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.	)))))	**File No. WE-2021-0390**

RESPONSE OF DCM LAND, LLC TO COMMISSION'S JANUARY 18, 2022 ORDER AND MOTION FOR CONTINUED EXPEDITED TREATMENT

COMES NOW DCM Land, LLC ("DCM"), by and through its undersigned counsel, and for its Response to the Missouri Public Service Commission's ("Commission's") Order of January 18,2022 and Motion for Continued Expedited Treatment, and in accordance with the schedule established by the Commission in its February 2, 2022 Order, states as follows:

1. In its January 18, 2022 Order, the Commission requested "the parties' positions on what legal authority the Commission has to grant the requested variance from the tariff".

2. This issue arises because, despite the parties filling a jointly agreed list of issues, on September 16, 2021, and thereafter and based thereon briefing the issue the Staff of the Commission (the "Staff") had raised in its Recommendation, i.e., that the Commission did not have the authority to grant the variances jointly requested by DCM and Missouri-American Water Company ("MAWC" or the "Company" and, collectively with DCM, the "Applicants") in this matter, because Staff had noted that MAWC's tariff does not expressly state that it may be varied by the Commission (Staff Recommendation, Para. 7 and 8), the Office of Public Counsel ("OPC"), which did not file a brief to address the issue when it had the opportunity to do so, filed an Application for Rehearing, now taking the position that the Commission does not have the authority to issue the requested variances.

3. In its Application for Rehearing, OPC relies on the same 1931 case as the Staff had cited, i.e., *State ex rel. Kennedy v. Public Service Commission*, 42 S.W2d 349, 350, 352-53 (Mo. 1931).

4. The Staff had taken its position, despite acknowledging, in Paragraph 7of its Recommendation, that Commission Rule 20 CSR 4240-2.060(4) provides a procedure to apply for such variances; and also acknowledging, in Paragraph 8 and footnote 4 of the Recommendation, that courts have found that a waiver of a line extension tariff for a water corporation is lawful, "upon approval of the Commission" . *Id.*.

5. *Kennedy*, supra, is a 1931 decision that upheld the propriety of a tariff that included a clause that would allow a different line extension cost sharing than specified in the tariff to be used, if the Commission approved such different sharing ratio. *Id.*.

6. In *Kennedy*, 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.

7. Staff and now OPC has cited to one sentence in the *Kennedy* case that reads:: "Without such a provision in the [tariff] the commission could not authorize the company to make an exception in the application of its approved [tariff]." *Id*.

8. The statement on which Staff and now OPC relies, however, was made in 1931, well before Section 386.250 (6), RSMo. which authorized the Commission to adopt rules that

prescribe the conditions for billing for public utility service, was first adopted. *See* Revised Statutes of Missouri 1929, §5136. The Commission's adoption of 20 CSR 4240-2.060(4), thereafter, codified the procedure by which the Commission's authority, as described by the *Kennedy* court, to grant a variance or waiver, would be exercised, rather than requiring each and every tariff to include a statement that would allow for the Commission to grant such a waiver or variance.

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. Staff's position is also puzzling, as Staff, itself, has previously requested that the Commission issue a variance from a line extension rule in a MAWC tariff, based on 20 CSR 4240-2.060(4). *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.).

11. The "Filed Rate Doctrine" referred to by Staff in its Recommendation does not require a different conclusion. A tariff that is subject to waiver and/or variance through application of 20 CSR 4240-2.060(4)'s procedure 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.

12. The fact that 20 CSR 4240-2.060(4) is included in a section of the Code of State Regulations that is entitled "Practice and Procedure" should not, as urged by OPC, be found to mean that such rule is strictly "procedural". That would ignore the part of the title of the Section entitled "Practice". Simply put, the rule sets forth the practice to be used to request a variance, rather than the former practice found valid in the Kennedy case of having each separate utility tariff expressly state that it could be varied. In short, the rule codifies both the substantive practice and the procedure to be applied for a utility to obtain a variance from its tariff, which all parties appear to acknowledge should be allowed, for good cause shown.

13. Based on the foregoing , the Commission should find that it does have authority to grant the requested variances.

14. 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.

15. In that regard, OPC posits, on p. 11 of its Application for Rehearing, that even if DCM does not proceed to develop Cottleville Trails, if the variances are not granted, that it is likely that the land will be developed by someone else and MAWC will have new customers from that development.

16. The parties entered an agreed Stipulation of Facts in this matter; and nowhere was it stipulated that other development would occur. Indeed, that is pure speculation that fails to recognize that it is the lower cost of water from the water district also servicing the area that is driving the development market; and developers will go to the adjoining territory where service may be had from the water district at a much lower cost. If other development occurs in this piece

of MAWC's service territory, it is likely to be much different development and many fewer customers, than Cottleville Trails would provide.

