

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

In the Matter of the Joint Application of)
Missouri-American Water Company and) **File No. WE-2021-0390**
DCM Land, LLC for a Variance from the)
Company’s Tariff Provisions Regarding the)
Extension of Company Mains)

**STAFF’S REPLY TO OTHER PARTIES’ RESPONSES TO
ORDER DIRECTING FILING**

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

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

Contrary to MAWC’s assertion that Staff’s position relies solely upon “a single court case from 1931,”¹ Staff’s position is that the Commission lacks authority to grant a variance based on the filed tariff doctrine. If MAWC’s tariff did contain a variance provision, ratepayers would be informed that the tariff may be adjusted in the future, and this is consistent with the filed rate doctrine. In other words, as the District of Columbia Court of Appeals stated, “no violation of the filed rate doctrine occurs when ‘buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.’”² The same is equally valid for a tariff’s other terms, including waiver or variance of the tariff itself.³

¹ MAWC’s *Response to Order Directing Filing* (hereinafter MAWC Response), ¶ 7 (Feb 4, 2022).
² *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)).
³ *American Tel. and Tel. Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) (rejecting the Ninth Circuit’s approach that the filed rate doctrine was inapplicable because services and billing, rather than rates, were involved).

MAWC and DCM Land agree with Staff and the Office of Public Counsel (OPC) that the Supreme Court of Missouri ruled in *State ex rel. Kennedy v. Public Service Commission* that the Commission does not have authority to grant a waiver or variance from an approved tariff without a waiver or variance provision. But MAWC and DCM Land assert that *Kennedy* is inapplicable, because this decision predates the Commission's authority to adopt rules, pursuant to §386.250(6), RSMo. According to MAWC and DCM Land, the Commission's adoption of 20 CSR 4240-2.060(4) codifies the procedure of granting tariff variances, in lieu of requiring each tariff to have a waiver provision.⁴

Kennedy is still good law; no part of it has been overruled. Furthermore, 20 CSR 4240-2.060(4) is consistent with *Kennedy*, and this rule does not render *Kennedy* superfluous. As OPC stated, 20 CSR 4240-2.060(4) is procedural, simply stating the filing requirements for a variance request.⁵ According to 20 CSR 4240-2.060(4), the variance request must state which statute, rule, or tariff the party seeks a variance from; the reasons for the request; a statement explaining good cause; and the name of the affected utility. If a utility's tariff does not provide for a variance, 20 CSR 4240-2.060(4) is not applicable. Read together, the filed tariff doctrine and *Kennedy* require a utility to have a tariff variance provision in order to be granted a variance from its tariff, and 20 CSR 4240-2.060(4) states the filing requirements for making a variance request to the Commission. *Kennedy* and 20 CSR 4240-2.060(4) coexist.

⁴ MAWC Response, ¶ 8 and *Response of DCM Land, LLC to Commission's January 18, 2022 Order and Motion for Continued Expedited Treatment* (hereinafter DCM Land Response), ¶ 8.

⁵ *Application for Rehearing*, P. 1 (Oct 22, 2021).

DCM Land claims it is being discriminated against because it would receive more favorable treatment from Public Water District No. 2 (PWD2) than MAWC.⁶ DCM Land's argument falls apart, because the territorial agreement (TA) that establishes MAWC and PWD2's territories provides a process for DCM Land to become a part of PWD2's territory,⁷ and the parties do not state whether they pursued this. Neither can DCM Land validly claim that it is being discriminated against "simply because the utility that serves [its] area did not request to include an express statement in its tariff."⁸ Different tariffs simply have different terms, and DCM Land bought property in MAWC's territory. There is no discrimination if a tariff from one utility has different terms than a tariff from another utility. Alternatively, DCM Land asserts that discriminating in its favor by granting it more attractive terms than other developers is supported by an "urgent need for such relief."⁹ This is entirely self-serving, because the only relief DCM Land seeks is a discount of its own construction costs.

DCM Land also complains that it did not receive notice of the TA and that the TA was not recorded.¹⁰ DCM Land points to no requirement of notice to future purchasers. As it is, there is no requirement that the parties to the TA make future purchasers aware of a TA.

MAWC and DCM Land both cite Case No. WO-2008-0301 as an example of the Commission granting a tariff variance as a reason why they should be granted a variance.¹¹ In this case, Staff recommended that the Commission grant a variance from

⁶ DCM Land Response, ¶¶ 23, 27. DCM Land states that if its development would be in PWD2's territory, PWD2 would pay to install the main and then recover the costs from homeowners. DCM Land, Footnote 1.

⁷ *Territorial Agreement*, WO-2001-0441, ¶ 6 (Oct 4, 2000). See Attachment A.

⁸ DCM Land Response, ¶ 9.

⁹ DCM Land Response, ¶¶ 6, 26.

