

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 16th day of March, 2022.

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

REVISED ORDER GRANTING VARIANCES AND GRANTING WAIVER

Issue Date: March 16, 2022

Effective Date: March 26, 2022

On May 6, 2021, Missouri-American Water Company (MAWC) and DCM Land, LLC (collectively referred to as the “Joint Applicants”) filed an application for variances from provisions of MAWC’s tariffs with regard to the connection time limit and funding percentage for an extension of MAWC’s water main into the Cottleville Trails development. The Joint Applicants also requested a waiver of Commission Rule 20 CSR 4240-4.017(1)(D) requiring a 60-day notice before filing the case.

The Commission issued notice of the application and set a deadline for the filing of applications to intervene. No requests to intervene were received.

The Commission ordered the Staff of the Commission to file a recommendation, which it did on August 13, 2021. Staff argued in its recommendation that the Commission does not have authority to grant a variance from a tariff unless the tariff contains the authority to do so. Staff also objected to a variance of the funding ratio on the grounds that such a variance would be unduly discriminatory.¹ Staff did not object to the grant of the waiver of the time limit for taking service.

¹ Recommendation, (filed Aug. 13, 2021), paragraph 6.

DCM Land and MAWC responded in opposition to Staff's recommendation to deny the variances. The Joint Applicants argue that the Commission has authority under Commission Rule 20 CSR 4240-2.060(4) to grant the requested variances and that they have shown good cause for the Commission to do so.

The parties met in a procedural conference on September 1, 2021. Thereafter, the parties filed a joint proposed procedural schedule which included a date for filing a stipulation of facts, list of issues, and briefs on the issues. Each of those items was filed on September 16, 2021. No party requested a hearing.

On October 14, 2021, the Commission issued an order granting the variances requested by DCM Land and MAWC. That order was given an effective date of October 24, 2021. The Office of the Public Counsel filed a timely application for rehearing on October 22, 2021, which the Commission granted on October 27, 2021.

The Commission issued an Order Directing Filing on January 18, 2022, that asked the parties to file a pleading describing how they would address a list of specific questions identified by the Commission. The parties responded on February 1, 2022, asking that the Commission establish a further procedural schedule whereby the parties would file additional information by February 4, 2022, with each party responding by February 14. The Commission established the requested procedural schedule and Staff, Public Counsel, MAWC, and DCM Land filed the anticipated pleadings.

Findings of Fact

1. MAWC is a water corporation and a public utility subject to the Commission's jurisdiction. MAWC provides water service to approximately 470,000

customers and sewer service to approximately 15,000 customers in the state of Missouri.²

2. DCM Land is currently developing the Cottleville Trails subdivision. The development is located in St. Charles County, Missouri, in the City of Cottleville.

3. The Cottleville Trails development has two planned phases. Phase 1 of the project consists of 354 single family residences and 175 apartments and Phase 2 will have an estimated 217 additional homes.

4. A development of this size is not reasonably expected to be completed within 120 days but is reasonably expected to be built over a five-year period.³

5. The development is located in the service areas of both MAWC and Public Water Supply District No. 2 of St. Charles County (PWSD#2).⁴ However, MAWC and PWSD#2 entered into a territorial agreement⁵ that places the development wholly within MAWC's exclusive territory.⁶

6. If not for the territorial agreement, the extension of the main to the Cottleville Trails development would not have been subject to a 120-day time limit for taking service and DCM Land would have been able to recover significantly more of its costs under PWSD#2's specifications and rules.⁷

7. As part of the project, DCM is installing a 12" main in place of an existing 4" main in Old Town Cottleville.⁸ The replacement main will improve fire protection in the

² Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 7.

³ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 15.

⁴ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 5.

⁵ The territorial agreement was approved by the Commission in File No. WO-2001-441 on May 15, 2001, and was amended in File No. WO-2012-0088, which was approved by the Commission on November 15, 2011.

⁶ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 5.

⁷ See, Response of DCM Land, LLC to Staff's Recommendation (filed Aug. 23, 2021), Appendix A, Rules 4 and 14 of PWSD#2; and Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), paras. 20 and 21.

