BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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.	)))))	**File No. WE-2021-0390**

BRIEF OF DCM LAND, LLC

COMES NOW DCM Land, LLC ("DCM"), by and through its undersigned counsel, and for its Brief, states as follows:

1. The first issue presented in this matter is whether the Commission should waive the 60-day notice required by Commission Rule 20 CSR 4240-4.17?

2. DCM respectively requests the Commission to do so, because of the carrying costs it loses everyday from delay in finishing its development, and all parties have stipulated that good cause exists to waive the 60-days. (Stipulation of Facts, Para. 23.)

3. The next issue presented in this matter is: "Does the Commission have the authority to grant a waiver or variance of Missouri-American Water Company's Tariff?"

4. This issue arises because the Staff of the Commission (the "Staff") took the position, in Paragraphs 7 and 8 of its Recommendation, that the Missouri Public Service Commission (the "Commission") does not have the authority to grant the variances jointly requested by DCM and Missouri-American Water Company ("MAWC" or the "Company" and, collectively with DCM, the "Applicants") in this matter, since MAWC's tariff does not expressly state that it may be varied by the Commission. (Staff Recommendation, Para. 7 and 8.)

5. The Staff has taken that position, despite acknowledging, in Paragraph 7of its Recommendation, that Commission Rule 20 CSR 4240-2.060(4) provides a procedure to apply for such variances; and also acknowledging, in Paragraph 8 and footnote 4 of the Recommendation,

that courts have found that a waiver of a line extension tariff for a water corporation is lawful, "upon approval of the Commission" . *State ex rel. Kennedy v. Public Service Commission,* 42 S.W2d 349, 350, 352-53 (Mo. 1931).

6. In Paragraph 8 of the Recommendation, Staff relies on *Kennedy,* supra, a 1931 decision that upheld the propriety of a tariff that included a clause that would allow a different line extension cost sharing than specified in the tariff to be used, if the Commission approved such different sharing ratio. *Id.*.

7. In *Kennedy,* in order to counter the argument that a clause that allowed the Commission to vary a tariff would allow for discrimination in service, the Court noted that: "Discrimination is not unlawful unless arbitrary or unjust"; and further held that the "provision was designed only to afford the possibility of such relief [i.e., a different cost sharing ratio] where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted." *Id*. That is exactly the conditions that exist, in this matter; and the *Kennedy* case, *Id..*, should be found to support the granting of the variances requested herein.

8. Staff has cited to one sentence in the *Kennedy* case that reads:: "Without such a provision in the [tariff] the commission could not authorize the company to make an exception in the application of its approved [tariff]." *Id*.

9. The statement on which Staff relies, however, was made in 1931, well before Section 386.250 (6), RSMo. which authorized the Commission to adopt rules that prescribe the conditions for billing for public utility service, was first adopted. *See* Revised Statutes of Missouri 1929, §5136. The Commission's adoption of 20 CSR 4240-2.060(4), thereafter, codified the procedure by which the Commission's authority, as described by the *Kennedy* court, to grant a

variance or waiver, would be exercised, rather than requiring each and every tariff to include a statement that would allow for the Commission to grant such a waiver or variance.

10. To find that the Commission could only grant a variance or waiver if the specific tariff expressly states that it might be varied would both (i) create discrimination, by disallowing some of the public to obtain a variance if they demonstrate special circumstances, simply because the utility that serves their area did not request to include an express statement in its tariff; and (ii) be contrary to the purpose of allowing the Commission the authority to grant a variance – i.e., the recognition that there may be exceptional conditions that create an urgent need for such relief, so that the relief may be justly granted. *Kennedy*, supra.

11. Staff's position is also puzzling, as Staff, itself, has previously requested that the Commission issue a variance from a line extension rule in a MAWC tariff, based on 20 CSR 4240-2.060(4). *In the Matter of the Application of Missouri-American Water Company for Approval of an Agreement with MLM Properties, Inc.*, WO-2008-0301, 2008 WL 4488297 (Mo.P.S.C.).

12. The "Filed Rate Doctrine" referred to by Staff in its Recommendation does not require a different conclusion. A tariff that is subject to waiver and/or variance through application of 20 CSR 4240-2.060(4)'s procedure is just as binding and effective at law, as a tariff that itself states that it may be varied by the Commission. Either way, the legal effect of the tariff is that it may be varied, but only if the Commission finds the variance is appropriate.

