

**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,) **File No. WE-2021-0390**
for a Variance from the Company’s Tariff Provisions)
Regarding the Extension of Company Mains)

STAFF’S RESPONSE TO ORDER DIRECTING FILING

COMES NOW the Staff of the Missouri Public Service Commission (Staff), through counsel, and submits *Staff’s Response to Order Directing Filing*.

BACKGROUND

Missouri-American Water Company (MAWC) and DCM Land, LLC (DCM Land) jointly filed an application on May 6, 2021 requesting variances from three rules of MAWC’s tariff in order to facilitate DCM Land’s development of Cottleville Trails, a residential development in St. Charles County. MAWC and DCM Land request a variance from that part of MAWC’s tariff Rule 23A.2. which establishes that if a main extension cost does not exceed four times the estimated average annual revenue, MAWC is entirely responsible for the main extension cost if DCM Land takes service within 120 days after the main is ready for service. Applicants seek to extend this to five years.

Applicants also petition for a variance from the parts of Rule 23A.3. and Rule 34C.6. establishing the funding ratio for a main extension if its cost exceed four times MAWC’s estimate of average annual revenue. Because DCM Land’s development is in MAWC’s St. Louis Metro District, MAWC’s tariff establishes the funding ratio as 95:5, in which DCM Land pays 95% of the extension cost, while MAWC pays 5%. Applicants request a ratio of 86:14, which is the tariffed ratio for districts outside the St. Louis Metro District. Under this scenario, DCM Land pays 9% less for the main extension than it

would otherwise pay under the existing tariff, while MAWC and its ratepayers pay 9% more.

In its *Recommendation*, Staff agreed that extending the timeline of Rule 23A.2. from 120 days to five years is reasonable, but allowing DCM Land to take advantage of a main extension funding formula that is more favorable than that offered other developers is unduly discriminatory and prejudicial to MAWC and its ratepayers. In any case, Staff stated that the Commission lacks legal authority to grant a variance from a provision of MAWC's tariff, because the tariff lacks language authorizing a variance. Staff recommended that the Commission deny MAWC and DCM Land's request.¹

The parties filed stipulated facts and issues² and submitted briefing. On October 14, 2021 the Commission issued its *Order Granting Variances, Granting Waiver, and Granting Expedited Treatment* (Order) finding good cause to grant the variances, stating they are reasonable and not unduly discriminatory.³ The Office of Public Counsel (OPC) moved for rehearing, arguing that MAWC's tariff does not allow the Commission to grant the requested variances and 20 CSR 4240-2.060(4) is a procedural regulation. The Commission granted rehearing on October 27, 2021.⁴

On January 18, 2022 the Commission stated it is interested in the parties' positions on the Commission's legal authority to grant the requested variances, as well as evidence why MAWC's extension policy for St. Louis County is different than its other service territory. The Commission additionally has questions about how the prospective extension will affect fire protection and nearby properties, how MAWC has resolved the

¹ *Recommendation* (Aug 13, 2021).

² *Stipulation of Facts and List of Issues* (Sept 16, 2021).

³ *Order Granting Variances, Granting Waiver, and Granting Expedited Treatment*, P. 4-5 (Oct 14, 2021).

⁴ *Order Granting Application for Rehearing* (Oct 27, 2021).

timing issue with other developers, and the flow capacity for a larger main.⁵ The Commission ordered the parties to file their responses to these questions by February 4, 2022 and responses to other parties' filings by February 14, 2022.⁶

STAFF'S RESPONSES TO COMMISSION QUESTIONS

1. What legal authority does the Commission have to grant the requested variances from the tariff?

Consistent with its prior briefing in this matter,⁷ Staff's position is that the Commission lacks legal authority to grant the requested variances under the filed tariff doctrine and the prohibition against undue discrimination or preferential treatment.

Missouri law gives the Commission the power to require utilities to file and make publicly available a tariff that includes "all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed" by the utility.⁸ Furthermore, it is well-established under the filed tariff doctrine that a validly adopted tariff "has the same force and effect as a statute, and it becomes state law."⁹ As such, a tariff that includes all the utility's rules is binding on the utility, the public, and the Commission. A filed tariff puts customers on notice of the terms of service, creates predictability, prevents discriminatory application, and avoids retroactive ratemaking.

⁵ *Order Directing Filing* (Jan 18, 2022).

⁶ *Order Establishing Procedural Schedule* (Feb 2, 2022).