⁸ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 22.

area and provide water main access to additional nearby properties,⁹ including existing buildings in Cottleville.¹⁰

8. According to DCM Land's estimates, the total cost of the water infrastructure under MAWC's design and material requirements for Phase 1 is \$2,100,000, which includes \$200,000 to extend the main.¹¹ DCM has not yet calculated the costs for Phase 2.¹²

9. MAWC estimates its total average annual revenues from the development to be \$305,135 once both phases are complete, based on its generally applicable residential rates.¹³

10. The Joint Applicants request variances from part of PSC MO No. 13, 1st Revised Sheet No. R 48, Rule 23A.2. and 3., and a variance from PSC MO No. 13, 1st Revised Sheet No. R 51, Rule 23C.6.¹⁴ The variance requested from Rule 23A.2. would change the time limit for customers to take service after MAWC accepts the main and determines it is ready for service from 120 days to five years to allow the build out and purchase of the homes and apartment buildings.

11. The variances requested from Rule 23A.3. and Rule 23C.6. would change the funding ratio for the main extension between DCM Land and MAWC from the current ratio of 95:5 (95% DCM Land and 5% MAWC) to a funding ratio of 86:14 (86% DCM Land and 14% MAWC). MAWC's service area in St. Charles County, including the Cottleville

⁹ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 22.

¹⁰ Linam Affidavit, MAWC's Response to Order Directing Filing.

¹¹ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 20.

¹² Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 20.

¹³ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), paras. 18 and 19. (MAWC estimates its total average annual revenue from the single family homes to be \$158,344 for Phase 1 and \$96,791 for Phase 2. Additionally, MAWC estimates its total average annual revenue from the apartments to be \$50,000.)

¹⁴ The tariff provisions are referred as "Rule 23A.2", "Rule 23A.3", and "Rule 23C.6".

Trails development, is a part of the St. Louis Metro District for the purpose of MAWC's tariff Rule 23 – Extension of Company Mains.¹⁵

12. MAWC's tariff provides that only the St. Louis Metro District has the 95:5 funding ratio for main extensions. All of MAWC's other districts use the 86:14 ratio.¹⁶ The cost difference to DCM Land of the funding ratio variance is estimated to be \$189,000 for the Phase 1 water infrastructure construction.¹⁷

Conclusions of Law

A. Section 393.140(11) RSMo authorizes the Commission to order changes to tariffs, or in any form of contract or agreement, and its rates or charges or services:

Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, electrical corporation, water corporation, or sewer corporation in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect.

B. Section 393.140(11), RSMo, gives the Commission authority to require a water corporation to file a tariff with the Commission showing "all rules and regulations relating to rates, charges or service used or to be used" by that water corporation. The Commission is also given authority to "prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise."

¹⁵ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 5.

¹⁶ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 14.

¹⁷ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 21.

C. Missouri's courts have held that a properly filed tariff "acquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves."¹⁸

D. However, Missouri's courts have also recognized that under some circumstances Commission-approved variances from tariffs are appropriate and necessary. For example, in a 1931 case, *State ex rel. Kennedy v. Public Service Com'n*,¹⁹ the Missouri Supreme Court affirmed a Commission decision to uphold against challenge a water tariff that indicated the main extension policies of the utility could be varied with the approval of the Commission in "exceptional" cases.

E. While the *Kennedy* decision recognizes that a tariff provision may be waived, it relies on the existence of a provision in the tariff authorizing a variance as the basis for the Commission's authority to grant such a variance.²⁰ But a subsequent court case calls into question the assumption that the Commission's authority to grant a necessary variance is limited to the authority established in a utility's tariff.

F. In a 2006 decision, *State ex rel. Missouri Gas Energy v. Public Service Com'n*,²¹ the Court of Appeals upheld the revisions of the Commission's cold weather rule against a challenge by two of the affected utilities. The utilities argued that their Commission-approved tariffs incorporated the terms of the Commission's original cold weather rule and that the Commission could not promulgate a new rule that would vary the terms of their tariffs without first instituting a contested case to consider proposed modification of the tariffs. In rejecting that argument, the Court held that "although a

¹⁸ *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Com'n*, 286 S.W. 84, 86 (Mo. 1926).

¹⁹ 42 S.W. 2d 349 (Mo. 1931).

²⁰ *Kennedy*, at 353.

²¹ 210 S.W.3d 330 (Mo. App. W.D. 2006).

properly passed tariff becomes the law of Missouri, placing the text of rules, which the Commission has already passed, into a tariff does not limit the power of the Commission to promulgate conflicting rules that it has the statutory authority to create.”²²

G. The *Missouri Gas Energy* ruling is important because it recognizes that while various Court decisions have said that “a tariff has the same force and effect as statute, and it becomes state law,” and indeed, the *Missouri Gas Energy* decision contains that very language,²³ a tariff is not a statute. The Commission is bound to follow a utility’s tariff as are the utility’s customers and the utility itself. But the existence of a tariff cannot nullify the Commission’s authority and obligation to regulate Missouri’s utilities in a way that protects the public.²⁴ This implies that the Commission can waive application of a provision of a utility’s tariff if doing so is necessary to protect the public interest. That authority is implied by the Commission’s statutory authority, and is not derived just from authority granted by a tariff.

