

**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 )

Case No. WE-2021-0390

**APPLICATION FOR REHEARING**

**COMES NOW** the Office of the Public Counsel (the “OPC”) and pursuant to RSMo. § 386.500, submits its Application for Rehearing concerning the Order Granting Variances, Granting Waiver, and Granting Expedited Treatment issued by the Missouri Public Service Commission (the “Commission”) in the above-captioned matter on October 14, 2021 (the “October 14, 2021 Order”). (Doc. 17).<sup>1</sup> In support of its Application for Rehearing, the OPC respectfully states as follows:

The October 14, 2021 Order is unlawful, unjust, and unreasonable because the Commission does not have authority to grant the requested variances and the stipulated facts in this case do not support granting the variances. Specifically, no regulation, no statute, and nothing in Missouri American Water Company’s (“MAWC”) current tariff allows the Commission to grant variances from MAWC tariff Rule 23. 20 CSR 4240-2.060(4), a procedural regulation, does not change that result. Further, the stipulated facts do not support granting the variances. For these reasons, the OPC requests that the Commission grant the Application for Rehearing, reconsider its decision to grant the requested variances as set forth in its October 14, 2021 Order, and deny the requested variances.

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<sup>1</sup> References to document numbers represent the document numbers assigned in the Electronic Filing Information System (“EFIS”).

## **I. Background**

### **A. Procedural Background**

On May 6, 2021, MAWC and DCM Land, LLC (“DCM”) filed a Joint Application for Variance and Motion for Waiver (the “Joint Application”) requesting, in part, that the Commission grant three variances from the rules set forth in MAWC’s current tariff. (Doc. 1). The Commission then filed an Order Directing Notice, Setting Time for Intervention and Responses, and Directing a Staff Recommendation. (Doc. 2).

The Staff of the Missouri Public Service Commission (“Staff”) then filed its Recommendation. (Doc. 6). DCM and MAWC filed their replies. (Docs. 7, 8). Following a Procedural Conference at which the OPC, Staff, DCM, and MAWC were present, the OPC, Staff, DCM, and MAWC filed a joint Stipulation of Facts and List of Issues. (Docs. 12, 13). On the same day that they filed the joint Stipulation of Facts, DCM, Staff, and MAWC each filed a brief addressing the issues in this matter. (Docs. 14, 15, 16). Finally, the Commission issued its October 14, 2021 Order, which granted the requested variances and waiver. (Doc. 17). The Commission’s October 14, 2021 Order takes effect on October 24, 2021. (*Id.*)

### **B. Factual Background**

MAWC and DCM requested three variances from the rule governing extensions of company mains set forth in MAWC’s tariff. (Stipulation of Facts ¶¶ 10, 11, 13, 14). Two of the variances pertain to the amount DCM may recover from MAWC of its costs incurred in extending water mains to a new residential development DCM plans to construct. (*Id.* ¶¶ 10, 11, 14). The final variance pertains to the amount of time new customers have to connect to MAWC’s water system. (*Id.* ¶¶ 10, 14). The new development, known as “Cottleville Trails,” is located in Cottleville, Saint Charles County, Missouri. (*Id.* ¶ 3). For the initial development, DCM plans for

355 single family residences and 175 apartment units. (*Id.* ¶ 4). An additional 217 single family residences are planned for future development. (*Id.*).

No dispute exists that a Territorial Agreement between MAWC and Public Water District No. 2 of St. Charles County, Missouri (PWD#2), which the Commission approved in Case Number WO-2001-441, and which was amended and again approved in Case Number WO-2012-0088, places Cottleville Trails in MAWC's exclusive service area. (*Id.* ¶ 5). All parties to this matter agree that MAWC's service area in St. Charles County is part of the St. Louis Metro District for the purpose of MAWC's tariff Rule 23 pertaining to the extension of company mains. (*Id.*).