17. Next OPC claims that no party disputes that the Territorial Agreement makes this area the exclusive service territory of MAWC and that no party has moved to invalidate the Territorial Agreement and that this is not the case to do so. (OPC Application for Rehearing at pp. 11 and 12.)

18. DCM agrees that this is not the case to challenge the Territorial Agreement, and, because the Commission has the authority to grant the requested variances, DCM has been willing to work with MAWC to request such variances.

19. DCM has not, however, waived any right it has to challenge the Territorial Agreement, if the variances are not granted. DCM does not believe it is appropriate for utility service to be significantly higher cost, in order to protect monopolistic service territory of a public utility, when a significantly lower cost service alternative is ready and able to serve. That is the very foundation of the Supreme Court's ruling in *Kennedy*, supra, that the Commission would have the authority to vary a tariff "for good cause shown". Tariff's are a general rule and simply cannot address all situations that arise.

20. As to the good cause for the specific variances requested, Staff did not object to the extension of the 120-day rule, if the Commission would find that the Commission had the authority to grant the requested variances; and, in its Memorandum filed with its Recommendation, Staff agreed with the Applicants that it is not reasonable to expect the construction of 747 homes and apartments and each residence to be considered ready for water service within a 120 day window. (Staff Memorandum. P. 4 of 8.)

21. Staff notes that "it will take far beyond 120 days, and perhaps years, for a substantial amount of the lots to be developed and have customers. (Staff memorandum. P. 5 of 8.)

22. Staff's Memorandum details several of the steps required to develop a residential community, and rightfully concludes that "a five year period to construct these residences and have them ready to take water service is a reasonable request and would create no undue discrimination." (Staff Memorandum. P. 5 of 8.)

23. From DCM's perspective, it would be entirely discriminatory for the Commission to find that the variance from 120 days to 5 years should not be granted, when, absent the Territorial Agreement entered by MAWC and Public Water District No. 2 ("PWD2) and approved by the Commission in Case No. WO-2001-441 on May 15, 2001 (and as further amended by an Addendum to the Agreement approved by the Commission on November 15, 2011, in Case No. WO-2012-0088) (the "Territory Agreement"), DCM would have been able to obtain water service for the development from PWD2 and, in accordance with PWD2's rules, would have not had a time limit on the recovery of its costs. This is particularly true because any developer who undertakes a development on the other side of the invisible line established by the Territory Agreement would be able to take service from PWD2 and not be subjected to the 120-day time limit to recover costs, even if their development were much smaller.

24. Staff did, and OPC now does, however, differ on whether the upfront 86:14 cost sharing ratio from the Company's other districts should be applied to Cottleville Trails, rather than the 95:5 cost sharing ratio that otherwise applies in the Company's St. Louis Metro District.

25. Staff and now OPC believe that the variance requested from the 95:5 cost sharing ratio should not be granted, because, in their view, that would give DCM an advantage not afforded

other developers. (Staff Recommendation, p. 6, Section 10; OPC Application for Rehearing, p. 11.)

26. But, as noted in *Kennedy*, supra, "Discrimination is not unlawful unless arbitrary or unjust"; and where, because of exceptional conditions, there may be urgent need for such relief and it may be justly granted, the relief of a variance may be given.

27. This is a situation where the requested variance would be just and fair, because absent the Territory Agreement, of which DCM and it's predecessor's in interest received no direct notice, the development could and would have received water service from PWD2 and been able to recover significantly more of its costs[1]; and where the competing developments that are within PWD2 but not subject to the Territory Agreement would otherwise have the economic advantage of being able to receive water service at such much lower cost.

28. In this regard, it is relevant that, in the Memorandum included with its Recommendation, Staff mischaracterizes PWD2 as being "another utility provider . . . *outside MAWC's service territory*". [Emphasis added.] The Cottleville Trails development is located within PWD2's annexed area and, therefore, this section of PWD2's territory is *within* MAWC's service territory. Thus, the cost of service from PWD2 is very much relevant to the justness and fairness of the requested variances.

29. RSMo Section 393.140 (11) requires rates to be the same for all those "under like circumstances". Here, the circumstance is not the same as other portions of MAWC's service territory, because Cottleville Trails is located in PWD2's annexed area, as well as in MAWC's certificated area; and the cost of service form PWD2 would be significantly less to DCM.

[1] Under Rules 4 and 14 of Public Water District No. 2, the District pays to install main that conforms to AWWA specifications; and then the District recovers the cost from the lots, as the homes connect to take service. See **Appendix A** attached to DCM's Reply to Staff's Recommendation.

