

**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

**THE OFFICE OF THE PUBLIC COUNSEL’S FEBRUARY 4, 2022 RESPONSE TO THE
COMMISSION’S JANUARY 18, 2022 ORDER DIRECTING FILING**

COMES NOW the Office of the Public Counsel (the “OPC”) and in response to the Missouri Public Service Commission’s (the “Commission”) January 18, 2022 Order Directing Filing (the “January 18, 2022 Order”) (Doc. 27)¹ and pursuant to the Commission’s February 2, 2022 Order Establishing Procedural Schedule (the “February 2, 2022 Procedural Schedule”) (Doc. 29) respectfully states as follows:

No legal authority exists conferring authority on the Commission to grant the variances requested by Missouri-American Water Company (“MAWC”) and DCM Land, LLC (“DCM”) in their Joint Application for Variance and Motion for Waiver (the “Joint Application”). (Doc. 1). At this time, the OPC offers no “evidence concerning why [MAWC’s] extension policy for St. Louis County is different from all its other service territory.” (Jan. 18, 2022 Order 1, Doc. 27). The OPC also takes no position regarding the numbered and lettered questions and sub-questions in the Commission’s January 18, 2022 Order. (*See id.* 1–2). The OPC reserves the right to take a position on these issues throughout the pendency of this matter, including in its February 14, 2022 filing.

I. Procedural Background

On May 6, 2021, MAWC and DCM filed the Joint Application requesting, in part, that the Commission grant variances from three subsections of Rule 23 in MAWC’s published and filed

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

tariff—PSC MO No. 13. (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 (the “Staff”) then filed its Recommendation. (Doc. 6). DCM and MAWC filed their replies. (Docs. 7, 8). Following a Procedural Conference at which the OPC, the Staff, DCM, and MAWC (collectively, the “Parties”) were present, the Parties filed a joint Stipulation of Facts and List of Issues. (Docs. 12, 13). On the same day that the Parties filed the joint Stipulation of Facts and List of Issues, DCM, the Staff, and MAWC each filed a brief addressing their arguments pertaining to each of the issues in the List of Issues. (Docs. 14, 15, 16). On October 14, 2021, the Commission granted MAWC and DCM’s requested variances from MAWC’s tariff Rule 23 and waiver from 20 CSR 4240-4.017(1) (the “October 14, 2021 Order”). (Doc. 17).

On October 22, 2021, the OPC filed an Application for Rehearing, which the Commission granted five days later, on October 27, 2021. (Docs. 18, 22). The Parties then participated in a prehearing conference before the Commission. (*See* Doc. 25). Following the prehearing conference, the Parties filed a Joint Motion for Clarification requesting Commission guidance “as to what aspects of this case [the Commission] wants to rehear.” (Jt. Mot. Clarification 2, Doc. 26).

The Commission’s January 18, 2022 Order made two inquiries and asked a series of numbered and lettered questions and sub-questions. Specifically, the Commission requested “the parties’ positions on what legal authority the Commission has to grant the requested variance from the tariff” and “evidence concerning why [MAWC’s] extension policy for St. Louis County is different from all its other service territory.” (Jan. 18, 2022 Order 1). The Commission’s questions and sub-questions requested additional factual information. The Commission ordered the Parties to provide “a pleading addressing how they plan to address these questions.” (*Id.* 3).

On February 1, 2022, the Parties filed a Joint Response to Commission’s January 18, 2022 Order Directing Filing (the “Joint Response”), describing their plan to address the Commission’s inquiries and questions. (Doc. 28). In the February 2, 2022 Procedural Schedule, the Commission adopted the Parties’ proposed filing schedule. (*See* Doc. 29).

In accordance with the Parties’ plan as described in the Joint Response, the OPC makes this filing asserting that no legal authority exists conferring authority on the Commission to grant the variances MAWC and DCM requested in the Joint Application.

II. Applicable Tariff Provisions

In the Joint Application, MAWC and DCM request, in pertinent part, a variance from three provisions of MAWC’s tariff—PSC MO No. 13—pertaining to Rules 23A.2, 23A.3, and 23C.6. (Jt. Appl. 4–5, Doc. 1; *see* Stipulation of Facts ¶¶ 10–11, Doc. 13). MAWC and DCM request the same variance from Rules 23A.3 and 23C.6, changing the applicable funding ratio from 95%/5% to 86%/14%. (*See* Jt. Appl. 5; Stipulation of Facts ¶ 14). The requested variance from Rule 23A.2 would change the definition of new Applicants by extending the amount of time that a customer has to connect to the water system from 120 days to 5 years. (Jt. Appl. 5; Stipulation of Facts ¶ 13). The language of the applicable tariff provisions appear below. The language affected by the requested variances appears in italics.

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.

(Stipulation of Facts ¶ 10 (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 (emphasis added)). 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 (emphasis added)).