Two of the three variances MAWC and DCM request would allow DCM to recover a larger portion of the investment it plans to make to extend water service to Cottleville Trails. (*See id.* ¶¶ 10, 11, 13, 14). The tariff rules from which MAWC and DCM request a variance set forth a cost-sharing mechanism for water main extensions. (*Id.* ¶¶ 10, 11). Specifically, Rule 23A.3 states:

If the estimated cost of the proposed extension required in order to furnish general water service exceeds four (4) times the Company's estimate of average annual revenue from the new Applicant, the Applicant and Company shall fund the remaining cost (i.e., total cost less four (4) times the estimated average annual revenue from any new Applicant(s)) of the proposed water main extension at a ratio of 95:5 (i.e., 95% Applicant funded and 5% Company funded) for St. Louis Metro District, and 86:14 (i.e., 86% Applicant funded and 14% Company funded) for all other districts.

(*Id.* ¶ 10; PSC MO. No. 13, 1st Revised Sheet No. R 48, Rule 23A.3 (emphasis added)). Similarly, Rule 23C.6 states:

Upon completion of the Main Extension, and prior to acceptance of the extension by the Company, the Applicant will provide to the Company a final statement of Applicant's costs to construct such extension. This final statement of costs will be added to the actual costs for Company to provide services as per the Developer Lay Proposal. Upon acceptance of the main extension, the Company will then issue payment to the Applicant of five percent (5%) (for St. Louis Metro District contracts) and fourteen percent (14%) (for all other district contracts) of the total, final costs that exceed four (4) times the estimated average annual revenue pursuant to Provision A.2. and 3., above. The Company will adjust its payment

based on the shortfall or excess of the difference between the actual Developer Lay costs and the Developer Lay Proposal payment made by the Applicant pursuant to Provision C.5., above.

(Stipulation of Facts ¶ 11; PSC MO. No. 13, Sheet No. R 51, Rule 23C.6 (emphasis added)).

Even though no party disputes that Cottleville Trails lies within MAWC's service territory due to the Territorial Agreement and that the county in which Cottleville Trails is located lies within MAWC's St. Louis Metro District, rather than proceed under the applicable 95%/5% ratio, MAWC and DCM request that the Commission allow them to proceed under the 86%/14% ratio applicable for all other districts. (Stipulation of Facts ¶¶ 5, 14). As part of the water main extension needed for the development, DCM will install a 12" main in place of an existing 4" main in Old Town Cottleville. (*Id.* ¶ 22). That replacement would improve fire protection in the area and provide water main access to several additional properties nearby. (*Id.*).

In addition to a variance from the tariff rules pertaining to the cost-sharing mechanism, DCM and MAWC also request a variance from a tariff rule requiring that a new customer guarantee to take service within 120 days. (*Id.* ¶¶ 10, 13). Rule 23A.2 states, in pertinent part:

The Company will be responsible for all main extensions where the cost of the extension does not exceed four (4) times the estimated average annual revenue from the new Applicant(s) whose service pipe(s) will immediately be connected directly to the extension and from whom the Company has received application(s) for service upon forms provided by the Company for this purpose. New Applicants shall be those who commit to purchase water service for at least one year, and *guarantee to the Company that they will take water service at their premises within one hundred twenty (120) days* after the date the Company accepts the main and determines it ready for Customer service.

(Stipulation of Facts ¶ 10; PSC MO. No. 13, 1st Revised Sheet No. R 48, Rule 23A.2 (emphasis added)). Specifically, MAWC and DCM request that the 120-day time period be extended to five

(5) years because the build out of both Phase 1 and Phase 2 of Cottleville Trails may not reasonably be expected to occur in 120 days. (Stipulation of Facts ¶¶ 13, 15).

## **II. Standard of Review**

“After an order or decision has been made by the commission, the public counsel . . . shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear.” RSMo. § 386.500(1). An application for rehearing “shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust, or unreasonable.” *Id.* § 386.500(2).

“Lawfulness is determined by whether or not the Commission had the statutory authority to act as it did.” *Pub. Serv. Comm’n v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012) (citations omitted). “Reasonableness depends on whether or not (i) the order is supported by substantial and competent evidence on the whole record, (ii) the decision is arbitrary, capricious or unreasonable, or (iii) the Commission abused its discretion.” *Id.* (internal quotation marks and citations omitted).