13. Based on the foregoing , the Commission should find that it does have authority to grant the requested variances.

14. The final issue presented in this matter is: "If the Commission does have the authority to grant a waiver or variance of the Company's tariff, should the Commission grant a variance allowing MAWC to:

a. Extend in this case the 120-day period for connecting customers to qualify for reimbursement from the Company to 5 years; and

b. Apply the upfront 86:14 cost sharing ratio from the Company's other districts to Cottleville Trails, rather than the 95:5 cost sharing ratio that otherwise applies in the Company's St. Louis Metro District?"

15. The answer to both of these sub-issues should be "yes", due to the exceptional conditions that exist. *Kennedy*, supra.

16. In its Memorandum filed with its Recommendation, Staff agreed with the Applicants that it is not reasonable to expect the construction of 747 homes and apartments and each residence to be considered ready for water service within a 120 day window. (Staff Memorandum. P. 4 of 8.)

17. Staff notes that "it will take far beyond 120 days, and perhaps years, for a substantial amount of the lots to be developed and have customers. (Staff memorandum. P. 5 of 8.)

18. Staff's Memorandum details several of the steps required to develop a residential community, and rightfully concludes that "a five year period to construct these residences and have them ready to take water service is a reasonable request and would create no undue discrimination." (Staff Memorandum. P. 5 of 8.)

19. From DCM's perspective, it would be entirely discriminatory for the Commission to find that the variance from 120 days to 5 years should not be granted, when, absent the Territorial Agreement entered by MAWC and Public Water District No. 2 ("PWD2) and approved by the Commission in Case No. WO-2001-441 on May 15, 2001 (and as further amended by an Addendum to the Agreement approved by the Commission on November 15, 2011, in Case No.

WO-2012-0088) (the "Territory Agreement"), DCM would have been able to obtain water service for the development from PWD2 and, in accordance with PWD2's rules, would have not had a time limit on the recovery of its costs. This is particularly true because any developer who undertakes a development on the other side of the invisible line established by the Territory Agreement would be able to take service from PWD2 and not be subjected to the 120 day time limit to recover costs, even if their development were much smaller.

20. Staff and the Applicants do, however, differ on whether the upfront 86:14 cost sharing ratio from the Company's other districts should be applied to Cottleville Trails, rather than the 95:5 cost sharing ratio that otherwise applies in the Company's St. Louis Metro District.

21. Staff believes that the variance requested from the 95:5 cost sharing ratio should not be granted, because, in Staff's view, that would give DCM an advantage not afforded other developers. (Staff Recommendation, p. 6, Section 10.)

22. But, as noted in *Kennedy*, supra, "Discrimination is not unlawful unless arbitrary or unjust"; and where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted, the relief of a variance may be given.

23. This is a situation where the requested variance would be just and fair, because absent the Territory Agreement, of which DCM and it's predecessor's in interest received no direct notice, the development could and would have received water service from PWD2 and been able to recover significantly more of its costs[1].

24. In this regard, it is relevant that, in the Memorandum included with its Recommendation, Staff mischaracterizes PWD2 as being "another utility provider . . . *outside*

[1] Under Rules 4 and 14 of Public Water District No. 2, the District pays to install main that conforms to AWWA specifications; and then the District recovers the cost from the lots, as the homes connect to take service. See **Appendix A** attached to DCM's Reply to Staff's Recommendation.

MAWC's service territory". [Emphasis added.] The Cottleville Trails development is located within PWD2's annexed area and, therefore, this section of PWD2's territory is *within* MAWC's service territory. Thus, the cost of service from PWD2 is very much relevant to the justness and fairness of the requested variances.

25. RSMo Section 393.140 (11) requires rates to be the same for all those "under like circumstances". Here, the circumstance is not the same as other portions of MAWC's service territory, because Cottleville Trails is located in PWD2's annexed area, as well as in MAWC's certificated area.

26. The basic purpose of public utility regulation is to provide utility service at just and reasonable rates. But it is neither just nor reasonable to require a developer (and, ultimately, the new homeowners) to pay significantly higher costs than would be available from another utility that is ready, willing, and able to provide the necessary service to the development.