III. Argument: No Legal Authority Exists Conferring Authority on the Commission to Grant the Variances from MAWC's Filed and Published Tariff Rules

No legal authority exists for the Commission to grant a variance from the rules set forth in MAWC's filed and published tariff. Specifically, no regulation, no statute, and nothing in MAWC's tariff allows for a variance from tariff Rule 23. Because a tariff, once approved by the Commission and filed and published, has the force and effect of law and nothing exists conferring authority on the Commission to grant a variance from the rules set forth in the tariff, the Commission does not have the legal 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*”); *Pub. Serv. Comm’n v. Mo. Gas Energy*, 388 S.W.3d 221, 227 (Mo. Ct. App. 2012) (“Any validly adopted tariff ‘has the same force and effect as a statute, and it becomes state law.’” (citation omitted)).

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 allowing variances from a rule in a company’s tariff did not invalidate the tariff rule, 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*”).

Granting MAWC and DCM’s requested variances would make this case at odds with two Missouri Supreme Court cases: *Kennedy* and *St. Louis Cty. Gas*. First, 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 349–50. The water utility’s tariff included a general rule governing when the utility or the requesting customer was to pay for the extension. *Id.* The general rule also included a clause allowing the Commission to grant a variance from the application of 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 customers’ requests for a rule requiring the utility to pay for the extension or allowing for a hearing before the Commission, the Missouri Supreme Court concluded that the clause allowing for a variance from the general tariff rule did not invalidate the rule as a whole. *Id.* at 350, 352–53. Rather, the *Kennedy* 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.

Further, granting the requested variances would likely lead to the Commission reaching the same reversible result a prior Commission reached as explained in *St. Louis Cty. Gas*, 286 S.W. 84. In that case, a group of potential customers sought to have gas mains extended to their homes. *Id.* at 85. St. Louis County Gas Company agreed to do so under its rules governing the extensions of mains. *Id.* The potential customers refused service under those terms, claiming that the company’s rules relating to the extension of mains were “unreasonable” and filed a complaint before the Commission. *Id.* After concluding that the company “could make the extensions without burdening its present customers or without incurring financial loss,” the Commission concluded that “[a]s applied to the facts in this case the [company’s] rule requiring a deposit from [the potential customers] before [the company] will extend its line to serve them is unreasonable.” *Id.* (internal quotation marks omitted). Therefore, the Commission required the company to extend service to the potential customers on terms different than those set forth in its tariff. *Id.*

The circuit court reversed the Commission and the Missouri Supreme Court affirmed. *Id.* at 85, 86. The Missouri Supreme Court noted that the rules applying to the extension of mains constituted an “integral part” of the company’s tariff. *Id.* at 86. It stated that if the Commission concluded that the rules applying to extensions of mains were “unjust and unreasonable” it could

“after a hearing, as just referred to, . . . order the schedule modified in respect to them.”² *Id.* However, the Commission could not “set them aside as to certain individuals and maintain them in force as to the public generally.” *Id.*

Although here MAWC and DCM request the variances from the rules relating to extensions of MAWC’s water mains, the principles enunciated in *Kennedy* and *St. Louis Cty. Gas* apply. No party disputes that Cottleville Trails is located within MAWC’s exclusive service area. (Stipulation of Facts ¶ 5). Similarly, no party disputes that MAWC’s service area in St. Charles County, where Cottleville Trails is located, “is a part of the St. Louis Metro District for the purpose of MAWC’s tariff Rule 23-Extension of Company Mains.” (*Id.* ¶¶ 3, 5). MAWC’s filed and published tariff in Rules 23A.3 and 23C.6 require the use of a 95%/5% funding mechanism for the St. Louis Metro District, such that the applicant funds 95% of the specified cost of extending MAWC’s water mains and MAWC funds the remaining 5%. (See Stipulation of Facts ¶¶ 10, 11). Further, MAWC’s filed and published tariff in Rule 23A.2 defines a “New Applicant” as “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.” (See *id.* ¶ 10). Nothing in MAWC’s tariff allows for variances from these rules. (See generally PSC MO No. 13).

The Commission has approved MAWC’s tariff, which is filed and published. Therefore, the tariff, including Rule 23, 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 Rule 23 of MAWC’s tariff “as to [DCM] and maintain [the rule] in force as to the public generally.” *Id.* If the Commission grants the requested variances, it would

² In the Joint Application, MAWC does not seek to amend the rules set forth in its tariff relating to the extension of its water mains. This is not the proper case for the Commission to consider such a change.

do just that. No legal authority exists in MAWC's tariff or otherwise granting the Commission the authority to do so.

IV. Conclusion

No legal authority exists conferring on the Commission the authority to grant the variances MAWC and DCM requested in the Joint Application.

WHEREFORE, the Office of the Public Counsel respectfully requests the Commission deny the variances requested in the Joint Application.

Respectfully submitted,

/s/ Lindsay VanGerpen
Lindsay VanGerpen (#71213)
Associate Counsel

Missouri Office of the Public Counsel
P.O. Box 2230
Jefferson City, MO 65102
Telephone: (573) 751-5565
Facsimile: (573) 751-5562
E-mail: Lindsay.VanGerpen@opc.mo.gov

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing have been mailed, emailed, or hand-delivered to all counsel of record this 4th day of February 2022.

/s/ Lindsay VanGerpen