## **III. Argument**

The Commission’s October 14, 2021 Order is unlawful, unjust, and unreasonable. The Commission does not have the authority to grant the requested variances. The Commission’s citation to 20 CSR 4240-2.060(4), a procedural regulation, does not change that result. Further, the stipulated facts in this matter do not support the Commission’s decision to grant the requested variances.

**A. The Commission Does Not Have the Authority to Grant the Variances from MAWC's Tariff Rules**

No authority exists for the Commission to grant a variance from the rules set forth in MAWC's tariff. Specifically, no regulation, no statute, and nothing in MAWC's tariff allow for a variance from tariff Rule 23. As stated by Staff in its Recommendation and Brief, because a utility's tariff, once approved by the Commission, has the force and effect of law, the Commission does not have the authority to grant MAWC and DCM's requested relief.

The Supreme Court of Missouri, dating back to at least 1926, has held that a regulated utility's tariff that has been approved by the Commission "acquires the force and effect of law." *State ex rel. St. Louis Cty. Gas Co. v. Pub. Serv. Comm'n*, 286 S.W. 84, 86 (Mo. 1926) (hereinafter "*St. Louis Cty. Gas*"). Numerous other courts have made similar findings. *See, e.g., Mo. Gas Energy*, 388 S.W.3d at 227 ("Any validly adopted tariff 'has the same force and effect as a statute, and becomes state law.'" (citation omitted)); *Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 824-25 (D.C. Cir. Aug. 27, 2021) ("Once a tariff is filed, the Commission has no statutory authority to provide equitable exceptions or retroactive modifications to the tariff."); *Questar Gas Co. v. Utah Pub. Serv. Comm'n*, 34 P.3d 218, 224 n. 13 (Utah 2001) ("[C]ourts have consistently held that tariffs have the force of law." (quoting cases)).

Therefore, a tariff is "binding upon both the corporation filing it and the public which it serves. It may be modified or changed *only* by a new or supplementary schedule, filed voluntarily, or by order of the Commission." *St. Louis Cty. Gas*, 286 S.W. at 86 (emphasis added). "If such a schedule is to be accorded the force and effect of law, it is binding not only upon the utility and the public, but upon the Public Service Commission as well." *Id.* The Commission "cannot set . . . aside" a utility's tariff "as to certain individuals and maintain them in force as to the public generally." *Id.*

In determining that a provision in a company's tariff that allowed for variances from a tariff provision did not invalidate the tariff, the Missouri Supreme Court stated that "[w]ithout some such provision in the rule the [C]ommission could not authorize the company to make an exception in the application of its approved rule." *State ex rel. Kennedy v. Pub. Serv. Comm'n*, 42 S.W.2d 349, 353 (Mo. 1931) (citation omitted) (hereinafter "*Kennedy*").

No party disputes that Cottleville Trails is located within the exclusive service area of MAWC. (Stipulation of Facts ¶ 5). MAWC's tariff does not include a variance provision applicable to tariff Rule 23. (*See generally* MAWC Tariff Rules and Regulations). MAWC does not seek to change its tariff, but requests three variances applicable to DCM only.

This case is at odds with the water main extension case considered by the Missouri Supreme Court in *Kennedy*. In *Kennedy*, a group of residents sought to have a water utility's tariff rules changed to require the company to cover the expense of extending its water mains to them. 42 S.W.2d at 350. The water utility's tariff included a general rule governing when the utility or the requesting customer was to pay for the extension. *Id.* at 349–50. The general rule also included a clause allowing the Commission to grant a variance from the general rule. *Id.* at 350. The variance clause stated: "In exceptional cases, where extensions are requested under conditions which may appear to warrant departure from the above rules, the cost of such extensions, if requested and desired by the company, shall be borne as may be approved by the Public Service Commission of Missouri." *Id.* After rejecting the customer's requests for a rule requiring the utility to pay for the extension or allowing for a hearing before the Commission, the Supreme Court of Missouri concluded that the clause allowing for a variance from the general tariff rule did not invalidate the general rule as a whole. *Id.* at 352–53. Rather, the Missouri Supreme Court

concluded that without such a provision, the company could not make an exception in the application of its general tariff rule. *Id.* at 353.