¹⁰ DCM Land Response, ¶ 27

¹¹ MAWC Response, ¶ 9 and DCM Land Response, ¶ 10.

a rule in MAWC's sewer tariff to accommodate an agreement in which a developer would reimburse MAWC for engineering and overhead costs associated with a sewer extension constructed by the developer. The tariff rule was silent whether MAWC could recover these expenses from a developer constructing the extension. Staff and the Commission found MAWC's request reasonable, "in order that existing customers do not subsidize part of the cost of extensions."¹² In contrast, here the developer does not want to pay the tariffed cost for its requested extension, which would be subsidized by existing customers.

MAWC also notes that the Commission granted tariff variances in other cases.¹³ In each of these cases, the tariff either allowed the variance or the variance resulted in no effect or a benefit to ratepayers. Also, MAWC cites a case in which a variance was requested, but the Commission did not grant it. None of these cases involved a detriment to ratepayers, as granting a waiver in this case would. Below Staff differentiates the cases MAWC cites from the issue at hand:

GO-98-500: The Commission granted Missouri Gas Energy's request for variances from its tariff sheets regarding the processing of certain refunds to its large volume customer class. MAWC overlooks that the relevant section of the tariff contained specific language ("Unless otherwise ordered by the Commission...") allowing a variance.¹⁴

¹² Memorandum attached to *Staff Recommendation*, WO-2008-0301, P. 3 (May 1, 2008) and *Order Granting Variance from Tariff*, WO-2008-0301, P. 3 (May 20, 2008).

¹³ MAWC Response, ¶ 9.

¹⁴ "Large Volume, Intrastate Transportation Service and Whiteman Air Force Base Customers: Unless otherwise ordered by the Commission, supplier refunds (including interest from suppliers), received by the Company from charges paid for natural gas resold to its Large Volume, Intrastate Transportation Service and Whiteman Air Force Base customers shall be refunded to each customer classification respectively when such accumulated refunds equal or exceed \$75,000. Such refunds shall be made within 90 days following receipt..."

P.S.C. MO. No. 1 First Revised Sheet No. 22 Canceling P.S.C. MO. No. 1 Original Sheet No. 22.

GR-2000-520 and GR-2001-461: These cases involved the actual cost adjustment (ACA) filings of UtiliCorp United, Inc. (UtiliCorp) / Aquila, Inc. (Aquila). Case No. GR-2000-520 dealt with UtiliCorp's 1999-2000 ACA filing and Case No. GR-2001-461 dealt with Aquila's 2000-2001 ACA filing. In Case No. GR-2000-520 the Commission granted UtiliCorp two variances. The first was to allow UtiliCorp to file its winter PGA filing, which was due on Saturday, November 4, 2000, instead on Monday, November 6, 2000.¹⁵ This variance – if it was actually needed – had no effect on ratepayers. The second was to spread its recovery of a large ACA balance over three years, rather than over one, in order to reduce ratepayers' immediate rate impact.¹⁶ This resulted in a benefit to ratepayers – avoidance of rate shock. In Case No. GR-2001-461, Aquila requested a waiver to defer carrying costs due to under-recovery balances. The Commission approved a stipulation between the parties in which Aquila agreed to forgo this carrying cost balance,¹⁷ therefore no waiver was needed nor granted.

EE-2003-0282: Kansas City Power & Light Company (KCP&L) received a Commission waiver for an independent living facility with apartments from the separate metering requirement of then 4 CSR 240-20.050(2) and its tariff.¹⁸ KCP&L stated in its application that the facility owner would pay residents' electric bills and that separate

¹⁵ *Order Granting Variance*, In the Matter of Missouri Public Service's Purchased Gas Adjustments Factors to be Reviewed in its 1999-2000 Actual Cost Adjustment, Case No. GR-2000-520 (Nov 2, 2000).

¹⁶ *Second Order Granting Variance*, In the Matter of Missouri Public Service's Purchased Gas Adjustments Factors to be Reviewed in its 1999-2000 Actual Cost Adjustment, Case No. GR-2000-520 (Nov 30, 2000).

¹⁷ *Order Approving Unanimous Stipulation and Agreement*, In the Matter of Missouri Public Service's Purchase Gas Adjustment Factors to be Reviewed in its 200-20001 Actual Cost Adjustment, Case No. GR-2001-461 (Mar 13, 2003).

