

**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.)

MAWC’S RESPONSE TO ORDER DIRECTING FILING

COMES NOW Missouri-American Water Company (“MAWC”) and, as its *Response to Order Directing Filing*, states as follows to the Missouri Public Service Commission (“Commission”):

1. On March 16, 2022 (effective March 26, 2022), the Commission issued its *Revised Order Granting Variances and Granting Waiver (“Revised Order”)* in this matter. That Order was subsequently appealed to the Missouri Court of Appeals, Western District. On December 27, 2022, the Court of Appeals affirmed the Commission’s Order. The Office of the Public Counsel (“OPC”) appealed the matter to the Missouri Supreme Court. The Supreme Court issued an order reversing and remanding the Commission’s Order on August 15, 2023.

2. The Missouri Supreme Court found and directed as follows: “For the foregoing reasons, the Commission's order is reversed and remanded to the Commission to enter a new order consistent with this opinion.”¹

3. On November 17, 2023, the Commission issued its *Order Directing Filing*, directing that no later than December 1, 2023, “any party wishing to be heard on this matter” “submit a response expressing its opinion on how the Commission should proceed.” MAWC responds herein.

¹ *In the Matter of the Joint Application of Missouri-American Water Company and DCM Land, LLC v. Office of Public Counsel*, Case No. SC99978, p. 9 (Mo. 2023).

4. MAWC believes that the Commission should issue an amended order consistent with the Supreme Court’s opinion (“remanded to the Commission to enter a new order consistent with this opinion”). It need not go further.

5. The OPC filed a response on November 21, 2023 suggesting that the Commission include in its next Order matters as to ramifications of this new order. OPC suggested:

. . . the Commission should: (1) direct MAWC to apply the tariff line extension rule in place when the extension occurred, (2) direct MAWC to make a filing in this case that details what MAWC did to reverse the variance and apply the appropriate line extension rule to DCM Land, and (3) after MAWC verifies how it corrected the error, the Commission should dismiss this case because it cannot grant the variance to MAWC’s water main line extension rule that MAWC and DCM Land seek.

(OPC Response, para. 4).

5. This suggestion implies that there is something to be undone. There is not. MAWC has operated under the Revised Order, as was effective at least until the Missouri Supreme Court issued its decision and perhaps until this Commission issues an order on remand and that order becomes effective.

6. Based on the then effective Order of the Commission, MAWC issued checks, dated May 25, 2023, to DCM Land, LLC in the amount of 14% of the cost of construction of the main extensions (being \$217,294.59 for Phase 1; and \$106,781.99 for Phase 2). No homes were in service until October 30, 2023, and no reimbursement based on connection of homes has been made.

7. Section 386.270, RSMo, states:

All rates, tolls, charges, schedules and joint rates fixed by the commission shall be in force and shall be prima facie lawful, and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie lawful and reasonable until found otherwise in a suit brought for that purpose pursuant to the provisions of this chapter.

8. The courts have interpreted this provision to include the Commission's orders:

All orders of the PSC are presumptively lawful and reasonable until found otherwise. § 386.270. Moreover, "[t]he pendency of an appeal under section 386.510 shall not of itself stay or suspend the operation of the order or decision of the [PSC]" § 386.520.1. . . .

AG Processing Inc. v. Mo. PSC (In re Determination of Carrying Costs for Phase-in Tariffs of KCP&L Greater Mo. Operations Co.), 408 S.W.3d 175, 186 (Mo. Ct. App. 2013).

9. "Read together, these statutes indicate that the legislature intended to give the PSC the authority to implement an approved rate, including carrying costs, as long as the rate has not been stayed." *Id.*

10. No stay of the Revised Order was granted, and in fact, none was requested. Further, Section 386.520.2(2), (3) and (4), RSMo are not applicable to the situation at hand.

11. Accordingly, the Commission's Revised Order has been in effect since March 26, 2022 (the effective date of the Revised Order).

12. Lastly, any change to the DCM Land, LLC extension rate on a retrospective basis implicates both the filed rate doctrine and retroactive ratemaking. The Court of Appeals has described the interaction between the filed rate doctrine and retroactive ratemaking as follows:

The [PSC] fixes rates prospectively and not retroactively. Our courts do not fix rates. Our courts may only review, and affirm or set aside or reverse and remand the [PSC]'s rate-fixing orders. Our courts cannot make the [PSC] do retroactively and our courts cannot retroactively do that which the [PSC], or other rate-making body, only does prospectively. *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 353 (Mo. 1951). "[T]o direct the [PSC] to determine what a reasonable rate would have been and to require a credit or refund of any amount collected in excess of this amount would be retroactive ratemaking." *State ex rel. Utility Consumers' Council of Mo. Inc. v. Public Serv. Comm'n*, 585 S.W.2d 41, 58 (Mo. banc 1979). Such retroactive ratemaking "is directly contrary to the filed rate doctrine, which 'prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue.'" *Crumley v. Time Warner Cable, Inc.*, 556 F.3d 879, 881 (8th Cir. 2009) (quoting *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679 (8th Cir. 2009)); *Bauer v. Southwestern Bell Tel. Co.*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997).

Brooks v. Empire Dist. Elec. Co., 420 S.W.3d 586, 592 (Mo. Ct. App. 2013)

13. The fact that an approved rate may ultimately found to be unlawful has no impact on the above reasoning:

Plaintiffs argue that the filed rate doctrine is inapplicable because it applies only to "lawfully approved rates"; however, as explained above, rates are *prima facie* lawful until found otherwise upon the conclusion of the appeal process. "When the established rate of a utility has been followed, the amount so collected becomes the property of the utility, of which it cannot be deprived by either legislative or judicial action without violating the due process provisions of the state and federal constitutions." *Straube v. Bowling Green Gas Co.*, 360 Mo. 132, 227 S.W.2d 666, 671 (Mo. 1950); *see also State ex rel. City of Joplin v. Public Serv. Comm'n*, 186 S.W.3d 290, 295 (Mo. App. W.D. 2005).

Brooks at 592.

14. Moreover, the tariff sheet and associated provisions from which the Commission granted the subject waiver and variances (1st Revised Sheet No. R 48, Rule 23 Extension of Company Mains, A.2. and 3.), has been superseded (by 2nd Revised Sheet No. R 48, Rule 23 Extension of Company Mains) in MAWC's most recent rate case (Case No. WR-2022-0303). The changes have resulted in substantive changes to the Extension of Company Mains Rule. "Tariffs that are superseded by subsequently filed tariffs are generally moot and are not considered on appeal because superseded tariffs cannot be corrected retroactively. *State ex. rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 334 (Mo. App. 2010)." *Mo. Pub. Serv. Comm'n v. Office of the Pub. Counsel (In re Mo.-Am. Water Co.)*, 516 S.W.3d 823, 828 (Mo. 2017)

15. Thus, in answer to the question posed by the Commission, the Commission should proceed to enter an amended order consistent with the Supreme Court's findings and then find the matter to be moot.

WHEREFORE, Missouri-American respectfully requests the Commission consider this *Response* and issue such orders as should find to be reasonable and just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been sent by electronic mail this 1st day of December 2023, to:

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