The Commission has approved MAWC's tariff. Therefore, that tariff has the force of law and binds "not only . . . the utility and the public, but . . . the Public Service Commission as well." *See St. Louis Cty. Gas*, 286 S.W. at 86. The Commission cannot set aside a rule found in a company's tariff "as to certain individuals and maintain them in force as to the public generally." *Id.* In granting the requested variances, the Commission has done just that. No authority exists in MAWC's tariff or otherwise giving the Commission the power to do so. Therefore, the Commission's October 14, 2021 Order is unlawful.

**B. 20 CSR 4240-2.060(4) is a Procedural Regulation and Does Not Grant the Commission the Ability to Grant a Variance from a Tariff Rule**

In its October 14, 2021 Order, the Commission did not substantively address Staff's contention that it lacked the authority to grant the requested variances. (*See generally* October 14, 2021 Order). Rather, the Commission simply cited to 20 CSR 4240-2.060(4) stating that the regulation "allows a utility to request a variance from tariff provisions for good cause." (*Id.* 2). Because 20 CSR 4240-2.060(4) is a procedural regulation and does not grant any new substantive rights, this regulation cannot form the basis for the Commission's authority to grant a variance from a rule in a lawfully enacted tariff.

"[P]rocedural regulations establish the method of enforcing rights and carrying on the suit." *Declue v. Dir. of Revenue*, 945 S.W.2d 684, 686 (Mo. Ct. App. 1977) (citation omitted); *see Wilkes v. Mo. Highway & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988) (defining procedural law with a similar definition and stating that "procedural law is the machinery used for carrying on the suit."). "Substantive laws define the rights and duties giving rise to the cause of action by impairing vested rights acquired under existing law, creating new obligations, or imposing new



duties.” *Declue*, 945 S.W.2d at 686 (citation omitted); *see Wilkes*, 762 S.W.2d at 28 (defining substantive law with a similar definition); *see also In re Mo.-Am. Water Co. for Approval to Establish an Infrastructure Sys. Replacement Surcharge*, 2017 Mo. PSC LEXIS 436, \*3 (2017) (granting the OPC’s motion to dismiss because a new law was substantive).

20 CSR 4240-2.060(4) of the Code of State Regulations appears in Chapter 2 of Title 20, which is entitled “Practice and Procedure.” *See* 20 CSR 4240-2.060. 20 CSR 4240-2.060 states its purpose as: “Applications to the commission requesting relief under statutory or other authority must meet the requirements set forth in this rule.” *Id.* Section 4240-2.060 provides:

(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 variance 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.

*Id.*

20 CSR 4240-2.060, which appears in a chapter entitled “Practice and Procedure,” in a section whose stated purpose is to set forth the requirements for an application submitted to the Commission, does not contain a new substantive right. *See id.* Rather, this regulation is procedural in that it simply defines what a party must include in its application submitted to the Commission. *See Declue*, 945 S.W.2d at 686; *see Wilkes*, 762 S.W.2d at 28. Because 20 CSR 4240-2.060(4) is a procedural regulation, it does not provide the Commission the power to grant a variance from a tariff rule absent some authority to do so. To conclude otherwise would circumvent the Supreme Court of Missouri’s directive in *St. Louis Cty. Gas* that a Commission-approved tariff “acquires the force and effect of law” and can be “modified or changed *only* by a new or supplementary

schedule.” See *St. Louis Cty. Gas*, 286 S.W. at 86 (emphasis added). Therefore, 20 CSR 4240-2.060(4) is a procedural regulation and cannot form the basis of the Commission’s authority to grant a variance from a rule in a lawfully enacted tariff. The Commission cites no other authority for its power to grant the requested variances. Therefore, its October 14, 2021 Order is unlawful.

