutes an unconstitutional taking. In a 2015 opinion, the United States Supreme Court clarified that taking personal property is as equally unconstitutional as taking real property and ruled that, when a governmental body takes the personal property of a private person for use by a governmental body, that amounts to a *per se* taking in violation of the Fifth Amendment of the United States Constitution, unless just compensation is paid. *See Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015), 192 L.Ed.2d 388, 83 USLW 4503. An approach approved by the Commission whereby developers and homebuilders are required to pay MAWC's income tax would amount to a taking of the developers' and homebuilders' personal property (their money) for use by a governmental body (both the State and Federal governments that receive the tax payments).

27. An approach requiring developers and homebuilders to pay the income tax the TCJA levied on MAWC would also constitute an impact fee imposed without an essential nexus between such fee and a legitimate state interest. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Even if an essential nexus could be identified, the amount of the impact fee does not

bear rough proportionality to the state interest, and as such would amount to an unconstitutional taking. *See Dolan v. City of Tigard*, 512 U.S. 374 (1994).

28. HBA's interests in this proceeding are unique from and not adequately represented by other parties that have or may seek to intervene, including any individual development companies that may have unique business models, interests and perspectives. As noted, HBA is the primary organization representing individuals and businesses in a variety of aspects of the building industry. As such, HBA's interests cannot be adequately represented by any other parties in this proceeding.

29. Correspondence, communications, orders and decisions in this matter should be addressed to:

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WHEREFORE, for the foregoing reasons, the Home Builders Association of St. Louis and Eastern Missouri respectfully requests that the Commission grant this Application to Intervene in this matter.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been electronically mailed to all parties of record as reflected in the records maintained by the Secretary of the Commission through the EFIS system.