⁷ *Recommendation* (Aug 13, 2021) and *Staff's Brief* (Sept 16, 2021).

⁸ § 393.140(11), RSMo.

⁹ *State ex rel. Mo. Gas Energy v. Pub. Serv. Com'n*, 210 S.W.3d 330, 337 (Mo. App., W.D. 2006). See also *American Tel. And Tel. Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1998) (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)), *Public Service Com'n of State v. Missouri Gas Energy*, 388 S.W.3d 221, 227 (Mo. App. W.D. 2012), and *State ex rel. St. Louis City Gas Co. v. Public Service Commission of Missouri*, 286 S.W. 84, 86 (Mo. 1926).

The filed tariff doctrine is not violated when customers are put on notice through a variance or waiver provision that part of the tariff may be adjusted in the future,¹⁰ and it is not uncommon for Commission-regulated utilities to contain such a provision.¹¹ Accordingly, a variance provision in MAWC's tariff would put its customers on notice that in the future, provisions of its tariff may change. However, MAWC's tariff contains no such provision.

The Supreme Court of Missouri stated in *State ex rel. Kennedy v. Public Service Commission* that without a waiver provision in the utility's rules, "the commission could not authorize the company to make an exception in the application of its approved rule."¹² DCM Land argued that the waiver language in *Kennedy* is irrelevant because the Commission's adoption of 20 CSR 4240-2.060(4)¹³ codifies the procedure for the Commission to grant a tariff variance, in lieu of requiring every tariff to include variance language.¹⁴ Read in conjunction with case law prohibiting variance and waiver of tariff provisions unless a tariff itself puts a utility and its customers on notice that certain

¹⁰ *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1123, 1231 (D.C. Cir. 2018) (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

¹¹ See MO.P.S.C. Schedule 6 Original Sheet No. 105 of the Union Electric Company tariff. "Company may make written application to the Commission to seek the approval of a waiver of any specified portion of these filed tariffs for good cause shown."

¹² *State ex rel. Kennedy v. Public Service Com'n*, 42 S.W.2d, 349 353 (Mo. 1931) (citing *State ex rel. St. Louis County Gas Co. v. Public Service Commission of Missouri*, 315 Mo. 312 (Mo. 1926)).

¹³ 20 CSR 4240-2.060(4) states:

(4) In addition to the requirements of section (1), applications for variances or waivers from commission rules and tariff provisions, as well as those statutory provisions which may be waived, shall contain information as follows:

(A) Specific indication of the statute, rule, or tariff from which the variance or waiver is sought;
(B) The reasons for the proposed variances or waiver and a complete justification setting out the good cause for granting the variance or waiver; and
(C) The name of any public utility affected by the variance or waiver.

¹⁴ *Response of DCM Land, LLC to Office of Public Counsel Application for Rehearing*, P. 2 (Oct 26, 2021) and *Brief of DCM Land, LLC*, P. 2-3 (Sept 16, 2021).

provisions may be waived, the Commission’s rule at 20 CSR 4240-2.060(4) is a procedural rule that can apply only when a tariff contains a waiver provision.

DCM Land overlooks that even if state statute and/or Commission rule allow a certain provision, pursuant to §393.140(11) the utility’s Commission-approved tariff must include it, as the tariff must include “all rules and regulations” and “all general privileges and facilities granted or allowed.” An example of this is MAWC’s recently-approved Water and Sewer Infrastructure Rate Adjustment (WSIRA).¹⁵ Missouri law¹⁶ allows water utilities to recover certain eligible infrastructure system project costs outside of a formal case filing via a WSIRA. Although statute codifies the WSIRA rule, the Commission cannot authorize MAWC to collect a WSIRA from its customers without WSIRA tariff provisions, which puts MAWC’s customers on notice that it will collect this charge.¹⁷

Similarly, the Commission cannot use the procedural requirements of 20 CSR 4240-2.060(4) to grant MAWC variances from its tariff when its tariff contains no waiver or variance provision. The rule against retroactive rulemaking is derived from Missouri law requiring MAWC to have a tariff Commission-approved tariff that is publically available. While Missouri’s Public Service Commission Act must be liberally construed with a view to the public welfare, efficient facilities, and substantial justice between patrons and public utilities,¹⁸ Missouri’s courts have held that, “[n]either convenience,

¹⁵ *Order Approving Water and Sewer Infrastructure Rate Adjustments*, WO-2021-0428 (Jan 12, 2022).