30. The basic purpose of public utility regulation is to provide utility service at just and reasonable rates. But it is neither just nor reasonable to require a developer (and, ultimately, the new homeowners) to pay significantly higher costs than would be available from another utility that is ready, willing, and able to provide the necessary service to the development.

31. The fact that service is available from another utility at significantly lower cost, absent the Territory Agreement, is the unique condition that provides the justification for varying the 95:5 sharing ratio that is in MAWC's tariff.

32. DCM has determined that the total difference in cost for Phase 1, if the variances and waiver requested herein are not granted, would be more than $1,209,539.52, as there would be no legitimate opportunity to recover any of the costs other than the 5% amount that the MAWC would pay upon installation of the main. (Stipulation of Facts, Para. 21)

33. It is, also relevant, that as a part of the water main extension needed for the development, DCM is installing a 12" main in place of an existing 4" main in Old Town Cottleville; and that replacement will improve fire protection in the area and provide water main access to several additional properties nearby. (Stipulation of Facts, Para. 22.)

34. Lastly, in considering whether the granting of the requested variances is arbitrary or unjust, it is relevant that neither DCM nor any of its predecessors in interest who owned the property sought to be developed ever received any direct notice of the application for or approval of the Territory Agreement; and there is nothing in the records of the Recorder of Deeds to give notice of the existence of such agreement.

35. As noted in in Paragraph 14 of Staff's Recommendation, notice of the proceeding to approve the Territory Agreement was only given "to the members of the General Assembly representing the Applicants' service areas and 'to the newspapers which serve Applicants' service

areas". No notice, however, was given to any property owner in the affected area, even though ownership of the property could be readily determined from County Assessor or Recorder of Deeds records. Additionally, no notice of the Territory Agreement was recorded in the land records in St. Charles County. Therefore, no person buying property subject to such Territory Agreement would be advised of its existence.

36. Without such notice, DCM reasonably expected that it could and would receive water service for the development from PWD2, and that it would not incur the unreimbursable costs that result from MAWC's current tariff for this area.

37. In its Order of October 24, 2021, the Commission granted DCM's Motion for Expedited Treatment in this matter (October 24, 2021 Order at p. 5); and such approval was not challenged in OPC's Application for Rehearing.

38. DCM was not able to close on its sale of lots with the builders who are under contract to purchase them by the October 1, 2021 Initial Closing Date discussed in DCM's Motion for Expedited Treatment; and DCM is now incurring approximately $38,000 per month in interest carrying costs for its development loan.

39. Closing on the first group of lots is now currently set for May 1, 2022.

40. Being able to proceed with the first closing on May 1, 2022 will avoid the damage to DCM Land that will occur if it is required to pay an additional $38,000.00 per month in carrying costs due to delay past the requested date.

41. There will be no negative effect on the general public and MAWC's existing customers will be benefited, because the sooner the homes are built and the additional customers the development will generate are on-line, the sooner there will be a greater customer base across which to spread MAWC's fixed costs. In addition, MAWC has indicated in its data request

response to Staff in PSC 00006 that fire protection will be improved to the Old Town Cottleville area, and access to water service provided to several additional properties, because MAWC is requiring DCM Land to install a 12" main in place of an existing 2" main in Old Town Cottleville, as a part of this development. Thus, both MAWC's existing customers and the public will be benefited, the sooner the development occurs.

42. This Motion has been filed as soon as it could have been, because, until the Commission issued its order on February 2, 2022 setting the schedule for the parties to file their responses to the items requested by the Commission following OPC's request for rehearing, it was not known what timeline might exist for the additional materials the Commission requested to be provided, in order to allow the Commission the opportunity to consider such materials and then make its ruling.

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,

/s/Sue A. Schultz

Sue A. Schultz, #37219
Anthony J. Soukenik #34097
600 Washington Ave., 15th Fl.
St. Louis, MO 63101
Telephone: (314) 231-3332
Facsimile: (314) 241-7604
sschultz@sandbergphoenix.com
asoukenik@sandbergphoenix.com

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 4th day of February, 2022, to:

Missouri Public Service Commission
staffcounselservice@psc.mo.gov
casi.aslin@psc.mo.gov
Karen.Bretz@psc.mo.gov
Curtis.Stokes@psc.mo.gov

Office of the Public Counsel
opcservice@opc.mo.gov
Lindsay.VanGerpen@opc.mo.gov
Nathan.Williams@opc.mo.gov

Missouri-American Water Company
Timothy.Luft@amwater.com
dcooper@brydonlaw.com

/s/Sue A. Schultz