

**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) **File No. WE-2021-0390**
Tariff Provisions Regarding the Extension of)
Company Mains.)

**REPLY OF DCM LAND, LLC TO PARTIES’ RESPONSES TO COMMISSION’S
JANUARY 18, 2022 ORDER DIRECTING FILING**

COMES NOW DCM Land, LLC (“DCM”), by and through its undersigned counsel, and for its Reply to the Parties’ Responses to the Missouri Public Service Commission’s (“Commission’s”) Order Directing Filing of January 18, 2022 (the “ODF”), and in accordance with the schedule established by the Commission in its February 2, 2022 Order, states as follows:

1. In their February 4, 2022 Responses (the “Responses”) to the ODF, the Staff of the Missouri Public Service Commission (“Staff”) and the Office of Public Counsel (“OPC”) each take the continued position that the Commission lacks the authority to issue the variances requested by DCM and Missouri-American Water Company (“MAWC” and collectively with DCM, the “Joint Applicants”) in this matter.

2. In their respective Responses, each the Staff and OPC cite to the 1926 case of *State ex rel. St. Louis Cty. Gas Co. v. Pub. Serv. Comm’n*, 286 S.W. 84.86 (Mo. 1926) and its holding that a tariff approved by the Commission has the force and effect of law that binds the utility, the public, and the Commission itself. Staff Response at p. 3; OPC Response at pp. 4-5.

3. However, the more recent case cited by Staff in its Response, *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm’n, et al*, 210 S.W. 3d 330 (WD MO 2006) clarified that the Commission has the authority to adopt rules prescribing “the conditions of rendering public utility service”, citing to MO Rev. Statutes Section 386.250(6). *Id. at 334*. In *Missouri Gas Energy*,

supra, the Commission adopted an emergency disconnect rule that over-rode the prior rule that had been incorporated into each gas utility's respective tariffs.

4. That exact same approach applies here. Rather than requiring each utility to specify in their respective tariffs that the Commission may vary them, as Staff and OPC each allege is required by citing to the 1931 case *State ex rel. Kennedy v. Public Service Commission*, 42 S.W2d 349, 350, 352-53 (Mo. 1931), following the adoption of Section 386.250(6) in 1939 (i.e., eight years after the *Kennedy* decision), the Commission adopted a standard rule regarding variance of a utility's tariff, by adopting Commission Rule 20 CSR 4240-2.060(4) , which no party disputes that the Joint Applicants have followed.

5. As noted by MAWC in its Response, the Commission has previously granted many variances and/or waivers based on 20 CSR 4240-2.060(4) . MAWC Response at pp. 2 and 3.

6. The enforceability of all such decisions is being called into question now by OPC's and Staff's position that 20 CSR 4240-2.060(4) is only procedural.

7. Curiously, this would include at least one case in which Staff, itself, requested the variance be issued under 20 CSR 4240-2.060(4), i.e., *In the Matter of the Application of Missouri-American Water Company for Approval of an Agreement with MLM Properties, Inc.*, WO-2008-0301, 2008 WL 4488297 (Mo.P.S.C.).

8. In *Kennedy*, *supra*, in order to counter the argument that a clause that allowed the Commission to vary a tariff would allow for discrimination in service, the Court noted that: "Discrimination is not unlawful unless arbitrary or unjust"; and further held that the "provision was designed only to afford the possibility of such relief [i.e., a different cost sharing ratio] where, because of exceptional conditions, there may be urgent need for such relief and it may be justly

granted.” *Id.* That is exactly the conditions that exist, in this matter; and the *Kennedy* case, *Id.*, should be found to support the granting of the variances requested herein.

9. To find that the Commission could only grant a variance or waiver if the specific tariff expressly states that it might be varied would both (i) create discrimination, by disallowing some of the public to obtain a variance if they demonstrate special circumstances, simply because the utility that serves their area did not request to include an express statement in its tariff; and (ii) be contrary to the purpose of allowing the Commission the authority to grant a variance – i.e., the recognition that there may be exceptional conditions that create an urgent need for such relief, so that the relief may be justly granted. *Kennedy*, *supra*.

10. The “Filed Rate Doctrine” referred to by Staff in its Response does not require a different conclusion. A tariff that is subject to waiver and/or variance through the practice specified in 20 CSR 4240-2.060(4) is just as binding and effective at law, as a tariff that itself states that it may be varied by the Commission. Either way, the legal effect of the tariff is that it may be varied, but only if the Commission finds the variance is appropriate.

11. Staff argues that Section 393.140(11) requires that all rules to apply to a utility must be included in a utility’s tariff. However, that interpretation of the statute both ignores Section 393.140(1) -which gives general supervisory power to the Commission and 386.250(6) RSMo , which authorizes the Commission to adopt rules for billing for public utility service; and is contrary to *Missouri Gas Energy*, *supra*.

12. As noted above, *Missouri Gas Energy*, *supra* involved an emergency cold weather rule adopted by the Commission that superseded the rules contained in the gas utilities’ individual tariffs. In finding the emergency rule valid, the Court noted that the adoption of a tariff cannot destroy the statutorily granted authority of the Commission to make a new rule. *Id.* at 337.

13. The Commission has general authority to adopt rules applicable to all utilities subject to its regulation, under Section 393.140(1) and 386.250(6) RSMo.; and Section 393.140(11), to be consistent with both logic and the precedent must be interpreted to intend that rules specific to a utility are what must be included in that utility's separate tariff. Not general rules properly adopted by the Commission to apply to all utilities.

14. To interpret Section 393.140(11) to require even general rules to be incorporated into each and every utility's tariff would mean that the Commission could not adopt an emergency cold weather rule, as it did in *Missouri Gas Energy*, supra; and would require that all tariffs be re-opened, every time the Commission had need to enter a general rule.

15. **All of the foregoing discussion, however, over-looks the fact that MAWC's tariff does expressly provide that the Rules and Regulations contained therein may be altered by MAWC from time to time, if it deems necessary or proper, if approved by the Commission.** Rule 2 (C), 1st Revised Sheet No. R 9. See *Attachment A*.

16. Based on the foregoing, therefore, the Commission should find that it does have authority to grant the requested variances, both because of the precedent and rules discussed; and because MAWC's tariff does expressly provide that its tariff may be altered, if approved by the Commission.

17. The secondary issue presented, once the Commission finds that it has the legal authority to grant the variances if good cause is shown, is whether good cause has been shown to grant the two variances requested.

18. In that regard, Staff now takes the position that granting the variances would be discriminatory.

19. As discussed in the prior filings and above, however, “Discrimination is not unlawful unless arbitrary or unjust”, *Kennedy*, supra. A different cost sharing ratio may be approved, where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted.” *Id.* That is exactly the conditions that exist, in this matter; and the *Kennedy* case, *Id.*, should be found to support the granting of the variances requested herein.

20. Cottleville Trails has been shown to be unique, because of its size and its location within the service territory of Public Water District No. 2, which would allow DCM to incur much lower costs for the water infrastructure, and because unaltered MAWC’s tariff would cause Cottleville Trails to incur costs well above the market costs developers not in MAWC’s territory would incur.

WHEREFORE, DCM respectfully requests the Commission find that:

1. The matter should continue to be handled with expedited treatment and a final order issued no later than April 1, 2022, in order to allow DCM to be able to achieve the current May 1, 2022 closing date for its initial sale of lots.
2. The Commission has the authority to grant the requested variances.
3. Reasonableness and fairness require that both the variances requested in this matter be granted.

Respectfully submitted,

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ATTORNEYS FOR DCM LAND, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 14th day of February, 2022, to:

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