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**

RESPONSE OF DCM LAND, LLC TO STAFF RECOMMENDATION

COMES NOW DCM Land, LLC ("DCM"), and provides this response to the recommendation ("Recommendation") and accompanying Memorandum filed by the Staff of the Missouri Public Service Commission (the "Staff") on August 13, 2021:

1. In Paragraph 7 of its Recommendation, Staff takes the position 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" and, collectively with DCM, the "Applicants") in this matter, despite acknowledging, in such Paragraph that Commission Rule 20 CSR 4240-2.060(4) provides a procedure to apply for such variances; and also acknowledging, in Paragraph 8 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).

2. 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.*.

3. 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.

4. 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*.

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

6. To find that the Commission could only grant a variance if the specific tariff expressly stated 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.

7. 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.).

8. The "Filed Rate Doctrine" referred to by Staff 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 as 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.

9. Staff next recommends that, if the Commission should find that it does have the authority to vary MAWC's tariff, the variance requested to the 95:5 cost sharing ratio not be granted, because, in Staff's view, that would amount to granting an undue discrimination in favor of DCM.

10. 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. This is a situation where the requested variance would be just and fair, because absent the Territorial Agreement between MAWC and Public Water District No. 2 ("PWD No. 2"), the development could and would receive water service from PWD No. 2 and be able to recover significantly more of its costs[1].

11. In this regard it is relevant that, in the Memorandum included with its Recommendation, Staff mischaracterizes PWD No. 2 as being "another utility provider . . . *outside MAWC's service territory*". [Emphasis added.] The Cottleville Trails development is located within PWD No.2's annexed area and, therefore, this section of PWD No. 2's territory is *within*

[1] Under Rules 4 and 14 of Public Water District No. 2, the District pays to install main that conforms to AWWA specifications (including lower cost main than MAWC requires); and then the District recovers the cost from the lots, as the homes connect to take service. See **Appendix A** attached.

MAWC's service territory. Thus, the cost of service from PWD No. 2 is very much relevant to the justness and fairness of the requested variances.

12. 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 PWD No. 2's annexed area, as well as in MAWC's certificated area.

13. 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 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.

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

15. Staff, in its Memorandum, states its doubt that $189,000[2] would render the project infeasible. But $189,000 is significant, both in real dollars and as a percentage of the cost of the water infrastructure for the project.

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

17. 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

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

project, however, a $189,000 difference is almost a 10% increase in cost of water infrastructure. 10% is significant, in any real-world financial application.

18. Lastly, in Paragraph 14 of its Recommendation, Staff takes the position that there was no unconstitutional taking by approving the Territorial Agreement, because due process was afforded through the delivery of notice "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 Territorial Agreement would be advised of its existence.

WHEREFORE, DCM respectfully requests the Commission find that reasonableness and fairness require that the variances requested in this matter be granted; and that the Commission does have the authority to grant them; and grant the variances Applicants have requested, 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

APPENDIX A

Rule #4. System Development Fees and Procedures
Section 1. General, Water and Sewer (continued)

The District may construct water system improvements to serve a particular area as may be described by the District from time to time. The water system improvements shall connect with public, or other District water system. The Board may cause the water system improvements to be constructed in each area whenever the Board shall deem the water system improvements necessary to thereby promote public health and sanitation, make available conveniences not otherwise possible, and for the general public welfare.

After the District has entered into a contract for construction of the water system improvements, the District's engineer shall compute the whole cost thereof and shall apportion the same against the lots or tracts of ground in the area to be served by the water system improvements, exclusive of the public highways, and the District engineer shall report the same to the Board of Directors of the District, and the Board shall therefore levy a surcharge against each lot or piece of ground within the area to be served by the water system improvements as they connect to the same.

Rule #14. Water Line Extensions

A. The specifics and details of this rule pertaining to water line extensions are generally described in the latest edition of the "Water Distribution System Specifications" a copy of which can be obtained upon request from the District. All existing and current practices, written and unwritten, now in effect, remain in effect and may be amended from time to time. All water line construction and water line extensions shall be designed in accordance to industry standards set forth by AWWA and the District's Engineer. Prior to any construction of any water line extension, all applicable planning, engineering, reviews and permits must be approved in writing by the District and all other applicable governmental agencies. Also, any applicable inspection fees must be paid.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 23rd day of August 2021, to:

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_*/s/Sue A. Schultz*________________

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