**C. The Stipulated Facts Do Not Support Granting the Variances from MAWC Tariff Rules 23A.3 and 23C.6**

In addition to not having the authority to grant the requested variances from MAWC’s tariff, the Commission’s October 14, 2021 Order is unreasonable and unjust because the stipulated facts do not support granting variances from MAWC’s tariff Rules 23A.3 and 23C.6.<sup>2</sup>

By statute “[n]o . . . water corporation . . . shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” RSMo. § 393.130(3). “[T]he principle of equality designed to be enforced by legislation and judicial decision forbids any difference in charge which is not based upon difference of service and even when based upon difference of service [the difference in charge] must have some reasonable relation to the amount of difference, and cannot be so great as to produce unjust discrimination.” *State ex rel. Laundry, Inc. v. Pub. Serv. Comm’n*, 34 S.W.2d 37, 44–45 (Mo. 1931) (citation omitted). The Missouri Court of Appeals has concluded that discrimination “as to rates is not unlawful under the statute where it is based upon a reasonable classification corresponding to actual differences in the situation of the consumers or the furnishing of the service.” *State ex rel. Mo. Office of Pub. Counsel v. Mo. Pub. Ser. Comm’n*, 782 S.W.2d

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<sup>2</sup> The OPC takes no position on whether the stipulated facts support granting a variance from the 120-day requirement in tariff Rule 23A.2.

822, 825 (Mo. Ct. App. 1990) (citation omitted). “Whether . . . discrimination is unlawful and unjust or the circumstances are essentially dissimilar is usually a question of fact.” *Id.* (citation omitted).

In granting the requested variances, the Commission cited

the added fire protection and access gained to nearby areas, the number of new customers taking service and the revenue expected to be produced, and the specific facts surrounding the location of this development within the service territory of St. Louis Metro District of MAWC instead of another tariffed district or the PWS#2.

(Oct. 14, 2021 Order 4). None of the cited reasons support discriminating between DCM and MAWC’s other customers by allowing DCM to take advantage of a more favorable cost-sharing mechanism than that which is available to MAWC’s other customers in the St. Louis Metro District.

First, although the larger water main that DCM intends to install will provide water main access to several additional properties nearby and will improve fire protection in the area, no evidence exists that fire protection in the area is lacking or that properties in the area lack access to a water supply or are forced to take water from inadequate sources.

Second, the number of new customers who will be taking service from MAWC if DCM builds out Cottleville Trails is not dependent upon the variances MAWC and DCM seek. Even if DCM chooses not to pursue Cottleville Trails after failing to receive the variances, it is likely that the land, which is located in St. Charles County, will be developed. Because that area exists in MAWC’s service territory, the future residents of that property will be MAWC customers.

Finally, no party disputes that because of the Territorial Agreement Cottleville Trails lies within MAWC’s service territory and that the county in which Cottleville Trails is located lies within MAWC’s St. Louis Metro District. (Stipulation of Facts ¶ 5). Whether DCM would have been able to recover a greater portion of its costs had it been able to obtain service from PWD#2

or if Cottleville Trails was located in a different MAWC service territory is irrelevant. The Commission cannot change Cottleville Trails' geographic location. Pursuant to the Territorial Agreement, based on that geographic location *only* MAWC may provide water service to Cottleville Trails. PWD#2 may not do so. The Commission approved the Territorial Agreement between MAWC and PWD#2 in Case No. WO-2001-441 and its amendment in WO-2012-0088. (Stipulation of Facts ¶ 5). No party has moved to invalidate the Territorial Agreement and this is not the case for the Commission to do so.

None of the reasons upon which the Commission relied support granting the variances MAWC and DCM seek. No evidence exists suggesting that the resulting discrimination between DCM and MAWC's other customers is based upon "difference of service." *See Laundry*, 34 S.W.2d at 44–45. Simply put, it appears that DCM seeks these variances solely to increase the amount of its investment it may ultimately recover from MAWC based on MAWC's tariff Rules 23A.3 and 23C.6. To allow it to do so would result in "undue or unreasonable preference or advantage to" DCM, which is directly prohibited by RSMo. § 393.130(3). Therefore, in addition to the Commission's October 14, 2021 Order being unlawful, it is unreasonable and unjust.

#### **IV. Conclusion**

The Commission does not have the authority to grant a variance from MAWC's tariff Rule 23. Furthermore, the stipulated facts do not support granting the requested variances. The Commission's October 14, 2021 Order is unlawful, unjust, and unreasonable.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission grant the Application for Rehearing, reconsider its decision to grant the requested variances as set forth in the October 14, 2021 Order, and deny the requested variances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 22nd day of October 2021.

/s/ Lindsay VanGerpen