¹⁸ *Order Granting Variance*, In the Matter of the Application of Kansas City Power & Light Company for a Variance from the Commission's Rule, and Kansas City Power & Light Company's Tariff, That Require Separate Metering for a New Building Located at Bishop Spencer Place, 4301 Madison Avenue, Kansas City, Missouri, Case No. EE-2003-0282 (May 13, 2003).

metering would increase residents' costs. The company's tariff had language allowing a waiver from the prohibition of customer resale.¹⁹

EE-2006-0124: Union Electric Company (Ameren) also received a Commission waiver from the separate metering requirement of then 4 CSR 240-20.050(2) in addition to that part of its tariff which prohibited master-metering for a public housing authority development.²⁰ Ameren stated that the waivers benefited residents, who would not normally meet Ameren's credit standards for service. The Ameren tariff allowed for waivers,²¹ as it does now.²²

GE-2016-0142: Laclede Gas Company (Laclede) requested a variance from a portion of its tariff which required it to file an evaluation of its Energy Efficiency Collaborative program within six months after the end of the program's second year. The Commission granted this, because Laclede ended its participation in this program before the end of the second year, saving ratepayers an unnecessary expense.²³

If the Commission rules against MAWC and DCM Land, the parties have an alternative. The TA between MAWC and PWD2 that established DCM Land's residential

¹⁹ "The restriction against 'redistribution' may be waived by the Company where the operation of certain types of multiple occupancy premises, either in whole or in part, make it impractical for the Company, in its judgment, to separately meter and supply electric service to each occupant as a Customer of the Company." P.S.C. MO. No. 2 Second SHEET No. 1.19 Cancelling P.S.C. MO. No. 2 First SHEET No. 1.19.

²⁰ *Order Granting Variance and Directing Filing*, In the Matter of the Application of Union Electric Company, doing business as AmerenUE, for a Variance from the Separate Metering Requirement of the Commission's Rule and the Company's Tariff for the Remodeling of Kingsbury Terrace Apartments Located at 5655 Kingsbury Avenue, St. Louis Missouri, Case No. EE-2006-0124 (Nov 17, 2005).

²¹ "The tariffs (i.e., rates, riders, rules and regulations) contained herein have been filed with and approved by the Missouri Public Service Commission and are subject to modification to conform with any revision filed by the Company and approved by the Commission. ... 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."

P.S.C. MO., ILL. C. C., IA. ST. C. C. SCHEDULE No. 5 8th Revised Sheet No 139 Cancelling Schedule No. 5 7th Revised Sheet No. 139.

²² MO. P.S.C. Schedule 6 Original Sheet No. 105

²³ *Order Granting Variance*, In the Matter of the Application of Laclede Gas Company for a Variance from an EEC Tariff Provision in its Laclede Service Territory, Case No. GE-2016-0142 (Feb 3, 2016).

development within MAWC's territory contains an amendment process "to allow a structure to receive service from one party though the structure is located in the service area of the other."²⁴ The instant situation is analogous to that in Case No. WO-2012-0088, cited by DCM Land.²⁵ In Case No. WO-2012-0088, MAWC and PWD2 requested an amendment to the TA approved in Case No. WO-2001-441 so PWD2 could serve property owned by the U.S. Army Reserve Regional Support Command (Army). The Army requested service from PWD2, because the construction cost of water mains to connect to MAWC's system would be higher than the cost of connecting to PWD2's system. The Commission granted this amendment.²⁶ In the case at hand, it does not appear that DCM Land has attempted to take advantage of the process to change providers. A TA amendment would accomplish the parties' goals.

In conclusion, preventing discrimination is at the heart of the filed tariff doctrine.²⁷ If MAWC wants to reduce DCM Land's contribution to main construction – which DCM Land represents as a discount to it of approximately \$1.2 million²⁸ – it should make this discount available to all other developers and put ratepayers on notice. The means of doing this is a tariff change. MAWC writes that the Commission could order it to file a new tariff;²⁹ however MAWC does not require a Commission order to request a tariff

²⁴ *Territorial Agreement*, WO-2001-0441, ¶ 6 (Oct 4, 2000). See Attachment A.

²⁵ DCM Land Response, ¶ 23.

²⁶ *Report and Order Approving Addendum to Territorial Agreement*, Case No. WO-2012-0088 (Nov 15, 2011).

²⁷ "[T]he filed-rate doctrine ... strictly directs that 'the rate of the carrier duly filed is the only lawful charge,' and bars the courts from permitting such inequity among ratepayers." *Old Dominion Electric Cooperative v. PJM Interconnection, LLC*, 2022 WL 164014 (4th Cir) Jan 19, 2022. (quoting *Louisville Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915)).

²⁸ DCM Land Response, ¶ 32.

²⁹ MAWC Response, ¶ 10.

change. If MAWC does not want to make this discount available to other developers, this is discrimination, and the Commission should not condone it. Extending special funding consideration to DCM Land which it does not extend to other developers is discriminatory. Granting this requested variance will be to the detriment of all ratepayers who will fill the gap left by the discount. There is no good cause to discriminate in DCM Land's favor to the disadvantage of other ratepayers who would subsidize DCM Land's discounted main construction cost. Staff recommends that the Commission deny MAWC and DCM Land's request for a variance from rules in its tariff related to the allocation of water main construction costs.

WHEREFORE, Staff submits its *Staff's Reply to Other Parties' 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 14th day of February, 2022.

/s/ Karen E. Bretz