¹⁶ §§ 393.1500 and 393.1509, RSMo

¹⁷ See the following MAWC tariff sheets:

Form No. 13 P.S.C. MO NO. 13 17th Revised Sheet No. RT 10 Cancelling 16th Revised Sheet No. RT 10;
Form No. 13 P.S.C. MO NO. 13 3rd Revised Sheet No. RT 11.1 Cancelling 2nd Revised Sheet No. RT 11.1;
and

Form No. 13 P.S.C. MO NO. 13 3rd Revised Sheet No. RT 11.2 Cancelling 2nd Revised Sheet No. RT 11.2.

¹⁸ §386.610, RSMo.

expediency or necessity are proper matters for consideration in the determination of whether or not an act of the commission is authorized by statute.”¹⁹

Further, MAWC extending special funding consideration to DCM Land which it does not extend to other developers is discriminatory. MAWC cannot “make or grant any undue or unreasonable preference to any ... corporation ... in any respect whatsoever.”²⁰ MAWC offers no legal justification to show that DCM Land is a unique customer seeking a unique service that entitles it to preferential treatment. If the Commission finds it has the legal authority to grant waivers from MAWC’s tariff, it should find that granting applicants’ request for waivers from Rules 23A.3 and 34C.6. would be unduly discriminatory. The Commission “cannot set [the terms of MAWC’s tariffs] aside as to certain individuals and maintain them in force as to the public generally.”²¹

But the Commission does not need to determine whether the requested variances are discriminatory, because according to Missouri law and the filed tariff doctrine, the Commission has no legal authority to grant the requested variances for Rules 23A.2., 23A.3., and 34C.6. of MAWC’s tariff. MAWC’s tariff is required to contain all terms of service and there is no clause in MAWC’s tariff allowing for variance or waiver.²²

¹⁹ *Matter of Verified Application and Petition of Laclede Gas Co.*, 504 S.W.3d 852, 859 (Mo. App. W.D. 2016).

²⁰ § 393.130(3), RSMo.

²¹ *State ex rel. St. Louis City Gas Co. v. Public Service Commission of Missouri*, 286 S.W. 84, 86 (Mo. 1926).

²² Staff’s position in this case is without prejudice to any position it may take in the future if MAWC seeks to amend its tariff to include a waiver provision or update its extension tariff to include different developer contribution rates applicable to all developers.

2. Why is MAWC's extension policy for St. Louis County different than its other service territory?

At this time, Staff has no evidence to offer regarding why MAWC's main extension funding ratio is different for its St. Louis Metro District compared to its other districts. MAWC's tariff was consolidated as a part of its rate case in Case No. WR-2010-0131. MAWC's position in Case No. WR-2010-0131 was that the developer should be responsible for all costs associated with main extensions, because "[i]t does not seem reasonable that all ratepayers in the district should support the developer by subsidizing the cost of the main extension."²³

The parties in Case No. WR-2010-0131 entered into a stipulation stating that they would, as a collaborative group, study existing main extension rules and develop new terms and conditions to become part of a unified tariff.²⁴ The Commission approved this stipulation and deferred a determination of the main extensions issue.²⁵ The collaborative group met numerous times before reaching an agreement, which contains the two funding ratios.²⁶ Unfortunately, these meetings were not recorded. A recording may have provided insights on the reasoning for the two funding ratios. These rules became effective October 15, 2011.

²³ *Rebuttal Testimony of Kevin H. Dunn*, WR-2010-0131, 22:20-23 (Apr 15, 2010). Mr. Dunn's rebuttal testimony is attached to this pleading as Attachment A. Staff requests that pursuant to §§ 386.290 and 536.070, RSMo the Commission take official notice of all attachments to this pleading.

²⁴ *Stipulation and Agreement*, WR-2010-0131, P. 7 (May 24, 2010). See Attachment B.

²⁵ *Report and Order*, WR-2010-0131, P. 7 (Jun 16, 2010). See Attachment C.

²⁶ *Report of Main Extension and Consolidated Tariff Collaborative Groups*, WR-2010-0131 (Jul 1, 2011). See Attachment D.

WHEREFORE, Staff submits its *Staff's Response to Order Directing Filing* for the Commission's consideration and information.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing have been emailed to all parties and/or counsel of record on this 4th day of February, 2022.

/s/ Karen E. Bretz