H. Certainly, the Commission has granted variances from utility tariffs in the past. Indeed, the Commission has promulgated a rule - 20 CSR 4240-2.060(4) - to establish the information that is to be included in an application for variance from Commission rules and tariff provisions.

I. Staff has argued that the “filed-tariff doctrine” means that the Commission can grant a variance from a tariff only if the tariff itself puts a utility’s customers on notice that the terms of the tariff may be varied or changed.²⁵ MAWC’s tariff does in fact contain a general provision stating that “[t]he Company may, subject to the approval of the

²² *Missouri Gas Energy*, at 337.

²³ *Missouri Gas Energy*, at 337.

²⁴ Section 393.140, RSMo.

²⁵ See. Staff’s Response to Order Directing Filing, (filed February 4, 2022).

Commission, prescribe additional rates, rules or regulations or to alter existing rates, rules or regulations as it may from time to time deem necessary or proper.”²⁶ Thus, readers of the tariff are notified that its provisions may be changed from time to time with the approval of the Commission.

J. Section 393.130.3, RSMo, prohibits any water corporation from making or granting any “undue or unreasonable preference or advantage to any person, corporation, or locality”. Nor may it subject any person, corporation, or locality to any “undue or unreasonable prejudice or disadvantage in any respect whatsoever.” Not all preferences or prejudices are forbidden. “Discrimination is not unlawful unless arbitrary or unjust.”²⁷ “If discrimination is reasonable because of the particular circumstances in the case, rates are not struck down merely because of the dissimilarity.”²⁸ “Whether discrimination is unlawful and unjust or the circumstances are essentially dissimilar is usually a question of fact.”²⁹

K. The Commission has allowed variance from its rules, at the request of a developer, to lower costs.³⁰

L. The rule variance granted in *Deaconess Manor* did not affect the rate classification of the units in question, which were billed in accordance with the utility’s generally applicable residential tariffs.³¹

²⁶ PSC MO No. 13, 1st Revised Sheet No. R9, Rule 2C.

²⁷ *Kennedy*, at 352.

²⁸ *State ex rel. Missouri Office of Public Counsel v. Missouri Pub. Serv. Com’n*, 782 S.W.2d 822, 825 (Mo. App. 1990).

²⁹ *Id.*

³⁰ *Deaconess Manor Ass’n v. Pub. Serv. Com’n*, 994 S.W.2d 602, 606-607 (Mo. App. 1999).

³¹ *Id.* at 608-609

Decision

In considering the application for variances, the Commission must consider two factors: First, a question of law, does the Commission have legal authority to grant the requested variances? As explained in the Conclusions of Law section of this order, the Commission finds that it does have the legal authority to grant a variance from MAWC's tariff. Second, a question of fact, does the application demonstrate good cause to grant the variances? In other words is the preference that would be granted to DCM Land undue or unreasonable within the meaning of the controlling statute, Section 393.130.3, RSMo.

DCM Land and MAWC request a variance from two provisions of MAWC's tariff. The first requests a variance from Rule 23A.2.³² That tariff provision relates to the extension of MAWC's water mains, and provides that MAWC will be responsible for main extensions where the cost of the extension does not exceed four times the estimated average annual revenues from new applicants. New applicants are defined as those who commit to purchase water service for at least one year and guarantee that they will take water service within 120 days after the new main is ready for service. Because of the large size of the Cottleville Trail development and the time it will take to build the residences that will take water service, it is not reasonable to expect those new applicants to take service within 120 days after the new main is constructed. For that reason it is reasonable to grant the requested variance to allow five years for those applicants to take service within the meaning of the tariff provision.

³² PSC MO No. 13, 1st Revised Sheet No. R48.

The second variance requested is from Rule 23A.3³³ and 23C.6³⁴. Both rules contain a provision that defines the percentage of the cost of extending a water main that will be borne by MAWC and the percentage that will be borne by the developer. Both provisions establish a 95:5 percentage ratio for contracts in the St. Louis Metro District, with the developer being responsible for 95 percent of the cost and MAWC responsible for 5 percent. For all MAWC's other districts, the ratio is 86:14 percent with the developer being responsible for 86 percent of the cost and MAWC responsible for the remaining 14 percent. The Cottleville Trails development is in the St. Louis Metro District, but DCM Land and MAWC ask that for this development the 86:14 ratio be applied instead of the 95:5 ratio.