27. The fact that service is available from another utility at significantly lower cost, absent the Territory Agreement, is the unique condition that provides the justification for varying the 95:5 sharing ratio that is in MAWC's tariff.

28. Staff, in its Memorandum, states its doubt that $189,000[2] would render the project infeasible. (Staff Memorandum, P. 6 of 8.)

29. Firstly, $189,000 is not the full effect of a failure to grant this requested variance, since the costs used in calculating that difference were only for the mains within Phase 1 of the development; and each the Phase 2 costs and costs to extend MAWC's main to get to the development would create a proportionate addition to that amount.

[2] $189,000 being the calculated difference between the 95:5 sharing ratio in MAWC's tariff for Phase 1 area; and the 86:14 ration requested by the Applicants.

30. Additionally, even $189,000 is significant, both in real dollars and as a percentage of the cost of the water infrastructure for the project. That is 9% of the estimated cost of the mains within Phase 1 on which the calculation was based, i.e., $189,000/$2,100,000.

31. Staff, in its Memorandum, also argues that 747 new customers is only a 0.0015% increase in MAWC's overall customer base. . (Staff Memorandum, P. 6 of 8.) However, we find the increase to be ten times that – i.e., 0.1589% (i.e., 747/470,000).

32. Staff entirely fails to recognize that $189,000 is only a .0564% increase in MAWC's overall costs of service, as identified in Commission Case No. WR-2020-0344. To this project, however, a $189,000 difference is a 9% increase in cost of water infrastructure. 9% is significant, in any real-world financial application.

33. Additionally, Staff fails to recognize that the revenues generated by Phase 1 of the development, when built out, will be more than the gross effect of the two requested variances for Phase 1, in 10 years, which is much shorter than the estimated life of water infrastructure, because the average annual revenue per residential customer connection in MAWC's St. Charles District is estimated to be $446.04 (Stipulation of Facts, Para. 17) and the estimate of annual revenue from the 175 unit apartment complex is $50,000 (Stipulation of Facts, Para. 19), which generates estimated annual revenue for Phase 1 of $208,344.

34. DCM has determined that the total difference in cost for Phase 1, if the variances and waiver requested herein are not granted, would be more than $1,209,539.52, as there would be no legitimate opportunity to recover any of the costs other than the 5% amount that the MAWC would pay upon installation of the main. (Stipulation of Facts, Para. 21)

35. It is, also relevant, that as a part of the water main extension needed for the development, DCM is installing a 12" main in place of an existing 4" main in Old Town

Cottleville; and that replacement will improve fire protection in the area and provide water main access to several additional properties nearby. (Stipulation of Facts, Para. 22.)

36. Lastly, in considering whether the granting of the requested variances is arbitrary or unjust, it is relevant that neither DCM nor any of its predecessors in interest who owned the property sought to be developed ever received any direct notice of the application for or approval of the Territory Agreement; and there is nothing in the records of the Recorder of Deeds to give notice of the existence of such agreement.

37. As noted in in Paragraph 14 of Staff's Recommendation, notice of the proceeding to approve the Territory Agreement was only given "to the members of the General Assembly representing the Applicants' service areas and 'to the newspapers which serve Applicants' service areas". No notice, however, was given to any property owner in the affected area, even though ownership of the property could be readily determined from County Assessor or Recorder of Deeds records. Additionally, no notice of the Territorial Agreement was recorded in the land records in St. Charles County. Therefore, no person buying property subject to such Territory Agreement would be advised of its existence.

38. Without such notice, DCM reasonably expected that it could and would receive water service for the development from PWD2, and that it would not incur the unreimbursable costs that result from MAWC's current tariff for this area.

WHEREFORE, DCM respectfully requests the Commission find that:

1. The 60-day period under Commission Rule 20 CSR 4240-4.17 should be waived.

2. The Commission has the authority to grant the requested variances and waiver.

3. Reasonableness and fairness require that both the variances requested in this matter be granted, along with such further and other relief as the Commission deems just in the circumstances.

Respectfully submitted,

/s/Sue A. Schultz

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ATTORNEYS FOR DCM LAND, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 16th day of September, 2021, to:

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