

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Proposed Missouri-)
American Water Company 2nd Revised) **File No. WT-2019-0054**
Tariff Sheet No. R. 65)

APPLICATION TO INTERVENE OF AVONDALE CUSTOM HOMES, LLC

COMES NOW Avondale Custom Homes, LLC (“AVONDALE”), by and through counsel, pursuant to Section 386.420, RSMo and 4 CSR 240-2.075, and applies to intervene and become a party in the above-referenced proceeding and in support of its Application to Intervene, AVONDALE states as follows:

1. AVONDALE is a Missouri limited liability company, organized on October 2, 2012, and is in good standing with the Missouri Secretary of State.
2. AVONDALE has its principal place of business at 2270 Bluestone Drive, St. Charles, Missouri.
3. AVONDALE develops property for residential use and consults with other developers in the industry; some of which have developments in Missouri-American Water Company’s service territory.
4. AVONDALE is currently consulting on a development in Cottleville, MO that is in both Missouri-American Water Company’s service territory and the annexed area of a public water district (the “Cottleville Development”).
5. Missouri-American Water Company (“MAWC”) is a Missouri corporation that provides water and sewer service to customers throughout the State of Missouri. MAWC’s service territory includes areas in the St. Louis metropolitan area and other outlying areas in the State of Missouri, including the area where the Cottleville Development is located.

6. 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 exempted from the taxable income of MAWC.

7. Following passage of the TCJA, MAWC demanded the Cottleville Development make an advance payment to MAWC of the entire federal and state tax purportedly owed by MAWC relating to CIAC and CAC. For the 66 lot development, the initial demand of MAWC was \$418,000. (This sum included engineering inspection and certain other costs, in addition to the advance payment of MAWC’s income tax on the CIAC required for the development. However, the tax, itself, was by far the largest part of this sum.)

8. Faced with this significant, unplanned cost that caused the cost to develop each lot to well exceed the market, AVONDALE began both discussing the inputs to MAWC’s calculation of the tax with MAWC and exploring the possibility of obtaining service from the public water district, instead. Notably, the public water district is exempt from paying income tax.

9. 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.

10. 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.

11. 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.

12. AVONDALE and other interested stakeholders participated in the July 19, 2018 workshop and suggested improvements to the proposed tariff to better 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.

13. During this workshop, AVONDALE'S counsel posed the issue that requiring private developers to pay a tax imposed on another private entity amounted to 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 that violates the Fifth Amendment of the United States Constitution, unless just compensation is paid. In this situation, if the Commission finds that developers must pay MAWC's income tax, that will amount to a per se taking of the developers' personal property (their money) for use by a governmental body (both the State and Federal governments that receive the tax payments). *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015), 192 L.Ed.2d 388, 83 USLW 4503.

14. 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 tax and segregating such income taxes in a deferred account for inclusion in rate base in a future rate proceeding. Under MAWC’s proposal, developer’s would not be forced to use their personal property to pay MAWC’s income tax; and the income tax on CIAC and CAC will be treated the same as MAWC’s other income tax.

15. 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.

16. 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.

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

18. 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.

19. 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).

20. AVONDALE meets the standards for intervention set forth in 4 CSR 240-2.075. As a consultant to a development that was faced with charges that would have made its lots unmarketable, AVONDALE 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).

21. AVONDALE has a substantial and direct interest in the outcome of this proceeding. Specifically, AVONDALE has a substantial and direct interest in the treatment on the tax on CIAC and CAC.

22. AVONDALE 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 AVONDALE.

23. AVONDALE and the developers with whom it consults may be adversely impacted by the Commission’s final order in this proceeding as AVONDALE and its consultees would have to bear the burden of the impact on taxable CIAC and CAC and would have their private property taken for use by governmental entities.

24. AVONDALE 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 assume a new financial obligation in paying MAWC’s income tax incurred because MAWC and its customers benefit from the construction, by AVONDALE and other developers of main extensions and other water and sewer infrastructure that bring additional customers to the system and, in some cases, provide facilities for additional developments along the route.

25. AVONDALE’s interests in this proceeding are unique from and not adequately represented by other parties that have or may seek to intervene, including the Homebuilders’ Association and any other individual development companies that may have unique business

models, interests and perspectives. As such, AVONDALE's interests cannot be adequately represented by any other parties in this proceeding.

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

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WHEREFORE, for the foregoing reasons, Avondale Custom Homes, LLC respectfully requests that the Commission grant this Application to Intervene in this matter.

Respectfully submitted,

**SANDBERG, PHOENIX & VON
GONTARD, P.C.**

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LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading has been served by electronic means on all parties of record as reflected in the records maintained by the Secretary of the Commission through the EFIS system.

/s/Sue A. Schultz