MAWC and DCM Land argue this variance is appropriate because the Cottleville Trails development will be located on land that could be served by PWSD#2, but for a Commission-approved territorial agreement between MAWC and the public water district that places the land in the exclusive service territory of MAWC. It would be less costly for DCM Land to obtain water service for its development from the public water district and, if it must take service from MAWC, it believes it is entitled to pay the lesser amount required by the 86:14 ratio that it would pay in any MAWC district outside the St. Louis Metro district. MAWC explains that it, and ultimately its other ratepayers, will benefit from the completion of the Cottleville Trails development and the provision of water service to that development by MAWC. MAWC will benefit because it will obtain additional revenue from the development and other ratepayers will benefit because the larger water main that will be installed to serve the new development will afford greater fire protection to

³³ PSC MO No. 13, 1st Revised Sheet No. R48.

³⁴ PSC MO No. 13, 1st Revised Sheet No. R51.

other nearby existing buildings as well as future development. The scope of the variances sought in this case extend only to the development phase of the project. Ultimately, service will be provided to residential customers within the proposed development at MAWC's generally applicable residential rate, as reflected in its current tariffs, so that residents of the development will be treated the same as MAWC's other residential customers.

The Commission has reviewed the verified application and other pleadings, Staff's verified recommendation, the stipulation of facts, and the briefs on the issues. Because of 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 PWSD#2, the Commission finds that the Joint Applicants have demonstrated good cause to grant the variances as requested. For these reasons, the Commission has also determined that such variances are reasonable and not unduly discriminatory. The Commission will grant the requested tariff variances.

The Joint Applicants also requested that the Commission direct that any Main Extension Contract, as referenced in PSC MO No. 13, 1st Revised Sheet No. R 51, Rules 23C.4. entered into with DCM Land for Cottleville Trails reflect the variances granted.³⁵ The Commission will grant this request.

In addition to variance from the tariff provisions, the Joint Applicants requested a waiver for this case of 20 CSR 4240-4.017(1) requiring that notice of intended case filings

³⁵ Stipulation of Facts and List of Issues, (filed Sept. 16, 2021), para. 12.

be filed at least 60-days prior to the application. Commission Rule 20 CSR 4240-4.017(1)(D) allows the Commission to grant a waiver of the 60-day notice requirement for good cause. The Joint Applicants stated that they have had no communication with the Office of the Commission within the prior 150 days regarding any substantive issue likely to be in this case. The Joint Applicants also explain that failure to waive the 60-day notice requirement could result in a costly delay of the development of Cottleville Trails. The Commission finds good cause to waive the 60-day notice requirement and it will be granted.

Because this is an order being issued after rehearing and because DCM Land has described a financial need to have these variances issued as soon as possible, the Commission finds it reasonable to make this order effective in less than 30 days.

THE COMMISSION ORDERS THAT:

1. The Joint Applicants are granted a variance from part of PSC MO No. 13, 1st Revised Sheet No. R 48, Rule 23A.2. so that 120 days is changed to five years for DCM Land's Cottleville Trails development.
2. The Joint Applicants are granted variances from parts of PSC MO No. 13, 1st Revised Sheet No. R 48, Rule 23A.3. and PSC MO No. 13, 1st Revised Sheet No. R 51, Rule 23C.6. so that the ratio of 95:5 (i.e., 95% DCM Land funded and 5% MAWC funded) is changed to a ratio of 86:14 (i.e., 86% DCM Land funded and 14% MAWC funded) for DCM Land's Cottleville Trails development.
3. Any Main Extension Contract, as referenced in PSC MO No. 13, 1st Revised Sheet No. R 51, Rules 23C.4. entered into by MAWC with DCM Land for Cottleville Trails shall reflect the variances granted.

4. The Joint Applicants are granted a waiver of the 60-day notice requirement in 20 CSR 4240-4.017(1) in this matter.

5. This order shall become effective on March 26, 2022.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris Woodruff
Secretary

Silvey, Chm., Rupp, Coleman, Holsman, and
Kolkmeier CC., concur.

Woodruff, Chief Regulatory Law Judge

STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 16th day of March, 2022.




Morris L. Woodruff
Secretary



MISSOURI PUBLIC SERVICE COMMISSION

March 16, 2022

File/Case No. WE-2021-0390

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Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.